National Reporter System—United States Series

THE

FEDERAL REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 214

PERMANENT EDITION

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

AUGUST—SEPTEMBER, 1914

ST. PAUL
WEST PUBLISHING CO.
1914

(214 FED.)

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

FIRST CIRCUIT

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

SECOND CIRCUIT

Hon. CHARLES E. HUGHES, Circuit Justice.....Washington, D. C.
Hon. E. HENRY LACOMBE, Circuit Judge.....New York, N. Y.
Hon. ALFRED C. COXE, Circuit Judge.....New York, N. Y.
Hon. HENRY G. WARD, Circuit Judge.....New York, N. Y.
Hon. HENRY WADE ROGERS, Circuit Judge.....New Haven, Conn.
Hon. EDWIN S. THOMAS, District Judge, Connecticut.....New Haven, Conn.
Hon. THOMAS I. CHATFIELD, District Judge, E. D. New York.....Brooklyn, N. Y.
Hon. VAN VECHTEN VEEDER, District Judge, E. D. New York.....Brooklyn, N. Y.
Hon. GEORGE W. RAY, District Judge, N. D. New York.....Norwich, N. Y.
Hon. CHARLES M. HOUGH, District Judge, S. D. New York.....New York, N. Y.
Hon. LEARNED HAND, District Judge, S. D. New York.....New York, N. Y.
Hon. JULIUS M. MAYER, District Judge, S. D. New York.....New York, N. Y.
Hon. JOHN R. HAZEL, District Judge, W. D. New York.....Buffalo, N. Y.
Hon. JAMES L. MARTIN, District Judge, Vermont.....Brattleboro, Vt.

THIRD CIRCUIT

Hon. MAHLON PITNEY, Circuit Justice.....Washington, D. C.
Hon. GEORGE GRAY, Circuit Judge[1].....Wilmington, Del.
Hon. VICTOR B. WOOLLEY, Circuit Judge[2].....Wilmington, Del.
Hon. JOSEPH BUFFINGTON, Circuit Judge.....Pittsburg, Pa.
Hon. JOHN B. McPHERSON, Circuit Judge.....Philadelphia, Pa.
Hon. EDWARD G. BRADFORD, District Judge, Delaware.....Wilmington, Del.
Hon. THOS. G. HAIGHT, District Judge, New Jersey.....Jersey City, N. J.
Hon. JOHN RELLSTAB, District Judge, New Jersey.....Trenton, N. J.
Hon. OLIVER B. DICKINSON, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. J. WHITAKER THOMPSON, District Judge, E. D. Pennsylvania..Philadelphia, Pa.
Hon. CHAS. B. WITMER, District Judge, M. D. Pennsylvania.....Sunbury, Pa.
Hon. CHARLES P. ORR, District Judge, W. D. Pennsylvania.....Pittsburg, Pa.
Hon. W. H. SEWARD THOMPSON, District Judge, W. D. Pennsylvania[3]...Pittsburg, Pa.

[1] Resigned June 1, 1914.
[2] Appointed August 12, 1914, to succeed George Gray.
[3] Appointed July 21, 1914.

FOURTH CIRCUIT

Hon. EDWARD D. WHITE, Circuit Justice.....Washington, D. C.
Hon. JETER C. PRITCHARD, Circuit Judge.....Asheville, N. C.
Hon. CHAS. A. WOODS, Circuit Judge .....Marion, S. C.
Hon. MARTIN A. KNAPP, Circuit Judge.....Washington, D. C.
Hon. JOHN C. ROSE, District Judge, Maryland.....Baltimore, Md.
Hon. HENRY G. CONNOR, District Judge, E. D. North Carolina .....Wilson, N. C.
Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
Hon. HENRY A. MIDDLETON SMITH, District Judge, E. and W. D. S. C..Charleston, S. C.
Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia .....Richmond, Va.
Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....Lynchburg, Va.
Hon. ALSTON G. DAYTON, District Judge, N. D. West Virginia.....Philippi, W. Va.
Hon. BENJAMIN F. KELLER, District Judge, S. D. West Virginia.....Charleston, W. Va.

FIFTH CIRCUIT

Hon. JOSEPH R. LAMAR, Circuit Justice.....Washington, D. C.
Hon. DON A. PARDEE, Circuit Judge.....Atlanta, Ga.
Hon. A. P. McCORMICK, Circuit Judge.....Waco, Tex.
Hon. DAVID D. SHELBY, Circuit Judge[4].....Huntsville, Ala.
Hon. HENRY D. CLAYTON, District Judge, N. and M. D. Alabama ....Montgomery, Ala.
Hon. WM. I. GRUBB, District Judge, N. D. Alabama.....Birmingham, Ala.
Hon. HARRY T. TOULMIN, District Judge, S. D. Alabama.....Mobile, Ala.
Hon. WM. B. SHEPPARD, District Judge, N. D. Florida.....Pensacola, Fla.
Hon. RHYDON M. CALL, District Judge, S. D. Florida.....Jacksonville, Fla.
Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia.....Atlanta, Ga.
Hon. EMORY SPEER, District Judge, S. D. Georgia.....Macon, Ga.
Hon. RUFUS E. FOSTER, District Judge, E. D. Louisiana.....New Orleans, La.
Hon. ALECK BOARMAN, District Judge, W. D. Louisiana.....Shreveport, La.
Hon. HENRY C. NILES, District Judge, N. and S. D. Mississippi.....Kosciusko, Miss.
Hon. GORDON RUSSELL, District Judge, E. D. Texas.....Sherman, Tex.
Hon. EDWARD R. MEEK, District Judge, N. D. Texas.....Dallas, Tex.
Hon. WALLER T. BURNS, District Judge, S. D. Texas.....Houston, Tex.
Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.....Austin, Tex.

SIXTH CIRCUIT

Hon. WILLIAM R. DAY, Circuit Justice.....Washington, D. C.
Hon. JOHN W. WARRINGTON, Circuit Judge.....Cincinnati, Ohio.
Hon. LOYAL E. KNAPPEN, Circuit Judge.....Grand Rapids, Mich.
Hon. ARTHUR C. DENISON, Circuit Judge .....Grand Rapids, Mich.
Hon. ANDREW M. J. COCHRAN, District Judge, E. D. Kentucky.....Maysville, Ky.
Hon. WALTER EVANS, District Judge, W. D. Kentucky.....Louisville, Ky.
Hon. ARTHUR J. TUTTLE, District Judge, E. D. Michigan.....Detroit, Mich.
Hon. CLARENCE W. SESSIONS, District Judge, W. D. Michigan.....Muskegon, Mich.
Hon. JOHN M. KILLITS, District Judge, N. D. Ohio.....Toledo, Ohio.
Hon. JOHN H. CLARKE, District Judge, N. D. Ohio[5].....Cleveland, Ohio.
Hon. HOWARD C. HOLLISTER, District Judge, S. D. Ohio.....Cincinnati, Ohio.
Hon. JOHN E. SATER, District Judge, S. D. Ohio.....Columbus, Ohio.
Hon. EDWARD T. SANFORD, District Judge, E. and M. D. Tennessee....Knoxville, Tenn.
Hon. JOHN E. McCALL, District Judge, W. D. Tennessee.....Memphis, Tenn.

SEVENTH CIRCUIT

Hon. HORACE H. LURTON, Circuit Justice[6].....Washington, D. C.
Hon. JAMES CLARK McREYNOLDS, Circuit Justice[7].....Washington, D. C.
Hon. FRANCIS E. BAKER, Circuit Judge.....Goshen, Ind.

[4] Died August 22, 1914.
[5] Appointed July 21, 1914.
[6] Died July 12, 1914.
[7] Appointed August 29, 1914, to succeed Horace H. Lurton.

Hon. WILLIAM H. SEAMAN, Circuit Judge.....Sheboygan, Wis.
Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....Chicago, Ill.
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.
Hon. J. OTIS HUMPRHEY, District Judge, S. D. Illinois.....Springfield, Ill.
Hon. ALBERT B. ANDERSON, District Judge, Indiana.....Indianapolis, Ind.
Hon. FERDINAND A. GEIGER, District Judge, E. D. Wisconsin .....Milwaukee, Wis.
Hon. ARTHUR L. SANBORN, District Judge, W. D. Wisconsin .....Madison, Wis.

EIGHTH CIRCUIT

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

NINTH CIRCUIT

Hon. JOSEPH McKENNA, Circuit Justice.....Washington, D. C.
Hon. WILLIAM B. GILBERT, Circuit Judge.....Portland, Or.
Hon. ERSKINE M. ROSS, Circuit Judge.....Los Angeles, Cal.
Hon. WM. W. MORROW, Circuit Judge.....San Francisco, Cal.
Hon. WM. H. HUNT, Circuit Judge.....Washington, D. C.
Hon. WM. H. SAWTELLE, District Judge, Arizona.....Tucson, Ariz.
Hon. OLIN WELLBORN, District Judge, S. D. California.....Los Angeles, Cal.
Hon. WM. C. VAN FLEET, District Judge, N. D. California.....San Francisco, Cal.
Hon. MAURICE T. DOOLING, District Judge, N. D. California.....San Francisco, Cal.
Hon. FRANK S. DIETRICH, District Judge, Idaho.....Boise, Idaho.
Hon. GEO. M. BOURQUIN, District Judge, Montana.....Butte, Mont.
Hon. EDWARD S. FARRINGTON, District Judge, Nevada.....Carson City, Nev.
Hon. CHARLES E. WOLVERTON, District Judge, Oregon.....Portland, Or.
Hon. ROBERT S. BEAN, District Judge, Oregon.....Portland, Or.
Hon. FRANK H. RUDKIN, District Judge, E. D. Washington.....Spokane, Wash.
Hon. EDWARD E. CUSHMAN, District Judge, W. D. Washington.....Seattle, Wash.
Hon. JEREMIAH NETERER, District Judge, W. D. Washington.....Seattle, Wash.

*

CASES REPORTED

*

CASES ON REHEARING

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

FIFTH CIRCUIT.

Fourth Nat. Bank of Macon, Ga., v. Willingham.....213 F. 219
Rehearing denied Oct. 5, 1914.

Van Ness v. Layne.....213 F. 804
Rehearing denied Oct. 5, 1914.

EIGHTH CIRCUIT.

Harper v. Victor.....212 F. 903
Rehearing denied Oct. 12, 1914.

NINTH CIRCUIT.

Eastern Oregon Land Co. v. Willow River Land & Irrigation Co....201 F. 203
Rehearing denied Oct. 13, 1914.

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

NEW YORK LIFE INS. CO. et al. v. DUNLEVY.†

(Circuit Court of Appeals, Ninth Circuit. May 18, 1914.)

No. 2349.

1. APPEAL AND ERROR (§ 850*)—SCOPE OF REVIEW—NECESSITY OF FINDINGS.
Where the trial court made no findings, an appellate court could not draw inferences from the testimony to establish ultimate facts, and hence a stipulation as to what a witness would testify if called would be disregarded.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3346, 3351–3362, 3375, 3376; Dec. Dig. § 850.*]

2. APPEAL AND ERROR (§ 850*)—SCOPE OF REVIEW—NECESSITY OF FINDINGS.
An agreed statement of facts, so far as it set forth ultimate as distinguished from evidentiary facts, might be considered as taking the place of special findings.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3346, 3351–3362, 3375, 3376; Dec. Dig. § 850.*]

3. INSURANCE (§ 200*)—ASSIGNMENT—LAW GOVERNING.
An assignment of an insurance policy is a contract distinct and separate from the contract of insurance, and is governed by the law of the place where the assignment is made.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 469; Dec. Dig. § 200.*]

4. COURTS (§ 366*)—STATE LAWS AS RULES OF DECISION—CONSTRUCTION OF STATUTES.
A decision of a state court, construing a statute of the state, is controlling in the United States courts.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954–957, 960–968; Dec. Dig. § 366.*
Conclusiveness of judgment between federal and state courts, see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank v. City of Memphis, 49 C. C. A. 468; Converse v. Stewart, 118 C. C. A. 215.]

5. INSURANCE (§ 211*)—ASSIGNMENT—DELIVERY—SUFFICIENCY.
Where insured executed an assignment of an insurance policy to his infant daughter, and delivered a duplicate copy of the assignment to the insurance company, retaining possession of the policy and never informing the daughter of the assignment, there was a sufficient delivery of the assignment to vest title in the daughter, since the essentials of a delivery are those which accord with the nature of the

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

† Rehearing denied October 13, 1914.

transaction, the circumstances and the relations between the parties, and while the mere execution of an assignment and delivery of a copy to the insurer without notice to the assignee would not in all cases be sufficient, it is sufficient if the assignee is the insured's wife or minor child.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 480; Dec. Dig. § 211.*]

6. INSURANCE (§ 219*)—ASSIGNMENT—EFFECT OF ASSIGNMENT.

An assignment of a tontine life insurance policy, providing for payment of a specified sum to insured if living on a certain date, and all dividend, benefit, and advantage to be had or derived therefrom, transferred to the assignee the tontine benefits, as well as the life benefits.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 488, 489, 494–496; Dec. Dig. § 219.*]

7. JUDGMENT (§ 17*)—PROCESS TO SUPPORT JUDGMENT—SUBSTITUTED SERVICE.

2 Purdon's Dig. Pa. (13th Ed.) p. 1551, par. 71, provides that when property levied on belongs to a person other than the defendant in the execution, a rule on the claimant to show cause why an issue should not be framed to determine the ownership shall be entered, and that notice of the rule shall be given plaintiff, defendant, and the claimant. Act April 6, 1859 (2 Purdon's Dig. [13th Ed.] p. 1422, par. 45) authorizes courts in certain cases to order any process served upon any nonresident defendant, provided such order limits a time after the service within which compliance with its requirement must be made, such process to be returnable at such time as the court shall direct. 1 Purdon's Dig. 244, requires writs for the commencement of actions to be made returnable on the first day of the next term, unless there shall not be 10 days between the issuance and the first day of the term when the writ may be made returnable on the day preceding the last day of the term or the first day of the second term. A judgment was recovered against a resident of Pennsylvania upon which execution was issued after she became a nonresident and an insurance company was garnisheed and alleged that defendant's father claimed to be the owner of the policy sought to be garnisheed. A rule to show cause was granted returnable February 26th, and served on defendant in California on February 18th, but there was no time limited after its service within which compliance therewith must be made, nor was the process made returnable by "special order" at a stated time after the service. *Held*, that the statute was not complied with, and the order directing the insurance company to pay the amount to defendant's father was void as to defendant, and did not defeat the company's liability to her, since statutes authorizing substituted service must be strictly complied with, and if the service is so defective as not to confer jurisdiction, the judgment is open to collateral attack.

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

8. GARNISHMENT (§ 226*)—LIEN—EFFECT OF PROCEEDINGS.

Where a third person claimed to own an insurance policy garnisheed by a judgment creditor, and upon a trial of the claim of ownership the court found for the claimant, but the rule to show cause why the claimant and defendant in the execution should not interplead was not properly served on the defendant, who was a nonresident, the insurance company was not discharged of liability to the defendant to the extent of the creditor's judgment, on the theory that the lien created by the writ of garnishment still subsisted, since the court with jurisdiction of the judgment creditor, garnishee, and claimant determined that the writ created no lien on the proceeds of the policy, and that the money belonged to the claimant.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 421, 422; Dec. Dig. § 226.*]

Dietrich, District Judge, dissenting in part.

*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 Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Action by Effie J. Gould Dunlevy against the New York Life Insurance Company and another. Judgment for plaintiff (204 Fed. 670), and defendants bring error. Affirmed.

The plaintiff in error issued a policy of life insurance to one Joseph W. Gould. The defendant in error, the daughter of Gould, as assignee of the policy, recovered judgment thereon in the court below. The parties to the action will be designated herein plaintiff and defendant, as they were in the court below. The policy was tontine, and it insured the life of Gould in the sum of $5,000, with the stipulation that if Gould were living on January 22, 1909, the policy might be surrendered for the sum of $2,479.70. It was for that sum that the plaintiff sued and recovered judgment in the court below. The case was tried before the court without a jury, upon the pleadings and an agreed statement of facts. In its answer the defendant set up two defenses: First, that the plaintiff was not entitled to maintain any action because Gould's assignment was never delivered to her, and because the assignment was not intended by Gould to transfer to her the tontine benefits to arise therefrom; second, because, by reason of certain garnishee proceedings instituted by creditors of the plaintiff in a state court of the state of Pennsylvania, the defendant had already been compelled to pay the full amount due under the policy. The date of the policy was January 24, 1889. On June 27, 1893, when the plaintiff was 13 years of age, and was living with her father, he made the assignment, which is as follows: "For value received, I hereby assign and transfer unto Effie J. Gould, of Pittsburg, Pa., the policy of insurance known as No. 305,011, issued by the New York Life Insurance Company upon the life of Joseph W. Gould, of Pittsburg, Pa., and all dividend, benefit and advantage to be had or derived therefrom, subject to the conditions of the said policy, and to the rules and regulations of the company." The assignment was signed, sealed, and acknowledged by Gould. The agreed statement of facts was as follows:

"That on or about the 27th day of June, 1893, defendant Joseph W. Gould, the assured in said policy, signed the instrument, a correct copy of which is set forth on pages 44 and 45, in Exhibit 'A' to the amended answer of defendant New York Life Insurance Company; that said policy remained in the possession of defendant Joseph W. Gould, the assured mentioned therein, and was never delivered to plaintiff herein; that said instrument, hereinbefore mentioned and set forth on pages 44 and 45 of said Exhibit 'A' to defendant New York Life Insurance Company's amended answer herein, was not, nor was any copy thereof, ever delivered to the plaintiff herein, but a copy of the same was delivered to defendant New York Life Insurance Company; that the notice attached to the said instrument contains a statement of the rules of defendant New York Life Insurance Company in force at the time of the signing thereof, and defendant New York Life Insurance Company executed the receipt therefor, as set forth on page 44 of Exhibit A to the amended answer of defendant New York Life Insurance Company as follows: 'The New York Life Insurance Company, in accordance with its rules, as stated below, has retained the duplicate of this assignment.

"'John A. McCall, Pres. per Lawes.'"

It was also agreed, in substance, that Gould, if called as a witness would, subject to any legal objection as to the competency or relevancy of his testimony, testify in substance as follows: That his intention in executing the assignment and delivering it to the defendant was solely to protect the plaintiff in the event of his death prior to the expiration of the tontine period; that he wished her to receive the $5,000 only in the event of his death prior to January 22, 1909; that he had no intention of making an absolute assignment of the policy to her, and never delivered the assignment to her, but that the policy remained in his possession until he surrendered it to the defendant; that he delivered a copy of the assignment to the defendant by reason of

the notice appended thereto, and that the plaintiff had no knowledge of the execution of said assignment until notified by the defendant on the maturity of the policy; and that he paid all the premiums due or payable on the policy. In addition to the agreed statement of facts, transcripts were filed of certain proceedings in the court of common pleas of the county of Alleghany, state of Pennsylvania.

E. J. McCutchen, Warren Olney, Jr., Charles W. Willard, and J. M. Mannon, Jr., all of San Francisco, Cal., for plaintiff in error New York Life Ins. Co.

Frank W. Taft, Clarence Coonan, and Nat Schmulowitz, all of San Francisco, Cal., for defendant in error.

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

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] Before considering the assignments of error, it is necessary to determine what questions are properly before this court for decision. The record discloses no findings of facts, either general or special, in accordance with sections 649–700 of the Revised Statutes (U. S. Comp. St. 1901, pp. 525–570), and no requests for instructions. In the absence of findings by the trial court, inferences of facts to establish ultimate facts cannot be drawn by an appellate court from the testimony which may be found in the record. Norris v. Jackson, 9 Wall. 125, 19 L. Ed. 608; W. L. Perkins Co. v. Von Baumbach, 185 Fed. 265, 107 C. C. A. 371; Streeter v. Sanitary Dist. of Chicago, 133 Fed. 124, 66 C. C. A. 190; Anglo-American Land M. & A. Co. v. Lombard, 132 Fed. 721, 68 C. C. A. 89. But the agreed statement of facts, so far as it sets forth ultimate facts as distinguished from evidentiary facts, may be considered as taking the place of special findings. Wilson v. Merchants Loan & Trust Co., 183 U. S. 121, 22 Sup. Ct. 55, 46 L. Ed. 113. It follows that the stipulation as to the testimony which would be given by Joseph W. Gould, if called as a witness in the present case, must be disregarded.

[3-5] It is contended that the court below erred in overruling the defendant's demurrer to the complaint, which was based upon the ground that there was contained therein no allegation of a delivery of the assignment to the plaintiff, or that she was notified or had knowledge of the assignment, also that, in the absence of proof of such delivery and notice to the plaintiff, the court erred in entering judgment against the defendant upon the agreed statement of facts. By the decided weight of authority it is held that an assignment of a policy is a contract distinct and separate from the contract of insurance, and is governed by the law of the place where the assignment is made. 2 Whart. Conf. of Laws, 467g, and cases there cited; Johnson v. Mutual Life Ins. Co., 180 Mass. 407, 62 N. E. 733, 63 L. R. A. 833; Russell v. Grigsby, 168 Fed. 577, 94 C. C. A. 61. The assignment in the present case was made in Pennsylvania, and if its validity depended upon a statute of that state, which had been construed by the courts thereof, such construction would be controlling here. The defendant cites the case of Scott v. Dickson, 108 Pa. 6, 56 Am. Rep. 192, a case in which the assured executed an assignment of the policy to one Scott, a friend, and

lodged a copy thereof with the insurance company in accordance with its rules, but no copy of the assignment was ever given to the assignee, nor was he notified thereof, and the policy remained in the possession of the assured, who paid the premiums on it up to the time of his death. It was held that the delivery of the assignment to the company was not the equivalent of a delivery to the assignee. But in so holding the Supreme Court of Pennsylvania construed no statute of that state. In Smith v. Hawthorn, 22 Pa. Co. Ct. R. 519, it was held that where a husband assigned a policy of life insurance to his wife and children, the fact that the policy and the assignment were found amongst his papers after his death was not sufficient to raise a presumption that the policy and the assignment had not been delivered. The court quoted with approval the language of the opinion in Turner v. Warren, 160 Pa. 336, 28 Atl. 781, where it was said:

"As between strangers it would be improbable that the grantee in a deed would permit it, after delivery, to remain in the possession of the grantor. It is not so, however, where the grantee is the wife of the grantor, and he has a safe for the keeping of valuable papers."

In Appeal of Madeira, 4 Atl. (Pa.) 908, the Supreme Court of Pennsylvania said that an assignment without valid consideration and a gift are equal, and added:

"The legal requisition is that the intention of the donor be established by clear and precise evidence, and that the delivery be secundum subjectam materiam."

And the court intimated that if there had been in that case an assignment of the policy to the wife of the insured, and it had been evidenced by nothing more than its deposit in a box or other receptacle common to the use of both husband and wife, there would be no doubt as to her right to the policy. While these decisions of courts of Pennsylvania are not controlling, we think they are in harmony with the doctrine that the essentials of a delivery of an assignment are those which accord with the nature of the transaction, the circumstances and the relations between the parties; that while the mere execution of an assignment and a delivery of a copy thereof to the insurance company without notice to the assignee, the assured continuing to hold the policy and pay the premiums thereon, would not in all cases be a sufficient assignment, it would be sufficient if the assignee sustained to the assured the relation of wife or minor child.

It has been held in other jurisdictions that the delivery may be constructive, and that an assignment of an insurance policy may be sustained where the intent of the assignor to assign is clearly shown, notwithstanding that the policy remains in his possession, and that filing the assignment or a copy thereof with the insurer, in accordance with its requirements to that effect, is a sufficient substitute for actual delivery to the assignee. In McDonough v. Ætna Life Ins. Co., 38 Misc. Rep. 625, 78 N. Y. Supp. 217, the court said:

"The assignments came to the office of the company, presumably, for the purpose of notifying the company that some one other than any of the parties to the contract of insurance claimed title to the policies. It was not an improper place to lodge the assignments. In the course of business, it was a very proper place, not only for safe-keeping, but to prevent the moneys upon

the policies, when they should grow due, from being paid to another. * * * If the assignor, the insured, sent them, then the presumption would be that he sent them for the benefit of the assignee. If that was the only delivery, it would be a good delivery, being for the benefit of the assignee."

See, also, Hurlbut v. Hurlbut, 49 Hun, 189, 1 N. Y. Supp. 854. In Northwestern Mut. Life Ins. Co. v. Wright, 153 Wis. 252, 140 N. W. 1078, the court said:

"The instrument of transfer may be delivered to a third person, with intention not to recall it, and the transaction be complete, even as indicated, without the new owner having present knowledge thereof. The delivery to the third person and acceptance by him for the purposes of the transaction is a delivery to the new owner; where such transaction is beneficial to the new owner, the law supplies the rest; acceptance by such new owner is presumed until the contrary is shown."

And in Burges v. New York Life Ins. Co., 53 S. W. 602, the Court of Civil Appeals of Texas held that actual delivery of an assignment of an insurance policy to the assignee, who was the assignor's adopted child, was unnecessary to validate the assignment. In that case the assignment was delivered to the insurer. The court said:

"Even in the absence of evidence of an actual manual delivery, we are warranted in holding that the facts and circumstances surrounding the donor and donee would constitute a delivery, within the meaning of the law."

The defendant cites decisions to the proposition that in order to invest an infant of tender years with title to property, there must be more than a mere execution of an instrument which the grantor retains in his custody, in the absence of satisfactory proof that it was his intention that such instrument should operate to convey the property immediately to the infant. But we find in the present case ample evidence of the intention of the assignor that the assignment should operate immediately. Everything that was necessary to carry out that intention was done. The assignment was signed, sealed, acknowledged, and lodged with the insurance company in compliance with its rules. The assignor was the natural guardian of the assignee, who was his daughter, and a minor, and was in his care and control. In retaining the papers in his possession, he should be deemed to have held them for her as her parent and guardian.

[6] But it is contended that there is absence of proof to show the intention of the assignor to assign the tontine as well as the life benefits of the policy. The only evidence which we have as to the assignor's intention is furnished by the language of the assignment itself. It recites that for value received, the policy "upon the life of Joseph W. Gould" is assigned, "and all the dividend, benefit and advantage to be had or derived therefrom." Language more apt could not have well been selected to transfer absolutely the whole interest of the insured in the policy, as well the life benefits as the tontine. The trial court correctly held, therefore, that the policy and all rights thereunder, had been assigned to the plaintiff.

[7, 8] It is contended that the plaintiff's cause of action is barred by the proceedings in the court of Pennsylvania, which are pleaded in the amended answer. In 1907, while the plaintiff was a resident of the state of Pennsylvania, Boggs & Buhl recovered judgment against her

for a debt, in a court of that state. Some two years later execution was issued upon the judgment, and Joseph W. Gould and the local agent of the defendant were garnisheed. The defendant in answering the writ set forth the fact of the issuance of the policy and the assignment thereof, and alleged that Gould claimed to be the owner thereof. Gould answered, claiming that the policy and all rights thereunder belonged to him. At that time the plaintiff had become a resident of the state of California. The statutes of Pennsylvania provide that when the sheriff is notified that the property which he has levied upon belongs to a person other than the defendant in the execution process, he shall enter a rule in the court, out of which the execution or process issued, on the claimant, to show cause why an issue should not be framed to determine the ownership, and that notice of the rule shall be given to the plaintiff, the defendant and the claimant. 2 Purdon's Digest (13th Ed.) p. 1551. On February 5, 1910, on the petition of the garnishee, a rule was granted on the plaintiff and the defendant in the execution, and also upon Joseph W. Gould, the claimant, to show cause why they should not interplead, and why the insurance company should not be permitted, when it was determined to whom the money ought to be paid, to pay the same into court for the benefit of the person entitled to receive the same, and that service of a copy of the rule, petition, and the order be made upon Mrs. Dunlevy by serving her personally at her residence in California. The rule was made returnable February 26, 1910. It appears by an affidavit that on February 18, 1910, personal service was made upon her, in San Francisco. The papers served upon her were a copy of the petition of the insurance company, a notice of its attorneys, and a copy of the order of the court of date February 5, 1910, reciting that a rule was granted on Effie J. Dunlevy, Joseph W. Gould, and Boggs & Buhl, to show cause why they should not interplead together, for the purpose of ascertaining to which of the parties the money in the hands of the insurance company belonged, and the order recites:

"And it appearing that Effie J. Dunlevy is a resident of the state of California, it is hereby ordered and decreed that service of said rule upon Effie J. Dunlevy be by serving her personally with a copy of this petition and order, or by sending a copy of same by mail, or registered mail, to her at her last known address. Rule returnable the 26th day of February, 1910."

The only attestation of the order are the words appended thereto, "By the Court." Mrs. Dunlevy made no appearance in the proceeding, and on May 3d an order of the court was made, framing the issue, which was whether Joseph W. Gould made a valid gift of the policy to Effie J. Dunlevy. While the insurance company expressed its willingness to pay the money into court, it was not actually paid into court until March 19, 1910. On September 19, 1910, a jury returned a verdict in the cause entitled Boggs & Buhl, A. J. Gould, and Lincoln National Bank, Interveners, v. Joseph W. Gould, as follows: "We, the jurors, impaneled in the above entitled case, find a verdict for defendant." No judgment was ever entered upon the verdict of the jury, but upon October 1, 1910, the court ordered that the money be paid to Joseph W. Gould. Counsel for plaintiff contend that the service of the rule to show cause and the other papers was ineffectual to require the

plaintiff's appearance on those proceedings, and that the court never acquired jurisdiction of her. Where the object of an action is to determine personal rights only, and the proceeding is merely in personam, constructive service on a nonresident "is ineffectual for any purpose." Dull v. Blackman, 169 U. S. 243, 18 Sup. Ct. 333, 42 L. Ed. 733. But assuming that the proceeding in the court of Pennsylvania was a proceeding quasi in rem, the object of which was to determine to whom belonged the money that had been seized under the writ of the court, and that the money owing by the insurance company, notwithstanding that it had not been paid into court when the rule to show cause was made, was in legal effect in the possession of the court and subject to its judgment, we have to inquire whether the service was made in accordance with the laws of the state. The law to which we must refer is found in the act of April 6, 1859, 2 Purdon's Digest (13th Ed.) 1422, which provides that it shall be lawful for any court of Pennsylvania having equity jurisdiction of any suit concerning goods, chattels, etc., or liens, mortgages, or incumbrances thereon, or where any court has acquired jurisdiction of the subject-matter by service of its process on one or more of the principal defendants, to order and direct that any subpœna or other process in such suit may be served upon any defendant then residing out of the jurisdiction of the court, and upon affidavit of such service to proceed as fully and effectually as if the same had been made within the jurisdiction of the court. But the statute expressly provides that—

"such order limit a time, depending on the place where such process is to be served, after the service thereof, within which compliance with the requirements thereof must be made by such defendant or defendants; such process to be returnable at such time after the service thereof, as such court shall, by special order, direct."

The proceedings in the case under consideration fail in several respects to comply with these provisions of the statute. But the most vital defect is that the order wholly fails to limit a time, after the service thereof, within which compliance with the requirements thereof must be made, or to direct by "special order" that the process be returnable at a stated time after the service thereof. The order which was served upon Mrs. Dunlevy was returnable in the court of a distant state within eight days after the service upon her, while, if she had been a resident of that state and served therein, she could not, under the state law, have been required to appear and plead until 10 days after the date of the service. 1 Purd. Dig. [13th Ed.] p. 244. No default was taken against her, and nowhere in the proceedings of that court is there a recital or finding that service had been made upon her. The records show that from and after the return of the service upon her of the order to show cause, she was ignored in the proceedings. Substituted service upon a nonresident defendant being of statutory origin, the law must be strictly complied with (Jennings v. Johnson, 148 Fed. 337, 78 C. C. A. 329), and where the service is so defective as not to confer jurisdiction on the court, the judgment is open to collateral attack. Johnson v. Hunter, 147 Fed. 133, 77 C. C. A. 359; Guaranty Trust Co. v. Green Cove Railroad, 139 U. S. 137, 11 Sup. Ct. 512, 35 L. Ed. 116; Noble v. Union River Logging Railroad, 147

U. S. 165, 173, 13 Sup. Ct. 271, 37 L. Ed. 123. In Amy v. Watertown No. 1, 130 U. S. 301, 316, 9 Sup. Ct. 530, 536 (32 L. Ed. 946), the court said:

"The cases are numerous which decide that where a particular method of serving process is pointed out by statute, that method must be followed."

And on page 317 of 130 U. S., on page 536 of 9 Sup. Ct. (32 L. Ed. 946) the court quoted with approval the following language of the Supreme Court of Wisconsin:

"When the statute prescribes a particular mode of service, that mode must be followed. 'Ita lex scripta est.' There is no chance to speculate whether some other mode will not answer as well. This has been too often held by this court to require further citations."

Applicable to the contention of the defendant that, having paid the money into the Pennsylvania court, it discharged the debt, and was no longer concerned with the disposition of the money, is the following from Drake on Attachment, § 695:

It follows, hence, that a garnishee must, for his own protection, inquire: First, whether the court has jurisdiction of the defendant; and, next, whether it has jurisdiction of himself. If the jurisdiction exists as to both, he has no concern as to the eventual protection which the judgment of the court will afford him; it will be complete."

In the proceedings upon the writ of garnishment, the garnishee had ample opportunity before it paid the money into court to discover that the defendant in the writ had not been duly served with process, and that the court had no jurisdiction over her.

It is suggested that the lien created by the writ of garnishment upon the fund owing by the insurance company on the policy still subsisted at the time when the judgment was rendered in the court below against the defendant herein, and that at least the amount of the debt owing to Boggs and Buhl, the judgment creditors, should have been deducted from the amount for which the judgment was rendered against the insurance company in the court below. To this it is to be said that the judgment in the garnishment proceedings, in which proceedings the court had jurisdiction of the judgment creditor, the garnishee, and the claimant, but not of the judgment debtor, finally disposed of the rights of Boggs and Buhl under that garnishment, and determined that their writ created no lien on the money which was in the hands of the insurance company, and that the money belonged to the claimant. With that judgment and the payment of the money to the claimant the jurisdiction of that court over the subject-matter of the present action came to an end.

We hold that the proceedings in the Pennsylvania court present no defense to the plaintiff's cause of action.

The judgment of the court below is affirmed.

DIETRICH, District Judge (dissenting). I concur in the view that we cannot consider certain testimony contained in the record; and in the further view that the Pennsylvania court never acquired jurisdiction to try the "feigned issue." But there being no averment of the actual or constructive delivery of the instrument of assignment to

the defendant in error, or to another for her use, it is thought that the complaint fails to state a cause of action, and that the judgment should therefore be reversed. This question is entirely distinct from that of the sufficiency of the proofs to warrant a finding of delivery, which, as I understand, is the question discussed in the opinion.

But if the sufficiency of the complaint be assumed, I still think the judgment should be modified by deducting therefrom the amount of the Boggs & Buhl judgment, including interest and costs. It is conceded that this latter judgment was regularly entered in a suit, in which the Pennsylvania court had plenary jurisdiction, and that thereupon execution-garnishment process was duly issued and properly served upon the plaintiff in error. In so far as concerns the amount of the garnishment claim, it was a case, therefore, falling squarely within the rule quoted in the opinion, with apparent approval, from Drake on Attachment. The court had jurisdiction of the defendant (the defendant in error here) and of the garnishee (the plaintiff in error here). Jurisdiction existing as to both, the garnishee could rest assured that by payment into court of the amount of the writ its protection would be complete. The fact that it paid in more than was required to satisfy the writ, and sought protection as to the excess through a "feigned-issue" proceeding, which was ineffective because jurisdiction as to such issue was not acquired over the person of the defendant in error, cannot operate to deprive it of the protection to which it was entitled upon yielding to the valid writ of garnishment. And as to the "feigned-issue" order or judgment, I am unable to see how it can be held void for want of jurisdiction in favor of one party and valid as against the other; if void as to one, it is void as to both. It is suggested that in that proceeding the court had jurisdiction of the judgment creditor and of the claimant, but in considering an issue between the plaintiff in error and the defendant in error, how can the presence of other parties operate to confer jurisdiction? I am unwilling to hold, in effect, that the plaintiff in error was, at the time of the proceedings in Pennsylvania, not indebted to the defendant in error, and thus enable her to escape her creditors there, and at the same time hold that it was and still is indebted to her, thus requiring it to pay the claim a second time.

NORTHERN PAC. RY. CO. et al. v. MENTZER.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1914.)

No. 2298.

1. RAILROADS (§ 479*) —FIRES—ACTION AGAINST DIFFERENT RAILROAD COMPANIES—PLEADING SINGLE CAUSE OF ACTION.

In an action against two railroad companies for setting fire to plaintiff's planing mill, a complaint, alleging that while the trains of defendants were running on and over the railway of the N. P. Ry. Co., and passing the property of plaintiff, one of the locomotives was so negligently constructed, and so carelessly operated by defendants' servants and agents that sparks were emitted therefrom, falling on and about the

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

building in which the greater part of plaintiff's property was located and set fire thereto, which fire spread on and over plaintiff's property, burning the same. *Held*, that the complaint charged but one cause of action, to wit, the burning of plaintiff's property by sparks negligently emitted from an engine belonging to one of the defendants, running over the tracks of the N. P. Ry. Co., and hence the fact that the engine that actually set the fire belonged to the O. W. Co., which was operated over the tracks of the N. P. Ry. Co., under a trackage agreement or lease, did not relieve the N. P. Ry. Co. from liability.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1706–1708; Dec. Dig. § 479.*]

2. RAILROADS (§ 259*) — OPERATION — TRACKAGE AGREEMENT — LIABILITY OF LESSOR COMPANY.

Where a railroad company permits another company to run trains over its tracks under a trackage agreement or lease, the lessor company is legally responsible to third persons for acts of negligence on the part of the lessee company, its agents, or servants, in running trains over such tracks.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 802–816; Dec. Dig. § 259.*]

3. ACTION (§ 38*)—TORTS—JOINT OR SEVERAL TORT.

Where an action is brought against two defendants for a joint tort, one of the defendants cannot insist that the action shall be treated as several.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549, 565; Dec. Dig. § 38.*]

4. ACTION (§ 38*)—JOINT RECOVERY—SEPARATE DEFENSE.

While a separate defense may defeat a joint recovery, it cannot deprive plaintiff of his right to prosecute his suit to final decision, as a joint cause of action against two or more defendants; the cause of action being regarded as the subject of the controversy, and for all purposes of the suit, whatever plaintiff declares it to be in his pleadings.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549, 565; Dec. Dig. § 38.*]

5. RAILROADS (§ 481*)—FIRES—OTHER FIRES.

In a suit against two railroad companies for burning plaintiff's property by a fire alleged to have been set out by defendants' locomotives running over the tracks of one of them, evidence concerning other fires, alleged to have been set by defendants' locomotives within 30 days prior to the fire in question, was properly admitted as tending to show a negligent habit of the officers or agents of the railroad companies, regardless of the fact that the locomotives which were claimed to have set such other fires were not identified as those claimed to have set the fire in question, and though it also appeared that a third railroad company operated trains over such tracks, and that a locomotive belonging to it might have caused the other fires.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1717–1729; Dec. Dig. § 481.*]

6. RAILROADS (§ 484*)—FIRES—QUESTION FOR JURY—INSTRUCTIONS.

Where, in an action for burning plaintiff's property by fire alleged to have been set out by the engines of defendant railroad companies, one of plaintiff's witnesses testified that he first saw the fire about 1:30 a. m., while the chief of the fire department testified that an alarm was turned in about 3:50 a. m., and defendants contended that if the fire did not break out and was not discovered until 3:30 a. m., it could not have been caused by sparks from either of the locomotives from which sparks had been seen to issue, but there was other testimony that a spark falling in a mill such as that in question during the dry season might smolder for

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

hours before fire would break forth, whether the fire was caused by sparks from the defendants' engines was for the jury, and the court properly refused to charge that, if the fire did not start until shortly before 3:30 a. m., the verdict should be for defendants.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740–1746; Dec. Dig. § 484.*]

7. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, in an action against certain railroads for the destruction of plaintiff's property by fire, there was no evidence that a certain engine of defendant N. P. Ry. Co., which passed at 3:35 a. m. emitted sparks while passing the property, the court did not err in refusing to charge that, while the jury could not find any negligence because of the operation of such engine, still the fact that it passed the building at the time was a circumstance to be considered by the jury in determining whether some other agency than that of the O. W. Ry. Co.'s freight, or the N. P. Ry. Co.'s passenger train caused the fire, etc.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. § 252.*]

8. APPEAL AND ERROR (§ 1068*)—REVIEW—HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.

Where, in an action for burning plaintiff's property by fire alleged to have been set out by a locomotive belonging to one of defendants, the jury expressly found in answer to a special interrogatory that the engine attached to N. P. Ry. freight No. 680, did not set the fire, defendants were not prejudiced by the refusal of an instruction that the jury were entitled to consider the fact that such train passed the building about 3:35 a. m. on the day of the fire as bearing on the question whether some other agency than that of defendant set the fire.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225–4228, 4230; Dec. Dig. § 1068.*]

9. RAILROADS (§ 484*)—FIRES—NEGLIGENCE—QUESTION FOR JURY.

Where, in an action against certain railroads for burning plaintiff's property by fire started from a locomotive, there was proof that defendants' trains passed the building, emitting sparks the size of a dime, and a locomotive inspector testified that the spark arrester of the locomotive in question was of the best known type and in perfect order on the morning of the day of the fire, that a spark arrester in proper condition would restrain all sparks larger than the head of a small match, and that if larger sparks went through to any height or distance, it would show that the arrester was in bad condition, whether defendants were negligent, was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740–1746; Dec. Dig. § 484.*

Presumption of negligence from fires, see note to McCullen v. Chicago & N. W. Ry. Co., 41 C. C. A. 370.]

10. RAILROADS (§ 453*)—FIRES—LIABILITY.

A railroad company is not an insurer of the property along its line, and cannot be held liable for the destruction of property by fire from sparks from its engines, unless they are improperly constructed or negligently operated.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1657–1660, 1667; Dec. Dig. § 453.*]

11. RAILROADS (§ 482*)—FIRES—SPARKS.

In order for plaintiff to recover against a railroad company for the destruction of his property by a fire set by sparks from a locomotive, he must prove that the property was destroyed by fire set out from sparks from one of defendants' engines; that the engine was either defectively constructed so that it would emit sparks of such a character that the

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

same could be provided against by the exercise of ordinary care, or that the engine was so negligently operated that it would emit sparks of a dangerous character that could have been prevented by the exercise of such care.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1730–1732, 1734–1736; Dec. Dig. § 482.*]

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by Cyrus A. Mentzer against the Northern Pacific Railway Company and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Cyrus A. Mentzer, the plaintiff in the court below, is a citizen of the state of Washington. The Northern Pacific Railway Company is a corporation organized and existing under and by virtue of the laws of the state of Wisconsin. The Oregon-Washington Railroad & Navigation Company is a corporation organized and existing under and by virtue of the laws of the state of Oregon. It is alleged in the amended complaint filed by the plaintiff that on or about the 15th day of July, 1911, he was the owner of a certain planing mill, including machinery and a large quantity of lumber, located at South Tacoma, in the state of Washington, and adjacent to the right of way of the Northern Pacific Railway Company, the planing mill and machinery and lumber being of the value of $3,330; that on or about that date, and for some time prior thereto, the defendant Oregon-Washington Railroad & Navigation Company was operating trains over the railroad of the defendant Northern Pacific Railway Company, and running by the property of the plaintiff; that on that date, while the trains of the defendants were running upon and over the railroad of the Northern Pacific Railway Company, and passing the property of the plaintiff, one of the locomotives of the defendants was so carelessly and negligently constructed, and so carelessly and negligently operated by the servants and agents of the defendants, that sparks were emitted therefrom, which, falling upon and about the building in which the greater portion of the property of the plaintiff was located, set fire thereto, which fire so set spread upon and over the property of the plaintiff, burning and consuming the same; that the loss, injury, and damage resulting to the plaintiff by reason of the fire was caused by the negligent construction of the locomotives of the defendants, and the carelessness and negligence of the servants and agents of the defendants in operating the same, and in starting the fire and permitting the same to burn the property of the plaintiff. The defendants filed separate answers to the amended complaint, denying all of the material allegations thereof. The case went to trial on the amended complaint and answer. At the close of the testimony each of the defendants moved the court to direct the jury to return a verdict in its favor upon the ground that the evidence was insufficient to justify a verdict against it; that there was not sufficient testimony showing that it was guilty of any negligence in the operation of its engines, or that its engines were negligently constructed or equipped; that there was no sufficient evidence to show that any fire was started by reason of any sparks emitted by its engine; and that the plaintiff, having sued upon a joint cause of action alleged against both defendants, and having proved, if he had proved anything, a separate act of each defendant, was not entitled to maintain the action. The jury returned a verdict in favor of the plaintiff in the sum of $3,120. To the form of verdict submitted to the jury there was annexed the following interrogatory: "Q. If your verdict is in favor of the plaintiff, state whether the fire was started by sparks from the engine drawing Northern Pacific passenger train No. 301, or the engines of Northern Pacific freight train No. 680, or the engine of the Oregon-Washington Railroad & Navigation freight train No. 691." To this interrogatory the jury in its verdict returned the following answer: "A. Fire was

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

started by sparks from the engine of the Oregon-Washington Railroad & Navigation freight train No. 691." A judgment was entered against the defendants and in favor of the plaintiff in the sum of $3,120, from which judgment, and from the order of the court below denying the motion of the defendant the Oregon-Washington Railroad & Navigation Company for a new trial, the defendants sued out a writ of error from this court.

J. W. Quick, of Tacoma, Wash., W. H. Bogle, Carroll B. Graves, F. T. Merritt, and Lawrence Bogle, all of Seattle, Wash., and P. C. Sullivan and Walter Christian, both of Tacoma, Wash., for plaintiffs in error.

E. D. Hodge and Charles Bedford, both of Tacoma, Wash., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] 1. The plaintiffs in error were defendants in the court below. It is contended by them that the plaintiff, having sued the defendants jointly upon one cause of action, cannot recover upon proof of distinct separate torts, one based upon the operation or construction of a particular engine of the Northern Pacific Railway Company, and one based upon a different claim of negligence in the operation or construction of an engine of the Oregon-Washington Railroad & Navigation Company. Admitting the rule to be as stated, it has no application in this case. No recovery was sought, nor has any recovery been had upon proof of distinct separate torts. The allegations of the complaint are that:

"While the trains of the defendants were running upon and over said railway of the said Northern Pacific Railway Company, and passing the property of the plaintiff, above described, one of the locomotives of the defendants was so carelessly and negligently constructed, and so carelessly and negligently operated by the servants and agents of the defendants, that sparks were emitted therefrom, which, falling upon and about the building, in which the greater portion of the property of the plaintiff was located, set fire to said building and property, which fire so set spread upon and over the property of the plaintiff burning and consuming the same."

This allegation charges but a single cause of action, namely, the setting fire to the plaintiff's property by sparks negligently emitted from an engine belonging to one of the defendants, not from engines belonging to both of the defendants, and the running of that engine over the tracks of the Northern Pacific Railway Company. It was stipulated between the parties that the Oregon-Washington Railroad & Navigation Company was running its trains over the trackage of the Northern Pacific Railway Company, between Tacoma and Portland, under a lease or trackage agreement with the Northern Pacific Railway Company; the property being owned by the Northern Pacific Railway Company. It remained, then, to ascertain whether the fire which destroyed plaintiff's property was caused by sparks negligently emitted from an engine running on the tracks of the Northern Pacific Railway Company, and, if so, to identify the engine. There was proof identifying the engine as belonging to the Oregon-Washington Railroad & Navigation Company, and the stipulation as to the ownership of the tracks on which it was running constituted proof of a single

cause of action. Upon this question the court instructed the jury as follows:

"It will first be your duty to determine in this case, and you will not go outside the evidence, and you will not speculate or guess concerning any of the issues in this case, but if the evidence has shown, it will be first your duty to determine whether or not the mill was burned by sparks emitted by one of these engines, that is, one of the engines of one of the defendant companies. If you find that there is a fair preponderance of evidence showing that it was set on fire and burned down by the sparks emitted from the engines of one of these companies, it will then be your duty to pass on and determine whether either of the defendants have been negligent in either of the particulars of which complaint is made by the plaintiff. If you find that one or both of the defendants were negligent in one or both of the particulars of which complaint is made in the complaint, and that is shown by a fair preponderance of the evidence, it will then be your duty to determine whether that negligence was the proximate cause of the setting fire to the mill. * * *

"If the Oregon-Washington Railroad & Navigation Company was negligent in the particular of which the plaintiff complained, and that negligence was the proximate cause of the fire, the Oregon-Washington Railroad & Navigation Company would not only be liable, but the Northern Pacific would be liable as well, because the Northern Pacific is allowing them to use their tracks in a negligent manner, but if the fire was negligently caused, as complained of, by one of the Northern Pacific engines, the Oregon-Washington Railroad & Navigation Company would not be liable, because the extent of its liability is confined to furnishing proper engines and properly equipped and operated in an ordinarily careful and skillful manner, and would not in any way be responsible for the conduct of the Northern Pacific Railway Company."

[2] The relationship of the defendants growing out of this trackage agreement or lease was such that the Northern Pacific Railway Company was legally responsible for acts of negligence on the part of the Oregon-Washington Railroad & Navigation Company, or its agents or servants, running trains over the tracks of the former.

This is now the established rule. The case of C., B. & Q. Ry. Co. v. Willard, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521, was a joint action against two railroad companies (one thereof being the lessee of the other), to recover damages alleged to have been caused by the negligence of the defendants by their agents and servants, whereby the intestate of the plaintiff was killed. Mr. Justice Harlan, delivering the opinion of the Supreme Court of the United States, said:

"Whatever liability was incurred on account of the death of the plaintiff's intestate could, at the plaintiff's election, be asserted against both companies in one joint action, or, at his election, against either of them in a separate action."

In Pennsylvania Co. v. Ellett, 132 Ill. 654, 24 N. E. 559, the Supreme Court of Illinois said:

"The law has become settled in this state, by an unbroken line of decisions, that the grant of a franchise, giving the right to build, own, and operate a railway, carries with it the duty to so use the property and to manage and control the railroad as to do no unnecessary damage to the person or property of others; and, where injury results from the negligence or unlawful operation of the railroad, whether by the corporation to which the franchise is granted, or by another corporation, or by individuals whom the owner authorizes or permits to use its tracks, the company owning the railroad and franchise will be liable. * * *

"While the company guilty of the negligence * * * will be liable for the damages resulting therefrom, the owner of the railroad to whom is grant-

ed the control and management of it will also be liable. The public may look for indemnity for injury resulting from the wrongful or unlawful operation of the road to that corporation to which they have granted the franchise, and thus delegated a portion of the public service; and for this purpose the company whom it permits to use its tracks, and its servants and employés will be regarded as the servants and agents of the owner's company."

In Lakin v. Railroad Co., 13 Or. 436, 11 Pac. 68, 57 Am. Rep. 25, the Supreme Court of Oregon said:

"The defendant * * * cannot escape liability for injuries to passengers caused by the negligence of another which it permits or allows to use its road for the purposes of traffic. In such case, as regards the public, those who operate the road must be regarded as the agents of the corporation. This doctrine is in accordance with sound public policy; for it would certainly be against the public interest to allow corporations, invested by the state with important franchises and privileges, and incorporated to discharge a public duty as well as to subserve a private benefit, to shirk its responsibilities, or shift its duties and liabilities to other, perhaps irresponsible, parties. Except as authorized by statute, it cannot relieve itself from responsibility for the exercise of its corporate powers and franchises."

The Supreme Court of the state of Washington has been called upon to apply this rule in cases arising before that tribunal. In Cogswell v. West St., etc., Electric Ry. Co., 5 Wash. 46, 31 Pac. 411, that court said:

"It is a well-established principle of the law governing common carriers which obtain certain rights or franchises from the public by either special or general legislation on the part of the state or municipal corporations, and upon whom in return therefore are cast the burden of certain duties, that they cannot, by means of any lease or other contract for the operation of their means of transportation or the management and control of their tracks and right of way, relieve themselves from liability for violations of contracts or the public law, or for torts committed by their lessees or the parties with whom they specially contract."

See, also, Herrman v. Great Northern Ry. Co., 27 Wash. 472, 68 Pac. 82, 57 L. R. A. 390.

In some of the cases in which this rule has been enforced, the lessor was out of possession of the railroad, and the lessee, for whose negligent acts the lessor was held responsible, was in entire possession and control of the railroad, and was the sole operator thereof. If the rule has been held to apply in such cases, how much stronger are the reasons for applying it in cases where, as in the one now under consideration, both the lessor and the lessee companies were jointly engaged in operating trains daily over the same right of way.

[3, 4] There is a further rule applicable to this case under which the cause of action as alleged and proven must be sustained, and that is the rule that in an action of tort the defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive the plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all purposes of the suit, whatever the plaintiff declares it to be in his pleadings. Louisville, etc., Railroad Co. v. Ide, 114 U. S. 52, 56, 5 Sup. Ct. 735, 29 L. Ed. 63; Pirie v. Tvedt, 115 U. S. 41, 43, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331; Sloane v. Anderson, 117 U. S. 275, 6 Sup. Ct. 730, 29 L. Ed. 899; Little v. Giles, 118 U. S. 596.

600, 601, 7 Sup. Ct. 32, 30 L. Ed. 269; Louisville, etc., Railroad Co. v. Wangelin, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 474; Torrence v. Shedd, 144 U. S. 527, 530, 12 Sup. Ct. 726, 36 L. Ed. 528; Connell v. Smiley, 156 U. S. 335, 340, 15 Sup. Ct. 353, 39 L. Ed. 443; C., B. & Q. Ry. Co. v. Willard, 220 U. S. 413, 425, 31 Sup. Ct. 460, 55 L. Ed. 521.

[5] 2. It is further contended that the court below erred in permitting the plaintiff, over the objection of the defendants, to introduce evidence concerning other fires alleged to have been set by locomotives of the defendants, within 30 days prior to the burning of the plaintiff's mill; and, further, that the court erred in refusing to give to the jury the following instruction requested by the defendants on that subject:

"There was some evidence introduced by plaintiff as to fires originating in the vicinity by sparks from engines within 30 days prior to the date when plaintiff's property was burned. The court instructs you that this evidence is too indefinite and uncertain to constitute any proof against the defendants, or either of them. You will therefore disregard this testimony in your consideration of the case."

The testimony with respect to previous fires, to which the defendants objected, was given by four witnesses on behalf of the plaintiff, each of whom was asked, in substance, whether or not he had ever seen any other fires in the immediate neighborhood of the mill set by sparks from the engines of the defendants Northern Pacific Railway Company, or Oregon-Washington Railroad & Navigation Company, at any time within 30 days prior to the burning of the plaintiff's mill. The answers of the witnesses to this question were to the effect that they had seen several such fires along the right of way of the Northern Pacific Railway Company, but that they did not know whether the same were set by sparks from the locomotives of the Northern Pacific Railway Company, or the Oregon-Washington Railroad & Navigation Company, or the Great Northern Railway Company, which last-named company it appeared from the testimony was also operating trains over the tracks and right of way of the Northern Pacific Railway Company, and past the mill of the plaintiff.

The specific objection to this testimony is that the admitted and stipulated facts showed that the plaintiff claimed that a particular engine of the Oregon-Washington Railroad & Navigation Company, or a particular engine of the Northern Pacific Railway Company, had caused the fire which destroyed the plaintiff's property; that the testimony should have been limited, if admitted at all, to fires started by those specific engines; and that the testimony of the plaintiff's witnesses with respect to seeing other fires set by locomotives of the defendants, within 30 days prior to the date of the fire which destroyed the plaintiff's mill, did not disclose the locomotive or locomotives of the respective defendants, or of the Great Northern Railway Company, by which such fires had been caused.

But we find no such stipulation or admission in the record. The only testimony in the case concerning the escape of sparks from locomotives of either of the defendants passing the plaintiff's mill on the morning of the destruction thereof related to two certain locomotives, both of which were proceeding in a southerly direction; one thereof

being attached to a freight train, and the other being attached to a passenger train. It appeared from the testimony that about 10 or 15 minutes elapsed between the passing of the two trains. There is in the record a stipulation between the parties, to the effect that a freight train of the Oregon-Washington Railroad & Navigation Company, numbered 691, and a passenger train of the Northern Pacific Railway Company, numbered 301, left the station of South Tacoma, bound for Portland, going south, on the morning of the fire in question. It further appeared from the block sheet of the defendants introduced in evidence, showing the arrival and departure of trains at South Tacoma on the morning that the plaintiff's property was burned, that the freight train of the Oregon-Washington Railroad & Navigation Company (No. 691) left South Tacoma at 1:43 a. m., and that the passenger train of the Northern Pacific Railway Company (No. 301) left South Tacoma at 1:57 a. m. The mill of the plaintiff was located at a point about three blocks to the south of South Tacoma Station, and about 90 feet from the main tracks of the Northern Pacific Railway Company.

The contention of the defendants, therefore, amounts to this: That testimony as to other fires being started by locomotives of the defendants prior to the date of the destruction of the plaintiff's property was not admissible because it was not shown that they were caused by either of these two locomotives.

In Grand Trunk Ry. Co. v. Richardson, 91 U. S. 454, 23 L. Ed. 356, this precise question was before the Supreme Court of the United States. In that case Mr. Justice Strong said:

"The plaintiffs were allowed to prove, notwithstanding objection by the defendant, that, at various times during the same summer before the fire occurred some of the defendant's locomotives scattered fire when going past the mill and bridge, without showing that either of those which the plaintiffs claimed communicated the fire was among the number, and without showing that the locomotives were similar in their make, their state of repair, or management, to those claimed to have caused the fire complained of. The evidence was admitted after the defendant's case had closed. But, whether it was strictly rebutting or not, if it tended to prove the plaintiffs' case, its admission as rebutting was within the discretion of the court below, and not reviewable here. The question, therefore, is whether it tended in any degree to show that the burning of the bridge, and the consequent destruction of the plaintiffs' property, were caused by any of the defendant's locomotives. The question has often been considered by the courts in this country and in England; and such evidence has, we think, been generally held admissible, as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company. Piggot v. R. R. Co., 3 M. G. & S. 229; Sheldon v. R. R. Co., 14 N. Y. 218 [67 Am. Dec. 155]; Field v. R. R. Co., 32 N. Y. 339; Webb v. R. R. Co., 49 N. Y. 420 [10 Am. Rep. 389]; Cleaveland v. R. R. Co., 42 Vt. 449; R. R. Co. v. Williams, 44 Ill. 176; Smith v. R. R. Co., 10 R. I. 22; Longabaugh v. R. R. Co., 9 Nev. 271. There are, it is true, some cases which seem to assert the opposite rule. It is, of course, indirect evidence, if it be evidence at all. In this case it was proved that engines run by the defendant had crossed the bridge not long before it took fire. The particular engines were not identified; but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire; and it seems to us that, under the circumstances, this probability was strengthened by the fact that some engines of the same defendant, at other times during the same season, had scattered fire during their passage."

In Northern Pacific Ry. Co. v. Lewis, 51 Fed. 658, 2 C. C. A. 446, Judge Gilbert, referring to the case of Railroad Co. v. Richardson, supra, said:

"It is assigned as error that the court permitted evidence of other fires set at other points on the road and at other times, and by other engines, and instructed the jury to take into consideration the fires so set in determining the question of negligence. The complaint did not designate the particular engines which were claimed to have caused the fire. The testimony, however, tended to show that the fire originated from one of two certain locomotives, and that these and other locomotives had set other fires both before and after the injury complained of. This evidence was clearly admissible, under the authority of the decision in the case of Railroad Co. v. Richardson, 91 U. S. 454 [23 L. Ed. 356], as 'tending to prove the possibility, and consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company.'"

In Noland v. Great Northern Ry. Co., 31 Wash. 430, 71 Pac. 1098, the Supreme Court of Washington said:

"It is assigned, first, that the court erred in admitting testimony that other trains at other times set other fires, and it is insisted that the pleadings do not put in issue the sufficiency of the spark arrester with which such engine was equipped, or its condition of repair, and that it is therefore improper to admit evidence that the same train or engine threw sparks at other times. It will be noted, however, that no specific engine is designated in the complaint. If such were the case, it would not be proper to admit evidence of fires by other trains at other times for the purpose of charging the train specified with setting the fire, for the reason that it is frequently impossible in practice to trace the fire to a particular locomotive. The appellant insists that even then the testimony is inadmissible, in the absence of an issue in the pleadings as to the condition of the spark arrester or other machinery. But we think that, even in the absence of such an issue, the fact that engines of the defendant were in the habit of emitting sparks upon the right of way might be admitted as a circumstance in the case tending to show the origin of the fire, which was a disputed question in this case."

We are of opinion, therefore, that the testimony was clearly admissible, despite the fact that no particular locomotive or locomotives of either of the defendants was designated.

Nor do we think that the fact that it also appeared from the testimony of the witnesses, who testified concerning fires set by locomotives along the right of way of the Northern Pacific Railway Company prior to the destruction of the plaintiff's mill, that the Great Northern Railway Company also was operating trains over the Northern Pacific right of way, and that a locomotive or locomotives of that company might have caused such fires, rendered the testimony any the less admissible.

The instruction given to the jury with respect to the setting of other fires was as follows:

"In this case there was some evidence admitted concerning other fires set within 30 days previous to the fire in question. You will understand that unless there is some evidence to show that those fires were set by engines of the Oregon-Washington Railroad & Navigation Company, you will not consider that evidence as in any way affecting that company."

Whether the failure of the court below to give to the jury a similar instruction with respect to the defendant the Northern Pacific Railway Company was error is not a question for our consideration. The

jury answered the interrogatory submitted by the court that the fire which destroyed the plaintiff's mill "was started by sparks from the engine of the Oregon-Washington Railroad & Navigation Company's freight train No. 691." The jury could not have failed to understand that any testimony tending to show that fires were set by locomotives of either the Northern Pacific Railway Company or the Great Northern Railway Company was not evidence tending to show negligence on the part of the defendant, the Oregon-Washington Railroad & Navigation Company, in running its engine drawing freight train No. 691.

[6] 3. The action of the trial court in refusing to give the following instructions requested by the defendants is also assigned as error:

"You are instructed that if you find that the fire was not discovered by the witnesses until about 3:30 a. m., then your verdict must be for the defendants.

"If you believe from the evidence that the fire which destroyed plaintiff's property did not begin until shortly before 3:30 a. m. July 15, 1911, then your verdict must be for the defendants."

There was conflict in the testimony as to the exact time at which the fire broke out in the mill of the plaintiff. One of the witnesses testified that he had first seen fire at the mill at about 1:30 a. m. On the other hand, the chief of the fire department of Tacoma testified that the records of his department showed that the alarm notifying his department of the fire had been turned in at 3:50 a. m. The defendants contend that if the fire did not break out and was not discovered until 3:30 a. m., or for a period of an hour and a half after the last locomotive claimed to have caused the fire passed the mill, it could not have been caused by sparks from either of the locomotives from which sparks had been seen to issue. But there was testimony tending to show that a spark falling in a mill such as that of the plaintiff, during the dry season, with an accumulation of sawdust on the roof, might lie and smolder for hours before fire caused thereby would break forth. The question became, therefore, one for the jury, and the instructions requested by the defendants were properly refused. McCullen v. C. & N. W. Ry. Co., 101 Fed. 66, 41 C. C. A. 365, 49 L. R. A. 642; Asplund v. Great Northern Ry. Co., 63 Wash. 164, 114 Pac. 1043; Hawley v. Sumter Valley Ry. Co., 49 Or. 509, 90 Pac. 1106, 12 L. R. A. (N. S.) 526.

4. It is further contended that the court below erred in refusing to give the following instructions requested by the defendants:

"While the jury cannot find any negligence against either company because of a train of the Northern Pacific Railway Company going north about 3:35 a. m., still the fact that this train did pass this building at that time, or about that time, is a circumstance to be considered by the jury in considering whether or not some other agency than that of the Oregon-Washington Railroad & Navigation Company's freight train, or the Northern Pacific Railway Company's passenger train, caused the fire.

"The fact that this train did pass the premises going north at the time it did is permissible to be considered by you as a circumstance tending to show that the fire might have been started by a train other than the freight train of the Oregon-Washington Railroad & Navigation Company, or the passenger train of the Northern Pacific Railway Company."

[7, 8] It is not exactly clear on what ground the defendants attribute error to the court below in refusing to give these instructions.

The engineer of the Northern Pacific freight train No. 680, referred to in the instructions requested, and which passed the mill of the plaintiff about 3:35 a. m. on the morning it was destroyed by fire, testified that in passing the mill he was on the side of his locomotive facing it, and that he had not observed any fire at the mill when he passed it. If the defendants sought to establish by the testimony of this engineer that fire had not yet broken forth in the mill of the plaintiff after the lapse of a period of over an hour and a half from the passage of the last locomotive claimed to have caused the fire, the objection falls within the assignment of error disposed of in paragraph 3 of this opinion; the question as to how long sparks might smolder on the roof of a building such as that of the plaintiff being one for the jury. If the objection to the refusal of the court to give these instructions was because the engine of this train might have emitted the sparks that set fire to plaintiff's property, the answer is that there was no evidence whatever that this engine emitted sparks when passing plaintiff's property. But it appears from the interrogatory annexed to the verdict rendered by the jury in this case that this identical locomotive and freight train were included therein, the jury being asked to state—

"whether the fire was started by sparks from the engine drawing Northern Pacific passenger train No. 301, or the engines of Northern Pacific freight train No. 680, or the engine of the Oregon-Washington Railroad & Navigation freight train No. 691."

No instruction was given to the jury with respect to this train and locomotive, and, as we have stated, none was required; but, inasmuch as this train was included in the special interrogatory annexed to the form of verdict, the jury, in concluding that the fire which destroyed the plaintiff's mill was started by sparks from the engine of the Oregon-Washington Railroad & Navigation Company's freight train No. 691, must have taken into consideration the fact that freight train No. 680 of the Northern Pacific had passed the mill at the time designated. And that is exactly what the jury would have been asked to do had the two instructions requested by the defendants been given by the court.

[9] 5. We are of opinion that there was sufficient evidence to sustain the verdict rendered against the Oregon-Washington Railroad & Navigation Company. William Ebert, a witness for the plaintiff, testified that he saw the freight train of that company (No. 691) before it passed the mill of the plaintiff, when it was down by the station about three or four blocks from the mill; that the train came up to the mill while he was watching it; that the locomotive attached to this train was throwing sparks when he first saw it, and that it continued to throw lots of sparks all the way along; that the sparks, as near as he could tell, were about the size of a dime; that the sparks were going in the direction of the mill of the plaintiff; that the passenger train of the Northern Pacific Railway Company (No. 301) passed about 10 or 15 minutes after the freight passed; that when he first saw the passenger train it was a block and a half or two blocks from the mill; that the locomotive attached to it was throwing up a few sparks; that they did not appear to be as big as the sparks thrown up by the locomotive of the

freight train, nor were there so many as from the locomotive of the latter train; that about 15 or 20 minutes after these trains passed he saw fire at the mill; that when he first saw it the fire was located in the roof; that the mill was all open; that he could see under the mill, and there was no fire under the shed at that time.

The testimony of witnesses called on behalf of the defendant Oregon-Washington Railroad & Navigation Company tended to show that the spark arrester and fire apparatus which were constructed in the locomotive attached to its freight train No. 691 on the morning in question were of the best known type and class and were in perfect order. The defendant Oregon-Washington Railroad & Navigation Company, therefore, insists that, as this testimony was uncontradicted by the plaintiff, the testimony disclosed an entire lack of negligence on its part, both in the construction and the operation of its locomotive. But it appears from the testimony of one Fred Zintz, a locomotive inspector in the employ of the Oregon-Washington Railroad & Navigation Company, that no sparks larger than the head of a small match would be able to escape through the meshes of the spark arrester constructed in the locomotive which was attached to train No. 691 of that company on the morning of the fire, and that if sparks larger than that went through the spark arrester to any height or distance, it would show that the spark arrester was not in good condition.

[10, 11] The question of the negligence of the defendant, the Oregon-Washington Railroad & Navigation Company, was submitted to the jury in the following instructions:

"A railroad company is not an insurer of the safety of the property along its line, and could not be held liable for the destruction of property by fire even though such fire is caused by sparks from its engines, unless the engine was improperly constructed or negligently operated, and this must be shown by a fair preponderance of the evidence. * * *

"In order to recover against the defendant the Oregon-Washington Railroad & Navigation Company, the plaintiff must prove: First, that the property was destroyed by fire; second, that this fire was set out and started by a spark or sparks from one of that company's engines; third, that the engine was either defectively constructed, so that it would emit sparks of such a character that the same could be provided against by the exercise of ordinary care and caution on the part of the company, or that the engine was so carelessly and negligently operated by the servants and agents of defendant company that it would emit sparks of such a character that it could have been provided against by the exercise of ordinary care and caution on the part of the defendant company.

"It is a matter of common knowledge that locomotive engines in which coal or wood are used as fuel will emit a certain amount of sparks, and that there has been no device adopted by which all of the sparks generated in an engine will be arrested, but that some of them will escape, although the engine is equipped with spark arrester of an approved pattern, and the engine operated by servants who are reasonably skillful and careful.

"In order to find the defendant the Oregon-Washington Railroad & Navigation Company negligent in the particulars mentioned, it is necessary for you to find that not only sparks escaped from its engine, but you must go further and find that these sparks which did escape were caused to escape by reason of the negligent construction of the engine from which they escaped (that is, you must find that negligence is the proximate cause), and unless you find such to be the fact from the evidence, it is your duty to return a verdict for this defendant, even though you should be of the opinion that

the fire was started by a spark or sparks thrown off from the passing engine of the defendant. * * *

"You are further instructed that, the defendant the Oregon-Washington Railroad & Navigation Company, being engaged in the operation of a railroad, it is its duty under the law to operate its trains upon its tracks, and that if its engines are equipped with spark arresters of an approved pattern, and the spark arresters are in good condition, and the engine was operated in an ordinary skillful manner, then the defendant has performed its full duty under the law, and would not be liable to plaintiff, even though sparks from its engine caused the fire which destroyed plaintiff's property."

We are of opinion that the foregoing instructions were a correct statement of the law applicable to the facts of this case; that whether the defendant Oregon-Washington Railroad & Navigation Company had or had not been guilty of negligence in the construction or operation of its trains was a question for the jury, and that the testimony was fully sufficient to support the verdict arrived at by the jury that the fire which destroyed the mill of the plaintiff was started by sparks from the locomotive of its freight train.

The judgment of the court below is affirmed.

COHEN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1914.)

No. 2339.

1. PERJURY (§ 27*)—SUBORNATION OF PERJURY—INDICTMENT.

Where an indictment for suborning a witness to testify falsely before a United States commissioner sufficiently showed that the proceeding was a preliminary examination, had not on an indictment or information, but on a complaint as provided by Rev. St. § 1014 (U. S. Comp. St. 1901, p. 716), as amended by Act Aug. 18, 1894, c. 301, 28 Stat. 416, with a view to holding the person accused in the complaint to answer for a crime charged, the indictment was not fatally defective because the words "trial" and "issue" were used in referring to the hearing before the commissioner, on the ground that the commissioner had no jurisdiction to try any issue between the United States and a person charged with crime.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 95; Dec. Dig. § 27.*]

2. PERJURY (§ 13*)—SUBORNATION OF PERJURY—ARREST OF PERSON SUBORNED.

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]), defendant acted as attorney for accused and, prior to a preliminary hearing before a United States commissioner, with knowledge that W. was accused's wife, advised her to testify falsely before the commissioner in order that she might assist to obtain the discharge of her husband, it was no objection to defendant's liability for subornation of perjury that the witness suborned had not been arrested when defendant was charged with having committed the crime, or that she knew she would be arrested and had in mind a particular tribunal or proceeding before which the perjury should be committed.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 61½; Dec. Dig. § 13.*]

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

3. CRIMINAL LAW (§ 1158*)—APPEAL—DIRECTED VERDICT—DENIAL.

In determining whether error has been committed in refusing a directed verdict in favor of defendant, the appellate court can only inquire whether there was any evidence to sustain the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061–3066, 3070, 3071, 3074; Dec. Dig. § 1158.*]

4. CRIMINAL LAW (§ 429*)—EVIDENCE—JUDICIAL RECORDS.

In a prosecution of defendant for suborning the wife of G. to commit perjury in his favor on the hearing of a complaint against him before a United States commissioner for violating the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p. 1343]), the complaint filed in such hearing before the commissioner against G. was properly admitted to prove one of the steps in the proceeding in which the alleged false testimony was suborned to be given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1018, 1020; Dec. Dig. § 429.*]

5. COURTS (§ 349*)—FEDERAL COURTS—STATUTES—"MODES OF PROCESS"—COMPETENCY OF WITNESSES.

Rev. St. § 1014 (U. S. Comp. St. 1901, p. 716), provides that any offender against the laws of the United States may be arrested, imprisoned, or bailed, etc., agreeably to the usual mode of process against offenders in a particular state. *Held*, that the words "mode of process" are equivalent to "mode of proceeding," and hence do not include the qualifications of witnesses the competency of whom is not governed by state statute, but by the common law, except where Congress has made specific provisions on the subject.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 925; Dec. Dig. § 349.*

For other definitions, see Words and Phrases, vol. 5, p. 4550.

Competency of witnesses in federal courts—following state practice, see notes to O'Connell v. Reed, 5 C. C. A. 602; Hinchman v. Parlin & Orendorff Co., 21 C. C. A. 278.]

6. WITNESSES (§ 52*)—COMPETENCY—HUSBAND AND WIFE.

At common law a husband and wife were under total disability to testify for each other, nor could they testify against each other unless both waived the privilege and consented thereto, subject to the exception that where a husband or wife was called as a witness to testify as to a personal wrong or injury sustained from the other they were competent to testify.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 124, 126–136, 165, 415, 416, 417, 419, 424; Dec. Dig. § 52.*]

7. WITNESSES (§ 61*)—HUSBAND AND WIFE—TORTS—"PERSONAL INJURY."

Where a husband transported his wife in interstate commerce from one state to another for an immoral purpose, such conduct constituted a personal wrong against her which entitled her to testify against him at common law; the term "personal injury" as applied to the wife, as used in the rule authorizing her to testify against her husband in case of a personal injury to her, not being limited to cases of personal violence, but might include cases involving a tort against the wife or a serious moral wrong inflicted on her.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 163, 174–176; Dec. Dig. § 61.*

For other definitions, see Words and Phrases, vol. 6, pp. 5340–5344; vol. 8, p. 7753.]

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

8. PROSTITUTION (§ 2*)—WHITE SLAVE ACT—VIOLATION—TRANSPORTATION OF WIFE.

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]), the fact that the victim was the wife of accused was no excuse.

[Ed. Note.—For other cases, see Prostitution, Dec. Dig. § 2.*]

9. PERJURY (§ 37*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, in a prosecution for suborning the wife of one charged before a United States commissioner with violating the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p. 1343]), the witness was not known at the time to be the wife of accused, and she refused to answer any question until she had an opportunity to consult with defendant as her attorney and was subjected to some coercion by the commissioner and district attorney, and after she had consulted with defendant and while defendant was in attendance at the hearing she freely and without coercion gave the false testimony he advised her to give, the court properly charged that the manner in which the witness was treated before the commissioner was not material, but if she was sworn and testified as a witness and knowingly and willfully testified falsely she committed perjury, and that any ill treatment she might have received at the time would be no justification or excuse to defendant if she committed the perjury at his request or instigation.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 134–138; Dec. Dig. § 37.*]

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Max G. Cohen was convicted of subornation of perjury, and he brings error. Affirmed.

The plaintiff in error was convicted of subornation of perjury in advising and inducing one Esther Wood to testify falsely in a proceeding before a United States commissioner, wherein one Jake Gronich was arrested and held to answer for a violation of the White Slave Traffic Act. Upon the trial it appeared that Gronich and another had been arrested on May 7, 1912, charged with having procured and caused the transportation of said Esther Wood from Cleveland, Ohio, to Portland, Or., for the purposes of prostitution and debauchery. There was evidence that Esther Wood, who was the wife of Gronich, was not present at the time when he was arrested; that upon learning of his arrest, the plaintiff in error, an attorney at law, was called from his office to consult with her as her attorney; that he went to a room in a hotel, in which she and three other prostitutes were; that he knew that Gronich had been arrested under said charge, and that the prosecution was to be had before the federal authorities; that Esther Wood informed him that she was a prostitute and that she had practiced as such in Denver, Colo., and Baker City, Or., and Portland, Or.; that he thereupon advised her to testify that she had never practiced prostitution in either of those places or elsewhere; that he asked her if the officers were in possession of any letters passing between her and Gronich, to which she replied that there were some postal cards in her trunk, of which the officers had possession; that the plaintiff in error advised her that if those were shown to her to say that she did not remember them, and to deny any knowledge of them; that Esther Wood inquired of him what she should do in case a certain girl, who had been transported with her and for the same purpose, should tell the truth as to her prostitution; that the plaintiff in error then advised her that in that case she (Esther Wood) was to say that such prostitution was without the sanction of Gronich, but was not to say this until she knew that the other girl had given such information. There was evidence that during the hearing before the commissioner the plaintiff in error repeated such advice to Esther Wood, and told her to stick to her story, and not to talk before the

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

commissioner until he got there; that in pursuance of such advice she denied that she had ever practiced prostitution in Baker City and Denver, or in Portland; that she had so testified before the commissioner, for the reason that the plaintiff in error had told her it was the only way to save Gronich, "because they found the tickets on him"; and that after she had so testified, he inquired of her whether she had talked, that she told him no, and that he said, "Good."

Mannix & Sullivan, Beach, Simon & Nelson, and R. E. Moody, all of Portland, Or., for plaintiff in error.

Clarence L. Reames, U. S. Atty., and Robert R. Rankin, Asst. U. S. Atty., both of Portland, Or.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] It is assigned as error that the court overruled the demurrer to the indictment, and it is contended that the indictment is fatally defective in that the words "trial" and "issue" were used in referring to the hearing before the United States commissioner, in which the alleged perjured testimony was given, for the reason that a United States commissioner is without jurisdiction to try any issue between the United States and the person charged with crime. We find no merit in the contention. The indictment sufficiently shows what the proceeding was. The plaintiff in error was in no way prejudiced by the fact that the indictment against him described the proceeding before the United States commissioner as the trial of an issue. He was well aware of the nature of the proceeding, and had advised the witness Esther Wood as to the testimony she should give at the examination. In a sense there are "issues" to be tried on such a preliminary examination, the issues whether a crime has been committed, and whether there is reasonable ground to believe that the defendant committed it, and these issues are tried for the purpose of deciding whether the defendant shall be held to answer for the crime charged. The plaintiff in error cites the case of State v. Furlong, 26 Me. 69, in which, in an indictment for perjury, it was alleged that a certain person accused of crime had been put upon trial before a justice of the peace, and that the justice of the peace had proceeded to hear and determine the matter, that the defendant was a witness on that trial and testified falsely, "to cause the accused to be convicted of the offense charged." In that case the court held that it appeared from the indictment that the justice of the peace had assumed jurisdiction to try and pass finally upon the guilt or innocence of the accused, and thus had exercised a jurisdiction with which he was not vested. But it does not appear from the indictment in the case at bar that the commissioner attempted to exercise jurisdiction to determine the guilt or innocence of Gronich, and it does distinctly appear that the proceeding was a preliminary examination had, not upon an indictment or an information, but upon a "complaint" as provided in Revised Statutes, § 1014 (U. S. Comp. St. 1901, p. 716), as amended by the Act of August 18, 1894, c. 301, 28 Stat. 416, with a view to holding Gronich to answer for the crime charged.

[2, 3] It is contended that it was error to deny the motion of the

plaintiff in error for a directed verdict in his favor on the ground that there was no evidence to sustain a verdict against him, that Esther Wood had not been arrested at the time when the defendant is charged with having committed the crime set forth in the indictment, that there was no evidence that she knew she would be arrested, and that the crime of subornation of perjury cannot be committed unless the person charged therewith had in mind some particular tribunal or proceeding before which the perjury should be committed. But there was evidence that, at the time when the plaintiff in error advised Esther Wood concerning her testimony, he was aware of the arrest of Gronich, that he knew that Esther Wood was the wife of Gronich, and that all of his advice to her as to her testimony had reference to the testimony that she was to give on the examination of Gronich before the United States commissioner, that when she asked the plaintiff in error if he did not think it best for her to leave town so that the officers could not get her, he said no, that she might as well go down and give herself up, that they were bound to get her. In addition to this, there is evidence that the plaintiff in error repeated his advice to Esther Wood during the investigation before the commissioner, and that, when she told him that she had followed his instructions, he approved her conduct in so doing. There was other evidence to sustain the verdict. In considering the question whether there has been error in refusing a directed verdict for the defendant on a criminal trial, this court can inquire only whether there was any evidence to sustain the verdict. Hedderly v. United States, 193 Fed. 561, 114 C. C. A. 227; Boren v. United States, 144 Fed. 801, 75 C. C. A. 531.

[4] We find no merit in the contention that it was error to permit the introduction in evidence of the complaint against Gronich which had been filed in the preliminary hearing before the commissioner. It was properly admitted to prove one of the steps in the proceedings in which the alleged false testimony was suborned to be given, and to sustain the allegations of the indictment. But if it was immaterial to the issue as against the plaintiff in error, as he now contends, its admission could not possibly have prejudiced him on the trial of the case in the court below. The contention that the testimony of Esther Wood tending to show the commission of the crime, and her testimony in regard to post cards exhibited to her at the hearing before the commissioner, were inadmissible, is so plainly without merit as to require no discussion.

[5] It is assigned as error that the court below admitted the testimony of Esther Wood to the effect that she had sworn falsely at the preliminary hearing before the commissioner, for the reason that on that hearing she was incompetent to be a witness against Gronich, to whom she had been married in December, 1910, and whose wife she still was. It does not appear that any objection whatever was made to her testimony in the court below, nor does it appear that, when she testified at the preliminary hearing, she did so against her consent, or without the consent of Gronich. Error cannot be predicated on the admission of her testimony in the court below as to what she had testified at the preliminary hearing, unless, when testifying at that hearing

she was, by virtue of the marital relation alone, under such disability that her testimony could not lawfully be received at that hearing. The plaintiff in error contends that the question of the admissibility of her testimony was determined by section 1535, c. 21, of Lord's Oregon Laws, which provides:

"In all criminal actions, where the husband is the party accused, the wife shall be a competent witness, and when the wife is the party accused, the husband shall be a competent witness; but neither husband nor wife, in such cases, shall be compelled or allowed to testify in such case unless by consent of both of them; provided, that in all cases of personal violence upon either by the other, the injured party, husband or wife, shall be allowed to testify against the other."

And that that statute was made applicable to the proceeding on the preliminary hearing by virtue of section 1014 of the Revised Statutes, which provides that any offender against the laws of the United States may be arrested, imprisoned, or bailed, etc., "agreeably to the usual mode of process against offenders in such state."

It is argued that the meaning of this section is that, in all hearings on the arrest and commitment of offenders against the laws of the United States, the practice and rules of evidence of the state in which the hearing is had shall be followed. We do not so construe that section. It provides only, as we held in United States v. Dunbar, 83 Fed. 151, 27 C. C. A. 488, that the proceeding before the commissioner shall assimilate the proceeding for a similar purpose provided by the laws of the state. It should not be assumed that it was the intention of Congress, in adopting section 1014, to enact that the admissibility of evidence in proving an offense against the laws of the United States shall depend upon the laws of evidence of the state in which the examination is had, with the result that for the same act a defendant might be held to answer in one state and discharged in another, and that the witnesses on the preliminary examination might be different from those who were competent to testify on the trial. The words "mode of process" are equivalent to mode of proceeding. Wayman v. Southard, 10 Wheat. 1, 27, 6 L. Ed. 253. The qualifications of witnesses have nothing to do with the "mode of process." It has never been held, so far as we are advised, that a United States commissioner must, on a preliminary examination, observe the laws of the state as to the qualifications of witnesses and rules of evidence. In United States v. Patterson, 150 U. S. 65, 14 Sup. Ct. 20, 37 L. Ed. 999, the court said:

"It was held, in the case of United States v. Ewing, 140 U. S. 142 [11 Sup. Ct. 743, 35 L. Ed. 388], that, in view of section 1014 of the Revised Statutes, the law of the state in which the services are rendered must be looked at, in order to determine what is necessary in the matter of procedure."

The competency of witnesses in criminal trials in the courts of the United States is not governed by a statute of the state, but by the common law, except where Congress has made specific provisions on the subject. Logan v. United States, 144 U. S. 263, 303, 12 Sup. Ct. 617, 36 L. Ed. 429. There being no specific provision on the subject, the common law is applicable.

[6] At common law the husband and wife were each under total disability to testify for the other, but the disability did not extend to the testimony of one against the other. Such testimony of the one against the other was excluded, however, unless both the husband and wife waived the privilege and consented to its admission. Wigmore on Evidence, § 2242; Benson v. Morgan, 50 Mich. 77, 14 N. W. 705. But the common law made an exception to the rule of privilege in cases where the husband or wife was called as a witness to testify as to personal wrong or injury sustained from the other. Wigmore, § 2239.

[7] We are of the opinion that the personal injury to a wife which permits the admission of her testimony against her husband, within the exception recognized at the common law, and expressed in the Oregon statute, is not confined to cases of personal violence, but may include cases involving a tort against the wife, or a serious moral wrong inflicted upon her, and that in a case of the prosecution of a man for bringing his wife from one state to another with intent that she shall practice prostitution, in violation of the White Slave Act, his act in so doing is such a personal injury to her as to entitle her to testify against him. It has been so held in United States v. Rispoli (D. C.) 189 Fed. 271, and in United States v. Gwynne (D. C.) 209 Fed. 993. The conclusion which we reach is that Esther Wood's testimony at the preliminary examination was admitted with her own consent and that of her husband, so that it was not incompetent, whether governed by the common law, or by the Oregon statute, and that it was also admissible, whether governed by the common law or the state statute, on the ground that it related to a personal injury inflicted upon the wife by her husband.

[8] The foregoing considerations are applicable also to the contention that the court erred in instructing the jury that the fact that Esther Wood was the wife of Gronich would not excuse him from violation of the White Slave Traffic Act, and that no man has a right to transport his own wife from one state to another for the purpose of prostitution, so that the fact that she was his wife was wholly immaterial.

[9] Error is assigned to the following instruction:

"Something has been said about the manner in which Miss Wood was treated before the commissioner. Now, I do not think that that is very material in this case. If she was sworn and testified as a witness in that case, and knowingly and willfully testified falsely, she committed perjury, and that is about all that is necessary to be said about that matter. It is one of the facts in the case, and you have a right to weigh it along with all the other testimony in the case; but however badly she may have been treated, or however wrongly she may have been treated, would be no justification or excuse on behalf of this defendant if, as a matter of fact, she committed perjury at his request or his instigation."

This instruction was not inapplicable to the state of facts disclosed by the evidence. Esther Wood, when she first appeared before the commissioner, was not known to be the wife of Gronich. She at first refused to answer questions. She was subjected to some coercion by the commissioner, and the district attorney, to compel her to answer. She declined to do so until she might have an opportunity to consult with the plaintiff in error, her attorney. After she had that consultation, and while the plaintiff in error was in attendance at the hearing,

she freely and without coercion gave the false testimony which he advised her to give. No suggestion was made at any time that she had the right to remain silent by reason of the fact that she was the wife of Gronich.

We find no error.

The judgment is affirmed.

WARNER BROS. CO. v. WIENER.

(Circuit Court of Appeals, Second Circuit. April 28, 1914.)

No. 271.

1. TRADE-MARKS AND TRADE-NAMES (§ 59*)—INFRINGEMENT—NAMES.

The use by defendant, in connection with the sale of corsets, of his name, "Wiener's," printed in heavy black letters, was not an infringement of plaintiff's registered trade-mark, consisting of the name "Warner's," printed in heavy black script; and hence, where defendant was enjoined from using his name, printed in script or any type so nearly resembling the style of type employed in plaintiff's trade-mark as might be calculated to deceive, the court did not err in refusing to also enjoin him from using his name in any style of type unless accompanied by his given name.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 68–72; Dec. Dig. § 59.*

Right to use one's own name as trade-name, see notes to R. W. Rogers Co. v. Wm. Rogers Mfg. Co., 17 C. C. A. 579; Kathreiner's Malzkaffee Fabriken Mit Beschraenkter Haftung v. Pastor Kneipp Medicine Co., 27 C. C. A. 357; Borden Ice Cream Co. v. Borden's Condensed Milk Co., 121 C. C. A. 205.]

2. TRADE-MARKS AND TRADE-NAMES (§ 73*)—UNFAIR COMPETITION—RIGHT TO USE NAME.

Unfair competition cannot be predicated on the use of a name which defendant has a perfect right to use.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. § 73.*

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.]

Lacombe, Circuit Judge, dissenting.

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

On appeal from an order of the District Court for the Southern District of New York which granted a preliminary injunction restraining the defendant from selling or offering for sale corsets having thereon, or on the boxes containing the same, the name "Wiener's" printed in the style of type shown in complainant's registered trade-mark "Warner's" or in any such near resemblance thereto as might be calculated to deceive. The order concludes as follows:

"The motion is denied in so far as it asks that the defendant be restrained from using the name 'Wiener's' in connection with the sale of corsets, irrespective of the style of type in which said name is printed unless the name is accompanied by the defendant's given name 'David.'"

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

The error assigned is that the court erred in refusing to grant an injunction restraining the defendant from using his name in connection with the sale of corsets irrespective of the style of type in which the said name is printed unless accompanied by the name "David."

Seabury C. Mastick, of New York City, for appellant.

John Bogart and Isidore Weckstein, both of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. [1, 2] The complainant moved in the District Court for a preliminary injunction restraining the defendant from using his name in connection with the sale of corsets which the complainant contends infringes its registered trade-mark. This trade-mark consists of the name "Warner's" printed in heavy black script. The defendant printed his name in similar black script in such a way that a purchaser might easily mistake it for that of the complainant. Both parties are engaged in selling corsets. The District Court enjoined the defendant from using his name printed in script and said in its opinion that the defendant must not use script "but must use plain type not similar to the script used by Warner."

This is exactly what the defendant has done. He now prints on his boxes in heavy black letters his name WIENER. It is this use of his name which the complainant seeks to enjoin. We think there is no merit in this contention. The defendant's name is Wiener, he is a corset maker, he has a right to make corsets and to use his own name in the business. The name as now used by him is as different from the name "Warner's," as it appears in the trade-mark, as it well can be. Assuming that he has a right to do business in his own name he could hardly differentiate the names more clearly. His name is not printed in script but in heavy black print and the only resemblance between the two names is the inherent similarity between the names Warner and Wiener. There is, therefore, no infringement of the trade-mark. Of course, unfair competition cannot be predicated of the use of a name which the defendant has a perfect right to use.

The order is affirmed.

LACOMBE, Circuit Judge (dissenting). This suit originally involved a charge of pirating trade-mark, and also a charge of unfair competition in printing the trade-mark in such type, etc., as to mislead purchasers. The latter branch of the case is not now here; relief as to the style of printing was given below, and no cross-appeal was taken.

The registered trade-mark is the word "Warner's." It is not the word printed in any particular way. The *statement* says that "the trade-mark consists of the word 'Warner's,' that it is appropriated to corsets and that it is usually displayed on the packages containing the goods" by placing thereon a printed label on which the same is shown. In the opinion of this court in the Davids Case (April 18, 1910) 178 Fed. 801, although in that case the *statement* said that the applicant

had adopted for its use the "trade-mark shown in the accompanying drawing," it was held that the trade-mark was the name, not the particular way of printing it shown in that drawing. It follows that the registered trade-mark here is the word "Warner's," irrespective of the type it is printed in.

With the decision in the Davids Case (April 18, 1910) 178 Fed. 801, which reversed me, I fully concur. I had overlooked entirely the act of 1905 (Act Feb. 20, 1905, c. 592, 33 Stat. 724 [U. S. Comp. St. Supp. 1911, p. 1459]). Under the act of 1881 (Act March 3, 1881, c. 138, 21 Stat. 502 [U. S. Comp. St. 1901, p. 3401]) the name alone could not be registered as a trade-mark. But under the later act, as was pointed out in the opinion of this court, the name could be so registered and when registered became entitled to protection. The later Davids decision (January 8, 1912) held, however, that another Davids was not cut off from using his own surname provided he differentiated it from the "Davids" trade-mark; and it was further held by a majority of the court that such differentiation was secured when he printed his full name "Cortland I. Davids" on one part of the label and "Davids Manufacturing Company" on another part of it. Under the earlier Davids decision it seems manifest that "Warner's" is a registered trade-mark owned by complainant and for which it may claim protection. It seems equally manifest under the later decision that defendant may sell his goods under his own name, provided he states such name in full "David Wiener's" or couples it with some other words such as "Wiener's Manufacturing Company," which will tend to avoid confusion.

I fail to see how the complainant in this cause can be refused the same measure of relief which was granted to the complainant in the Davids Case, unless the decision of this court in that case, construing the act of 1905, is reversed. Since I think that decision was correct, I must dissent from the opinion of the majority of the court in the cause at bar.

MASON et al. v. WASHINGTON-BUTTE MINING CO.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1914.)

No. 2323.

1. MINES AND MINERALS (§ 43*)—PLACER CLAIM—PATENT—EFFECT.

A patent to a placer claim passed to the grantee all mineral within the claim including veins or lodes not known to exist at the time of the application for the patent, so that, by introducing the patent in a suit to quiet title, complainant established prima facie title to all land contained within the boundaries described and all ores and minerals lying therein.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 125–129; Dec. Dig. § 43.*]

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

The term "discovery," as applied to mining claims, means the acquirement of knowledge that a vein or lode exists within the limits of the claim, and, while it is not necessary that pay ore be found in order to make a valid discovery, it is necessary that the indications be such that

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

miners in the district would follow them in the expectation of finding ore, which would justify them in working the claim.

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

For other definitions, see Words and Phrases, vol. 3, pp. 2093–2095; vol. 8, p. 7638.]

3. MINES AND MINERALS (§ 41*)—ADVERSE CLAIMS—JUDGMENT—CONCLUSIVENESS.

Where placer claimants entered a protest and adverse claim to mining ground in controversy, and the proceeding was duly prosecuted and resulted in judgment in favor of such claimants, a copy of which was filed in the land office, and a patent issued, the judgment was conclusive as between the parties and their successors in interest that the lode location previously made was not a valid subsisting location sufficient to segregate the land covered thereby from the public domain and to exclude the same from the ground covered by the placer claim as described in the application for the patent.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 116–119; Dec. Dig. § 41.*

Conclusiveness of patent for mining claim, see notes to Carson City Gold & Silver Mining Co. v. North Star Mining Co., 28 C. C. A. 346; Bunker Hill & S. Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co., 48 C. C. A. 674.]

4. MINES AND MINERALS (§ 41*)—ADVERSE CLAIMS—PLACER LOCATION—LODES—JUDGMENT—CONCLUSIVENESS.

A judgment, in an adverse suit in favor of placer claimants as against prior lode locations, was not effective to determine that there were not, within the ground covered by the placer claim, veins or lodes known to exist at the time of the application for the placer patent, and hence the judgment had no bearing on the question of the validity of subsequent locations the rights whereof depended on whether, at the time the placer patent was applied for, there were known veins or lodes such as could be excluded from the grant.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 116–119; Dec. Dig. § 41.*]

5. MINES AND MINERALS (§ 43*)—PLACER LOCATIONS—PATENTS—VEINS OR LODES—EXCLUSION.

In order to establish exclusion of veins or lodes from a grant of land included in a placer patent, it is not sufficient to show that the land in fact contained valuable minerals, but it must also be shown that at the time of the application for the patent it was known to the applicant, or in the community generally, or that a reasonable and fair inspection of the premises would have disclosed rock in place bearing minerals of such extent and value as would justify expenditure to extract them.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 125–129; Dec. Dig. § 43.*]

Appeal from the District Court of the United States for the District of Montana; Frank S. Dietrich, Judge.

Suit by the Washington-Butte Mining Company against Louis Mason and others. Decree for complainant, and defendants appeal. Affirmed.

The appellants herein were the defendants in the court below in a suit brought by the appellee to quiet its title to a portion of what is known as the Butte & Boston placer mining claim. In its bill the appellee alleged that the appellants' claim of estate or interest in said land was without right and in-

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

valid. The appellants answered, alleging that, prior to the location of the placer claim, two certain lode claims, the Point Pleasant and the Pleasant View, had been located, covering a portion of the ground in controversy; that, at the date of the application for the patent to the placer claim, certain lodes, veins, or deposits of mineral ore or rock in place carrying valuable minerals were known to exist within the boundaries thereof, or by reasonable diligence should have been known to the applicants for the patent; that the application did not include any application for such veins or lodes, and for that reason the same were excluded and excepted out of the land patented; and that thereafter, and about ten years after the date of the placer location, certain quartz lode claims were located on such veins or lodes, to wit, the Hornet, the Gulf, the Olivia, the Hope, and the Rabbit. Upon the issues and the testimony, the court found for the appellee, and entered a decree quieting its title to that portion of the placer claim which was described in the bill.

Certain salient facts disclosed in the evidence are the following: On April 1, 1890, the Pleasant View and the Point Pleasant quartz claims were located, covering a portion of the land in controversy, and a year later, Louis Mason, one of the appellants herein, acquired an interest in said claims. On December 20, 1890, the placer claims now known as the Butte & Boston placer claim were located, covering a portion of the ground included in the Point Pleasant and Pleasant View quartz lode locations. On May 11, 1891, an application was made for patent for the placer claim, but patent was not issued until December 19, 1895. In the meantime, the owners of the two quartz claims commenced an adverse suit, and in March, 1895, the contest was compromised, the quartz claimants permitted the placer applicants to take judgment and to go to patent in consideration of the latter conveying to the former the east ten acres, which was about one-third of the ground included within the placer application. Deeds were exchanged, whereby the lode claimants conveyed to the placer claimants the west two-thirds of the placer claim, and they in turn conveyed the east ten acres to the lode claimants. The Gulf, Rabbit, Hope, Olivia, and Hornet quartz claims were located in 1900, and the appellants subsequently acquired the interest of the locators thereof.

Walsh, Nolan & Scallon, of Helena, Mont., and J. A. Poore, of Butte, Mont., for appellants.

John A. Shelton, of Butte, Mont., for appellee.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] The patent to the placer claim conveyed to the appellee's grantors all mineral within the claim, including veins or lodes not known to exist at the time of the application therefor (Sullivan v. Iron Silver Min. Co., 143 U. S. 431, 12 Sup. Ct. 555, 36 L. Ed. 214), and, by introducing the patent in evidence, the appellee established, prima facie, title to all the land described therein and all ores and minerals lying within the boundaries thereof (Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co., 143 U. S. 394–401, 12 Sup. Ct. 543, 36 L. Ed. 201). But the appellants contend: First, that the placer location was void as to that portion thereof which was included within the Point Pleasant and Pleasant View quartz locations, and that the ground covered thereby remained public domain, subject to entry at the time of the location of the Gulf, Rabbit, Hope, Olivia, and Hornet lode claims; second, that at the time of the application for the placer patent there were known lodes and veins upon the ground, which, for the reason that they were known to the placer applicants, were excepted from

the placer patent so that they became subject to entry by the lode locations which were made in 1900.

[2] The discovery shaft of the Pleasant View claim was within the boundaries of the land in controversy, but it is conceded by the appellants that there was no discovery sufficient to validate the location. The discovery shaft of the Point Pleasant claim was at the eastern end of that claim, and outside of the ground in controversy. We agree with the court below that it is extremely doubtful whether the evidence is sufficient to show that any sufficient discovery was made thereon prior to the application for the placer patent. The ground in controversy is land that has been filled by erosion and débris from the mountain above it, and the depth of the material so deposited increases with the distance from the mountain, so that at the western end it is several hundred feet in depth. In the material so deposited are rock and boulders, together with fragments of mineral bearing rock, and, while it is shown that shafts were sunk on the lode claims during the time referred to, there is no satisfactory evidence that a vein, lode, or lead in place containing one or more of the minerals mentioned in the statute was found. Discovery means the acquirement of knowledge that such a vein or lode exists within the limits of the claim. Waterloo Min. Co. v. Doe (C. C.) 56 Fed. 685. And while it is not necessary that pay ore be found in order to make a valid discovery, it is necessary that the indications be of such a character that miners in that district would follow them in the expectation of finding ore, such as would justify them in working a claim for that purpose. Shoshone Min. Co. v. Rutter, 87 Fed. 801, 31 C. C. A. 223.

We are of the opinion, also, that both the lode locations were rendered void ab initio so far as they included any of the land in controversy by the judgment in the adverse proceedings. Section 2326 of the Revised Statutes (U. S. Comp. St. 1901, p. 1430), under which the adverse proceeding was had, requires the adverse claimant to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and declares that his failure to do so shall be a waiver of his adverse claim, and that after judgment the whole proceeding and the judgment shall be certified by the register to the Commissioner of the General Land Office, and the statute provides that a patent shall issue thereon for the claim "or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess." There is no question here involving the doctrine established by Belk v. Meagher, 104 U. S. 279, 26 L. Ed. 735, Noyes v. Mantle, 127 U. S. 348, 8 Sup. Ct. 1132, 32 L. Ed. 168, Brown v. Gurney, 201 U. S. 184, 26 Sup. Ct. 509, 50 L. Ed. 717, and Farrell v. Lockhart, 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162, to the effect that mineral ground covered by a valid location is, during the life of the location, segregated and not open to location by another, and that, until a location is terminated by abandonment or forfeiture, no right or claim to the property can be acquired by an adverse entry thereon, with a view to the relocation of the same. In Duffield v. San Francisco Chemical Co., 205 Fed. 480, 123 C. C. A. 548, we said:

"By these statutes there was relegated to a court the jurisdiction to determine the right of possession between the adverse claimants. The determination of that question necessarily involves, not only the question which of the adverse claimants was prior in time in making location, and whether the location was made in compliance with the law, but also the question whether the land occupied and covered by the location was subject to location in the manner in which it was attempted to be acquired."

In Iron Silver Min. Co. v. Campbell, 135 U. S. 286, 10 Sup. Ct. 765, 34 L. Ed. 155, the court said that the result of the judicial investigation "shall govern the action of the officers of the Land Department in determining which of these claimants shall have the patent, the final evidence of title, from the government."

And in Mining Co. v. Tunnel Co., 196 U. S. 337, 357, 25 Sup. Ct. 266, 275 (49 L. Ed. 501), the court said that the decision of a conflict between two mining claimants is "a decision which will enable the Land Department without further investigation to issue a patent for the land."

[3] In the case at bar the protest and adverse claim and adverse suit of the locators were duly filed and commenced, such proceedings were had therein that judgment in favor of the placer applicants was entered and a certified copy thereof was filed in the Land Office, and on December 19, 1895, patent was issued to the applicants for the placer patent, the predecessors in interest of the appellee. The effect of the judgment in those proceedings was to establish as between the parties thereto that the lode location was not a valid subsisting location such as was efficient to segregate the land covered thereby from the public lands of the United States, and to exclude the same from the land covered by the placer claim and described in the application for patent therefor. It may be admitted, however, that the government was not bound by the adjudication further than it has declared that it will accept such a judgment as conclusive of the right of possession as between contending claimants. And the judgment went no further than to end the contest between the adverse parties, and determine the right of possession, leaving the applicant to make the proof required by law to entitled him to a patent. Branagan v. Dulaney, 2 Land Dec. Dept. Int. 744; Alice Placer Mine, 4 Land Dec. Dept. Int. 314; Perego v. Dodge, 163 U. S. 168, 16 Sup. Ct. 971, 41 L. Ed. 113.

[4] It had not the effect to determine that there were not, within the ground covered by the placer claim, veins or lodes known to exist at the time of the application for the patent, and it has no bearing upon the question of the validity of subsequent locations, the rights whereof depend on the question whether, at the time when the placer patent was applied for, there were known veins and lodes such as to be excluded from the grant of the patent.

The question remains whether, at the time of the application for the placer patent, there were known veins or lodes within the ground described in the application for patent so that, by operation of law, they were excluded from the patent. In United States v. Iron Silver Min. Co. 128 U. S. 673, 683, 9 Sup. Ct. 195, 199 (32 L. Ed. 571), which was a suit brought by the United States to set aside placer patents on the ground that the patented tracts were not placer mining ground but

land containing mineral veins or lodes of great value "as was well known to the patentee on his application for the patents," the court held that it was not enough that there might have been some indications of outcroppings on the surface, or of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as known veins or lodes. "To meet that designation, the lodes or veins must be clearly ascertained to be of such extent as to render the land more valuable on that account and justify their exploitation, and evidence of a vein which might be sufficient to sustain a lode location as against a conflicting placer claim is not sufficient to establish the existence of a known vein or lode within the meaning of the statute." The doctrine of the decision in that case and the language we have quoted therefrom were approved in Chrisman v. Miller, 196 U. S. 313, 321, 25 Sup. Ct. 468, 49 L. Ed. 770.

[5] The conclusion to be drawn from these decisions is that, before it can be held that veins or lodes are excluded from the grant of land included in a placer patent, it is not sufficient to show that the land does in fact contain valuable minerals, but it must be shown that, at the time of the application for patent, more has been discovered than the indications of mineral which would ordinarily sustain a lode location, and that it was at that time "known to the applicant for the placer patent, or known to the community generally, or else disclosed by workings and obvious to any one making a reasonable and fair inspection of the premises, for the purpose of obtaining title from the government" (Iron Silver Co. v. Mike & Starr Co., 143 U. S. 394, 402, 12 Sup. Ct. 543, 545 [36 L. Ed. 201]), that there was rock in place bearing minerals of such extent and value as would justify expenditures for the purpose of extracting them. In the case last cited, it was said:

"It is undoubtedly true that not every crevice in the rocks, nor every outcropping on the surface, which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great value, can be adjudged a known vein or lode within the meaning of the statute."

The evidence is convincing that, within these definitions, no vein or lode had been discovered in any of the shafts that had been sunk on the ground in controversy in this suit, prior to the date of the application for the patent. Nor was there any outcropping of a vein or lode on the surface of the ground nor any mineral-bearing vein in the surrounding country which might be traced to run in that direction.

The decree is affirmed.

UNITED STATES ex rel. BROWN-KETCHAM IRON WORKS et al. v. ROBINSON et al.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 211.

UNITED STATES (§ 67*)—CONTRACTS—SUBCONTRACTORS—ACTION ON BOND—TIME—"FINAL SETTLEMENT."

Act Cong. Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1911, p. 1071), authorizes an action against contractors with the United States for the construction of public buildings and their sureties, to be instituted in the name of the United States for the benefit of subcontractors, etc., on specified conditions, one of which is that, where the United States has not sued the principal contractor, the action for the benefit of subcontractors must be instituted, if at all, at least six months and not more than a year after complete performance of the contract between the United States and the contractor and "final settlement" thereof. *Held*, that "final settlement," as so used, does not mean the final determination of all outstanding controversies between the government and the contractor arising out of the contract, but an official indication that the government is satisfied with the contractor's performance and by some official act evidences an intention to make no effort to collect anything further from the contractor or from the bond, so that where a basis of settlement was submitted by the supervising architect, and the Secretary of the Treasury approved the same in writing and settlement was made upon that basis, such approval constituted a final settlement within the statute.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*

For other definitions, see Words and Phrases, vol. 3, p. 2804.]

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

This cause comes here upon writ of error to review a judgment of the District Court, Southern District of New York, entered on the report of a referee, in which judgment the complaints of the several plaintiffs in error were dismissed. The defendant Robinson contracted with the United States to do certain interior work on the New York custom house at Bowling Green. The other defendants are surety companies who executed bond to the government for the faithful performance of his work. The plaintiffs are Robinson's subcontractors, or supplied materials for the work.

The right of action herein is asserted by the several plaintiffs as having been created by the Act of Congress of February 24, 1905 (33 Stat. 811) which superseded the Act of August 13, 1894 (28 Stat. 278, c. 280 [U. S. Comp. St. 1901, p. 2523]).

The act relied on authorized an action against persons contracting with the United States for the construction of public buildings and against their sureties to be instituted in the name of the United States for the benefit of subcontractors, etc., on certain conditions prescribed by the act. The only one of these conditions material to the case at bar is that where (as here) the United States has not sued the principal contractor, the statutory action for the benefit of subcontractors must be instituted, if at all, at least six months and not more than one year after "complete performance of said contract" between the United States and the principal contractor "and final settlement thereof."

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

The action was begun October 15, 1909, when the summons was given to the marshal for service. The only question presented to this court is whether between October 15, 1908, and April, 1909 (respectively six months and one year before the action was begun), there had taken place a "final settlement" of the completely performed principal contract, such as was intended and referred to by the language of the statute.

The referee, having come to the conclusion that there had been no "final settlement," excluded all the testimony as to the performance of the various contracts between Robinson, the government contractor, and his subcontractors and dismissed the complaints of the original plaintiff and of all the other intervening plaintiffs. The full text of the relevant provisions of the act will be found in the margin at the foot of this opinion.

F. Hulse, of New York City, for Ivins and others.

F. M. Brown, of New York City, for Robinson.

J. B. Coleman, of New York City, for Yawger.

M. L. Fearey, of New York City, for Brown-Ketcham Iron Works and others.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. [1] The sole question to be determined here is the meaning of the phrase "final settlement of the contract" between the original contractor and the government. Does it mean that all outstanding controversies between the government and the contractor arising out of the contract must be finally determined? Or is it sufficient if the government has officially indicated that it intends to make no effort to collect anything further from the contractor or from the bond? The statute is awkwardly and inartificially expressed, but it seems to us it may be easily construed by applying the well-recognized rule of ascertaining first what was the difficulty to remedy which the statute was passed and second what was the method adopted to remedy such difficulty.

Under the old act, the United States was exposed to a loss of the security it had provided to secure a proper execution of the contracts it had let, in cases where the contractor became insolvent. Subcontractors and materialmen, sometimes before the work was even near completion, could proceed independently to secure their pay out of the proceeds of the bond, thereby reducing it to such an extent that the government might get nothing. Manifestly this was improvident legislation and it was undoubtedly to remedy this difficulty that the act was passed. The new act provided in the first place that suit to enforce the bond should be brought by the United States and materialmen be allowed merely to intervene in that suit. There might, of course, be instances where the government, making no claim against its contractor to recover damages would bring no suit on the bond. In that case the new act provides that the materialmen may themselves bring such suit. These provisions deal more particularly with the practice.

The more important part of the new act is found in the clauses which provide in substance that no materialman shall take one dollar out of the fund which the bond produces, until every dollar due the United States under the contract shall be fully paid. Keeping these clauses in mind, it seems to us that a reasonable interpretation of the

disputed phrase is to be readily found. In determining the time when materialmen may begin suit, it would not do to fix it at some day "after complete performance" merely. Defective work, damages for delay, and other matters might give the United States some claim which it might not decide to prosecute until some time after the work was turned over, apparently complete. The date was, therefore, fixed relatively to "complete performance of the contract and *final settlement thereof.*" We take it that these italicized words refer to the time when the proper government officer, who has the final discretion in such matters, after examination of the facts, satisfies himself that the government will accept the work, as it is, without making any claim against the contractor for unfinished or imperfect work, damages for delay or what not, and records that decision in some orderly way. Six months after that date, materialmen may begin suit. This construction protects the government against the defect of the old act, viz., that its suit to recover might prove barren, because the money is gone. We can see no reason why Congress should have provided that, when the government claims nothing from contractor or sureties, all others must wait still further until some claim of the contractor against the government for having underpaid him reaches a conclusion. Such suit can in no way affect the fund provided by the bond out of which the government might have satisfied its claim, if it had any. In other words we see no reason for holding that the final settlement must be mutual, in cases where the government makes no claim against the contractor.

Under the statute whenever the government does make claim, it will be paid first, since the act says:

"After paying the full amount due the United States, the *remainder* shall be distributed pro rata," etc.

The time fixed by the statute for beginning a subcontractor's suit is any time within the period extending from six months after completion and final settlement to one year after completion and final settlement.

Referring to the referee's report, we find a letter of the supervising architect to the Secretary of the Treasury March 13, 1908, and a supplementary letter July 1, 1908, recommending final settlement on the basis of deducting from the 15 per cent. held up on periodical payments a certain sum for overtime damages and other sums to cover omissions, defects, and unfinished items. Since the amount retained exceeds the aggregate of these sums, the proposed settlement contemplated the payment of a balance of some $5,000 to the contractor. This was approved in writing by the Secretary of the Treasury on February 10, 1909, and was a final statement by the head of the department that the contract had been completed to the satisfaction of the government and that after paying over the $5,000 it had no claim to make against the contractor or his surety.

There are decisions, no doubt, to the effect that the United States may repudiate such action by its officers, when a private party could not, and that no lapse of time or laches can bind it; but Congress was not legislating with regard to any such unusual or abnormal cases.

What it had in mind was such a determination as to its rights, by the proper government officers, as might fairly be taken by all persons interested as an authoritative announcement that the government was not a claimant to any part of the proceeds of the bond. When such a determination has been made and six months has elapsed thereafter, then the others interested in the fund may bring their suit. Such a construction does not expose a government to risk of loss. Even after a creditor's action is brought the United States may bring an action in its own name on the bond, if it thinks its officers acted improvidently and that it has some claim of its own against the contractor. If it should bring such action, there would be no ascertainable "remainder" available for creditors until after such action was disposed of; and if the government prevailed in such action there might in some cases be no "remainder" at all.

This suit was begun October 15, 1909, more than six months and less than a year after February 10, 1909, the date when the Secretary of the Treasury recorded the fact that the government had no claim to make on the bond. This was within the statutory period, and the judgment of dismissal must be reversed, except as to one of the defendants. This defendant is J. F. Yawger, as receiver of the Metropolitan Surety Company one of the sureties on the bond. That company was dissolved and permanent receiver appointed by final decree of the state court on January 30, 1909, more than six months before plaintiffs' causes of action accrued. The referee held that the plaintiffs have no claim against the receiver or upon the funds with which he has been intrusted by the state court for distribution among the creditors of the surety company, under the authority of People v. Metropolitan Surety Co., 205 N. Y. 135, 98 N. E. 412, Ann. Cas. 1913D, 1180. No one seems to dispute the correctness of this ruling. As to Yawger, receiver, therefore, the judgment is affirmed; as to the other defendants, it is reversed.

NOTE.

The text of the act construed in the above opinion is as follows:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public improvement or public work, 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 any person, company or corporation who has furnished labor or materials used in the construction or repair of any * * * building or public work, and 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 intervenors. 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, upon 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 amount in controversy in such suit, 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."

CHARLES H. WELLING CO. v. ZIEGLER et al.

(Circuit Court of Appeals, Second Circuit. April 28, 1914.)

No. 251.

LANDLORD AND TENANT (§ 83*) — LEASE — RENEWAL — STIPULATIONS — CONSTRUCTION.

Pending a suit by tenants to enforce specific performance of a covenant to renew a lease, it was stipulated that if the suit should be determined adversely to the tenants, and it should ultimately be decided that they were not entitled to a renewal, except at the rate of $14,000 a year, and they failed to exercise their right of renewal, and for that reason lost it, they would quietly remove from the premises "at the expiration of 12 months from the service of a demand for such removal, and not before," continuing to pay rent at the rate of $1,166.66 per month in advance until the date they vacated the premises on such demand, and in consideration of the foregoing the landlord would waive all claims for damages, or double rent, against the tenants for holding over after February 1, 1908. The suit was decided in favor of the landlord July 12, 1909, and on July 13th following the tenants gave notice that they intended to vacate, and did vacate October 31st following, having paid rent in full up to that date at the rate of $14,000 per annum. *Held*, that the stipulation should not be construed as an agreement that, in case of the tenants' failure to maintain their contention, they would remain and pay rent at the rate of $14,000 in perpetuity, unless the landlord exercised its right to terminate the tenancy by notice, but rather as securing to the tenants a year after the decision, during which they might occupy the premises on paying full rental, and then surrender the same without liability as a tenant holding over after the expiration of the term.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 263, 264, 266, 267, 269, 278, 295; Dec. Dig. § 83.*]

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, for $12,708.98 in favor of plaintiff in error, who was plaintiff below.

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

C. A. Jayne, of New York City, for plaintiff in error.
J. B. Coleman, of New York City, for defendants in error.

Before LACOMBE, COXE and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The defendants are executors of persons deceased, who, when living, constituted the firm of Sohmer & Co. Hereinafter the firm and present defendants will be referred to indifferently as Sohmer & Co., or defendants. So, too, the present plaintiff and its predecessor in title to the premises in question will be referred to indifferently as plaintiff or the Welling Company.

On November 16, 1897, plaintiff and defendants entered into a lease of 170 Fifth avenue for a term of ten years, expiring February, 1908. The rent stipulated for was $10,000 for the first three years, $12,000 for the second three years, and $14,000 for the last four of the term. The lease also gave defendants "the privilege of a further renewal for ten years on the same terms and conditions." A few months before the lease expired Sohmer & Co. gave notice to the Welling Company of their intention to renew the lease for another ten years, contending that the rent under the renewal lease should be $10,000 for first three years, $12,000 for next three years, and $14,000 for the balance of the term. The Welling Company refused to renew on these terms, contending that the lease gave Sohmer & Co. only a right to renewal at $14,000 for the entire term. Sohmer & Co. then brought suit for specific performance, viz., to require the Welling Company to execute a lease including the crescendo rental. At no time did Sohmer & Co. undertake to renew at $14,000 rental. As the event has shown, they preferred to vacate after the expiration of the original term rather than to continue occupying at $14,000.

To provide a modus vivendi, without disturbing the rights of either party during the pendency of this suit for specific performance, the parties to that suit entered into a written stipulation, which is the basis of the present action. They agreed that Sohmer & Co. should remain in possession until final determination of the suit, the provisional tenancy to be governed by the terms of the lease, except as to the monthly rent to be paid. This it was agreed should be $1,000 a month, with the proviso that, if the court should hold that Sohmer & Co. were correct in their contention as to the meaning of the original lease, the overpayment each month should be credited against future rentals. Of course, if they did prevail in the state court, there would be a renewal for ten years, and therefore there would be future rentals. If, however, the suit should result in a decision that Sohmer & Co. had no right to a renewal, except at $14,000 a year for the full term, then they should pay the difference between $1,000 a month and $1,166.66 a month for the period during which they had paid only $1,000 a month. The stipulation further contained the following provisions:

"It is further stipulated and agreed that if the determination of this suit shall be adverse to the plaintiffs and it shall ultimately be decided that they had no right of renewal of the said lease except upon the payment of an annual rental of fourteen thousand ($14,000) dollars a year, and that the plaintiffs failed accordingly to exercise their right of renewal of the said lease as therein provided and for that reason lost their right to renew, they will

quietly and peaceably remove from the said premises at the expiration of twelve (12) months from the service of a demand for such removal, and not before, they continue to pay rent at the rate of one thousand one hundred sixty-six and $^{66}/_{100}$ ($1,166.66) dollars per month in advance, as aforesaid, until the date of their vacatur of the premises upon said demand; and that in consideration of the foregoing the defendant will waive all claims for damages or double rental against the plaintiffs for holding over after February 1, 1908, upon their compliance with terms of this stipulation."

The state court suit was decided in favor of the Welling Company on July 12, 1909. On July 13, 1909, Sohmer & Co. gave notice that they intended to vacate, and did vacate October 31, 1909, having paid rent in full at the rate of $14,000 per annum to that date. The present action was begun June 26, 1912, to recover rent at $14,000 per annum, from October 31, 1909, to June 1, 1912, less certain offsets by way of rent received from others. The court decided that plaintiff was entitled to rent only for one year after July 13, 1909, the date when Sohmer & Co. gave notice of their intention to vacate. Dissatisfied with the amount of this recovery, plaintiff sued out this writ of error; defendants accepted the result, and have not sought to review it.

It will be noted that the sole question presented is the construction of the stipulation, because the claim for any rent at all rests solely on the stipulation; the original lease was never renewed by Sohmer & Co. exercising their option in conformity with its terms, since their offer to renew was coupled with a provision that they should pay less rent during the renewal period than the original lease provided. Manifestly this stipulation requires construction; it cannot be interpreted literally without producing a result so unreasonable that it cannot be accepted as the agreement of the parties. Literally interpreted, it would require defendants to remain in possession, paying $14,000 a year rent, in perpetuity, for the term is not to expire until one year after the Welling Company demand that Sohmer & Co. remove. Certainly no such meaning can be given to the stipulation.

In construing it we are to take into consideration the situation as it existed when the stipulation was entered into, and are to ascertain the meaning of the parties in the light of that situation. There is no controversy as to the evidential facts; the situation was as indicated above. Evidently Sohmer & Co. wanted to renew the lease for ten years, if they could get it at the lower rental; there is nothing to show that they were willing to take it at the higher rental. They were confident that their construction of the renewal provision of the new lease was correct, so confident that they went to the expense of a lawsuit to establish what they believed was their right. They realized, of course, that they might not prevail, and, if so, would have to vacate immediately premises with which their business had been associated for ten years and on which they had a large stock of pianos. Indeed, they might have to vacate before the suit would come to trial in order to escape the heavy obligations which fall upon one who holds over. It was for their interest to secure a reasonable period during which to effect vacatur, in the event of their not prevailing in their suit, and for that time they were willing to occupy and pay the higher rent. The structure of the clause in the stipulation indicates that it was framed

to secure them such protection, without their being put to the risk of paying double rent by a hold-over after February 1, 1908. Certainly there is nothing to indicate that, if no stipulation had been made, they would have held over. It is true that they did hold over more than four days before the stipulation was signed, but presumably negotiations for adjustment had well progressed before that time, and double rent for four days, or even for a month, would not be a serious matter. It is to be remembered that if they had to vacate, because the Welling Company refused to renew, and some such modus vivendi had not been agreed to, and the state court should thereafter hold that Sohmer & Co. were entitled to renewal on the terms they had proposed, they might have an action for damages against the Welling Company for breach of contract.

The Welling Company, no doubt, was also confident of the result of the suit to construe the lease; but no one is ever sure of the result of a litigation. Under this stipulation, if it were defeated, the renewal for ten years on crescendo rental would go into effect, without any claim of damages against it for a broken contract. If it should succeed, it would have its full rental for the entire period of occupancy under the stipulation including the year after notice of vacatur; thus much at any rate would it obtain from a tenant who had refused to renew at all at the higher rate. The construction which the trial judge gave to the stipulation, securing a period of a year after decision in which the one side should occupy and the other should receive full rental, is a reasonable one, and as it seems to us fairly expresses what the parties seemingly intended. That in such a situation as then existed the one side required and the other side acquiesced in an agreement to remain in possession at the higher rental in perpetuity, unless the Welling Company, at any indefinite time in the future might terminate by notice, is a proposition to which we cannot accede. Nor do we find any warrant in the record for reading into the stipulation, before the words "until the date of their vacatur of the premises upon said demand," the words "for ten years from February 1, 1908," or "on the theory that the stipulation was concerned with a ten-year period or ten-year renewal." The stipulation was concerned with a provisional tenancy, with something which would be a substitute for the renewal, which the parties had failed to agree to and about which they were litigating.

The judgment is affirmed.

UNITED STATES v. GREAT NORTHERN RY. CO.

(Circuit Court of Appeals, Eighth Circuit. April 20, 1914.)

No. 3881.

1. ALIENS § (56*)—OFFENSES AGAINST IMMIGRATION LAWS—IMPORTATION OF CONTRACT LABORERS.

Immigration Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898 (U. S. Comp. St. Supp. 1911, p. 500), provides for the exclusion of the class of "aliens" therein specified, including contract laborers induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements to perform labor. Section 4 makes it a misdemeanor to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer. Section 5 provides that for every violation of section 4 the person violating it shall forfeit $1,000, which may be sued for and recovered by the United States or by any person including any such "alien" promised labor or service, and that separate suits may be brought for each "alien." *Held*, that a person or corporation does not become liable to the penalty by assisting or encouraging contract laborers other than aliens to migrate into this country, especially in view of the title and purpose of the whole act which deals most exclusively with the immigration of aliens.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 113–116; Dec. Dig. § 56.*]

2. ALIENS (§ 56*)—OFFENSES AGAINST IMMIGRATION LAWS—IMPORTATION OF CONTRACT LABORERS.

Under Immigration Act Feb. 20, 1907, c. 1134, § 5, 34 Stat. 900 (U. S. Comp. St. Supp. 1911, p. 503), providing that for every violation of the preceding section the persons, corporations, etc., violating it by "knowingly" assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States, shall forfeit $1,000, knowledge of all the essential facts constituting the wrongdoing, including knowledge of the essential fact that the contract laborer is an alien, is a necessary condition to liability.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 113–116; Dec. Dig. § 56.*]

3. ALIENS (§ 58*)—OFFENSES AGAINST IMMIGRATION LAWS—IMPORTATION OF CONTRACT LABORERS.

Where a trainmaster at Minot, N. D., in response to an inquiry from a person residing in Manitoba, relative to the possibility of procuring employment, sent him a pass stating that if he would come over they might be able to use him, and, upon his arrival, employed him as a brakeman, after further negotiations, the facts did not show knowledge on the part of the railroad company that he was an alien, so as to subject it to the penalty under Immigration Act Feb. 20, 1907, c. 1134, § 5, 34 Stat. 900 (U. S. Comp. St. Supp. 1911, p. 503), since whatever inference might be drawn if the importation is from a European country, the conditions existing between the United States and the border provinces of British America are such that no presumption of knowledge arose from the facts that the employé actually was an alien and was induced to migrate to this country by the railroad company.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 113, 114; Dec. Dig. § 58.*

Importation of contract labor, see note to United States v. Parsons, 66 C. C. A. 133.]

Smith, Circuit Judge, dissenting in part.

*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 North Dakota; Charles F. Amidon, Judge.

Action for a penalty by the United States against the Great Northern Railway Company. Judgment dismissing the action, and the United States brings error. Affirmed.

Edward Engerud, of Fargo, N. D. (M. A. Hildreth, of Fargo, N. D., on the brief), for the United States.

Murhpy & Toner, of Grand Forks, N. D., for defendant in error.

Before HOOK, ADAMS, and SMITH, Circuit Judges.

ADAMS, Circuit Judge. [1] This is a writ of error sued out by the United States to review a judgment of the District Court of North Dakota dismissing an action brought to recover the penalty of $1,000 prescribed by section 5 of the Immigration Act, approved February 20, 1907 (34 Stat. c. 1134, p. 898 [U. S. Comp. St. Supp. 1911, p. 499]). The pertinent portions of that act follow:

"Sec. 2. The following classes of aliens shall be excluded from admission into the United States: * * * Persons, hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled. * * *

"Sec. 4. It shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States. * * *

"Sec. 5. For every violation of any of the provisions of section four of this act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars. * * *"

The complaint in this case charged that the defendant, the Great Northern Railway Company, knowingly assisted and encouraged the immigration of one Graham, from the city of Beverly in the Province of Manitoba and Dominion of Canada, to the city of Minot, in the state and district of North Dakota, upon the understanding and agreement that Graham should enter the employ of the defendant as a brakeman.

After issue was joined, trial by jury was duly waived, and the cause submitted to the court for decision upon the following agreed facts:

"On the 4th day of May, 1910, at Minot, N. D., one Paul F. Keating, trainmaster of the defendant upon what is known as the Minot Division of the defendant, wrote and mailed to one G. N. Graham, an alien at Beverly, Manitoba, a letter as follows, to wit: 'Mr. G. N. Graham, Beverly, Man. Dear Sir: Replying to your letter of Apr. 29th asking for a position on this division, will say that I am inclosing pass for you, and if you come over, we may be able to use you. Yours truly, Paul F. Keating, Trainmaster.' The said letter was in reply to a letter or inquiry received from said Graham asking in reference to the possibility of procuring employment with the defendant. Pursuant to said letter, the said Graham came to Minot from said Beverly, Manitoba, and used the transportation inclosed in said letter, and upon arrival at Minot entered into further personal negotiations with the defendant and its trainmaster in reference to procuring employment, and, his record and qualifications proving satisfactory, was then and there employed by the defendant as a freight brakeman. The said Graham, prior to coming to Minot

and at the time of the correspondence above referred to, was a freight brakeman; that is he (said Graham) had theretofore been employed as a brakeman upon freight trains of various railroad companies, and was experienced in said line of business."

The court on these facts held that, as there was no showing that the defendant railway company knew that Graham was an alien, the government could not recover and dismissed the action.

The assignments of error and argument of counsel challenge the correctness of this ruling for two reasons: (1) Because no such knowledge was a prerequisite to liability for the penalty, and (2) if it were so the agreed state of facts disclosed such knowledge on the part of the defendant.

Counsel for the government make this argument: That a "contract laborer," as defined by section 2 of the act, is "a person who has been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements * * * to perform labor in this country, * * *" and that a "contract laborer" as so defined is the subject of section 5, which denounces the penalty. That section accordingly denounced its penalty against those who violated the provisions of section 2 by knowingly assisting, encouraging, or soliciting the migration into this country of "persons who have been induced or solicited to migrate into this country by offers or promises of employment, or in consequence of agreements to perform labor in this country," and it is contended that the act penalizes every one who knowingly so assists, encourages, or solicits the migration or importation into this country of any person, alien or not, provided only he comes here by reason of offers or promises of employment, etc.; that a person so defined is "the contract laborer" referred to in section 5 of the act.

Lest it be thought we have misapprehended the contention of the government, we quote from its counsel's brief as follows:

"It (the act) penalizes every one who knowingly assists, encourages, or solicits the migration or importation into this country of any person who comes by reason of offers or promises of employment. As construed by the trial court, however, the act is made to read in substance as follows: Any person who violates the act by knowingly assisting, etc., the migration or importation of any contract laborer, knowing such contract laborer to be an alien, shall be liable to the penalty."

The issue presented to us is therefore a sharp one: Does the act denounce the penalty against a person or corporation who knowingly assists or encourages any contract laborer to migrate into this country by offers of employment, etc., or is it only against a person or corporation who knowingly assists an alien contract laborer by offers of employment, etc., to so migrate?

If regard be had to the mere letter of the act of Congress it might be said that the penalty, as denounced by section 5 is: For assisting the migration of "any contract laborer" and that such contract laborer as defined by section 2 is one "who has been induced or solicited to migrate to this country by offers or promises of employment," etc. * * * On this literal view of a few words of the act, the argument is made that one incurs the penalty, if he assists or encourages the im-

migration of any one, whether alien or not, by offers or promises of employment, etc. But this kind of an argument does not appeal to us. The whole act discloses that it deals most exclusively with the subject of immigration of aliens.

The title to the act is "An act to regulate the immigration of aliens into the United States." The opening sentence of section 2 is: "The following classes of aliens shall be excluded from admission into the United States," among them "persons, hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind. * * *"

Again in section 5 of the act which denounces the penalty for violating the provisions of section 4 provision is found for the recovery of the penalty by the United States or any person who might first bring the action "including any such alien thus promised labor or service of any kind as aforesaid; * * * and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid."

In view of these provisions and of the manifest purpose of the act as disclosed by all its provisions, we have no hesitancy in holding the contention of the government to be untenable.

[2] From the opinion of the learned trial judge preserved in the record it seems that it must have been contended at the trial that the adverb "knowingly" found in section 5 of the act modified the immediately following words "assisting, encouraging or soliciting" only, and did not require knowledge of any other facts constituting the essence of the wrongdoing and therefore could not be construed as requiring knowledge of the essential fact that the contract laborer was an alien. But counsel for the government now abandon such contention. They say:

"We concede that the adverb 'knowingly' as it appears in this statute goes beyond the mere verb and includes broadly all that is expressed in the full act charged to have been done. We therefore concede that there is no liability for the statutory penalty unless it appears that the defendant not only knowingly did the acts of assistance, encouragement, etc.; but also that he knew the person assisted to be one who was coming or was being brought into the country in consequence of promises, etc., of employment."

This concession, however, is unnecessary, for we think it very plain that the word "knowingly" as used in section 5 necessarily makes knowledge of all the essential facts constituting the wrongdoing a necessary prerequisite to liability for the penalty. Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Price v. United States, 165 U. S. 311, 17 Sup. Ct. 366, 41 L. Ed. 727; Burton v. United States, 73 C. C. A. 243, 142 Fed. 57. It must therefore be held that knowledge of the essential fact that the contract laborer was an alien is a necessary condition to liability for the penalty. See Grant Bros. Construction Co. v. United States, 232 U. S. 647, 34 Sup. Ct. 452, 58 L. Ed. ——, just decided by the Supreme Court.

[3] Answering the second assignment of error, we are of opinion that the agreed facts failed to disclose knowledge by defendant of the alienage of Graham at the time it secured his services. The con-

tention is that because Graham was actually an alien and was induced to migrate to this country by defendant the presumption must be indulged that the defendant knew him to be an alien.

To this we are unable to agree. The learned trial judge, after alluding to what inference might be drawn if the importation was from a European country, made this observation:

"But in view of the conditions existing between the United States and the border provinces of British America, I do not think that such an inference can properly be drawn in this case."

And so it seems to us that, where the employer and employé are located as in this case on opposite sides of and near to an international boundary line over which people must necessarily pass and repass with much frequency and for a variety of purposes, no presumption of fact arises that the employé is a citizen of that country in which he may on a given occasion be found.

We think the agreed facts on which this case was submitted to the trial court failed to disclose that the defendant knew Graham was an alien when it induced him to come to this country for work, and for that reason the action was properly dismissed.

The judgment is affirmed.

SMITH, Circuit Judge (concurring). I cordially concur in all that is said in the foregoing opinion with reference to the first assignment of errors. That is, in such cases to warrant a finding for the government it must appear that the defendant assisted or encouraged the migration here of one he knew to be an alien.

I cannot wholly agree to what is said about the second assignment of errors. There is no dispute that Graham was an alien. We start with the proposition that it was essential for the government to prove that the defendant knew that Graham was an alien. There was an agreed statement of facts, but there was no agreement as to what inferences should be drawn from the facts agreed to.

Knowledge can seldom be proven by direct evidence; it is usually proven by circumstances.

Whatever rule is here declared with reference to Canada and North Dakota must in my judgment be equally applicable to Old and New Mexico. While in both Canada and North Dakota the language generally spoken is English, there are in both countries many foreigners chiefly from Northern Europe. On the other hand, in Old and New Mexico the majority of the people are of Spanish descent and as yet speak the Spanish tongue. In both there are a considerable number of Americans in the population.

Prepared to indulge every presumption in favor of innocence, I concede that if a man carrying on railroad building or operation in New Mexico should be traveling in Old Mexico and there met a Mexican who said he was an American and wanted employment on the American side, and the person thus approached believed the Mexican and employed him, he would not be guilty of knowingly assisting or encouraging the migration to this country of an alien; but if without anything to mislead him the person in question wrote to a Mexican in

Mexico to come over and he would be given employment, a jury would be justified and it would be its duty to find that the man who thus wrote knew that the party was an alien.

If I am not right in this, it would in substantially all cases be impossible to prove knowledge, and there is nothing in the statute to prevent this country from being flooded with the cheap peons of Old Mexico under contract.

In this case while it would normally have been for the jury to say from the fact that this man was an alien and wrote from a foreign land asking employment and the cautious character of the reply of the defendant's trainmaster whether the defendant knew that Graham was an alien, so a jury being waived, it was for the court to find from the evidence whether defendant knew that fact. If personally called upon to pass upon that question, I would have found there was knowledge upon the defendant's part from the circumstances; but the District Court found otherwise, and, as its finding has the force and effect of the finding of a jury, I am not so sure that it was wrong that I feel its decision should be reversed.

I therefore concur in the result, but must make it plain that if the finding had been the other way I should have deemed it the duty of this court to have affirmed the judgment.

BRYANT v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 16, 1914.)

No. 3931.

1. HABEAS CORPUS (§ 109*)—DISPOSITION OF PETITIONER—AUTHORITY OF FEDERAL COURTS.

   Under Rev. St. § 761 (U. S. Comp. St. 1901, p. 594), which requires a federal court in a proceeding for a writ of habeas corpus "to dispose of the party as law and justice require," on application by a prisoner for discharge on the ground that his sentence was illegal, it is proper for the court on so finding to direct his return to the court by which he was tried for a correction of the sentence.

   [Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 97, 98; Dec. Dig. § 109.*]

2. CRIMINAL LAW (§ 193¼, New, vol. 19 Key-No. Series)—ILLEGALITY OF SENTENCE—POWER OF COURT TO CORRECT.

   The resentencing of a prisoner duly convicted of a crime, who has obtained his discharge on habeas corpus on the ground that his first sentence was illegal, is not subject to the objection that the defendant is put twice in jeopardy for the same offense.

3. CRIMINAL LAW (§ 1002*)—ILLEGALITY OF SENTENCE—JURISDICTION OF COURT TO CORRECT AT SUBSEQUENT TERM.

   Where a defendant, duly convicted of a crime, obtains his discharge from imprisonment on habeas corpus, on the ground that his sentence was illegal, the court has jurisdiction to impose a corrected sentence, although the term at which he was convicted and sentenced has passed.

   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2559½; Dec. Dig. § 1002.*]

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

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

Criminal prosecution by the United States against Joe Bryant. From the action of the court in imposing a corrected sentence on defendant, he brings error. Affirmed.

James Hepburn and Will H. Chappell, both of Guthrie, Okl., for plaintiff in error.

Isaac D. Taylor, Asst. U. S. Atty., of Guthrie, Okl. (Homer N. Boardman, U. S. Atty., of Oklahoma City, Okl., on the brief), for the United States.

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

HOOK, Circuit Judge. This case involves the validity of a correction of a sentence for perjury in violation of section 5392, R. S. (U. S. Comp. St. 1901, p. 3653), which provides for a fine of not more than $2,000 and imprisonment at hard labor not more than five years. Bryant was convicted in Oklahoma and sentenced to imprisonment in the "federal penitentiary at Ft. Leavenworth, Kansas, for a period of one year." No fine was imposed as the statute requires, and the imprisonment was not expressly specified to be at hard labor. On October 10, 1912, he was delivered to the warden of the penitentiary and entered upon the service of his term. Later he applied to the District Court of the United States for the District of Kansas, where the penitentiary is located, for release by habeas corpus on the ground that his sentence, not being according to the law, was void. The court ordered his discharge from the custody of the warden by delivery of him to the United States marshal, who should conduct him to the custody of the court in Oklahoma, there to abide the judgment and order of that court. When taken there his sentence was corrected to imprisonment in the United States penitentiary at Leavenworth, Kan., at hard labor, for the term of one year, and a fine of $1; the term of imprisonment to begin at the time he commenced serving the defective sentence. Though differently and correctly named, the penal institution is the same as that first designated. It is the corrected sentence which is attacked by this writ of error. Bryant is at large upon bond.

It is not clear Bryant was injured by the omissions from the first sentence, unless hard labor is a right of which he could not be deprived; nor does it appear that it was not in fact being required of him. But doubtless the court in Kansas, in deciding the application for the writ of habeas corpus, was influenced by Ex parte Karstendick, 93 U. S. 396, 399, 23 L. Ed. 889, where it was said:

"In cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence."

[1] The defects in the first sentence, if any, did not inhere in the trial or verdict, and therefore it appears Bryant is guilty and was properly convicted. He could have had the defects corrected by a direct proceeding for that purpose, which would have enabled the appellate court to regard also the rights of the government.

"When the orderly procedure of appeal is employed, the case is kept within the control and disposition of the courts; and if the judgment be excessive or illegal, it may be modified or changed, and complete justice done, as we have said, to the prisoner, and the penalties of the law satisfied as well." Ex parte Spencer, 228 U. S. 652, 663, 33 Sup. Ct. 709, 712, 57 L. Ed. 1010.

But, instead of adopting that course, Bryant sought by habeas corpus wholly to escape the remainder of his term of imprisonment. We think the District Court in Kansas properly prevented this by sending him back for a correction of the sentence. In re Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149; United States v. Carpenter, 81 C. C. A. 194, 151 Fed. 214. In habeas corpus a court is expressly authorized "to dispose of the party as law and justice require." Section 761, R. S. (U. S. Comp. St. 1901, p. 594). In Beale v. Commonwealth, 25 Pa. 11, it was said:

"The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine that a prisoner, whose guilt is established by a regular verdict, is to escape punishment altogether, because the court committed an error in passing the sentence. If this court sanctioned such a rule, it would fail to perform the chief duty for which it was established."

In the Bonner Case, supra, the Supreme Court quoted the above and added:

"It is true that this language was used in a case pending in the Supreme Court of a state on writ of error; but if then the court would send the case back to have the error, not touching the verdict, corrected, and justice enforced, there is the same reason why such correction should be made when the prisoner is discharged on habeas corpus for alleged defects of jurisdiction in the rendition of the judgment under which he is held. The end sought by him—to be relieved from the defects in the judgment rendered to his injury—is secured, and at the same time the community is not made to suffer by a failure in the enforcement of justice against him. The court is invested with the largest power to control and direct the form of judgment to be entered in cases brought up before it on habeas corpus."

[2] The objection of double jeopardy for the same offense is made. It is well settled that it is not double jeopardy to resentence a prisoner who had his first sentence vacated by writ of error (Murphy v. Massachusetts, 177 U. S. 155, 20 Sup. Ct. 639, 44 L. Ed. 711), nor to retry him on a new indictment after a prior indictment, conviction, and sentence have been set aside in a proceeding in error (Ball v. United States, 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300). The principle of such cases is that a sentence that has been vacated by the action of a prisoner cannot then be put up by him as an obstacle to the further administration of justice; and we think it immaterial that his attack was collateral, as by habeas corpus, instead of direct, by appeal or writ of error. Here he was the actor, and the result left his conviction unimpaired.

[3] It is also urged that, since the term of the Oklahoma court at which Bryant was convicted had passed, jurisdiction to amend the sentence was lost. The failure to impose the punishment prescribed by the statute was doubtless due to the inadvertence of the court, and the subsequent correction was not, as in many cases, of mere omissions of the clerk. Still the making of the correction did not involve the opening up of the case, or the consideration or retrial of any ques-

tion of fact, and, it is important to remember, it was Bryant, not the government, who put in motion the machinery which led to the result. Had his attack on the sentence been direct, clearly jurisdiction would have been retained after the expiration of the trial term, and in sound reason the case should not be different where the attack is collateral. Otherwise it is plain that a gross miscarriage of justice could be accomplished by mere delay of habeas corpus until adjournment of the term at which sentence was imposed. If the first sentence be regarded as having been wholly vacated at the instance of Bryant, the case would then stand upon trial and conviction without sentence, in which view jurisdiction of the unfinished business would remain. In Re Harris, 68 Vt. 243, 35 Atl. 55, it was said:

"The record before us shows that the petitioner was properly convicted. The error was in the sentence, and there does not seem to be any good reason why jurisdiction of the petitioner should not be reassumed by the court in which he was convicted, that he may be properly sentenced. To prevent the defeat of justice we may well remand the petitioner to the custody of the sheriff of Caledonia county, that he may be taken before the county court and sentence properly imposed."

The above case was in habeas corpus. The report does not show whether the term of the trial court had passed or not, but the reasons why jurisdiction should be "reassumed" would apply equally in either case.

The corrected sentence is affirmed.

KAHN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 238.

1. BANKRUPTCY (§ 495*)—OFFENSES—FALSE OATH.

The offense of having made a false oath in a bankruptcy proceeding, denounced by Bankr. Act July 1, 1898, c. 541, § 29, subd. "b" (2), 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), is not of equal enormity with perjury, and is not within the rule that proof of perjury, in order to sustain a conviction, must be by two witnesses, or one witness and corroborating circumstances.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 912; Dec. Dig. § 495.*]

2. BANKRUPTCY (§ 495*)—FALSE OATH—WEIGHT OF EVIDENCE.

In a prosecution for false swearing in a bankruptcy proceeding, in violation of Bankr. Act July 1, 1898, c. 541, § 29, subd. "b" (2), 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), evidence which not only contradicts the testimony of the defendant, but so far preponderates it as to justify the jury in finding that the latter was not only false, but was made by defendant knowingly and fraudulently, is sufficient to sustain a conviction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 912; Dec. Dig. § 495.*]

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

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

William J. Kahn was convicted of having made a false oath in a bankruptcy proceeding, in violation of Bankr. Act July 1, 1898, § 29, subd. "b" (2), and be brings error. Affirmed.

W. M. K. Olcott and Terrence J. McManus, both of New York City, for plaintiff in error.

H. Snowden Marshall and Kenneth M. Spence, both of New York City, and Roger B. Wood, for the United States.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The indictment contains two counts. The first count under which the defendant was convicted—the second count being dismissed by the court—charges the defendant with having knowingly and fraudulently made a false oath in a proceeding in bankruptcy. The specific charge is that in the bankruptcy proceedings instituted against the defendant and Louis J. Kahn, the defendant, having been duly sworn in a proceeding before Referee Olney, gave false testimony. The facts sworn to by him, which are alleged to be false, were as follows:

First. That he, the defendant, borrowed $3,000 from Aaron Waldman to settle a case which was brought against him by Daniel Pimenthal.

Second. That he did settle the case by giving nine notes in the sum of $250 each, aggregating $2,250, and with the money borrowed from Waldman he paid one of the notes amounting to $250 and paid $250 to his attorney Joseph Lichtenberg for services, and thereafter he paid another of the said notes amounting to $250.

Third. That he repaid the said Waldman with moneys belonging to his firm—Kahn Bros. & Co.

The indictment charges that it was not true that the defendant borrowed $3,000 from Waldman or that he borrowed said sum to settle the Pimenthal suit or that he did settle the said suit, by giving notes as alleged, or in any other manner. It charges further that it is not true that the defendant paid any of the said notes from moneys borrowed from Waldman or from any other moneys or that he repaid Waldman the moneys loaned by him. The indictment further charges that when he swore before the referee, the defendant well knew that he did not borrow the sum of $3,000 from Waldman at any time and that he did not settle the said case either by giving notes or in any other manner and that he did not pay any of the notes given in settlement of the Pimenthal Case and that he did not repay Waldman any of the money which had been loaned by him to the defendant.

There can be no doubt that the borrowing of the money from Waldman and the giving of the notes to Pimenthal in settlement of the suit brought by him against the defendant were material, relevant and proper subjects of inquiry before the referee and that if the bankrupt swore falsely as to these matters he was guilty of having made a false oath under the statute above referred to.

This controversy and the testimony bearing thereon was clearly stated to the jury by the trial judge and they were instructed that:

"The question in this case is whether, upon and at this proceeding before the referee he (defendant) swore 'knowingly, fraudulently and falsely,' and that is the question you have to consider."

[1] No exception was taken to the charge, no requests to charge were made, no motion to dismiss or to direct a verdict was made at the close of the testimony. The evidence tended to show that each and all of the three statements as before enumerated were false. It is said, however, that their falsity was not shown by the clear and convincing proof necessary in perjury cases, which the defendant maintains requires the direct testimony of at least one witness supported by proof of corroborating circumstances. It must be remembered that this prosecution is brought under a special provision of the Bankruptcy Act making it an offense, punishable by imprisonment for a period not exceeding two years, to make a false oath, knowingly and fraudulently in a proceeding in bankruptcy. Of course, broadly stated, this is a perjury statute, but we should not overlook the fact that at the time the present Bankruptcy Act was passed there was on the statute book, and had been for over a hundred years, a general perjury statute (now section 125 of the Criminal Code, Act March 4, 1909, c. 321, 35 Stat. 1111 [U. S. Comp. St. Supp. 1911, p. 1625]) which provides that a person found guilty under its provisions "shall be fined not more than two thousand dollars and imprisoned not more than five years."

If Congress regarded the crime of false swearing in bankruptcy proceedings as equal in enormity to the crime of perjury, what necessity was there for section 29b (2) at all? The fact that the word *perjury* does not appear in the later act and that the term of imprisonment was reduced from five years to two years and the $2,000 fine omitted altogether, makes it clear that Congress in the Bankruptcy Act was dealing with a crime not in its judgment so aggravated as the crime of perjury. If this view of the situation be correct it is manifest that the burden of proof in perjury cases is not necessarily applicable here. However, the ancient rule of the common law requiring two witnesses to contradict the defendant's oath has been practically annulled and at present the rule in several jurisdictions means hardly more than the common-law rule that the defendant must be proved guilty beyond a reasonable doubt.

The rule is stated in Cyc. vol. 30, page 1452, as follows:

"Positive and direct evidence is absolutely necessary in a perjury case. Direct evidence is not limited to a denial in ipsissimis verbis of the testimony given by the defendant, but includes any positive testimony of a contrary state of facts from that sworn to by the defendant on trial, or which is absolutely incompatible with his evidence, or physically inconsistent with the facts so testified to by him."

In U. S. v. Wood, 14 Pet. 430, 10 L. Ed. 527, the court reached the conclusion that where the contradiction comes directly from the defendant perjury may be proved without the aid of a living witness. In other words, the court held that rule is not an arbitrary one and where the probative force of the testimony is equal to that of two witnesses or to one witness corroborated, it is sufficient.

In Hashagen v. United States, 169 Fed. 396 at page 399, 94 C. C. A. 618 at page 621, the court, speaking of the old rule, says:

"But this strictness has long since been relaxed, and we find many cases in the books where convictions have been sustained upon the testimony of a single witness, corroborated by circumstances proved by independent evidence sufficient to warrant the jury in saying that they believe one rather than the other."

In the case of People v. Doody, 172 N. Y. 165, 64 N. E. 897, the Court of Appeals of New York upheld a conviction of perjury where the defendant swore that he did not remember certain material facts when the testimony showed that he did remember them.

[2] Without pursuing the subject further we think that the ancient rule has become inapplicable to modern conditions and has been relaxed to such an extent that evidence which not only contradicts the testimony of the defendant but so far preponderates it as to justify the jury in finding that the latter was not only false but was made by the defendant knowingly and fraudulently is all that it required to prove a crime under 29b (2) of the Bankruptcy Act.

Without discussing the testimony in detail we think the jury was justified in finding that the defendant testified falsely when he swore that he borrowed $3,000 from Waldman to settle the Pimenthal suit and that he did settle it by giving nine $250 notes and paid Waldman with money belonging to Kahn Bros. & Co.

The judgment is affirmed.

HOM YUEN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 247.

1. ALIENS (§ 27*)—CHINESE PERSONS EXCLUDED—PERSONS DEPARTING FROM AND RETURNING TO UNITED STATES.

Under Act Sept. 13, 1888, c. 1015, § 5, 25 Stat. 477 (U. S. Comp. St. 1901, p. 1314), providing that no Chinese laborer after leaving the United States shall be permitted to return, except under the conditions therein stated, a Chinese laborer's certificate of residence was abrogated by leaving the United States and did not entitle him to return.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 85–87; Dec. Dig. § 27.*

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

2. ALIENS (§ 28*)—CHINESE PERSONS EXCLUDED—PERSONS DEPARTING FROM AND RETURNING TO UNITED STATES.

Under Act Sept. 13, 1888, c. 1015, § 6, 25 Stat. 477 (U. S. Comp. St. 1901, p. 1314), providing that no Chinese laborer leaving the United States shall be permitted to return unless he has within the United States a wife, child, or parent, property worth $1,000, or debts of like amount, and section 7, requiring a Chinese person, claiming the right to leave and return, to apply to the Chinese inspector and make on oath a full statement of his family, property, or debts, and providing that the inspector, if he shall so decide, shall sign and give to the person applying a certificate, which shall be the sole evidence given to such person of his right to return, and that no Chinese person shall be permitted to re-enter the United States without producing such return certificate, the granting of the return certificate is not conclusive as to the right to re-enter, espe-

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

cially as, though a Chinese person has a parent or child, property, or debts entitling him to return when the certificate is issued, he cannot re-enter, if he does not comply with the conditions imposed by section 6 on the right to re-enter when he applies to re-enter.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 88–90; Dec. Dig. § 28.*]

3. ALIENS (§ 32*)—EXCLUSION OF CHINESE—PROCEEDINGS—COLLATERAL ATTACK.

Under Act Sept. 13, 1888, c. 1015, § 7, 25 Stat. 476 (U. S. Comp. St. 1901, p. 1314), providing that a Chinese laborer possessing a return certificate issued to him when leaving the United States shall be admitted to the United States only at the port from which he departed therefrom, the decision of the immigration officer at the port from which a laborer departed against his right to re-enter could be reviewed only by an appeal to the Secretary of Commerce and Labor, or by an application to the proper court, and could not be collaterally attacked by a laborer who, after his exclusion, surreptitiously entered the United States and was arrested and ordered deported.

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

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

This cause comes here on appeal from a decision of the District Court, Southern District of New York, sustaining a decision of the United States Commissioner, who found that defendant was a Chinese person of Chinese descent and a laborer, without certificate of residence, that he was unlawfully within the United States, and ordered that he be deported. Affirmed.

R. M. Moore, of New York City, for appellant.

F. M. Roosa, Asst. U. S. Atty., of New York City.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. On April 4, 1894, a certificate of residence was issued to Hom Yuen by the collector of internal revenue for the First district of New York (Brooklyn). On October 27, 1902, wishing to return to China, he was granted a return certificate by the collector of customs at Malone, N. Y., under the act of September 13, 1888 (25 Stat. at Large, 476). This act provides (section 5) that after its passage no Chinese laborer in the United States shall be permitted, after having left, to return thereto, except under the conditions stated in the act. Section 6 provides that no Chinese laborer within the purview of the preceding section shall be permitted to return to the United States unless he has a lawful wife, child, or parent in the United States, or property therein of the value of $1,000, or debts of like amount due him and pending settlement. Section 7 provides that a Chinese person claiming the right to leave and return must apply to the Chinese inspector in charge of the district from which he wishes to depart, and make on oath before the inspector a full statement descriptive of his family, or property, or debts as the case may be. He must also furnish such proofs as may be required. If the inspector, after hearing and investigation, shall decide to issue a certificate of re-

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

turn, he shall sign and give to the person applying a certificate, which shall be the sole evidence given to such person of his right to return. No Chinese person shall be permitted to re-enter the United States without producing to the proper officer in charge at the port of such entry the return certificate herein required. The same section further provides that a Chinese laborer possessing a certificate under this section shall be admitted to the United States only at the port from which he departed therefrom.

The return certificate issued to Hom Yuen at Malone was issued upon his sworn statement that:

"Hum Lang, 253 Court street, Brooklyn, owes me $1,000, money borrowed January 20, 1902, for laundry purposes. He is unable to pay me at present, but intends to do so on my return from China."

On receipt of his return certificate he gave up his labor certificate to be held by the proper governmental authorities until his re-entry into the United States. Hom Yuen departed from Malone for China October 27, 1902. He applied for readmission at the same port on June 28, 1904; thereupon investigation was made as to the alleged debt due him, and as a result thereof he was denied admission upon the grounds that such debt was not bona fide. He appealed to the Secretary of Commerce and Labor, who sustained the decision below. Thereafter he was delivered to the Canadian Pacific Railway Company for return to China and the certificate of residence was subsequently canceled.

[1] Hom Yuen thereafter effected a surreptitious entry from Canada into the United States and was found here—a laborer without certificate. The contention of the appellant is that the return certificate was conclusive; that, having that with him when he applied at Malone, there was no right to refuse him re-entry; also that he had a right to rely on his original certificate of residence. The certificate of residence was abrogated by section 5, supra, by his leaving the United States; right to return could be secured only in the way prescribed by the statute.

[2] The proposition that there is any finality about the "return certificate" is wholly unfounded. In the very nature of things it could not be final; it is concerned only with what is shown to be the situation as to family, property, or debts, at the time when it is issued. But re-entry is to be determined by the status on the day of return. A Chinese person may have a parent or child living here, or may own property here, or there may be money owing to him, when he takes out the return certificate; but if, during his absence, the relatives die or cease to reside here, or the property is sold and the money sent to him in China, or the debt extinguished by payment, he cannot re-enter, certificate or no certificate, because when he applies to re-enter he does not comply with the conditions which section 6 imposes on all Chinese persons seeking re-entry.

[3] Moreover all questions as to his right to re-enter must be settled at the port from which he departed; there only under section 7 can he re-enter. Hom Yuen applied at Malone and the question of his right to re-enter was there properly inquired into. What testi-

mony was before the immigration officer does not appear; the record seems to indicate that the alleged debtor swore that he owed defendant nothing; it may be that Hom Yuen testified to the contrary—presumably he did so and the officer believed the other man. If the defendant thought himself aggrieved by this adverse decision, he should have undertaken to review it directly, either by appeal to the Secretary of Commerce and Labor (this he seems to have done), or, if there were some irregularity which a court could look into, by application of some sort to the proper tribunal (this he did not do). The decision by the proper officer at the proper place adverse to his admission certainly cannot be attacked collaterally.

The decision of the District Court is affirmed.

REILLY v. CORNELL STEAMBOAT CO.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 225.

1. TOWAGE (§ 11*)—INJURY TO TOW—CONTRIBUTORY NEGLIGENCE.

Where a tug used a new and apparently sufficient hawser, which it passed to two scows, the B. and G., with instructions to put the eye of the hawser on the bitt of the B., to make a round turn on the G.'s port bitt, and lead it out of the G.'s port chock, but the man in charge of the G., instead of following such instructions, merely led the hawser from the B. back of his bitt to the port chock, and, one scow being higher than the other, the constant rising and falling of the scows, due to the rough water, caused the hawser to cut through on the square bitt of the G., the tug could not be held liable for the loss of the G.

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

2. TOWAGE (§ 11*)—INJURY TO TOW—LIABILITY.

Where a tug, after a scow which it was towing had broken loose, passed an extra line, which had been lying coiled up on the deck, to the scow, but, owing to the drifting of the scow, the deckhand of the tug was unable to fasten the hawser to the tug, and the hawser as a result was dragged into the water, permitting the scow to go on the rocks, the tug was not liable because of its failure to fasten the hawser to its bitt before passing it to the scow, since one of the eyes of the hawser was naturally at the bottom of the pile, while it would have been difficult to pass the hawser to the scow, if the other eye had been first placed over the bitt of the tug.

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

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

This cause comes here on appeal from a decree holding respondent liable for damages sustained by the scow Go Ahead in Tompkin's Cove a little way below the Highlands of the Hudson river, after breaking loose from respondent's tug Primrose, of which she was in tow. Reversed and remanded, with instructions.

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

Amos Van Etten, of Kingston, N. Y., for appellant.
W. J. Martin, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The flotilla, consisting of several vessels, was proceeding up river in tow of respondent's tugs Crosby and Mead; the Primrose was a helper. About 5 p. m. of November 3d they were off Ver Plank's Point when the Primrose took off the Go Ahead and another scow, the Blarneystone, which were bound for Tompkin's Cove on the west side of the river. At the time there was a strong northeast wind blowing, accompanied by rain and the water was rough. The two scows were light, there is no evidence to show that the wind was blowing more than 20 miles an hour, the tug was of ample power, and if the hawser were sufficient there was nothing to indicate that there was any trouble to be apprehended in the undertaking. The District Judge based his finding that the storm was too severe to take the scows across solely on the circumstance that the rope "broke"; but, since we are satisfied it did not break, we reach a different conclusion, and are satisfied that there was no negligence in starting them across the river to their destination under existing conditions. While thus proceeding the hawser parted, and the two scows drifted over towards Stoney Point. The tug thereupon put about and tried to pick them up. She passed a hawser to one of them, which was made fast there; but owing to the drifting of the scows the deckhand of the tug was unable to fasten it on the Primrose, it ran into the water, and the scows went on the rocks.

Judge Holt held the tug in fault because the hawser was not sufficiently strong and because the Primrose, when trying to effect a rescue, did not fasten her hawser to her own bitt before passing it to the scows.

[1] The hawser was a brand new five-inch line, never used before. There is nothing to indicate it was not entirely sufficient for the use to which it was put. Nor is there any evidence of any latent defect. Had it not been misused, as will be pointed out below, presumably it would have taken the scows over without mishap. One line was used, instead of two, because the scows were to be landed in Tompkin's Cove, where the depth of water would not allow the tug to go as far inshore as the tow. There is evidence that this is usual and proper practice, and we find no fault in following it on this occasion. Preparatory to taking them off, the Blarneystone and the Go Ahead were made fast to each other. The Primrose then passed her towing hawser to them, with instructions to put the eye of the hawser on the bitt of the Blarneystone, to make a round turn on the Go Ahead's port bitt, and to lead it out of the port chock of the Go Ahead. There is no evidence, and we see nothing to indicate, that there was anything improper about this method of making fast. Whatever canting or slewing might result is unimportant, and it certainly was safer than fastening the towline to one boat only. If their own lines chafed and parted, this towline thus attached would still keep them together. The cause of the whole subsequent trouble was the failure of the man in charge of the

Go Ahead to follow the instructions given to him. Instead of taking a round turn around his own bitt, he merely led the hawser from the Blarneystone back of his bitt to the port chock. One scow was higher than the other, and the effect of the rough water was to cause a constant rising and falling of the scows. The result was that this brand new five-inch line was cut through on the square bitt of the Go Ahead. That this is what happened, that the line did not break, but was cut, is proved indisputably by the master of the Go Ahead. He says the jumping of the boats slacked the hawser and gave it a chance to see-saw; that it was cut on his bitt, and that it left the mark of seesawing on the bitt itself.

There is some conflict of testimony as to what was said when the towing hawser was passed aboard, but we find the evidence from the Primrose—viz., that the scowmen were told to take a round turn on the Go Ahead's bitt—more persuasive. It is manifestly the correct way. Any boatman should have known that was the thing to do, and it was in that way that the lines between the Go Ahead and the Blarneystone were made fast. Under our decisions in The Lyndhurst, 147 Fed. 110, 77 C. C. A. 336, and The Edwin Terry, 162 Fed. 309, 89 C. C. A. 19, the master of the tug cannot be held in fault because he did not himself go aboard the scows to see that his instructions as to making fast the hawser had been carried out.

[2] As to the alleged fault in the effort to save the boats after they went adrift, it might well be held that this was in extremis. But we are not satisfied there was any real fault about it. The Primrose, approaching the two scows, had one line available to pass to them. This was her own head line, lying on the deck as an extra line, available for whatever service it might be required to subserve. It had an eye at each end for convenience of use. Surely it was not negligence to have this line coiled up on deck till wanted, without either eye over a bitt. When coiled up, one eye would naturally be at the bottom of the pile. It was rope, not twine, the bottom eye could not be caught hold of and pulled out from under the pile. We do not see how *it* could be passed over a bitt until after most of the superimposed coils had been paid out. If the eye on top of the coil had been first placed over a bitt, it is difficult to see how the bight of the rope could be passed over to the scows. The natural thing to do was to pass the free eye to the scow, and when it was once placed on a bitt there to try and make fast the line on the tug. This is precisely what was done, the deckhand passed the top eye out to the scows, and as the line was running off he did succeed in making two turns around the Primrose's bitt. This was not sufficient to hold, and before he could make other efforts, manifestly more or less dangerous, the line was dragged from the tug falling into the water.

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

THE ROANOKE.

(Circuit Court of Appeals, Ninth Circuit. May 18, 1914.)

No. 2348.

1. SALVAGE (§ 18*)—RIGHT TO COMPENSATION—VESSELS UNDER COMMON OWNERSHIP.

Where a vessel, on receiving a wireless message from another, which had broken her propeller, asking for assistance, immediately changed her course for the disabled vessel, the fact that while on the way her master called up the president of the company, which was the common owner of the two vessels, and asked for instructions, did not prevent the service rendered from being a voluntary one for which the officers and crew were entitled to salvage compensation under Act Aug. 1, 1912, c. 268, 37 Stat. 242.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 31–43; Dec. Dig. § 18.*]

2. SALVAGE (§ 13*)—NATURE OF SERVICE—SALVAGE OR TOWAGE SERVICE.

Service rendered by one vessel to another which had broken her propeller at sea and was anchored half a mile from the coast, in response to wireless messages from the captain of the disabled vessel asking for assistance, and which required the salving vessel to steam five hours from her course, *held* a salvage and not a towage service, and entitled to compensation as such.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 16, 23–25; Dec. Dig. § 13.*]

Appeal from the United States District Court for the Northern District of California; M. T. Dooling, Judge.

Suit in admiralty by A. Sjogren and others against the steamer Roanoke; the North Pacific Steamship Company, claimant. Decree for libelants, and claimant appeals. Affirmed.

For opinion below, see 209 Fed. 114.

Charles H. Sooy and David L. Levy, both of San Francisco, Cal., for appellant.

F. R. Wall, of San Francisco, Cal., for appellees.

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

DIETRICH, District Judge. This was a libel for salvage against the steamer Roanoke by the officers and crew of the Santa Clara, excepting the master and chief engineer. In the court below the libelants had a decree for one-half month's pay to each, aggregating $887.50, and claimant, North Pacific Steamship Company, appeals.

The salient facts may be briefly stated: On April 10, 1913, while bound from San Pedro to San Francisco, and when in the neighborhood of Point Arguello, the "Roanoke" was disabled by the loss of her propeller. She was a steamer of 1,654 net and 2,354 gross tons, worth about $150,000, and was carrying 93 passengers and a cargo. The injury was such as to leave her without motive power, and, the water being too deep to afford a safe anchorage, her captain permitted her to drift in shore from 10:05 a. m., the time the accident occurred,

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

until 11:10 a. m., when anchor was dropped in about 14 fathoms of water. She was then at a point about 1½ miles south of east from Point Arguello, and from one-half to three-quarters of a mile from the shore at the nearest point. She remained there at anchor until about 5 o'clock p. m., when the Santa Clara came to her assistance. The Santa Clara, also owned by the claimant, and loaded with cargo and passengers, had left San Francisco on April 9th, bound on a voyage thence to Port Harford, and a little after 10 o'clock a. m. on the next day, April 10th, and when she was within about an hour and a half's steaming of her port of destination, she received a wireless message from the Roanoke, as follows, "Come to our assistance, lost wheel two miles south Point Arguello." Her captain replied, "Your message received, coming to your assistance." Thereupon the Roanoke asked when the Santa Clara would arrive, and the latter replied, "Expect to arrive in five hours." Then the Santa Clara inquired of the president of the claimant company at San Luis Obispo, "Do you want us to go to the assistance of Roanoke—takes five hours." The reply was, "Help him if necessary until tug arrives." Then the Santa Clara sent the following message to the Roanoke, "We are full of freight and passengers; is it absolutely necessary for us to come to your assistance?" The reply came, "We need your assistance at once."

[1] By Act of Congress of August 1, 1912 (37 Stat. 242), it is declared:

"That the right to remuneration for assistance or salvage services shall not be affected by common ownership of the vessels rendering and receiving such assistance or salvage services.

"Sec. 2. That the master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, crew, or passengers, render assistance to every person who is found at sea in danger of being lost; and if he fails to do so he shall, upon conviction, be liable to a penalty of not exceeding $1,000.00 or imprisonment for a term not exceeding two years, or both.

"Sec. 3. That salvors of human life, who have taken part in the services rendered on the occasion of the accident giving rise to salvage, are entitled to a fair share of the remuneration awarded to the salvors of the vessel, or cargo, and accessories."

No question therefore arises because of the common ownership of the vessels. And while the captain of the Santa Clara inquired concerning the wishes of the claimant's president, the fact still remains undisputed that upon receiving the first message of distress from the Roanoke the Santa Clara's course was immediately altered, and from that moment she continued, without stop or further change of course, to steer for the Roanoke; and it must therefore be held that the assistance was voluntarily rendered.

[2] The defense most earnestly pressed is that the service was towage and not salvage; it may be summarily disposed of. A "salvage" service, as distinguished from a towage service, is defined as follows:

"A salvage service is a service which is voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger either present or to be reasonably apprehended. A towage service is one which is rendered for the mere purpose of expediting her voyage, without reference to any circumstances of danger." McConnochie v. Kerr (D. C.) 9 Fed. 50.

See, also, The Flottbek, 118 Fed. 960, 55 C. C. A. 448.

It is clear beyond peradventure that Capt. Dickson of the Roanoke believed he was in peril. No labored analysis of his messages can serve to remove the first and natural impression they make upon the mind; they were calls of distress, and, had they been disregarded by the captain of the Santa Clara, he would have stood in danger of the penalty provided in section 2 of the act, supra. That being the case, we are not disposed nicely to weigh the circumstances and conditions for the purpose of determining how imminent the peril may have been. Considering the situation as he saw it at the time, Capt. Dickson's solicitude for the safety of his ship and passengers was not without reason. It is quite unimportant that as we now look backward the position of the Roanoke may not impress us as having been extremely perilous. "Wisdom born after the event is the cheapest of all wisdom." Though not of a high order, the service is entitled to be classed as salvage service.

The remaining question relates to the amount of the decree. While we think that the allowance was liberal, and possibly in excess of what we would award, we are reluctant to interfere with the discretion of the trial court in a matter where manifestly there is and can be no fixed standard. No principle of law was violated, and it cannot be said that there was a clear abuse of discretion.

Accordingly, the decree will be affirmed.

PATTEN et al. v. STURGEON et al.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1914.)

No. 129.

1. BANKRUPTCY (§ 396*)—EXEMPTIONS—HOMESTEAD—STATUTES—CONSTRUCTION.

Act Okl. March 15, 1905 (Sess. Laws 1905, c. 18) § 1, provides that the homestead of a family, which shall consist of the home of the family, whether the title is lodged in or owned by the husband or wife, shall be exempt. Const. Okl. art. 12, § 1, provides that the homestead of a family not within any city, town, or village shall consist of not more than 160 acres, while the homestead in a city, town, or village, owned and occupied as a residence only, shall consist of not more than an acre of land, "provided that the same shall not exceed in value the sum of $5,000," and in no event shall the homestead be reduced to less than a quarter of an acre, without reference to value. *Held*, that the proviso quoted applies only to a city, town, or village homestead, and that a bankrupt is entitled to claim a country homestead, not greater than 160 acres in area, as exempt without reference to its value.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659–668; Dec. Dig. § 396.*]

2. BANKRUPTCY (§ 396*)—EXEMPTIONS—"CARRIAGE."

An automobile belonging to a bankrupt, who had no other carriage, was a "carriage," within Sess. Laws Okl. 1905, c. 18, § 1, subd. 10, exempting to a debtor one carriage or buggy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 659–668; Dec. Dig. § 396.*

For other definitions, see Words and Phrases, vol. 1, pp. 976–978; vol. 8, p. 7596.]

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

Petition to Revise Order of the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Petition by F. L. Patten, as trustee in bankruptcy of John R. Sturgeon and Nancy A. Sturgeon, and others, to revise an order setting aside a homestead and an automobile as exempt property. Petition denied.

M. W. Hinch, of Kingfisher, Okl. (John T. Bradley, Jr., of Kingfisher, Okl., on the brief), for petitioners.

E. M. Bradley, of Kingfisher, Okl. (J. T. Bradley, of Kingfisher, Okl., on the brief), for respondents.

Before HOOK, ADAMS, and SMITH, Circuit Judges.

ADAMS, Circuit Judge. This is an original petition brought to revise an order of the District Court of the Western District of Oklahoma setting apart a homestead and an automobile as exempt property in a bankruptcy case. John R. Sturgeon and Nancy A. Sturgeon, husband and wife, were the bankrupts. At the time of their adjudication, the wife was, and for a long time prior thereto had been, the owner of a tract of 160 acres of land situated in the country; that is, not within a city, town, or village of the state of Oklahoma. This tract was of the value of $12,000. Upon it the husband and wife had for a long time resided and made their home. The husband, at the time of their adjudication, was the owner of an automobile worth $500, and neither the husband nor the wife was the owner of any other vehicle, like a buggy or carriage. The referee and the trial court, on due proceedings taken, held that the tract of land on which the husband and wife resided was a homestead, and the automobile was a carriage, within the meaning of the Oklahoma statutes, and ordered the same set apart to the bankrupts as exempt property.

The trustee, joined by two creditors of the bankrupts, prosecute this petition to secure a reversal of those rulings. Was there error in them? In answering this question it is conceded that the laws of Oklahoma must control.

[1] By the act of the Oklahoma Legislature approved March 15, 1905 (Sess. Laws 1905, c. 18, § 1), it was enacted as follows:

"The following property shall be reserved to every family residing in the territory exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided: First, the homestead of the family, which shall consist of the home of the family, whether the title to the same shall be lodged in or owned by the husband or wife. * * * Tenth, one carriage or buggy."

The Constitution of the state of Oklahoma, adopted in the year 1907 (section 1, art. 12), ordained as follows:

"The homestead of any family in this state, not within any city, town or village, shall consist of not more than one hundred and sixty acres of land, which may be in one or more parcels, to be selected by the owner. The homestead within any city, town, or village, owned and occupied as a residence only, shall consist of not exceeding one acre of land, to be selected by the owner: *Provided, that the same shall not exceed in value the sum of five thousand dollars*, and in no event shall the homestead be reduced to less than one-quarter of an acre, without regard to value: And provided further, that

in case said homestead is used for both residence and business purposes the homestead interests therein shall not exceed in value the sum of five thousand dollars."

The contention of the petitioners is: That the proviso in the Constitution just underscored, namely, "Provided that the same shall not exceed in value the sum of five thousand dollars," is a limitation upon the value of a homestead in the country as well as in the city, town, or village, and therefore that the District Court erred in setting apart a homestead to the bankrupts, even though located in the country, exceeding in value the sum of $5,000. We think it very plain that this contention is without merit. The construction of the sentence, the language employed, and the context in which it appears, as well as the punctuation, show that the limitation of value to $5,000 is confined "to homesteads within any city, town or village," and has no reference to homesteads "not within any city, town or village," which was the subject of the first or preceding clause.

We have carefully examined the authorities relied on by the petitioners for their contention, namely, Miller v. Marx, 55 Ala. 322, and Beecher v. Baldy, 7 Mich. 488, and we fail to find in them any support for their contention in this case. We think the trial court was clearly right in holding that the homestead of a family in the state of Oklahoma "not within any city, town or village" may consist of 160 acres of land without regard to its value, and that no error was committed in setting apart the homestead in question as exempt property.

[2] We are also of opinion that "an automobile" is a carriage, within the meaning of the Oklahoma statute which exempts to every family "one carriage or buggy," and especially is this so when the family had no other carriage than the automobile.

The petition to revise must therefore be denied.

UNITED STATES v. INVESTORS' & TRADERS' REALTY CO.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 4.

1. SHIPPING (§ 7*)—FOREIGN-BUILT YACHT—TONNAGE TAX.

Tariff Act Aug. 5, 1909, c. 6, § 37, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 1197), provides that a tonnage tax shall be levied and collected annually on the 1st day of September on the use of every foreign-built pleasure yacht now or hereafter owned or chartered for more than six months by any citizen of the United States. *Held*, that the tax so specified is on the "use" of every such foreign-built yacht; and hence, where defendant became the owner of a yacht during the year prior to September 1, 1909, but there was no proof that it used the same at any time, the tax was not recoverable.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 16-20; Dec. Dig. § 7.*]

2. SHIPPING (§ 7*)—YACHTS—TONNAGE TAX—"FOREIGN-BUILT."

A schooner yacht, built in Montreal, was sold to F. for $9,500. He brought it to Brooklyn, changed it to a steam yacht, and so altered it that very little of the old vessel remained; the cost of the alterations be-

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

ing $46,712, and the only identity of the new yacht with the old being that certain available timber and materials of which the old yacht was constructed were used in the new. *Held*, that the new yacht was not "foreign-built," and was therefore not subject to the tonnage tax imposed by Act Cong. Aug. 5, 1909, c. 6, § 37, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 1197).

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 16–20; Dec. Dig. § 7.*]

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

On writ of error to review a judgment (190 Fed. 372) sustaining a tax of $7 per gross ton levied by the collector at the port of New York, September 1, 1909, upon the use by defendant of the yacht Allita, alleged to have been built in Canada. The tax was levied under the act of August 5, 1909 (36 Stat. 112). The United States also assigned error based upon the failure of the court to allow interest upon the amount of the tax. The parties will be alluded to as they appear in the court below, viz., as plaintiff and defendant.

Julius Miller, of New York City, for plaintiff in error.

Addison S. Pratt, Asst. U. S. Atty., of New York City.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. In view of the conclusion reached by a majority of the court upon the main issue, it is unnecessary to consider the error assigned by the plaintiff relating to interest. The Circuit Court found:

"The defendant acquired title to the said steam yacht Allita on the 13th day of July, 1908, by a bill of sale from the said John H. Flagler, dated on the said day. The defendant took the said yacht in part exchange for real estate and for the purpose of reselling her. The defendant is engaged in the business of buying and selling real estate. At no time prior to September 1, 1909, did the defendant use her as a yacht."

[1] The law provides that the tax shall be levied "upon the *use* of every foreign-built yacht." Since the decision of Billings v. United States, 232 U. S. 261, 34 Sup. Ct. 421, 58 L. Ed. ——, United States v. Billings, 232 U. S. 289, 34 Sup. Ct. 427, 58 L. Ed. ——, and the Pierce Case, 232 U. S. 290, 292, 34 Sup. Ct. 428, 58 L. Ed. ——, by the Supreme Court on February 24, 1914, there can be no question that use must be shown. The court says that the right to use "is the subject upon which the statute places the excise duty. In this view the fact of use, not its extent or its frequency, becomes the test, as distinguished from mere ownership, for that in the statutory sense could exist without use having taken place." As there is not a particle of proof that the defendant used the Allita during the year prior to September 1, 1909, or, in fact, at any time, it follows that the judgment must be reversed. The district attorney concedes that the judgment must be reversed upon this ground, but requests an expression of opinion by this court upon the main issue, for the guidance of the court below in the event of his being able to prove the necessary use by the defendant. Was the Allita a foreign-built vessel?

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

[2] The Gadabout was built in Montreal. She was a schooner yacht and was sold by Mr. J. P. Morgan to Mr. Flagler as the Algonquin for $9,500. Mr. Flagler changed her to a steam yacht and named her the Allita. She was sent by Flagler to Poillon's dock in Brooklyn and there altered, so that very little of the old vessel remained. These alterations cost Flagler $46,712. After reading his testimony it is apparent that the changes were so radical and extensive that practically nothing was left of the old construction. There were new masts, new sails, new stern, new bow, new engine and new boiler. The center, though old material was utilized, was practically new. Some of the old keelsons and other parts were used, but after the repairs the entire structure was changed. The Gadabout disappeared and the Allita came into being. To say that the Allita was a foreign-built yacht is a fiction. She was an American-built yacht with some of the materials, which went into the new structure, purchased in Canada. $34,000 was added to her value; she was lengthened 30 feet. A new and larger boiler and propeller were supplied and a new deck house 45 feet long was added. In short, nothing remained of the old schooner yacht Gadabout considered as a yacht. Where timber and materials were found that were not decayed and could be used in the construction of the new yacht they were so utilized, but we find it impossible to read this record and conclude that the Allita, which left the Brooklyn yard in 1901, was built in Montreal nine years before. We are very clear that the Allita was not built in Canada and was practically a new yacht, although some of the old material was used.

A house built in 1913 can hardly be called old because constructed partly on old foundations and because some of the materials which were in the house which originally stood there have been carried into the new structure. We have been able to find little authority upon the question. The plaintiff cites Hardy v. The Ruggles, 2 Hughes, 78, Fed. Cas. No. 6,062; U. S. v. The Grace Meade, 2 Hughes, 83, Fed. Cas. No. 15,243; Hartupee v. The Coal Bluff, 11 Fed. Cas. No 6,172, where the facts were somewhat analogous. These cases certainly are not opposed to the views above expressed, but tend rather to sustain them.

The judgment is reversed.

In re NEWMAN.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 100.

1. CONTEMPT (§ 66*)—APPEAL—INVITED ERROR.

An order appointing a receiver for an alleged bankrupt was served upon a public auctioneer, to whom the bankrupt had transferred property to defraud her creditors, and a demand made that a sale thereof be stopped. The auctioneer threw the order on the floor with contemptuous expression as to the court, stating that he was not selling the goods of the bankrupt, but goods consigned to him for sale by other parties, and con-

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

tinued the sale until served with an order to show cause why he should not be punished for contempt and directing him to turn over the goods to the receiver, whereupon he stopped the sale, allowed the receiver to put in keepers, submitted himself to the order of the court, and had not delivered any of the goods to the purchasers. He was thereafter adjudged guilty of a civil contempt, and a fine imposed, which he was ordered to pay by turning over the goods of the alleged bankrupt. *Held*, that, having submitted himself to the jurisdiction of the court, he could not complain that it had disposed of the matter summarily, instead of leaving the receiver to a plenary action.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213–215, 223–237; Dec. Dig. § 66.*]

2. CONTEMPT (§ 2*)—CIVIL AND CRIMINAL CONTEMPT.

Such auctioneer was guilty of a criminal contempt against the dignity and authority of the court, but, not having disposed of any of the goods, was not guilty of a civil contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 1–3, 5, 7, 8; Dec. Dig. § 2.*

Civil and criminal contempts distinguished, see note to Merchants' S. & G. Co. v. Board of Trade, 120 C. C. A. 593.]

Petition to revise order of the District Court of the United States for the Southern District of New York. Reversed.

N. Freeman, for petitioner.

J. Frank, of New York City, for respondent.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. [1, 2] This is an appeal from an order of the District Court adjudging Jacob Weisz, the appellant, to be guilty of a civil contempt, and imposing upon him a fine of $2,500. It is to be inferred from the order that the court below has found that Jeanette B. Newman, alleged bankrupt, made a transfer of her stock of goods to the appellant, who was a public auctioneer, with the intent of hindering, delaying, and defrauding her creditors, and that the purchase of them, though for a present consideration, was not made in good faith. As the alleged bankrupt immediately disappeared with the purchase money, her intent is quite clear.

May 16, 1913, at about 12:15 p. m., while the appellant was engaged in selling the goods in question at public auction an order of that date appointing a receiver of the property of Jeanette B. Newman was served upon him and the receiver demanded that the sale be stopped. The appellant threw the order on the floor with contemptuous expressions as to the court, saying that he was not selling the goods of Jeanette B. Newman, but goods consigned to him for sale by one Aronowitz and one Gottdiener and continued the sale. At 3:30 p. m. an order of the District Court was served upon him to show cause why he should not be punished for contempt, and directing him to turn over all the goods in question to the receiver. Thereupon he stopped the sale, allowed the receiver to put in keepers, submitted himself to the order of the court, and has not delivered any of the goods to the purchasers. Having submitted himself to the jurisdiction of the court, he cannot now complain that it has disposed of the question summarily instead

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

of leaving the receiver to a plenary action. May 21st the court found the appellant guilty of a criminal contempt, and ordered him to be confined in jail for 60 days as a punishment therefor, and also guilty of a civil contempt, and ordered him to pay a fine of $2,500 and if the same were not paid within 60 days to be imprisoned until it was paid. June 12th the court vacated the order as to the criminal contempt in view of our decision in the Matter of Kahn, 204 Fed. 581, 123 C. C. A. 107, and also vacated the injunction in the order served May 16th requiring the appellant to turn over the goods in question to the receiver. June 23d the order appealed from was entered, directing the appellant to pay the fine of $2,500 by turning over goods at his premises belonging to the alleged bankrupt appraised at that value, the balance, if any, to be paid within 10 days after the appraisal.

It will be seen that the proceedings have been in the highest degree summary. The order which the appellant is punished for disobeying is the usual order appointing a receiver. It applied only to the alleged bankrupt and to all persons having her goods in their possession. The goods in question were being sold as belonging to Aronowitz and Gottdiener and it was not a civil contempt on the part of the appellant to continue the sale in the face of that general order. When later the specific order was served, he stopped the sale, submitted himself to the jurisdiction of the court, permitted the receiver to appoint custodians of the goods, and has not delivered the goods to purchasers at the sale. Still the decree of the court subsequently made relates, and we must treat the appellant as knowing, that the goods in question belonged to the alleged bankrupt when the order appointing the receiver was served upon him. The contempt of which he was guilty seems to us to have been a criminal contempt against the dignity and authority of the court. As he has not disposed of any of the goods in question, and they are still on hand, and the receiver or trustee, if one has been appointed is entitled to take possession as against any claim of his, we do not see that he has been guilty of any civil contempt. The order is reversed.

STATE OF MISSOURI v. KETTLE RIVER CO.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1914.)

No. 3898.

CORPORATIONS (§ 652*)—FOREIGN CORPORATIONS—PENALTY FOR VIOLATION OF STATUTE—CONDITIONS PRECEDENT.

Under Rev. St. Mo. 1899, § 1025, requiring foreign corporations to file a copy of their charter and a sworn statement of the proportion of their capital invested in Missouri with the Secretary of State and to pay into the state treasury certain incorporating taxes and fees as a prerequisite to a certificate from the Secretary of State authorizing them to do business, and section 1026 imposing a penalty of not less than $1,000 for neglect or failure to comply therewith, making it the duty of the Secretary of State, when advised of a violation, to report the fact to the prosecuting attorney of the county, and providing that the prosecuting attorney shall, as soon thereafter as practicable, institute proceedings to recover such

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

penalty, a report by the Secretary of State is a condition precedent to an action by the prosecuting attorney.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2537, 2549; Dec. Dig. § 652.*

Foreign corporations doing business in state, see notes to Wagner v. J. & G. Meakin, 33 C. C. A. 585; Ammons v. Brunswick-Balke Collender Co., 72 C. C. A. 622.]

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action by the State of Missouri against the Kettle River Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Wilson Cramer, of Jackson, Mo. (Lane & Alexander and James H. Doris, all of Cape Girardeau, Mo., on the brief), for plaintiff in error.

I. R. Kelso, of Cape Girardeau, Mo. (J. G. Miller, of Cape Girardeau, Mo., on the brief), for defendant in error.

Before HOOK, ADAMS, and SMITH, Circuit Judges.

HOOK, Circuit Judge. The prosecuting attorney of Cape Girardeau county, Mo., brought an action in the name of the state against the Kettle River Company, a Minnesota corporation, to recover a penalty of $50,000 for doing business in Missouri without first obtaining from the Secretary of State a certificate of permission. The trial court held the action was brought without proper authority. The case depends on sections 1025 and 1026, Rev. Stat. of Mo. 1899. The first requires every corporation of another state organized for gain, "now or hereafter doing business within this state," to file with the Secretary of State a copy of its charter and a sworn statement of the proportion of its capital represented by its property and business in Missouri and to pay into the state treasury certain incorporating taxes and fees, as a prerequisite to a certificate from the Secretary of State authorizing it to do business. Section 1026 imposes a penalty of not less than $1,000 for neglect or failure to comply with the statute recoverable in any court of competent jurisdiction, makes it the duty of the Secretary of State, when advised of a violation, to report the fact to the prosecuting attorney of the county where the business of the corporation is located, and provides that the prosecuting attorney shall, as soon thereafter as practicable, institute proceedings, etc.

We think the trial court was right in holding it was the intent of the statute that a report by the Secretary of State should be a condition precedent to an action by the prosecuting attorney. The statute is highly penal; the fine prescribed being without limit above the sum of $1,000. An example of what might be done under it is shown by the present action in which the penalty demanded is $50,000, though the company had fully complied with the statutory requirements about six months before it was brought. Such statutes should be fairly construed to give effect to the legislative intent, but care should be taken not to go beyond. When the statute in question was enacted, it was doubtless recognized that many foreign corporations were already doing business in the state; that many others would come afterwards; and that,

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

as we all know, many violations of such laws are inadvertent and unintentional and are corrected at once upon notice. Again it is quite likely that some might be engaged in business not in a single locality but in many counties of the state, and a large number of proceedings might result in confiscation rather than an adjustment of the punishment to the offense. These and other considerations of like character may well have suggested the propriety of some supervision over the enforcement of the law and some restraint upon hasty and indiscriminate prosecutions. The office of the Secretary of State is the source of the authority of foreign corporations to engage in business in the state. The showing is made there which fixes the fees and taxes to be paid. The jurisdiction of the Secretary being coextensive with the limits of the state, his power or duty of precedent action would insure a harmonious and efficient administration of the law. Unless the clause in which the word "thereafter" appears be given the meaning attributed to it, it serves no particular purpose in the legislation; without it the prosecuting attorney would have had adequate authority under the general laws. Such restraints upon local official activities are not uncommon in legislation. An important instance may be found in section 4 of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3201]); Minnesota v. Northern Securities Co., 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870. The value of such supervision is commonly recognized. We pass the contention of the company that this action, though in the name of the state, is prosecuted by private counsel to serve private ends, also the contention that the business of the company was interstate commerce, and therefore not within the statute.

The judgment is affirmed.

PEOPLE'S ELECTRIC RY. CO. et al. v. McKEEN MOTOR CAR CO.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1914.)

No. 4012.

1. LIENS (§ 7*)—CREATION.

Liens may be created by statute or by contract or may arise from the usages of trade or commerce, but, being rights of property, cannot be created by the courts merely from a sense of justice in particular cases.

[Ed. Note.—For other cases, see Liens, Cent. Dig. §§ 26–28; Dec. Dig. § 7.*]

2. SALES (§ 481*)—CONDITIONAL SALE CONTRACT—LIEN IN PURCHASER.

Where a conditional sale contract provided that the seller should retain title and the right to retake possession on specified conditions, the purchaser, by rescinding a contract for breach of an implied warranty by the seller, could not give rise to a lien on the property to secure such claim.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1449–1455; Dec. Dig. § 481.*]

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

3. SALES (§ 479*)—CONDITIONAL SALES—BREACH OF CONDITION—RECOVERY OF PROPERTY—DEFENSES—BREACH OF WARRANTY.

In replevin by a seller to recover the property under a conditional contract of sale for the buyer's default, the latter could not successfully assert damages for a breach of the seller's implied warranty in defense.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1418–1432, 1434–1438; Dec. Dig. § 479.*

What constitutes a contract of conditional sale, see note to Dunlop v. Mercer, 86 C. C. A. 448.]

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Replevin by the McKeen Motor Car Company against the People's Electric Railway Company and another. Judgment for plaintiff on the pleadings, and defendants bring error. Affirmed.

Arthur G. Moseley, of St. Louis, Mo. (C. N. Haskell, of Muskogee, Okl., and G. W. Risser, of Ottawa, Ohio, on the brief), for plaintiffs in error.

R. W. Blair, of Topeka, Kan. (B. W. Scandrett, of Omaha, Neb., and C. A. Magaw and T. M. Lillard, both of Topeka, Kan., on the brief), for defendant in error.

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

HOOK, Circuit Judge. In an action in replevin by the seller of a chattel under a contract of conditional sale by which he reserved title and the right to possession if the purchase price was not fully paid, the purchaser who had not paid in full set up in defense a breach of implied warranty, a rescission of the contract of sale, and a claim of equitable lien on the chattel or right to retain it until reimbursed for his partial payment and some expenses.

Judgment for the seller was entered on the pleadings.

In cases of enforcement of contracts of conditional sale, circumstances not infrequently appear which make the result seem inequitable, but as was said in Bierce v. Hutchins, 205 U. S. 340, 347, 27 Sup. Ct. 524, 525 (51 L. Ed. 828):

"Such sales sometimes are regulated by statute and put more or less on the footing of mortgages. With the development of its effects there has been some reaction against the Benthamite doctrine of absolute freedom of contract. But courts are not Legislatures, and are not at liberty to invent and apply specific regulations according to their notions of convenience. In the absence of a statute, their only duty is to discover the meaning of the contract and to enforce it, without a leaning in either direction, when, as in the present case, the parties stood on an equal footing and were free to do what they chose."

[1] Liens may be created by statute or by contract or may arise from the usages of trade or commerce. They are rights of property and not mere matters of procedure (The Lottawanna, 21 Wall. 558, 579, 22 L. Ed. 654), and therefore they cannot be created here and there by the courts merely from a sense of justice in particular cases.

[2] A lien in the purchaser is not consistent with the terms of the contract before us. The parties agreed that the seller should remain

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

the owner and should have the right to retake possession upon conditions definitely specified. The purchaser cannot change this to his advantage by rescinding the contract. The effect of the rescission, if any, was to make it clear that the seller's right to possession was immediate were there otherwise doubt about it.

[3] If there was a warranty and a breach of it, the purchaser has a cause of action, but it is well settled that it cannot be asserted in defense to replevin. In Blair v. Johnson, 111 Tenn. 111, 76 S. W. 912, it was held that set-off or recoupment authorized by statute, when "arising out of plaintiff's demand" or "out of the original consideration of any written instrument," is not available to a purchaser for a breach of warranty in a conditional sale of personalty against replevin by the seller on breach of the condition. In Ryan v. Wayson, 108 Mich. 519, 66 N. W. 370, the court said:

"There is nothing to indicate that the defendant had a special interest in or lien upon those goods. He had a right to purchase them by making payment according to the contract. If, as seems to be claimed, he had a right to treat the contract as rescinded, he would certainly have no interest in the property, and at most might have a personal claim against the plaintiff for the amount paid."

See, also, Fairbanks v. Malloy, 16 Ill. App. 277.

The judgment is affirmed.

THE FLEMINGTON.

THE CAR FLOAT NO. 33.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 229.

COLLISION (§ 95*)—STEAM VESSELS CROSSING—COMMON FAULTS.

A collision in North River at night between a steamer proceeding at a speed of from 13 to 18 miles an hour and a car float in tow alongside of a tug on a crossing course *held* due to faults of both the steamer and tug; the steamer being in fault for proceeding at such speed until collision when the lights of the tug could be clearly seen, and the tug for proceeding to cross the steamer's bows contrary to signals and in violation of the rules.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*

Collision with or between towing vessels and vessels in tow, see note to The John Englis, 100 C. C. A. 581.]

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

On appeal from the District Court for the Southern District of New York by the Central Railroad Company of New Jersey, as owner of the steam tug Flemington and car float No. 33. The decree adjudged the tug solely in fault for a collision which occurred October 12, 1910, between the steamer Marlborough, and the car float No. 33, which was being towed on the tug's port side, the bow of the float extending beyond the bow of the tug. A decree was entered against the claimant of the Flemington for $2,561.28.

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

De Lagnel Berier, of New York City, for appellant.

J. Parker Kirlin and William H. McGrann, both of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The collision occurred about 5 o'clock on the morning of October 12, 1910. The weather was clear—bright starlight. The Marlborough is a passenger and freight steamboat plying between Newburgh and New York. At the time in question she was making through the water at least 13 and perhaps 18 miles per hour. It is almost impossible to tell from the testimony of the witness Dennis, who speaks upon this question, how fast she was going by the land. There is no doubt that the Marlborough was "hooked up" at the time she first sighted the Flemington and continued so until the collision. Her captain was not on deck at the time of the collision, but she had a lookout in front of the pilot house and a licensed pilot and a second pilot in the pilot house. That the Marlborough was fully manned as to numbers there can be no question, but the fact that Secor, the lookout, had been on duty for 12 hours prior to the collision, and Brooks, the steersman, had been "on watch all night, too, from 5 o'clock the night before," may, perhaps, have had some effect upon the accuracy of their observations. However, the Marlborough was a comparatively fast river steamer, easily handled and readily maneuvered. The Flemington, on the other hand, was a tug incumbered with a heavy two-track car float. She was making four miles by the land, or about one-fourth the speed of the Marlborough. The District Judge was in doubt as to the negligence of the Marlborough. He says:

"It is true that the Marlborough may have been also at fault in failing to give her (the Flemington) a wider berth. Perhaps she did not starboard as soon as she ought, yet I believe that the case is a proper one to apply the rule that when a vessel is gravely at fault, a court will not be studious to find the other vessel also in fault."

We are inclined to think that this view of the case leaves out of consideration the comparative helplessness of the encumbered tug to avoid the collision after it was possible, if not imminent. The same rules do not apply to a yacht and a mud scow. There was nothing in the elements to prevent safe navigation. It was a bright, clear night, the lights of both vessels were burning and could have been seen for at least a mile. No other vessels were in the vicinity to confuse navigation and we cannot resist the conclusion that for the Marlborough to proceed "hooked up" until she was in the jaws of collision was manifest fault. When it became clear that the Flemington, through a misunderstanding of signals, or other cause, was headed directly across the Marlborough's bow, it seems to us that the Malborough should have put her helm hard-a-port and gone off to the right under the stern of the car float. It seem almost incredible that a steamer in perfect control, seeing a heavily incumbered vessel approaching from a long distance off, cannot avoid her. The problem was so absolutely plain and simple, that we are convinced that a collision could not have occurred

without crass stupidity on the part of both vessels. It required the combined efforts of two fatuous navigators to produce the collision.

The decree is reversed with half costs and the cause is remanded to the District Court with instructions to enter a decree in favor of the libelant for half the damages of the Marlborough.

YOU FOOK HING v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 246.

1. ALIENS (§ 32*)—PROCEEDINGS FOR DEPORTATION OF CHINESE PERSON—EVIDENCE.

The certificate of a United States Commissioner that a Chinese person had a full hearing before him and was adjudged to be lawfully in the United States by reason of being a citizen thereof is not competent evidence of either of such facts in a subsequent proceeding for his deportation.

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

2. ALIENS (§ 32*)—PROCEEDINGS FOR DEPORTATION OF CHINESE PERSON—REVIEW ON APPEAL.

The concurring judgments of a commissioner and a District Court, in proceedings for the deportation of a Chinese person, on a question of fact dependent on the credibility of defendant as a witness, will not be reviewed, where there is nothing unusual or extraordinary to call for a reexamination.

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

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

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

This cause comes here upon appeal from a decision of the District Court, Southern District of New York, filed May 9, 1913, affirming a decision of United States Commissioner Shields, dated March 22, 1913, which held that defendant is a Chinese person not lawfully entitled to be and remain in the United States and ordered him to be deported.

R. M. Moore, of New York City, for appellant.

F. M. Roosa, Asst. U. S. Atty., of New York City.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Defendant after some years' residence in this country left for China via Malone, N. Y., on January 21, 1909, and made application for readmission at the same place on August 21, 1909, under the name of Mah Sum or Mar Sum, relying on a certificate dated September 24, 1897, alleged to be signed by F. B. Sexton, United States commissioner for the Western district of Texas, and certified to by Walter D. Howe, also United States commissioner for that district. The so-called Howe certificate was never issued to defendant;

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

he bought it when he left, in order to use it when he came back. He was denied admission at Malone, and turned over to the Canadian Pacific Railway Company for return to China. He went to Montreal, paid Canadian head tax, and subsequently smuggled back into the United States. He was examined under oath at Malone and again in this proceeding, making several inconsistent statements.

Practically the only contention on this appeal is that his right to enter and remain in the United States has been judicially determined in his favor. It is asserted that on March 20, 1896, the question came up on complaint of the United States attorney for the district of Vermont and was heard by Felix W. McGettrick, United States commissioner for said district, who, it is asserted, held that You Fook Hing had the lawful right to be and remain in the United States by reason of being a citizen thereof.

[1] What would be the effect of such a decision by a United States commissioner, whether or not it is a judicial determination of defendant's rights for all time, need not now be considered. There is no sufficient proof that any such inquiry was had before the United States commissioner in Vermont, or that any such decision was rendered by him. Defendant's counsel on the hearing before Commissioner Shields put in evidence a certificate, signed by McGettrick, stating that Hing had had a full hearing before him as United States commissioner and had been adjudged to be lawfully in the United States by reason of being a citizen thereof. This so-called certificate was not competent proof either of the alleged hearing or of the decision. U. S. v. Lew Poy Dew (D. C.) 119 Fed. 786; Ah How v. U. S., 193 U. S. 65, 24 Sup. Ct. 357, 48 L. Ed. 619. It should have been excluded.

[2] The only other testimony offered to show such examination and decision is that of defendant himself. Neither the commissioner nor the District Judge believed him. These two concurrent judgments dispose of the question of fact, there being nothing unusual or extraordinary to call for any re-examination. Chin Bak Kan v. U. S., 186 U. S. 201, 22 Sup. Ct. 891, 46 L. Ed. 1121. In view of the conflicting statements which the witness has made from time to time under oath, it is difficult to see how any weight could be given to his testimony.

The decision is affirmed.

J. W. CLEMENT CO. v. BROWN FOLDING MACH. CO.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 141.

1. APPEAL AND ERROR (§ 859*)—REVIEW—QUESTIONS OF FACT.
The weight of the evidence cannot be reviewed on a writ of error.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3441-3445; Dec. Dig. § 859.*]

2. FRAUDS, STATUTE OF (§ 158*)—SALES—ACTIONS FOR PRICE—ADMISSIBILITY OF EVIDENCE.
In an action for the purchase price of a machine, alleged to have been built to order, and for extra work involved in changing the size of the

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

machine after work on it had begun, where defendant pleaded the statute of frauds, the plans and blueprints according to which the machine was built were admissible to corroborate the testimony of witnesses that it was built to order, and to support the allegations as to the claim for extra work.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 373–376; Dec. Dig. § 158.*]

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

This cause comes here on appeal from a judgment of the District Court, Western District of New York, entered upon the verdict of a jury in favor of defendant in error, who was plaintiff below. The action was brought to recover the purchase price of a certain folding machine. Affirmed.

Vernon Cole, of Buffalo, N. Y., for plaintiff in error.

August Becker, of Buffalo, N. Y., for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. [1] There was a sharp controversy between the two principal witnesses as to whether the contract alleged in the complaint—an oral one—was or was not made. Defendant contends that the verdict of the jury was contrary to the weight of evidence, but that question does not come here on writ of error. If they credited plaintiff's witness, as they manifestly did, there was sufficient evidence to sustain their verdict.

[2] The only assigned error which need be considered relates to the admission of testimony. It is asserted that the machine was not of the ordinary stock design, but was of special construction. Plaintiff was allowed to introduce in evidence plans and blueprints according to which the machine was built. The trial judge seems to have admitted this testimony on the theory that it tended to show good faith on the part of the plaintiff. Without considering the sufficiency of that ground of admission, we think the testimony was competent. The statute of frauds was pleaded in defense, and it was necessary for plaintiff to show that the machine was not in stock, but was built specially to order. The testimony was corroborative of the statements of the witnesses that it was so built. Moreover the complaint included a claim for extra work involved in changing the size of the machine after work on it had begun; the testimony objected to tended to support the averment that such change was made.

The judgment is affirmed.

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

In re WATTS.

(Circuit Court of Appeals, Second Circuit. April 16, 1914.)

1. COURTS (§ 404*) — CIRCUIT COURT OF APPEALS — ORIGINAL JURISDICTION — MANDAMUS.

The Circuit Court of Appeals in aid of its appellate jurisdiction has power to grant a mandamus to compel the District Court to enter judgment in an action in order that the defeated party may have a review by writ of error.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 404.*

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

2. MANDAMUS (§ 51*)—JUDGMENT—COMPELLING ENTRY—RIGHT OF DEFEATED PARTY.

Even though the right of a defeated party to have judgment entered is only incidental to an appeal by him, it is a matter of right and not of discretion, since the right to a review by appeal or writ of error is a matter of right and there can be no such review until judgment has been entered.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 98–100; Dec. Dig. § 51.*]

3. MANDAMUS (§ 51*)—JUDGMENT—COMPELLING ENTRY—RIGHT OF DEFEATED PARTY.

A long delay by the successful party in an action to enter judgment in connection with the death of witnesses and the possible loss of evidence did not destroy the defeated party's right to have the judgment entered in order that he might sue out a writ of error.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 98–100; Dec. Dig. § 51.*]

This cause comes here upon the application of James R. Watts, plaintiff in the action of Watts v. Weston, for a mandamus to require the District Court, Southern District of New York, to enter judgment in said action. Application granted.

McLear & McLear, for petitioners.

Sullivan & Cromwell, for respondents.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. [1] The action of Watts v. Weston was tried in the Circuit Court, Southern District of New York, and verdict directed in favor of defendants April 10, 1900. A bill of exceptions was prepared and settled, but no judgment was ever entered, and therefore no writ of error was ever issued. It was, of course, the duty of the defendants to enter such judgment. Plaintiff wishing to have the trial reviewed in this court has recently requested defendant's attorneys to enter such judgment, which they refused to do. He made a similar application to the clerk of the District Court (which under the Judicial Code has succeeded to the jurisdiction of the Circuit Court). This application was refused in view of the time which had elapsed since the trial. Plaintiff then applied to the District Judge for an order directing the clerk to enter judgment. This was denied, on the ground that the right of the defeated party to insist upon an entry of the judgment

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

is not created by statute but is only a right incidental to appeal, and therefore not absolute but resting in the discretion of the court. The pending application was then made to this court. Since the mandamus asked for is manifestly in aid of the appellate jurisdiction of this court, it is within our power to grant it.

[2, 3] We do not concur with the District Judge. Even though the right to have judgment entered be "only incidental" to appeal, review by appeal or writ of error when sought to be availed of in time is a matter of right not of discretion. In form the trial judge "allows" petition of review, but when the proceedings in the trial court are such as the statute makes reviewable in the appellate court, and petition is presented within the statutory time and in the proper way—accompanied with assignments of error, bond for costs, etc.—it is the duty of the judge to "allow" it. Davidson v. Lanier, 4 Wall. 447, 18 L. Ed. 377. There can be no review by appeal or writ of error until judgment has been entered; the right of review cannot be defeated by failure of the prevailing party to enter judgment. As to the long delay which has taken place in this case, with death of witnesses and possible loss of evidence, the fault is primarily with the prevailing party, who could have set the time to appeal running at any moment. He surely cannot avail of his own neglect to deprive his adversary of all right to appeal.

Mandamus will issue to the District Court, directing entry of the judgment.

THE GEORGE HILL.

(Circuit Court of Appeals, Second Circuit. April 28, 1914.)

No. 231.

SEAMEN (§ 29*)—INJURY TO DECK HAND—LIABILITY OF VESSEL.

Evidence considered, in an action by a deck hand on a tug to recover for an injury to his hand by being caught between the bridle of a hawser he had passed to a tow and one of the bitts of the tug, and *held* insufficient to show any defect in the condition or construction of the bitt which rendered the tug liable, but rather to show that the injury was due solely to libelant's carelessness.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188-194; Dec. Dig. § 29.*]

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 dismissing a libel to recover for personal injuries sustained by a deck hand of the tug George Hill. His hand was caught between the bridle of a hawser he had passed to a barge and one of the bitts of the tug. As the strain came the bitt lifted a little and bent over out of perpendicular.

B. B. Coyne, of New York City, for appellant.

W. A. Jones, Jr., of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

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

PER CURIAM. We think the libelant was very careless when trying to lift the bridle so as to avoid its fouling the bitt, in taking hold of it *between* the line of force and the bitt, instead of at the hawser beyond the bitt. Moreover, we should suppose it was the plain duty of a deck hand who was ordered to pass the bridle of a hawser to a tow—the hawser being fast at its end to one bitt—not only to hand the eyes of the bridle to the tow, but also to watch the line to see that it did not foul anything as it payed out from his tug. This measure of attention to his particular job we are satisfied the libelant did not give. His attention was diverted, and he did not discover that the bridle was about to foul till the captain called his attention to it. That, however, is only half the case; his contributory negligence in admiralty would only divide the damages.

We find no negligence in the maneuvers of tug and tow. The real question in the case is whether or not the bitt was properly fastened in place to meet the strains it might be expected to encounter. It seems well established that bitts should be secured to a deck beam by two bolts driven diagonally down through the bitt into the beam. There are six bitts on this tug; five of them (which so far as the testimony shows have never been overhauled since construction) were thus fastened. Why the builder should have failed similarly to fasten this one is difficult to understand. There is a conflict of testimony as to whether or not these lower bolts were in before the accident. The District Judge saw all the witnesses, and apparently did not find the testimony of libelant's witnesses persuasive. We are not inclined to reverse him, especially as the particular bitt had been in service certainly for five or six years, during claimant's ownership of the tug, and, so far as the testimony shows, since 1889, when the tug was built, and had apparently withstood all ordinary strains.

Decree affirmed.

PAINE LUMBER CO., Limited, et al. v. NEAL et al.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 197.

MONOPOLIES (§ 24*) — AGREEMENT IN RESTRAINT OF TRADE — INJUNCTION — RIGHT TO RELIEF.

The carrying out of an agreement in violation of federal or state antitrust laws, or otherwise in restraint of trade, will not be enjoined at suit of a private party, not shown to have been the direct object of such agreement or to have suffered special damages.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

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

This cause comes here on appeal from a decree of the District Court, Southern District of New York, dismissing a bill in equity brought by eight corporations, located in other states and engaged in the manufacture of wood trim used in the erection of buildings. The defendants

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

are the officers or agents of the United Brotherhood of Carpenters and Joiners, five union manufacturers of wood materials, operating closed shops in competition with complainants' open shops, and a hundred or more boss carpenters or builders, all of whom are members of the Master Carpenters' Association of the City of New York engaged in the work of building in that city. Relief is prayed in the shape of an injunction to restrain all the parties defendant from acting under certain agreements into which they have entered, which agreements prevent the use of complainant's nonunion-made trim in buildings constructed in said city. It is the contention of the complainant that these agreements violated the common law, the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), the state Anti-Trust Act (Consol. Laws, c. 20, §§ 340–346), and subdivision 6 of section 580 of the Penal Law of the state of New York (Consol. Laws, c. 40).

The opinion of the District Judge will be found in 212 Fed. 259. It held that the agreements violated these laws, but that the complainants did not suffer special damage and were not entitled to private relief.

W. G. Merritt, of New York City, for appellants.

W. P. Maloney, C. M. Beattie, and F. Hulse, all of New York City, for appellees.

Before LACOMBE, ROGERS, and HUNT, Circuit Judges.

PER CURIAM. We agree with Judge Mayer that, since it clearly appears—indeed, the proposition is not disputed—that defendants' acts were not malicious nor personally directed against the individual complainants, injunctive relief, which is all they pray for, cannot be granted in this suit. The bill was, therefore, properly dismissed. Any discussion of the other questions raised, viz., whether the particular agreements or combinations are obnoxious either to the common law or to one or more of these statutes would be academic and need not now be entered into.

The decree is affirmed, with costs.

WHITFIELD, Immigrant Inspector, v. KRAWZA.

(Circuit Court of Appeals, Eighth Circuit. May 4, 1914.)

No. 3884.

HABEAS CORPUS (§ 113*)—APPEAL—BRIEFS—SPECIFICATION OF ERRORS.

While the court may at its option notice a plain error, notwithstanding the failure to comply with rule 24 of the Eighth circuit, requiring the briefs to contain a specification of errors, stating particularly in what the decree is claimed to be erroneous, it will not do so on appeal in a habeas corpus proceeding by an alien, ordered deported as having entered the country for an immoral purpose, where there is absolutely no effort to comply with the rule, no evidence can be found that the applicant en-

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

tered the United States for an immoral purpose, and she is not represented on the appeal.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 102–115; Dec. Dig. § 113.*]

Appeal from the District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

Habeas corpus by Bransilawa Krawza against Samuel L. Whitfield, as Immigrant Inspector. From an order discharging the applicant, the Immigrant Inspector appeals. Appeal dismissed.

Marcellus L. Temple, U. S. Atty., of Osceola, Iowa, for appellant.

Before HOOK, ADAMS, and SMITH, Circuit Judges.

SMITH, Circuit Judge. Bransilawa Krawza was born in Lithuania. Her mother having moved to Des Moines, Iowa, Bransilawa Krawza followed her about October, 1910. At that time she was approximately 18 years old. On June 26, 1911, a warrant was issued for her arrest, and after a hearing before an immigrant inspector she was ordered deported from the United States, because she entered this country for an immoral purpose. She sued out a habeas corpus, and under it was discharged, and the immigrant inspector appeals.

We have read with care all the evidence taken before the immigrant inspector, and upon which she was ordered deported, and all the evidence taken before the District Court of the United States for the Southern District of Iowa, but we find none that she entered the United States for an immoral purpose.

Rule 24 of this court requires that briefs shall contain a specification of the errors relied upon, and in cases brought here by appeal the brief shall contain a specification of errors, which shall state as particularly as may be in what the decree is alleged to be erroneous, and that errors not specified according to the rule will be disregarded; but the court may, at its option, notice a plain error not specified. There has been absolutely no effort to comply with this rule in the brief filed by the appellant.

With the conviction that the order of deportation was improvidently made, and with the immigrant not here represented, we must decline to exercise the option, and this appeal is dismissed, under the fourth subdivision of rule 24.

MUNSON S. S. LINE v. ELSWICK STEAM SHIPPING CO., Limited.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 179.

SHIPPING (§ 40*)—CHARTERS—TERMINATION OF TIME CHARTER—REDELIVERY—WAIVER OF PROVISION.

Where the provision of a time charter party as to the place of redelivery creates an obligation of the charterer to the owner, the latter may waive it and resume possession at another port on expiration of the term, when it is to his advantage.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 40.*]

*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.

For opinion below, see 207 Fed. 984.

C. S. Haight, of New York City, for appellant.

J. P. Kirlin and John M. Woolsey, both of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. This decree is affirmed on Judge Veeder's opinion, with the note that we do not find it necessary to pass upon what the rights of the parties would have been if the charterer had been in a position to load at Buenos Aires before the expiration of the flat term of six months; nor to inquire which party would benefit most by redelivery of the steamer in the United Kingdom. Doubtless a charter party may be drawn so as to make such redelivery a privilege from the owner to the charterer, but in this charter such redelivery is a contractual obligation of the charterer to the owner, and as such the owner may waive it.

PINELAND CLUB et al. v. SANDERS et al.

(Circuit Court of Appeals, Fourth Circuit. February 27, 1914.)

No. 1179.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston.

Action at law by Pauline Sanders and others against the Pineland Club and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

See, also, Pineland Club v. Roberts, 213 Fed. 545, 130 C. C. A. 125.

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.

SHERMAN-CLAY & CO. v. SEARCHLIGHT HORN CO.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1914.)

No. 2,306.

1. PATENTS (§ 274*)—ACTION FOR INFRINGEMENT—EVIDENCE.
In an action at law for infringement of a patent for a horn for phonographs and similar machines, where the claims in suit described the invention as a horn larger at one end than at the other, and tapered in the usual manner, composed of longitudinally arranged strips, tapered from one end to the other, and secured together at their edges, and the outer side thereof at the points where such strips are secured together being provided with longitudinal ribs, substantially as shown and described, it was not error to permit the jury to take into consideration the configuration and shape of the horn as shown in the specification, and drawings showing it to be an operative device.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 419–421; Dec. Dig. § 274.*]

2. PATENTS (§ 276*)—ACTION FOR INFRINGEMENT—INSTRUCTIONS.
An instruction, in an action for infringement, that "in a doubtful case, if it appears by the evidence that the patented device has gone into general use and has superseded prior devices having the same purpose, that fact is sufficient evidence of invention" *held* not erroneous, where the evidence showed without contradiction that the device of the patent at once superseded all prior devices for the same purpose in the market, and there was no evidence to show that its success was due to any other cause than its merits.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 240, 432–434; Dec. Dig. § 276.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—HORN FOR TALKING MACHINES.
The questions of the validity and infringement of the Nielsen patent, No. 771,441, for a horn for phonographs or similar machines, as against the defenses of anticipation, lack of invention, and noninfringement, *held* properly submitted to the jury and by proper instructions in an action for its infringement, and a verdict for plaintiff *held* supported by the evidence.

In Error to the District Court of the United States for the Second Division of the Northern District of California; William C. Van Fleet, Judge.

Action by the Searchlight Horn Company against Sherman-Clay & Co., a corporation, for infringement of letters patent No. 771,441, for a horn for phonographs or similar machines granted to Peter C. Nielsen October 4, 1904. Judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 214 Fed. 99.

On April 14, 1904, one Peter C. Nielsen, a resident of Greenport, in the county of Kings, state of New York, filed in the United States Patent Office his application for a patent for certain new and useful improvements in horns for phonographs or similar machines. The object of the invention, as set forth in the specification, was to provide a horn for machines of the class designated, which would do away with the mechanical, vibratory, and metallic sound usually produced in the operation of such machines, and also produce a full, even, and continuous volume of sound in which the articulation would be clear, full, and distinct. Accompanying the specification, and form-

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

ing a part thereof, were filed drawings on which were delineated the separate parts of the improvement for which patent was sought. A sketch of the drawings filed with the specification is hereto attached.

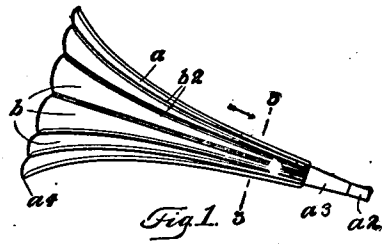

Fig. 1.

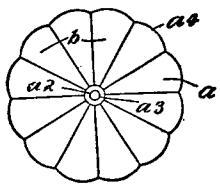

Fig. 2.

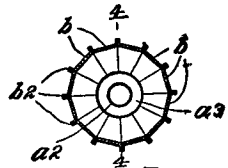

Fig. 3.

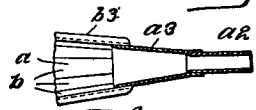

Fig. 4.

The specification described a horn, *a*, provided at its smaller end with a nozzle-piece, *a2*, by means of which connection was made with the machine. In the form of construction shown in the drawings a supplemental piece, *a3*, was employed between the larger or body portion of the horn and the nozzle-piece; but it was stated in the specification that the parts *a3* and *a2* might be formed integrally. The main or body part of the horn, *a*, was bell-shaped in form and tapered outwardly gradually from the part *a3* to the larger or mouth end, *a4*, and this curve or taper was greater or more abrupt adjacent to the larger or mouth end. The body portion of the horn was composed of a plurality of longitudinal strips, *b*, which were gradually tapered from one end to the other, and which were connected longitudinally so as to form the longitudinal ribs *b2*. Each of the strips *b* was provided at its opposite edges with a flange, *b3*, and these flanges of the separate strips *b* were connected to form the ribs *b2*. The strips *b* forming the body portion of the horn were made of sheet metal, and when placed together the strips were so arranged that the body portion of the horn, in cross section, was made up of a plurality of short lines forming substantially a circle. In the language of the specification, it was the construction of the body portion of the horn, as shown on the drawings, that gave to the horn the qualities which it was the object of the invention to produce, those qualities being the result of the formation of the body portion of the horn by the longitudinal strips *b*, providing the outer surface thereof with the longitudinal ribs *b2*, and curving the body portion of the horn in the manner described. It was the longitudinal ribs *b2* which, in the opinion of the applicant, contributed mostly to the successful operation of the horn; the ribs serving to do away with the vibratory character of horns of that class as usually made, and doing away with the metallic sound produced in the operation thereof. The specification also provided that changes in and modifications of the construction described might be made without departing from the spirit of the invention, or sacrificing its advantages.

The claims of the invention for which patent was sought were as follows:

"1. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally-arranged strips of metal provided at their edges with longitudinal outwardly-directed flanges, whereby said strips are connected, and whereby the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs, substantially as shown and described.

"2. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally-arranged strips of metal provided at their

edges with longitudinal outwardly-directed flanges whereby said strips are connected, and whereby the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs; said strips being tapered from one end of said horn to the other, substantially as shown and described.

"3. A horn for phonographs and similar machines, said horn being tapered in the usual manner, and the body thereof on the outside thereof being provided with longitudinally-arranged ribs, substantially as shown and described."

It appears from the file-wrapper that claim No. 3, as above set forth, was rejected by the Examiner of Patents, the Examiner holding that it would not constitute patentable invention to provide a horn with longitudinal ribs, in view of the transverse ribs of patent No. 181,159, for a toy blow horn, issued to C. W. Fallows on August 15, 1876, and the longitudinal rib of English patent No. 20,557, for an improvement for phonographs, issued to John Mesny Tourtel by the British government on August 20, 1903.

The application was thereupon amended by the applicant by inserting the following claim, which was numbered 4:

"4. A horn for phonographs and similar machines, said horn being tapered in the usual manner and the body thereof on the outer side thereof being provided with longitudinally-arranged ribs between which the longitudinal parts of the horn taper from one end to the other, substantially as shown and described."

In a letter forwarded to the Patent Office with the above amendment, it was stated by the solicitors for the applicant that the references cited by the examiner did not show a horn for talking machines having longitudinally-arranged ribs on the outer side thereof; that the invention of C. W. Fallows showed spirally-arranged ribs, but that this in no sense anticipated the applicant's invention; that such an arrangement of the ribs would make the horn vibrate more, and cause more of a metallic sound than if no ribs at all were formed on it; and that it was the longitudinally-arranged ribs on the outer side of the horn which produced the result claimed by the applicant.

The amendment numbered 4 was also rejected by the Examiner of Patents; the Examiner stating that the applicant's horn as described in claims 3 and 4 was considered the equivalent of a part of a patent for an audiphone issued to J. Clayton on October 18, 1898.

Prior to the rejection of claim No. 4, the following supplemental amendment, numbered 5, was forwarded to the patent office by the applicant:

"5. A horn for phonographs and similar instruments, said horn being larger at one end than at the other, and being composed of longitudinal-tapered strips which are secured together at their edges, substantially as shown and described."

Subsequently the following amendment, numbered 6, was added:

"6. A horn for phonographs and similar instruments, said horn being larger at one end than at the other, and tapered in the usual manner, said horn being composed of longitudinally-arranged strips secured together at their edges, and the outer side thereof at the points where said strips are secured together being provided with longitudinal ribs, substantially as shown and described."

In a communication forwarded to the Patent Office by the solicitors for the applicant, together with the amendment numbered 6, it was stated that the Clayton patent had been carefully considered, that no similarity therein to the applicant's device, either in construction or operation, could be seen; that the object of the applicant's construction was to destroy the vibratory character of a phonographic horn, and that this could not be done by corrugating the horn, as all forms of corrugations increase the vibration instead of diminishing it.

In reply to the last-mentioned letter, the Examiner of Patents stated that it was believed that it could not constitute a patentable invention to provide any horn with longitudinal stiffening ribs to render the horn perhaps less vibratory. The claims numbered 3, 4, and 5 were therefore held to be devoid of patentable novelty and invention, in view of the prior art as exhibited by the patents cited, together with a patent for a horn for sound recording and producing apparatus, issued to G. Osten and W. P. Spaulding, on July 22, 1902. The claim numbered 6 was allowed, and was inserted in the specification as claim No. 3; the claims as allowed then reading as follows:

"1. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally-arranged strips of metal provided at their edges with longitudinal outwardly-directed flanges whereby said strips are connected, and whereby the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs, substantially as shown and described.

"2. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally arranged strips of metal provided at their edges with longitudinal outwardly-directed flanges whereby said strips are connected and whereby the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs; said strips being tapered from one end of said horn to the other, substantially as shown and described.

"3. A horn for phonographs and similar instruments, said horn being larger at one end than at the other and tapered in the usual manner, said horn being composed of longitudinally-arranged strips secured together at their edges, and the outer side thereof at the points where said strips are secured together being provided with longitudinal ribs, substantially as shown and described."

On October 4, 1904, a patent was duly and regularly issued by the Commissioner of Patents, covering the invention of the applicant as described in the three claims last set forth. On February 5, 1905, the patentee sold, transferred, and assigned all of his right, title, and interest in and to the patent so issued to him to one Christian Krabbe. The patent was subsequently assigned by Krabbe to the United States Horn Company, a corporation, and on January 4, 1907, the last-named corporation assigned all of its right, title, and interest in and to the patent to the plaintiff herein, the Searchlight Horn Company, a corporation organized and existing under and by virtue of the laws of the state of New York.

The defendant, Sherman-Clay & Co., is a corporation organized and existing under and by virtue of the laws of the state of California, and it was alleged in the declaration filed by the plaintiff that the defendant had, since the 4th day of January, 1907, continuously used and sold from day to day horns for phonographs containing and embracing the inventions described, claimed, and patented in and by the letters patent issued to Nielsen by the United States of America on October 4, 1904, without the license or consent of the plaintiff; that the horns used and sold by the defendant were known as "Victor Phonographic Horns," and were made according to the specification of the letters patent issued to Nielsen, and constituted an infringement upon each and all of the claims therein contained. In the answer filed by the defendant all of the allegations of the declaration were denied. The action was tried before a jury. At the trial of the case the plaintiff abandoned the claim numbered 1 of the specification, electing to rely upon the claims numbered 2 and 3. At the close of the testimony, the defendant moved the court to direct the jury to find a verdict in its favor, the motion being based on the grounds: First, that claims 2 and 3 of the patent in suit were void for want of patentable invention; and, second, that neither of the claims had been infringed by the defendant. The motion for a directed verdict was denied. A verdict was rendered in favor of the plaintiff, and damages against the defendant were assessed by the jury at the sum of $3,578. Judgment was entered against the defendant for the amount of $3,578, but subsequently the plaintiff voluntarily remitted all of the judgment, with the exception of $1, and an amended judgment was thereupon entered for the latter amount. From the judgment entered against the defendant in the court below, a writ of error has been prosecuted to this court.

Nicholas A. Acker and J. J. Scrivner, both of San Francisco, Cal., and Horace Pettit, of Philadelphia, Pa., for plaintiff in error.

John H. Miller and Wm. K. White, both of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). 1. The first question to be determined is the scope of the invention involv-

ed in this case. In the application of Nielsen for a patent he set forth that he had invented certain new and useful improvements in horns for phonographs or similar machines, and that the object of his invention was to—

"do away with the mechanical, vibratory, and metallic sound usually produced in the operation of such machines, and also produce a full, even, and continuous volume of sound in which the articulation is clear, full, and distinct."

He described his improvement in the usual specification and drawings, from which it appears that the horn is provided at the smaller end with a nozzle piece, by means of which connection is made with the phonograph or other machine. A supplemental piece is employed to connect the nozzle piece with the larger or body portion of the horn, but these parts may be formed integrally. This larger or body portion of the horn is bell-shaped in form, and tapers outwardly gradually from the supplemental piece to the larger or mouth end of the horn. The curve or taper of the horn is greater or more abrupt adjacent to the larger or mouth end of the horn. The body portion of the horn is described as composed of a plurality of longitudinal strips gradually tapered from one end to the other, and connected longitudinally so as to form longitudinal ribs, each of the strips being provided at its opposite edges with flanges, and these flanges of the separate strips being connected to form the ribs. The strips are composed of sheet metal, and the inner wall of the body portion of the horn is made up, in cross section, of short lines forming substantially a circle. It is in the construction of this body portion of the horn that Nielsen's alleged improvement is located, and which it is claimed gives to the horn the qualities which it is the object of the invention to produce. More specifically it is declared that the improvement consists in forming the horn, or the body portion thereof, of longitudinal strips and providing the outer surface of the horn with longitudinal ribs, and curving the body portion of the horn in the manner described. It is declared further that it is the longitudinal ribs which contribute mostly to the successful operation of the horn, the ribs serving to do away with the vibratory character of horns of this class as usually made, and doing away with the metallic sound produced in the operation thereof. The claims of the patent are as follows:

"1. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally-arranged strips of metal provided at their edges with longitudinal outwardly-directed flanges whereby said strips are connected, and whereby the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs, substantially as shown and described.

"2. A horn for phonographs and similar machines, the body portion of which is composed of longitudinally-arranged strips of metal provided at their edges with longitudinal outwardly-directed flanges whereby said strips are connected, and whereby the body portion of the horn is provided on the outside thereof with longitudinally-arranged ribs, said strips being tapered from one end of said horn to the other, substantially as shown and described.

"3. A horn for phonographs and similar instruments, said horn being larger at one end than at the other and tapered in the usual manner, said horn being composed of longitudinally-arranged strips secured together at their edges, and the outer side thereof at the points where said strips are secured to-

gether being provided with longitudinal ribs, substantially as shown and described."

In the Patent Office, in support of a proposed amendment to a pending claim, it was contended by the attorneys for Nielsen that it was "the longitudinally-arranged ribs on the outer side of the horn that produced the result claimed by applicant." We find accordingly "longitudinally-arranged strips" an element in each of the three claims of the patent. In claims 1 and 2, these "longitudinally-arranged strips" form on the outside of the horn "longitudinally arranged ribs" and in claim 3 "longitudinal ribs." The other elements claimed by Nielsen are: In claims 1 and 2 these strips are of "metal." In claim 3 the word "metal" is omitted. In claims 1 and 2 these strips are "provided at their edges with longitudinal outwardly directed flanges, whereby said strips are connected, and whereby the body portion of the horn is provided on the outside thereof with longitudinal ribs." In claim 3 the strips are "secured together at their edges" (outwardly directed flanges omitted), "and the outer side thereof, at the points where said strips are secured together, being provided with longitudinal ribs." In claims 1 and 3 the shape of the strips is not given. In claim 2 they are described as "said strips being tapered from one end of said horn to the other," and in claim 3 the horn is described as "being larger at one end than at the other and tapered in the usual manner."

The essential differences between claims 1, 2 and 3 are therefore: In claims 1 and 2 the strips are of "metal"; in claim 3 they are not required to be of "metal." In claim 1 the "strips of metal" are not "tapered from one end of said horn to the other" as in claim 2, and in claim 1 the horn is not "larger at one end than at the other," as in claim 3, and is not "tapered in the usual manner" as in claim 3. In claims 1 and 2 the "strips of metal" are provided at their edges "with outwardly-directed flanges." In claim 3 they are "secured together at their edges."

In claims 1 and 2 the "metal strips" are connected together by means of the "longitudinal outwardly-directed flanges," and, being so connected, the body of the horn is "provided on the outside thereof with longitudinally-arranged ribs." In claim 3 the "longitudinally-arranged ribs" are "secured together at their edges, and the outer side thereof * * * where said strips are secured together being provided with longitudinal ribs."

This comparison of the various elements of the claims identifies the essential element of the improvement as the "longitudinally-arranged strips," providing the horn on the outside thereof with "longitudinally-arranged ribs." By dropping claim 1, we find that the strips are tapered from one end of the horn to the other, and the horn is larger at one end than at the other and tapered in the usual manner.

The case was tried before the court and a jury. The attorney for the plaintiff, in his opening statement to the jury, described the Nielsen horn, and said "it was of a shape with a large, flaring mouth"; that the horn was made "into sections shaped like a bell, so that it has a big, broad, flaring mouth." Upon the cross-examination of the first witness introduced by the plaintiff, the court inquired about the claims

of the patent, and wanted to know what they were. The attorney for the plaintiff announced that they relied upon claims 2 and 3, thus eliminating claim 1, and placing the case upon the elements contained in claims 2 and 3. These elements, as has already been stated, described a horn larger at one end than at the other and tapered in the usual manner, and composed of longitudinally-arranged strips, tapered from one end of the horn to the other, these longitudinally arranged strips providing the horn on the outside thereof with longitudinally-arranged ribs. The specification and the accompanying drawings showed a horn, bell-shaped in form, tapering outwardly from the smaller end to the larger or mouth end; the curve or taper at the larger or mouth end being greater or more abrupt adjacent to the larger or mouth end.

[1] It is objected that an improvement of the form or shape here described is not contained in either of the claims, and is therefore no part of the Nielsen invention. The statute (section 4888 of the Revised Statutes [1]) requires that an applicant for a patent "shall" in his application "particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery." It has accordingly been held that the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the Patent Office. Keystone Bridge Co. v. Phœnix Iron Works, 95 U. S. 274, 278, 24 L. Ed. 344. But in Seymour v. Osborne, 11 Wall. 516, 547 (20 L. Ed. 33) it was held that:

"Where the claim immediately follows the description of the invention, it may be construed in connection with the explanations contained in the specifications; and, where it contains words referring back to the specifications, it cannot properly be construed in any other way."

In McCarty v. Lehigh Valley Railroad Co., 160 U. S. 110, 116, 16 Sup. Ct. 240, 242 (40 L. Ed. 358) it was held that reference may be had to the specification and drawings for the purpose of "showing the connection in which a device is used, and proving that it is an operative device." In the light of these and other decisions that might be cited, we see no reason why the court should not refer to the specification and drawings for the construction of the elements of the claims relating to a horn composed of "strips tapered from one end of the horn to the other" and a horn "larger at one end than the other, and tapered in the usual manner," and, when so construed, we find the device operative in the form constructed. But there is a further reason why this objection cannot prevail. No objection was made to the opening statement of plaintiff's attorney describing the shape of the horn as shown by the specification and drawings, and no objection was made to the introduction of testimony and exhibits showing the construction of such a horn, and no objection was made to that part of the instructions of the court to the jury wherein the shape of the horn as described in and shown by the specification and drawings was stated by the court to be part of the Nielsen invention and covered by the claims of the patent.

[3] 2. It is next contended by the plaintiff in error that the patent issued to Nielsen was void for lack of invention. There is a presumption of novelty that always attends the grant of a patent, and the burden of proof is always on the defendant to establish its want of novel-

[1] U. S. Comp. St. 1901, p. 3383.

ty. Singer v. Brill, 54 Fed. 380, 4 C. C. A. 374. The testimony at the trial of this case tended to show that at the date of the issuance of the patent to Nielsen, and prior thereto, horns for phonographs and similar machines most commonly used were constructed of a single piece of tin, cut in the general shape of a triangle, and folded or bent around a form until the longitudinal edges met; these edges being fastened together by what was known in the tin smith art as a lock seam. The lock seam was made by bending portions of the metal outwardly along the longitudinal edges, thus forming flanges, one of which was made longer than the other. The longer flange was then bent down over the shorter. The interlocked flanges thus formed were then flattened down upon themselves and upon the body of the horn, forming a rib or seam on the outside thereof. The essential differences between a horn such as that just described, which the testimony tended to show was in general use at the time of the issuance of the patent to Nielsen, and a horn such as that described in and shown upon the specification and drawings of that patent are very obvious. The patent of Nielsen described a horn composed of a plurality of strips of metal, joined together along their longitudinal edges by means of outwardly directed flanges. In the horns in use at the date of the Nielsen patent the angle assumed by the tapering sides remained the same throughout the entire length of the horn. In the Nielsen horn the strips of metal, as has already been explained, were so shaped that when joined together the form assumed by the horn was that of a bell, or, as designated by the inventor, a flower. Whether this construction of the Nielsen horn constituted invention was a question of fact for the jury, and which the court submitted to the jury with appropriate instructions.

[2] It is contended, however, that the following instruction was error:

"No * * * exact definition can readily be given you of what constitutes invention as distinguished from mere mechanical skill; but there is one established principle or rule which can be easily understood and followed in determining that question whenever the facts of the case make it applicable. That rule is that in a doubtful case, if it appears by the evidence that the patented device has gone into general use and has superseded prior devices having the same purpose, that fact is sufficient evidence of invention, and will justify a jury in deciding that the patent involves invention and is valid.

"If you find, therefore, that this is a doubtful case on the question of invention, and that after Nielsen's horn became known it went into general use and superseded the prior devices having the same purpose and theretofore used, you will be justified in giving effect to those facts in accordance with the rule pointed out, by finding that the device involved invention."

It is conceded by the plaintiff in error that where a device has gone into general use and has superseded all other devices having the same purpose, the fact is persuasive evidence of invention, and where that question is in doubt, the court might so instruct the jury. But it is contended that when the court instructed the jury that it was sufficient evidence of invention, the court was in error. The instruction must be considered with reference to the evidence to which it relates. Witnesses on behalf of the plaintiff had testified that after the Nielsen flower horns were introduced to the market everybody used them on their machines; that they were bought by everybody, by agents, by the dry

goods stores, by the department stores and everybody. Everybody wanted them. Nobody wanted the old-style horns. There was no evidence tending to show that this extensive use of the Nielsen horns was due to any other cause than that of merit of the device; there was no evidence of greater business efforts or advertising in bringing the horns to the attention of the public. This fact taken in connection with the evidence of general and extensive use, was admittedly persuasive evidence, and, if persuasive, it must have been sufficient under all the circumstances.

In Morton v. Llewellyn, 164 Fed. 692, 697, 90 C. C. A. 514, 518, this court said:

"Apart from the presumption of novelty that always attends the grant of a patent, the law is that where it is shown that a patented device has gone into general use, and has superseded prior devices having the same purpose, it is sufficient evidence of invention in a doubtful case."

[3] The giving of the other instructions on the subject of lack of invention is not assigned as error. We conclude, therefore, on this branch of the case, that the motion of the defendant, made at the close of the testimony, that the jury be directed to find a verdict in its favor upon the ground that the claims of the patent were void for want of patentable invention was properly denied. The whole question, under the testimony, was for the jury, and it was clearly and accurately submitted to them under the instructions given.

3. It is next contended that the court should have directed the jury to return a verdict in favor of the defendant for the reason that the patent was void on the ground of anticipation. In support of this contention, the defendant introduced in evidence patents issued by the United States of America, and also by the British government, for a lamp shade, a speaking trumpet, a toy blow horn, a sheet metal pipe, a ship ventilator, and various other articles having a general outline similar to that of a horn for phonographs. The very obvious objection to these patents as tending to prove that the patent issued to Nielsen for phonograph horns was void for anticipation is that they were all for articles other than phonograph horns, and consequently qualities claimed by Nielsen to be resultant in a phonograph horn by reason of the arrangement of strips of metal in a certain manner, and fastened together in a specified way, would be entirely lacking in any other instrument or article formed in any manner whatsoever. We shall not, therefore, attempt to set forth the distinguishing features of, or draw comparisons between, the horn for phonographs and similar machines patented by the letters issued to Nielsen, and the articles described in the various American and British patents introduced in evidence. Such procedure would serve no useful purpose, nor would it assist us in any degree to a solution of any of the questions arising on this appeal.

There was, however, introduced in evidence a patent issued by the Patent Office of the United States on September 29, 1903, to one G. H. Villy, for a horn for phonographs, ear trumpets, etc., and it is this patent on which the defendant strongly relies in support of its contention that the patent issued to Nielsen should have been held void for

anticipation. The object of the Villy patent, as set forth in the specification, was to provide a horn or trumpet like device which could be folded when not in use, so as to be capable of ready transportation, and which could be placed within the case of the phonograph, or in the pocket of the user, when it was to be applied to an ear instrument, or the like. The horn was to be made of a series of strips of paper, wood, linen, or other preferably flexible material, and there was to be a hinge-like connection between each of the strips. In substance, the claims of the patent were for a collapsible but self-sustained phonograph horn, ear trumpet, or the like, composed of a number of flexible strips having curved meeting edges and flexible connections between such edges. In brief, the great object of the Villy patent was a horn made of strips of flexible material joined by means of flexible connections at the edges in such manner that the whole would be collapsible. There was not involved in the Villy patent, as in the horn described in the Nielsen patent, the problem of preventing tintinnabulation or metallic resonance; and, indeed, in a horn composed of strips of paper, wood, linen, or other flexible material, such as Villy proposed to use in the structure of his horn, no precautions against tintinnabulation would, in the nature of things, have been necessary. In the material of which the strips were to be made, in the method by which they were to be joined, and in the primary object to be attained, the Villy and the Nielsen horns were vastly dissimilar. The Villy horn was made of strips of paper, wood, linen, or other flexible material; the Nielsen horn was made of strips of metal. The strips of the Villy horn were joined at their edges with flexible connections; the strips of the Nielsen horn were connected at their edges by means of longitudinal outwardly-directed flanges, forming a solid rib or seam on the outside of the horn. The primary object sought in the Villy horn was that it might be collapsible; the great object of the Nielsen horn was the prevention of metallic resonance or tintinnabulation. In no sense, as we view it, can the horn described in the Villy patent be deemed an anticipation of the horn described in the patent issued to Nielsen. Experts called at the trial of the case testified that the two horns were dissimilar in formation and in principle.

In this connection we may notice an error assigned relating to the refusal of the court to admit in evidence a reissue of the Villy patent dated January 30, 1906. The plaintiff in error offered the reissued patent in evidence at the trial. The defendant in error objected on the ground that it was not prior to the patent in suit; that is to say, the patent in suit is dated October 4, 1904, and the reissued Villy patent is dated January 30, 1906, and that the latter could have no effect in construing the prior patent to Nielsen. No satisfactory answer was made to this objection in the court below. The objection was accordingly sustained, and the reissued patent excluded. This patent is not in the record, and we are not able to form any opinion as to its elements. It appears that the United States Horn Company, the predecessor in interest of the defendant in error, purchased the original Villy patent, and thereafter, contending that broader claims should have been allowed, applied for and obtained a reissue of the patent. It is con-

tended that it was important that the reissued patent should have been admitted in evidence for a number of reasons, among others that the defendant in error had marked its horns with the Villy reissued patent of January 30, 1906, and also with the Nielsen patent in suit; thereby admitting, it is contended, that the Nielsen horn was constructed under the Villy reissued patent, as well as under the Nielsen patent, and that the reissued patent was the connecting link between the original Villy patent and the Nielsen patent. What merit there is in these contentions we are unable to determine from the record before us, but, giving to the statement of the plaintiff in error full credit for all that is claimed for the reissued patent, we do not see how it was material or relevant to any issue before the court.

4. The failure of the court below to give to the jury certain instructions requested by the defendant on the subject of anticipation is assigned as error. We have carefully examined the instructions given by the court, and we find that they include, in substance, all of the instructions asked for by the defendant. We find no error in the statement of the law therein contained, and, in fact, none of the assignments of error are based upon the instructions on the subject of anticipation as given by the court.

5. The next question is that of infringement. The horns for phonographs, as at first manufactured by Nielsen under the patent issued to him, and later for a short period by his assignees, were composed of metal strips joined together along their longitudinal edges by means of outwardly directed flanges, as described in the specification and shown in the drawings thereto annexed. This method of connecting the strips consisted in bending portions of the metal outward along the longitudinal edges, at a right angle to the body portion of the strip of metal. The two outstanding flanges thus formed were then placed together and held securely and rigidly in place by means of solder. But it appears from the testimony that shortly after the United States Horn Company, one of the successors in interest of Nielsen, acquired title to the patent, they found the above method of joining the strips of metal to be very expensive, and, in order to make the cost price of the horns as low as possible, they substituted for the method of joining the strips by means of soldered flanges the method known in the art of tin smithing as a lock seam, made, as we have heretofore stated, by bending portions of the metal outward along the longitudinal edges, thus forming flanges, one of which was made longer than the other. The longer flange was then bent down over the shorter, and the interlocked flanges thus formed were bent down upon themselves and upon the body of the horn, forming a rib or seam on the outside thereof.

The horns sold by the defendant, and which were claimed by the plaintiff to be an infringement of the patent granted to Nielsen, were formed by metal strips of precisely the same shape as those employed in the Nielsen horn, and, when placed together, formed a horn having precisely the same outline as the horn described in the Nielsen patent. But in the horns alleged to be infringements of the Nielsen patent, the metal strips were connected by means of the lock seam. It is not contended by the defendant that their horns differed in any respect what-

ever from the Nielsen horns, save and except in the manner of joining together the strips of metal of which they were composed. And it is this difference in the method of joining the strips which the defendant relies upon in support of its contention that the horns which it was charged with having sold do not constitute an infringement of the Nielsen patent. The answer of the plaintiff to this contention is that the lock seam, as a means of joining two strips of metal employed in the construction of a phonograph horn, is the mechanical equivalent of longitudinal outwardly-directed flanges, and that both methods of joining the strips answer the same purpose and accomplish the same result in substantially the same manner.

There was testimony tending to support each of these contentions. Baldwin Vale, a patent expert called on behalf of the plaintiff, testified that a lock seam such as that used in the horns sold by the defendant would correct or minimize the tintinnabulation or vibratory disposition of the strips just as the flanges described in the patent in suit; that any horn having a thickening of metal in the longitudinal seam between the strips of tin accomplished the formation of a rib for the purpose of removing the vibratory and mechanical sound from the horn. This witness also testified that the clause in the specification that changes in and modifications of the construction described might be made without departing from the spirit of the invention or sacrificing its advantages covered means for destroying mechanical noise and vibration equivalent to the means described in the specification and shown on the drawings. On the other hand, William H. Smyth, an expert called by the defendant, testified that in his opinion there was no such problem as taking care of vibrations of metal in the construction of phonograph horns, and that such a problem never existed. In this condition of the testimony we are of opinion that the action of the trial judge in denying the motion of the defendant for a directed verdict on the ground that the claims of the Nielsen patent had not been infringed by the defendant was without error, and that the instructions requested by the defendant, in substance, to the effect that the lock seam employed in the horns sold by them was not a mechanical equivalent of the flange used in the Nielsen horn, and constituted no infringement thereof, were properly refused. The whole question of infringement was left to the jury, and they were instructed on that subject as follows:

"The defendant contends that, even if the Nielsen patent is valid, the defendant has not infringed upon any of its claims, and in that behalf it is pointed out and relied upon by the defendant that the metal strips constituting the plaintiff's horn are secured together by a seam or joint known as a flanged or butt seam. The difference between those seams has been explained to you by the witnesses. Now, while it is true that the drawings of the Nielsen patent show only flanged or butt seams, and not the lock seam specifically, and while it is true that the specification described only the flanged seam, nevertheless it is urged by the plaintiff that the lock seam is the mechanical equivalent of the flanged or butt seam, and was known as such mechanical equivalent in the tinsmith art long prior to the time when Nielsen made his invention. Now, if you are satisfied from the evidence that the lock seam is the mechanical equivalent of the flange or butt seam as a seam and strengthening rib, then the fact that the defendant has substituted and used the lock seam will not be sufficient to disprove infringement of the Nielsen patent;

and in this connection I charge you that in patent law two things are mechanical equivalents when they both accomplish substantially the same results in substantially the same manner, although they may differ somewhat in form and details of construction. The law does not require a patentee to put into his patent all the different forms in which his invention may be embodied. He is required to illustrate in his patent only one form, which must be the best form in which he has contemplated embodying his invention, and, after he has done that, then the patent covers other forms which are the mechanical equivalent of the one shown in the patent. And, furthermore, in this connection, you have a right to consider the clause in the Nielsen patent, that is: 'Changes in and modifications of the construction described may be made without departing from the spirit of my invention or sacrificing its advantages.' If, therefore, you find that at the date of Nielsen's invention the lock seam was a mechanical equivalent of the flanged or butt seam in the sheet metal art, and that they both accomplish the same result in substantially the same manner as a seam and rib when used in phonograph horns, then you must find that the two things are mechanical equivalents, and that the defendant is not relieved from the change of infringement merely because its horns use the lock seam instead of the flanged or butt seam."

In the instructions requested by the defendant on the subject of infringement, the refusal to give which is assigned as error, there were set forth the several amended claims sought to be included in the application for patent filed by Nielsen, and which were rejected by the Patent Office. In and by the requested instructions, the jury was informed that Nielsen was limited by the Patent Office in the construction of his horn to the identical method of joining the strips of metal shown in the drawings and described in the specification; and the jury was virtually required, if it found that the means of joining the strips employed by the defendant differed in any respect whatsoever from the means of joining the strips described in the specification and shown on the drawings of the Nielsen patent, to render a verdict for the defendant. Obviously, the giving of such instructions would have been error, for by them the whole doctrine of mechanical equivalents, which, under well-established rules, pertains and attaches to all inventions, would have been taken from the jury, and it would have been directed as to the verdict which it should return on one of the important questions arising in the case, the determination of which, in the light of the conflicting testimony, was clearly and solely within its province. We think the instructions were properly refused.

The other errors assigned do not, in our opinion, call for discussion. We have carefully considered them all; and, finding no reversible error, the judgment of the court below is affirmed.

SHERMAN-CLAY & CO. v. SEARCHLIGHT HORN CO.

(Circuit Court of Appeals for the Ninth Circuit. May 4, 1914.)

No. 2307.

PATENTS (§ 297*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

In general the granting or refusing of a preliminary injunction in an infringement suit rests in the sound discretion of the court, but where the validity of the patent has been sustained, in a prior action at law, and infringement is clear, the court has no discretion to refuse such an injunction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481–488; Dec. Dig. § 297.*

Grounds for denial of preliminary injunctions in patent infringement suits, see note to Johnson v. Foos Mfg. Co., 72 C. C. A. 123.]

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Suit by the Searchlight Horn Company against Sherman-Clay & Co., a corporation, to enjoin infringement of letters patent, No. 771,441, for a horn for phonographs or similar machines, granted to Peter C. Nielsen October 4, 1904. From an order granting a preliminary injunction, defendant appeals. Affirmed.

See, also, 214 Fed. 86.

Nicholas A. Acker and J. J. Scrivner, both of San Francisco, Cal., and Horace Pettit, of Philadelphia, Pa., for appellant.

John H. Miller and Wm. K. White, both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This is a suit for an injunction based upon the judgment entered in the court below in the action at law between the same parties. In the bill for injunction it was alleged that since the rendition of the judgment in the action at law, the defendant, without the consent of the plaintiff, had continued to use and sell horns for phonographs containing and embracing the invention described, claimed and patented in and by the letters patent issued to Nielsen, and that unless the defendant was restrained by the court from using and selling such horns, the plaintiff would suffer great and irreparable injury, for which it had no plain, speedy, and adequate remedy at law. These allegations of the bill, which were supported by affidavits filed on behalf of the plaintiff, were denied in the answer, and in the affidavits filed in support thereof, by the defendant. A writ of injunction was granted by the court below, pursuant to the prayer of the bill, commanding and enjoining the defendant from making, selling, offering for sale or using any horn for phonographs containing and embodying the invention described in claims 2 and 3 of the letters patent, No. 771,441, issued to Nielsen by the United States of America.

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

The granting of a preliminary injunction in a suit for infringement of a patent rests within the sound discretion of the trial court. Jensen Can-Filling Co. v. Norton, 64 Fed. 662, 12 C. C. A. 608; Southern Pacific Co. v. Earl, 82 Fed. 690, 27 C. C. A. 185; Kings County Raisin & Fruit Co. v. United States Con. Seeded Raisin Co., 182 Fed. 60, 104 C. C. A. 499. Under this rule the only question for the court to determine would be: Had the court abused its discretion? But another general rule applicable to the present case is that, the validity of the patent having been sustained by a prior adjudication in an action at law, and the infringement being clear, the court has no discretion to refuse a temporary injunction pending a final hearing upon the issues involved in the case. This was held by Mr. Justice Nelson as early as Gibson v. Van Dresar, 1 Blatch. 532, Fed. Cas. No. 5402, and this rule has been followed ever since, except in cases where the circumstances are such as to make some other rule of equity more appropriate in the administration of substantial justice. There is no such exceptional circumstance in this case. We must therefore hold that the trial court was justified in issuing the temporary injunction.

The decree of the court below is affirmed.

HYDE v. MINERALS SEPARATION, Limited, et al.†

(Circuit Court of Appeals, Ninth Circuit. May 4, 1914.)

No. 2346.

1. PATENTS (§ 90*)—ANTICIPATION—PRIOR PATENTS.
   A paper patent, if it fully describes an invention, whether a machine, device, or process, is as effective to show anticipation as a patent which describes an invention that has gone into extensive use, since a presumption of operativeness and of some utility attends the granting of a patent.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 113–120; Dec. Dig. § 90.*]

2. PATENTS (§ 19*)—INVENTION—CHANGE IN DEGREE.
   To discover that a smaller quantity of a given material is required in a process than was before deemed necessary is not an invention or discovery, within the meaning of the patent laws, but is a change only in degree and not of kind, and is not patentable.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 19; Dec. Dig. § 19.*]

3. PATENTS (§ 35*)—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.
   The fact that a patented device or process has gone into extensive and successful use is of no value as evidence where the question of invention or patentability is free from doubt, and in any case its value depends largely upon the causes which produced it.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 39; Dec. Dig. § 35.*]

4. PATENTS (§ 328*)—INVENTION—PROCESS OF ORE CONCENTRATION.
   The Sulman, Picard, and Ballot patent, No. 835,120, for an improvement in ore concentration by the oil process, describes a process which differs in no essential from those in prior use and disclosed in prior patents, except that a smaller quantity of oil is used, and is void for lack of patentable invention, in view of the prior art.

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

† Rehearing denied July 6, 1914.

Appeal from the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Suit in equity by the Minerals Separation, Limited, and the Minerals Separation American Syndicate, Limited, against James M. Hyde. Decree for complainants, and defendant appeals. Reversed.

For opinion below, see 207 Fed. 956.

Thomas F. Sheridan and Walter A. Scott, both of Chicago, Ill., J. Bruce Kremer, of Butte, Mont., George L. Wilkinson, of Chicago, Ill., and K. R. Babbitt, of New York City, for appellant.

Henry D. Williams, of New York City, John H. Miller, of San Francisco, Cal., and Odel W. McConnell, of Helena, Mont., for appellees.

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

GILBERT, Circuit Judge. This is an appeal from the decree of the court below sustaining letters patent No. 835,120, issued to Sulman, Picard, and Ballot, on November 6, 1906, and assigned to Minerals Separation, Limited, and Minerals Separation American Syndicate, Limited, adjudging the appellant herein to have infringed the same, and enjoining further infringement. The patent is for new and useful improvements in ore concentration. Its object is to separate metalliferous matter from gangue, by means of oils and fatty acids which have a preferential affinity for metalliferous matter. In the specifications reference is made to United States Letters Patent No. 777,273, granted to A. E. Cattermole. The Cattermole patent specifies that an amount of oil, varying from 4 per cent. to 6 per cent. of the weight of metalliferous matter present, is agitated with an ore pulp, so as to form granules which can be separated from the gangue. The specifications of the patent in suit state that the inventors have found that:

"If the proportion of oily substance be considerably reduced (say, to a fraction of 1 per cent. on the ore), granulation ceases to take place, and after vigorous agitation there is a tendency for a part of the oil-coated metalliferous matter to rise to the surface of the pulp in the form of a froth or scum."

And the specifications add:

"The proportion of mineral which floats in the form of froth varies considerably with different ores, and with different oily substances, and, before utilizing the facts above mentioned in the concentration of any particular ore, a simple preliminary test is necessary to determine which oily substance yields the proportion of froth or scum desired."

There are 13 claims in the patent. The first is:

"The herein described process of concentrating ores, which consists in mixing the powdered ore with water, adding a small proportion of an oily liquid having a preferential affinity for metalliferous matter (amounting to a fraction of 1 per cent. on the ore), agitating the mixture until the oil-coated mineral matter forms into a froth, and separating the froth from the remainder by flotation."

The next three claims specify the quantity of oil as amounting to "a fraction of 1 per cent. on the ore." The second claim adds to the first the use of slightly acidified water. The third adds to the second

"warming the mixture." The fourth adds to the third "and removing the oily coating from the mineral." The fifth specifies the oil as "oleic acid of a quantity of from 0.02-0.5 per cent. on the ore." The sixth adds to the fifth the use of water containing 1 per cent. of sulphuric acid. The seventh adds "warming the mixture to 30°-40° centigrade." The eighth specifies the use of oleic-soap solution, to produce oleic acid, "amounting to 0.02-0.5 per cent." The ninth is:

"The process of concentrating powdered ores which consists in separating the mineral from the gangue by coating the mineral with oil in water containing a small quantity of oil, agitating the mixture to form a froth, and separating the froth."

The tenth adds to the ninth "warming the mixture"; and the eleventh adds the use of acid. The twelfth adds "separating the froth from the remainder of the mixture"; and the thirteenth adds a current of water to carry off the coarser minerals, and "filtering off the froth and removing the oleic acid therefrom by treatment with an alkali."

The answer of the appellant denied that Sulman, Picard, and Ballot were the first inventors of the process, or that there was any invention described in the patent, and denied infringement, and alleged that the process described in the patent was old and not patentable; that the process had been included in certain patents which were enumerated in the answer. The appellant was adjudged to have infringed claims numbered 1, 2, 3, 5, 6, 7, 9, 10, 11, and 12.

The appellees' process depends primarily upon the affinity of oil for the metalliferous portion of powdered ore when mixed with water. It is conceded that that affinity and the fact that oil will carry the metalliferous portions to the surface of the mixture while the rock or gangue will sink, have been known for many years. That which is presented as new in the patent, and as the pivotal discovery on which its validity depends, is the formation of a froth or scum containing the metalliferous matter produced by agitation of the pulverized ore in water, by the action of oil in a quantity less than 1 per cent. of the quantity of ore treated.

Turning to the patents which are adverted to as showing the prior art, we find the following: The British patent to Haynes, No. 488, issued in 1860, recommends the use of from 11 to 25 per cent. of oil by weight to the finely powdered ore; the mixture to be agitated with water, either warm or cold, until the earthy matter sinks and the metal is gathered by the oil. In that process the sunken earthy matter is removed, fresh ore is replaced, and the operation repeated with the same oil until it will take up no more metalliferous matter. The United States patent, No. 348,157, issued to Everson, in 1886, specifies the use of oil in quantities varying from 5 to 18 per cent. Miss Everson was the first to make the important discovery that the affinity of the oil for the metal was increased by the addition of an acid. In the description of her process, she states that, in the operation, the mass is broken up and thoroughly stirred in water, in a vessel provided with a mechanical stirrer, and having an outlet or outlets at the bottom for the escape of the water and sand. The Schwarz United States pat-

ent, No. 807,503, applied for in May, 1904, and granted in December, 1905, describes a process in which the dry ore is first mixed with enough oil to make a thick pasty mass, and water is thereafter added, and the mass is agitated so as to cause the metallic particles to float. The quantity of oil to be used is not further specified, but it is in the testimony that the Schwartz process has been experimentally used with cotton seed oil; the quantity used being 3.6 per cent. of the ore treated. The United States patent to Kirby, No. 809,959, was applied for December 14, 1903, and granted January 16, 1906. The oil, used by Kirby was kerosene oil in which 5 per cent. of bitumen was dissolved. One of the claims is as follows:

"The process of separating minerals, which consists in mixing together the pulverized mineral material, a considerable quantity of water and a solution of bitumen in a distillable hydrocarbon liquid, the proportion of bitumen in solution being substantially sufficient to insure the coating and entrainment of the mineral particles; and allowing the same to settle, and removing therefrom the floating layer of said solution and the mineral particles which have been coated thereby."

In his specifications he says:

"These materials to be so thoroughly agitated together as to finely subdivide said solution into small globules, and bring said globules into contact with substantially all of the pulverized mineral particles, which will by preference adhere to them."

And, in describing the means for the agitation, he specified a "vertically rotating shaft" in the mixing tank, which it is said is to be "rotated rapidly." No specific quantity of oil is prescribed, but it is stated in the specifications that a sufficient amount of the kerosene and bitumen in solution is to be used; "excellent results being obtained by using one-fourth to three-fourths as much by weight as ore."

In the Froment Italian patent, issued May 20, 1902, and the British patent to Froment, issued June 4, 1903, the invention described is declared to consist "of a modification of what is known as the oil process of ore concentration." The modification consisted in releasing gas from the finely powdered ore, and "adding a suitable oil," resulting in a flotation of the oil and metal to the surface. Froment mentions the use of gas to aid in the flotation of sulphides reduced to powder and moistened by a fatty substance, in explanation of which the patentee says that if, for example, in a test tube there is placed ten grams of sulphurated copper ore, with its gangue, a gram of limestone, the whole reduced to powder, and there is added thereto 30 grams of water, a few drops of sulphuric acid "and a thin layer of ordinary oil," and the mixture is agitated for a second, the whole of the copper pyrite will instantly rise to the top of the liquid. The patentees of the appellees' patent purchased from Froment on November 17, 1903, the Froment patent, and Froment agreed to send all possible information, together with the plans, drawings, and a model plant, to England, for the use of the purchasers. The agreement was carried out in December, 1903. The instructions which Froment sent contain the following:

"If the ore contains more than 5 per cent. of metallic matter, such as copper, lead, it will be necessary to use a little more oil. As a general rule one

may assume 1 per cent. of oil for ore containing up to 5 per cent. of metals, 1½ per cent. of oil for ore containing up to 10 per cent. and so on, up to ores containing 50 per cent. of metallic lead, which it was said would require 3½ per cent. of oil."

In the instructions the mixing device is described as composed of a cylindrical body made of strong sheet iron, riveted with bolts, "in which two stirring devices work in opposite directions, making about 300 revolutions per minute."

The Cattermole process, which is referred to in the letters patent in controversy in this suit, is presented in two United States patents, one No. 777,273 and one No. 777,274, both of date December 13, 1904. The amount of oil specified in the Cattermole process is from 4 to 6 per cent. of the weight of metalliferous mineral matter present in the ore. This quantity with the average ores would be less than 1 per cent. of the mass treated. The fact that the final purpose of the Cattermole process is to increase the sinking tendency of the metalliferous mineral instead of removing it upon the surface does not render that process any less instructive as to the state of the prior art, for there are two distinct steps in the treatment of the ore; there is first a violent agitation to cause the oil to gather up the metalliferous particles, as in the case of other oil flotation processes. Then follows a slow, smooth stirring of the mass, which releases the air from the froth or scum and causes the oil and metalliferous particles to adhere together and form granules of sufficient size and weight to sink, after which the mass at the bottom is drawn off, and the particles of sand and gangue therein are forced upward and thus separated from the granules of metal. Here is described a process in which the quantity of oil used approximates the quantity which is called for by the appellees' patent, a fraction of 1 per cent.

When the claims and the description of the process of the appellees' patent are compared with the patents of the prior art, it will be seen that the only material difference is in the smaller quantity of oil which the appellees use. Comparing the appellees' process with the Froment process, it will be seen that in both powdered ore is mixed with a sufficient water to form a freely flowing pulp; that while Froment recommends the use of oil of from 1 per cent. to 3½ per cent. of the ore by weight, the appellees recommend a fraction of 1 per cent. of oil; that Froment recommends the use of ordinary oil or a suitable oil, while the appellees' patent mentions oils, fatty acids, and oleic acid; that in both processes there is agitation of the mixture; that in both processes a small quantity of sulphuric acid is recommended; that in both processes the mixture of all the substances is made before the agitation; and that in both processes bubbles of air or gas are caught in the sulphides in the form of a froth which rises to the surface. So also, in the Kirby patent, the various steps of the process are similarly described. We find there the pulverization of the ore, mixing it with water to form a floating pulp, mixing therewith kerosene oil with a small percentage of bitumen, violently agitating the mass so as to bring the oil into contact with the mineral particles of the ore, causing the oil-coated mineral particles to rise and float on the surface of the wa-

ter, while the gangue sinks to the bottom, and lastly skimming the floating concentrate from the surface of the liquid.

[1] But the appellees say that the Froment patent is a paper patent, and that therefore it is to be disregarded. A paper patent, if it fully describes an invention, whether it be a machine, device, or process, is just as effective to show anticipation as a patent which describes an invention which has gone into extensive use, for a presumption of operativeness and of some utility attends the granting of letters patent. Packard v. Lacing Stud Co., 70 Fed. 66, 16 C. C. A. 639; E. L. Watrous Mfg. Co. v. American Hardware Mfg. Co. (C. C.) 161 Fed. 362; National Chemical & Fertilizer Co. v. Swift & Co., 104 Fed. 87, 91, 43 C. C. A. 421; Universal Winding Co. v. Willimantic Linen Co., 82 Fed. 228; Van Epps v. United Box Board & Paper Co., 143 Fed. 869, 75 C. C. A. 77; Ironclad Mfg. Co. v. Dairyman's Mfg. Co., 143 Fed. 512, 515, 74 C. C. A. 372; Dashiell v. Grosvenor, 162 U. S. 425, 432, 16 Sup. Ct. 805, 40 L. Ed. 1025. In Telephone Cases, 126 U. S. 1, 536, 8 Sup. Ct. 778, 783 (31 L. Ed. 863), it was said:

"The law does not require that a discoverer or inventor, in order to get a patent for a process, must have succeeded in bringing his art to the highest degree of perfection. It is enough if he describes his method with sufficient clearness and precision to enable those skilled in the matter to understand what the process is, and if he points out some practicable way of putting it into operation."

[2] The fact that the appellees use a smaller quantity of oil than was used in the prior art is not of itself, and it is not claimed by them to be, sufficient to distinguish their process so as to render it patentable. To discover that the desired result may be accomplished with the use of a fraction of 1 per cent. of oil when formerly a much larger quantity of oil had been used, and had been deemed necessary, is not an invention or discovery within the meaning of the patent laws. It is a difference of degree and not of kind.

"'A change only in form, proportions, or degree, doing substantially the same thing in the same way, by substantially the same means, with better results,' * * * is not such invention as will sustain a patent." Roberts v. Ryer, 91 U. S. 150, 23 L. Ed. 267.

In Fried. Krupp Aktien-Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 112 C. C. A. 194, the court said:

"But mere useful and economical administrative methods, however valuable, while they may and usually are incident to invention, do not themselves constitute invention."

And in De Lamar v. De Lamar Min. Co., Ltd., 117 Fed. 240, 249, 54 C. C. A. 272, 281, this court, referring to the use of zinc dust for the purpose of precipitating mineral in a solution, said:

"The right to use the dust being free to all, we think it follows, necessarily, that all have the right to adjust the quantity of the material to the necessities of each case, and to ascertain by experiment or analysis, if need be, the quantity that may be required to produce the desired end, and that such a use cannot be made the subject of monopoly; there being involved in it no discovery, but only the exercise of ordinary prudence and skill."

See, also, Brady Brass Co. v. Ajax Metal Co., 160 Fed. 84, 87 C. C. A. 240; Commercial Mfg. Co. v. Fairbank Co., 135 U. S. 176, 10

Sup. Ct. 718, 34 L. Ed. 88; Bullock Electric Mfg. Co. v. General Electric Co., 149 Fed. 409, 79 C. C. A. 229; Lauman v. Urschel White Lime Co., 136 Fed. 190, 69 C. C. A. 206; Tilghman v. Proctor, 102 U. S. 707, 26 L. Ed. 279; Guidet v. Brooklyn, 105 U. S. 550, 26 L. Ed. 1106.

But it is said that the appellees' process is the only froth process, and that the processes described in the prior art are the bulk flotation or oil buoyancy process. We have to inquire, therefore: What is the oil buoyancy process. It is described in the Elmore patents, No. 676,679, issued June 18, 1901, and No. 689,070, issued December 17, 1901, and in the testimony of Mr. Ballantyne, general patent counsel of the appellees. Mr. Ballantyne said that it was essential to this process: First, that the oil should be thick and viscous, for otherwise the metal would easily fall out of the oil; second, that the process be carried out in the cold, because, if the oil be heated, it becomes thin and will not entrap or float the mineral; third, that the mingling of the pulp and the oil be as gentle as possible, so to avoid breaking the oil into globules. And the appellees' expert, Dr. Chandler, testified that, in the oil bulk flotation, 15.7 parts of oil must be used to 6.7 parts of ore. With these definitions and explanations of the oil buoyancy process in view, it is very plainly to be seen that in none of the patents herein discussed, aside from the Elmores', is that process used. The Haynes patent uses 11 per cent. of oil to the ore, and directs that the mixture be agitated with hot, warm, or cold water. Kirby recommends thorough agitation by rapid rotation of the agitator, and he refers to the floating concentrate as a "scum." The Everson patent declares that thorough agitation of the mass or pulp, comprising water, the finely divided ore, the oil of fat, and the acid is necessary, and in the Engineering and Mining Journal of November 15, 1890, there is an article describing a test operation of that process, in which it was said that as the result thereof "a thick scum of sulphurets rose to the surface and was skimmed off, leaving the hitherto black ore as white as snow; in fact, pure silica." And so in the Cattermole process, although its ultimate purpose was to precipitate the metal in the form of granules to the bottom of the tank, it was first required that the mixture be thoroughly agitated, and, as the result thereof, a froth necessarily came to the surface.

The contention is made, however, that if, indeed, the prior patents disclose froth processes, the scum which the appellees' process causes to rise to the surface of the water is so different from the froth or scum which arises under the prior art that it is a new result and is not anticipated by anything in the prior art. Say counsel for the appellees, "You produce a froth which is not our froth;" and again they say that the appellees' froth is "a pure metal froth," while that of the other patents is an "oil froth," and that the appellees' froth consists of air bubbles surrounded by metal armor without any appreciable quantity of oil connected therewith. The evidence in the case, together with the illustration thereof afforded by demonstrations of the various processes which were made in the aid of the argument before this court, convince us that the froth in all these processes is the same,

with the exception that there is less oil (as there must necessarily be) in the appellees' froth than in the others. The froths are all similar in appearance; they all rise to the surface after the same amount of agitation; they all gather with equal efficiency the same quantity of metal; and all may be removed from the surface in the same way. It is not literally true, of course, that there is no oil in the froth which the appellees produce. If there were no oil in it, there would be no froth. The quantity of oil that has been put into the mixture must necessarily be found in the froth. It would manifestly be a physical impossibility to create a froth consisting only of bubbles of air and the particles of mineral. This is admitted in the specifications of the appellees' patent, in which it is said that there must be agitation "until the oleic acid has been brought into efficient contact with all the mineral particles in the pulp," and that the air bubbles which make the scum floatable adhere "only to the mineral particles which are coated with the oleic acid."

It is said in the appellees' brief that one feature of the froth produced by their process is that it is unnecessary to clean the mineral of the oil, as the infinitesimal oil coating has no adhesive effect, and that the concentrates may be freely tabled or vanned; and counsel say, "All you have to do is to gather that froth from these vessels, dry it out, and take it to the smelter." We find no evidence in the record that the froth which the appellees produce may be smelted without removing the oil therefrom, or that it would be a distinct advantage to do so, or that the froth produced by some of the anticipating processes may not be taken to the smelter without removing the oil. If the statement made in the brief is true, it is very clear that that feature of their froth was not known to the patentees at the time of their application for the patent, and is nowhere disclosed in the specifications or claims. The specifications deal only with the production of the scum or froth; but claim 13 includes "filtering off the froth and removing the oleic acid therefrom by treatment with an alkali"; and on May 3, 1905, in a statement of their method of oil concentration which they sent to Australia, the patentees said:

"The oleic acid is therefore of necessity recovered in the process and in the state in which it is required for re-use. This is not undertaken merely for the purpose of recovering the oleic acid, but as a necessary step in rendering the concentrates fit for vanning, separation into blende and galena."

[3] The decision of the court below appears to have been largely influenced by the consideration that the appellees' patent had gone into extensive and successful use. The fact that a patented device or process has gone into extensive and successful use is often of value in determining the question of invention and patentability. It is referred to for the purpose of turning the scales in cases of grave doubt. It is of no value whatever where the question of the invention or patentability is free from doubt, and in any case its value depends largely upon the causes which produced it. It is often due to business ability in manufacturing, exploiting, and advertising, and to the fact that prior conditions have not stimulated development. The appellees' process, originally patented in Great Britain, has been installed in Australia, Sweden, Finland, Chile, and Wales, and it is in the process of installa-

tion in Cuba. It is not improbable that in those countries the prior art may have been substantially unknown, and it is possible that the appellees' success there is referable to the fact alleged in the bill:

"That the complainants have been to great trouble and expense in the introduction into use of the process, and have invested large sums of money in its introduction into commercial use in different parts of the world, and in the effort to introduce it into commercial use in the United States."

It is in evidence that, in making the process known to the public in the United States, the appellees have expended $60,187. Notwithstanding these efforts and expenditures, their process has not yet been installed in the United States.

In Olin v. Timken, 155 U. S. 141, 155, 15 Sup. Ct. 49, 55 (39 L. Ed. 100), it was said:

"While the patented article may have been popular and met with large sales, that fact is not important when the invention is without patentable novelty."

In McClain v. Ortmayer, 141 U. S. 419, 428, 12 Sup. Ct. 76, 79 (35 L. Ed. 800), the court said:

"That the extent to which a patented device has gone into use is an unsafe criterion even of its actual utility is evident from the fact that the general introduction of manufactured articles is as often effected by extensive and judicious advertising, activity in putting the goods upon the market, and large commissions to dealers, as by the intrinsic merit of the articles themselves."

It would serve no useful purpose to review all the numerous decisions in patent cases that are cited by the appellees. But we will refer to two of them which seem to be especially relied upon, Naylor et al. v. Alsop Process Co., 168 Fed. 911, 94 C. C. A. 315, and United States Mitis Co. v. Midvale Steel Co. (C. C.) 135 Fed. 103. In the first of these cases the court held that an expert cannot take a process patent which has never been applied industrially and work the process in his labratory, and discover therefrom something which is not disclosed on the face of the patent, and then transfer that experience back to the time of the patent, and make it a part of the prior art for the purpose of defeating a subsequent patent for a meritorious invention. There is nothing in the present case to which that ruling applies, and it is to be observed that the court sustained the patent in that case expressly upon the ground that the complainant therein was the first to discover a successful process for bleaching flour. The court said:

"His act was not selection of known agents in the art of bleaching flour, but was the discovery of the only agent that has yet been found to accomplish that result successfully in the milling industry."

The second case is said by counsel for the appellees to be "conclusive." The invention there under consideration was a process for making steel castings homogeneous so as to prevent blow holes, and it consisted in adding to the molten steel, when it is about to be poured into the mold, a minute quantity of metallic aluminum. But the distinction between that case and the case at bar is plainly to be seen in the fact that there the inventor made a distinct addition to the known art. He added something which had not been used by others, and

which was effective in producing the result which was sought. In the present case nothing has been added.

[4] We hold that to sustain the appellees' patent would be to give to the owners thereof a monopoly of that which others had discovered. What they claim to be the new and useful feature of their invention, as stated by their counsel, is "agitating the mixture to cause the oily coated mineral to form a froth." As we have seen, that feature was clearly anticipated by the prior art, and, when the elements of the appellees' claims are read one by one, it will be found that each step in their process is fully described in more than one of the patents of the prior art, with the single exception of the reduced quantity of oil which they use. The patentees of the appellees' patent made a valuable contribution to the art in discovering the smallest quantity of oil which would produce the desired result. In doing so, they pursued the course which all skillful metallurgists would be expected to pursue. They made a series of experiments to determine how small a quantity of oil could be used successfully. They found, as all must find who apply the oil flotation process, that certain oils are adapted to use with certain ores, and that a larger quantity of oil is necessary for one kind of an ore than for another. The appellees admit that for some ores they use four times as much oil as for others. Their discovery that a small fraction of 1 per cent. of oil is sufficient to produce flotation of the metalliferous matter cannot, as we have seen, be made by itself or in a combination the subject of a patent. The appellees cannot take from others the right to use oil economically. This was evidently the ruling of the Patent Office on their application for a patent. One of their claims in the original application was "the process of concentrating powdered ore, which consists in separating minerals from gangue by coating the minerals with oil in water containing a fraction of 1 per cent. of oil on the ore, and recovering the oil coated minerals." This was rejected in view of the Cattermole patent "as expressing merely a difference of degree thereover as to the proportion of oily matter employed." Counsel for appellees admit that the claim was properly rejected for the reason that it leaves out the agitation and froth, and say, "Our invention is something else than the mere reduction of oil."

The decree is reversed, and the cause is remanded, with instructions to dismiss the bill.

JOHNS-PRATT CO. v. SNOW.

(Circuit Court of Appeals, Second Circuit. April 7, 1914. On Petition for Rehearing, April 21, 1914.)

No. 237.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SAFETY FUSE.

The Sachs patent, No. 660,341, for a safety fuse, *held* not anticipated, valid, and infringed.

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

This cause comes here upon appeal from a decree of the District Court, Western District of New York, holding defendant to be an infringer of United States letters patent No. 660,341, granted October 23, 1900, to Joseph Sachs for improvements in safety fuses. The opinion of the District Judge will be found in 212 Fed. 173.

F. F. Church, of Rochester, N. Y., for appellant.

Edmund Wetmore, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The questions involved in this appeal have been several times judicially determined adversely to defendant.

There is no serious contention that defendant's device is substantially different from the devices found to be infringements in the earlier cases.

The patent was first held valid and infringed by Judge Cross, sitting in the district of New Jersey. Johns-Pratt Co. v. Freeman (D. C.) 201 Fed. 356. His decision was affirmed by the Circuit Court of Appeals, for the Third Circuit, 204 Fed. 288, 122 C. C. A. 512. Subsequently a motion for preliminary injunction, after a long argument, was granted by Judge Thompson in the Eastern District of Pennsylvania, the defendant being the Economy Fuse Company; no written opinion was filed. Infringement was also found in the case of Johns-Pratt Co. v. Sachs Co., decided in this court (175 Fed. 70, 99 C. C. A. 92); the validity of the patent was not there passed upon, as defendant was in privity with the inventor who could not be heard to assert its invalidity. The patent, prior art, etc., were very fully considered in the opinions in the Freeman Case.

There is no prior art in this record which was not before the Circuit Court of Appeals in the Third Circuit, except possibly the Downes patent, 640,371. That patent was discussed by the court, but it assumed that it was later than Sachs. It now appears that the application for the Downes patent antedated Sachs'. That circumstance, however, is unimportant because Downes shows, not only a plurality of small wires or strips instead of Sachs' thin flat strip of extended area, but also an "air space about the middle of the fuse-link," which Sachs eliminates by entirely filling the containing box with nonconducting material.

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

We concur with the judges in the Third Circuit and with Judge Hazel in the conclusion that no one prior to the patentee had combined in one structure the thin flat strip of metal, of extended area, embedded within and entirely isolated by a filling material, which was in contact with a maximum amount of surface of the strip as a result of its thinness and wideness and which strip was connected to terminals of greater conductivity within the case which held the filling material about the strip. It seems unnecessary to add anything to the discussion of the case in the Third Circuit and in the later opinion of Judge Hazel in the case now on appeal.

The decree is affirmed, with costs.

On Petition for Rehearing.

PER CURIAM. There is nothing new presented in the petition; indeed, the suggestion is that the court apparently overlooked or failed to consider what petitioner now refers to as the principal point in the case. It may occasionally happen, of course, that some particular citation of testimony or reference to authority will be overlooked, but it would be difficult to overlook the point referred to in this petition, as it covered some 40 pages of the defendant's brief. It was not overlooked; on the contrary, it was considered in connection with the eight or nine pages of complainant's brief which undertook to answer defendant's contention. Examining the testimony of the expert which was thus discussed in the brief, we reached the conclusion that the complainant had the best of the argument. The testimony of this expert showed, no doubt, that the device of the patent was not the "last word" in safety fuses; that there was room for further improvements; but in our opinion it did not negative the conclusion drawn from the whole record that Sachs had disclosed an advance over the prior art, which was novel, useful, and patentable.

We did not discuss this testimony, because it did not seem to be the principal point in the case, and it is not our practice to undertake to cover in an opinion every proposition, major or minor, which may be advanced in argument or on the briefs.

Petition is denied.

GILL ENGRAVING CO. v. DOERR et al.

(District Court, S. D. New York. May 19, 1914.)

1. INJUNCTION (§ 101*) — TEMPORARY INJUNCTION — VIOLATION OF CRIMINAL LAWS.

That the acts of the officers of a photo engravers' union in warning employers that the members of the union would handle the work of only such customers as had all their engraving done in union shops, and in threatening to strike if work was done for other customers, constituted a crime under Penal Law N. Y. (Consol. Laws, c. 40) § 580, making it a misdemeanor for two or more persons to conspire to prevent another from exercising a lawful trade or calling or doing any other lawful act or to commit any act injurious to trade or commerce, was not ground for injunctive relief pendente lite to the proprietor of a nonunion shop injured

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

by such acts, since injunctions pending suit are more of grace than of right, and penal statutes should be enforced in the criminal courts and not by injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175; Dec. Dig. § 101.*]

2. MONOPOLIES (§ 24*)—REMEDIES OF PRIVATE PERSONS—INJUNCTION.

A private party in his own suit is not entitled to injunctive relief against a conspiracy or combination in violation of General Business Law N. Y. (Consol. Laws, c. 20) § 340, making contracts, agreements, etc., whereby a monopoly in the manufacture, production, or sale of any article or commodity of common use is created, established, or maintained, or whereby competition in the supply or price of any such article is restrained or prevented, or whereby, for the purpose of creating or maintaining a monopoly of the manufacture, production, or sale of any such article, the free pursuit of any lawful business, trade or occupation is restricted or prevented, illegal and void.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

3. MONOPOLIES (§ 10*)—"BOYCOTT"—ILLEGALITY.

The word "boycott" does not necessarily import illegality, and the test is the legality of the object in view and of the means of attainment.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 9; Dec. Dig. § 10.*

For other definitions, see Words and Phrases, vol. 1, pp. 855, 856; vol. 8, p. 7592.]

4. INJUNCTION (§ 101*)—STRIKES—LEGALITY OF OBJECT AND MEANS USED.

Where the object of a photo engravers' union and its officers and members, in warning employers that the members would handle the work of only such customers as had all their work done in union shops and in threatening to strike, was to increase the power of the union and get more, better, easier, and better paid work for the members, and not to injure the proprietor of a nonunion shop, though such injury had occurred and was foreseen, and though a part of the motive was hate of such proprietor, the object of the combination and the means employed were legal, and hence gave such proprietor no right to injunctive relief.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175; Dec. Dig. § 101.*]

5. INJUNCTION (§ 101*)—BOYCOTTS—RIGHT TO RELIEF—DOING EQUITY.

That the proprietor of a photo engraving business, seeking relief against the acts of a labor union claimed to have injured it, had discharged and refused to employ union engravers did not deprive it of the aid of equity.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175; Dec. Dig. § 101.*]

In Equity. Suit by the Gill Engraving Company against William Doerr, individually and as business agent of the New York Photo-Engravers' Union No. 1, and others. On motion for an injunction pendente lite. Motion denied.

Walter Gordon Merritt, of New York City, for complainant.

Abram I. Elkus and Joseph M. Proskauer, both of New York City, for defendants.

HOUGH, District Judge. Complainant (hereinafter called "Gill Company") has long conducted a photo-engraving business; i. e., from a photograph or drawing it produces a plate from which a picture or pattern can be printed. The principal use of such engravings is to

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

adorn the pages of books, magazines, and the like. It follows that, when complainant's work is finished, it is not useful, or at any rate not ordinarily used, except in conjunction with the services of printers, electrotypers, bookbinders, etc. The united efforts of all these tradesmen produce the completed volume, toward which complainant has then contributed but one item. To carry on its business and produce its share in the book trade the Gill Company employs photo-engravers; i. e., men whose trade qualifies them for membership in Union No. 1.

The defendants may be said to represent and act for Union No. 1. As officers of that union they or some of them have written and spoken, acted, and induced others to act in a manner which is thought to justify the charge of the bill; that they and others have long been guilty of "a combination and conspiracy to prevent the employment at his trade of any photo-engraver in the city of New York who was not a member of Union No. 1." It is further charged that the same persons have also been engaged for years in another combination and conspiracy (contrary to common law and the statutes of New York) to "restrain trade and commerce in the production and sale of photo-engravings within the state of New York," to injure and destroy the Gill Company's "good will, trade, and business," and to prevent that company from competing with other photo-engraving shops in which the members of Union No. 1 are or have been exclusively employed.

These several objects of conspiracy defendants (and others equally active but not within the jurisdiction) are alleged to have pursued with the assistance and co-operation of the Allied Printing Trades Council, an aggregation for purposes of mutual assistance of the unions of all the trades commonly considered as requisite for the preparation and publication of a printed book. This allegation is not sustained. Union No. 1 and the allied council have some officers in common, and some letters have been written on paper of the allied council, but everything proved or admitted to have been done was the act of the photo-engravers as represented by Union No. 1, and not of any other trade organization. There is no proof that printers, bookbinders, etc., have taken any part in the matters producing this suit.

The principal officers of complainant (who are named Gill), and therefore the company itself, have been admittedly distrustful of, if not hostile to, Union No. 1 since about 1898, but the definite history of contest begins in 1907. In April of that year the Gill Company kept an open shop[1] employing about 120 men. Union No. 1 "ordered a strike of all union men employed by complainant, comprising about one-half of its employés; said strike took place * * * and caused complainant great loss and damage."

The immediate causes of the strike in 1907 are stated differently by the contending parties. Undoubtedly one Schwartz was the agent of the union in the matter, and Gill says that Schwartz told him the sole question was the "closed" shop.

[1] A shop is "open" if union and nonunion men are therein employed without discrimination; it is "closed" if either unionism or nonunionism excludes an applicant from employment. Irving v. Joint District Council (C. C.) 180 Fed. 896; Sackett, etc., Co. v. Nat. Ass'n, 61 Misc. Rep. 150, 113 N. Y. Supp. 110.

Schwartz denies that the strike was ordered in an effort to unionize the Gill Company, and alleges that the reason for striking he gave Gill was that his own employés had entered a protest with the union against the employment of an excessive number of apprentices, a number so great that the Gill Company was "looked upon as a school for teaching photo-engraving, a condition that was eminently unfair[2] to organized labor."

As article 4 of the Constitution of Union No. 1 declares that "this union claims the right to regulate the number of persons who may be employed as apprentices," and article 5 of the same document makes the union initiation fee $30 for all who have learned their trade under the jurisdiction of the union and $200 for those who have done so outside said jurisdiction, the difference between Gill's version of the difficulties of 1907 and that of Schwartz would seem to be one of time merely. But the effect of Schwartz's statement (whatever it was) and of the consequent strike on the Gill Company's conduct is thoroughly admitted. From that date to the present the Gill Company has refused to knowingly employ any union worker, has discharged any and every employé who joined the union, and, in short, has refused to recognize, deal with, or encourage Union No. 1 (or any other union) in any way whatever. For seven years the Gill shop has been "closed" in a recognized but unusual sense of that word.

The record is full of reasons for this action on the part of complainant and of assertions by defendants that the Gill Company does not give to its employés the "same scale of wages and the same working conditions as those generally prevailing." This phrase means conditions which respond to the demands of the union, and, when tested by the affidavits submitted, the difference between the Gill shop and a union shop in New York appear to be these: Some of the Gill employés (the most skillful) get more than union wage; the average or ordinary workman gets less; and special time is allowed in union plants for luncheon, which is not the case in the Gill shop. As mediocrity always outnumbers ability, I think it proven that a shop closed to union men has hitherto been cheaper than one exclusively manned by unionists, and that the most obvious result of change is to make mediocrity more expensive.

No change needing comment is shown to have occurred in the relations between these parties from 1907 to 1913. In that year it is admitted that the defendants Doerr and Brady officially addressed communications to customers or persons of influence with customers of the Gill Company, urging that the business of such customers be diverted from complainant to union shops. Doerr also sent out circular letters to friends throughout the land indicating methods by which one large customer of complainant (MacMillan Company) might be coerced into withdrawing patronage from the Gill Company "until such time as it was a union office." MacMillan promptly succumbed, but there is no

[2] The words "fair" and "unfair" are frequently used through the pleadings and the affidavits of defendants. The difference between them is the classic distinction between orthodoxy and heterodoxy. "Fair" means what is pleasing to the parties using the word, and "unfair" means whatever they do not like.

evidence to show whether its action was distasteful or gratifying to itself. MacMillan's change of business relations with complainant is evidenced by the following (from a letter to defendant Brady):

"Our manufacturing department has been instructed to withhold any further orders from the Gill Engraving Company for the present; and all future contracts for printing books will contain a proviso that all work coming under the jurisdiction of International Photo-Engravers' Union [8] * * * shall be done in accordance with the scale of wages and conditions of these unions in the locality where the work is done."

Shortly before the defection of MacMillan Company, other fuel, and of a different kind, was added to the flames of contest and hatred.

The men managing the Gill Company owned stock and held office in the Colorplate Company, a concern operating a union shop and doing a special line of engraving work. Mr. Gill deposes that he was told by the Colorplate's president that, unless the Gills severed all connection with that corporation and parted with their stock, "the officers" of Union No. 1 would call a strike. Under this threat the Gills retired, to their loss directly as shareholders and indirectly as owners of the Gill Company; the Colorplate Company having done for them work the main concern was not equipped to do.

This tale, as told by defendants, is that the Colorplate employés were afraid that the Gills would get control and then discharge them, as was being done in the Gill Company, whereupon said employés "unanimously voted that they resign," without "an order on the part of any union officials." The difference between a threatened strike and an announced unanimous intention to resign is that between tweedledum and tweedledee; but the fact that the managers of the Gill Company were recognized and acted against as enemies, by even private members of Union No. 1, is noticeable and admitted.

On the whole, defendants' union seems to have been encouraged by the results of effort during 1913, for in January, 1914, at the annual meeting where these defendants were elected to office, the following report was made, according to the "Official Journal of the International Photo-Engravers Union":

"With the new year this local (1. e., Union No. 1) has taken a pledge to organize 100 per cent., if possible. The prospects seem good. The Gill Engraving Company, which has been the only nonunion concern of any consequence in the past, is dwindling down to such a size as to no longer be a detriment to the many fair minded employers in the city. Their competent men are seeing the wisdom of joining our ranks and the others are being discharged, as the Gill Engraving Company seems to find it difficult to hold its old customers or to replace them with new ones. The plan as laid down by the officials last April has been studiously followed out and will be continued indefinitely in the future or until such time as an amicable agreement is reached with the Gill Engraving Company."

In March of 1914 the action was taken by defendants, which evidently produced this suit, for the history of contest which has been related is not asserted to be of importance, except as it shows intent and may induce the court to draw from acts and occurrences, other-

[8] This "union" is a conference or league of many locals like Union No. 1, and extends over North America.

wise colorless, the same inferences as do complainant's counsel. A meeting was called of representatives of all union shops under the jurisdiction of Union No. 1, and such representatives were instructed that thereafter the shop in which they worked was to do no business for any customer who likewise did business with a nonunion shop. In order to apprise employers as to who were the probable offenders, a list was handed each shop representative, who was to pass it on to his employer. Defendant Doerr reinforced these instructions by sending a letter to each employer running a union shop in New York, stating that after April 1, 1914, their employés would handle the work only of those customers "who will assure us that they will have their engraving done in shops fair to our members. In other words, we will do all of their work or none."

A few days later new lists were furnished of customers who still refused to have all of their photo-engraving work done under "fair" conditions. This list was much smaller than the one first sent out, and it is alleged and not denied that the reduction in size represented a corresponding reduction in the Gill Company's patronage.

It may be important to ascertain whether this weapon of Union No. 1 is or is not leveled directly or especially at the Gill Company. The position of the union has been stated in writing by several defendants, but perhaps the letter of one Volz (not a defendant, but a vice president and acting with defendants) is most instructive. On March 30, 1914, Volz declares that the union is going to carry out certain of its rights. Though he complains of the Gill Company, the rights that are to be enforced consist in refusing "to do any part of the engraving for any magazine, etc., made in whole or in part by any concern where our members are unjustly discriminated against; * * * all photo-engravings for any publication or concern will be produced either under fair conditions or all under unfair conditions. We refuse to assist publications unfair to our members."

Thus (according to Volz) the war declared is on a class, not any one person, unless that person is sui generis. This is exactly what the Gill Company says it is, viz., the only considerable nonunion commercial photo-engraving shop in New York, the only concern whose customers would be likely to have more work than one shop could always do, and therefore (by a process of exclusion) the sole object of the union's hostility, and the only business affected by the order apparently leveled against "unfair conditions" generally.

On this point there has been some conflict, and 13 nonunion shops are enumerated by defendants. Several of these are noncommercial (i. e., doing special work only for one customer), and the rest are so small that the substantial correctness of the statement (above quoted) of the union's newspaper seems proved, viz., that the Gill Company is the "only nonunion concern of any consequence."

Defendant Brady has signed an affidavit (probably drawn after a perusal of reported cases) in which he thus states the purpose and intent of the union's order:

"Publishers who have the substantial part of their work done in anti-union shops, which do not conform to the union scale of wages and hours, do not

compete on terms of equality with those publishers who have their work done in shops where union labor is employed and which conform to the union scale of wages and hours. The refusal of the members of the union to perform for publishers that portion of the work which they desire to have performed by members of the union, unless said publishers should send the entire job into shops where members of the union are employed and which conform to the union scale of wages and hours, was intended as an effort to obtain for the members of the union the work of the entire job or jobs of such publishers, and the effect, if any, on the Gill Engraving Company is merely incidental."

It is believed the foregoing covers the whole evidence; there is almost no contradiction as to physical facts; in result it stands admitted that defendants have in concert, as the result of premeditation, by agreement with each other and with persons not parties to this suit, as the representatives of Union No. 1 and by and through their power as such representatives, procured and caused the workmen belonging to their union, being 75 per cent. of the journeymen photo-engravers in New York, exclusively manning every considerable commercial shop in that city, to concertedly refuse to do work for any customer of their several employers who will not agree to patronize exclusively union photo-engravers. These acts have destroyed much of complainant's business and threaten the rest.

As to the purpose with which defendants have acted, I am of opinion that hostility to Gill Company is subordinate and incidental. All nonunion businesses are treated alike; naturally the greater the business the greater the aggregate dislike, but the quality of hatred is the same, irrespective of size. That Gill Company is hurt is gratifying but incidental; the procedure would be the same were complainant nonexistent. The priest of Juggernaut may be glad that the car rolls over a personal enemy, but the car rolls primarily to glorify the god within. Of course defendants well knew that their plan of campaign would injure Gill Company; they intended to injure anybody who got in their way and they knew complainant was there; nevertheless the ultimate purpose, the causa causans, of defendants' action was deeper and more far-reaching than merely to injure one business. Doerr told nearly the whole truth when he wrote, "We will do all of (your customers') work or none." If he had added "and if they can get it done otherwise after this we will think up something else," he would have told the whole truth, because the great and all-absorbing object of defendants' endeavors was and is to get all the work in the trade, or at any rate all the work worth having, for their own members. This finding of ultimate purpose completes my view of the facts. As to the physical acts and words of the parties, it may again be said there is no conflict worthy the name, but as to the mental facts, as to inferences of intent, men will differ widely, just as a jury would probably disagree on such a subject. This renders the study of motive important, for motive begets intent, as has often been observed by writers on criminal law.

What motive incited defendants to injure Gill Company? None, except that it hinders the expansion and aggrandizement of the union, and therefore gives rise to the same kind of objection that the soldier has to the man who prevents his onward march. It can rarely be said

that the soldier is moved by a desire to kill his opponent, but he will kill him if necessary.

Before applying the law to the findings of fact, much that was mentioned in argument may be laid aside. It is not shown that any national statute has been violated; nor that any principle peculiar to national law (e. g., interstate commerce) is concerned; nor that the question presented is complicated by disturbance of the peace, physical trespass, or violence; nor that any government function (e. g., mail transportation) has been interfered with. These exclusions make the case purely local. The jurisdiction of this court is an incident, depending on the New Jersey incorporation of a business wholly conducted in New York City. Therefore I think it desirable that the law of New York should be applied so far as I am capable of discovering it, unless the decisions of federal courts superior to this compel different treatment.

[1] It is asserted that the defendant's acts constitute a crime under New York Penal Code, § 580. I decline to consider such violation as ground for injunctive relief pendente lite. Let it be admitted that under Kellogg v. Sowerby, 190 N. Y. 370, 83 N. E. 47, a civil suit will lie against a person committing a crime by one who is injured through the commission thereof, and that on final hearing, and after a full presentation of testimony, authority might compel the issuance of an injunction; but injunctions pending suit are more of grace than of right. I am sure that penal statutes are meant to be enforced in criminal courts; their use as bases for injunction is usually illegitimate and always illogical; even the not infrequent fact that prosecuting officers do not enforce the statute against some citizens and rigidly enforce it against others does not justify an attempted administration of criminal law by courts of equity.

[2, 3] It is further urged that the defendants have engaged in a conspiracy or combination in violation of sections 340, 341, General Business Law of New York (the Donnelly Act). It seems plain enough that this is true, but it is settled that for such cause a private party in his own suit is not entitled to injunctive relief. Irving v. Neal (D. C.) 209 Fed. 471; Paine Lumber Co. v. Neal (U. S. D. C. November, 1913) 212 Fed. 259, affirmed in 214 Fed. 82, 130 C. C. A. —, April 7, 1914. Therefore this motion is to be decided by what is usually called common law; i. e., the law of New York as evidenced by the decisions of its courts, supplemented only by the inquiry as to whether any controlling divergence of opinion is found in the appellate tribunals to which this court is more directly responsible. There will also be disregarded much argument resting on the statement that defendants have produced a boycott. In common parlance, a boycott has been attempted or created. But the word is of vague signification, and no accurate and exclusive definition has, so far as I know, ever been given.[4]

Nor does it advance matters to call the affair a boycott, for "it cannot be said that to boycott is to offend the law." Mills v. U. S. Printing Co., 99 App. Div. 611, 91 N. Y. Supp. 185, affirmed in 199 N. Y.

[4] See a collection in Joyce on Monopolies, c. 3.

76, 92 N. E. 214. This is not thought to mean that every form of boycotting is lawful, but that the word does not necessarily import illegality. I do not perceive any distinction upon which a legal difference of treatment should be based between a lockout, a strike, and a boycott. They often look very unlike, but this litigation illustrates their basic identity. All are voluntary abstentions from acts which normal persons usually perform for mutual benefit; in all the reason for such abstention is a determination to conquer and attain desire by proving that the endurance of the attack will outlast the resistance of the defense; and for all the law of New York provides the same test, viz., to inquire into the legality (1) of the object in view, and (2) of the means of attainment. When courts generally (with some legislative assistance from behind) abandoned the doctrine that any concerted arrangement which hindered the following of a trade or constituted an attempt to change trade conditions (especially wages) amounted to an actionable conspiracy, this judicial position was quite sure to follow, unless it was admitted that the passing of the old doctrine had left the matter political rather than judicial. This has not yet been done.

It was easy to find out whether a man was hindered, if, as matter of law, the court held the hindering criminal (Rex v. Eccles, 1 Lea, C. C. 274); it has not been found so easy to fix any responsibility when a mere result is no longer sufficient to warrant judgment.[5] The leading cases in New York (Curran v. Galen, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496; National Protective Ass'n v. Cumming, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. [N. S.] 292, 111 Am. St. Rep. 730, 5 Ann. Cas. 280; Park Co. v. National Druggists, 175 N. Y. 40, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578; McCord v. Thompson-Starrett Co., 129 App. Div. 130, 113 N. Y. Supp. 385, affirmed in 198 N. Y. 587, 92 N. E. 1090; Mills v. U. S. Printing Co., supra) all show that the court sits primarily to decide a question of fact, viz.: What is the object of the combination? The conflicting opinions in the Cumming Case illustrate this perfectly. Parker, C. J., for the court, declared:

"There is no pretense that the defendant associations * * * had any other motive than one, which the law justifies of attempting to benefit their members by securing their employment." There is not "even a hint that a strike was ordered or a notification given of the intention to order a strike for the purpose of accomplishing any other result than that of securing the

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[5] To parade the cases bearing on such controversies as this is useless, for reconciliation is impossible. Very different viewpoints are afforded by the publications below enumerated. The historical development of the law is admirably stated by Mr. James Wallace Bryan in Johns Hopkins University Studies, series 27, Nos. 3–5 (1909). The American cases to 1908 are critically collated by Mr. Walter G. Merritt in his pamphlet entitled "Limitations on the Right to Strike." The University of Wisconsin's Bulletins on Boycotting and Blacklisting (1906) are endeavors to state impartially results to date. "Boycotts and the Labor Struggle" (H. W. Laidler, 1913), while not a conventional law book, tabulates the confusion of cases, and is especially full in respect of New York. I venture to think that Justice Holmes' article on "Privilege, Malice, and Intent" (8 Harv. L. Rev. 1894) is still the clearest exposition of fundamentals.

discharge of the members of the plaintiff association and the substitution of members of the defendant associations in their place. Such a purpose is not illegal."

Whereas Vann, J., for the minority, stated:

"The object of the defendants was not to get higher wages, shorter hours, or better terms for themselves, but to prevent others from following their lawful calling."

And this was the point of acute difference in a court which could not make any findings of fact of its own. The learned judges could not even agree as to the meaning of the findings of the lower court.[6] The English courts devote themselves to deciding the same questions of fact, and find it no easier. Cf. the opinions of Lord Shand in Allen v. Flood, L. R. 1898, A. C. 1, and Quinn v. Leathem, infra.

[4] Applying this rule to this case, it is held that the object of defendant's combination is not to injure Gill Company, though such injury has occurred and was foreseen. The object is to increase the power of the union, so as to get more, better, easier, and better paid work for its members; this is now regarded as laudable.

As to the means employed, everything lately done and alleged as ground for present action consists in threatening strikes. This is the exercise of a legal right. If defendants have sought to attain a legal end by legal means, that a motive, or part of a motive, was hate of Gill Company is immaterial. Roseneau v. Empire Circuit Co., 131 App. Div. 435, 115 N. Y. Supp. 511; Quinn v. Leathem, L. R. 1901, A. C., at 538.

That wrong and injury are being done in this matter is plain enough. Why does the law refuse or neglect to correct it? Andrews, J., has, I think, given the best answer in Foster v. Retail Clerks' Ass'n, 39 Misc. Rep. 48, 78 N. Y. Supp. 860:

"Injury * * * is never good, but to suffer it may entail less evil than to attempt to check it by legal means. * * * In the last analysis this freedom to commit injury, and the bounds imposed upon it are regulated by what has been thought to be public policy."

The cases cited could be used to show that no bounds have been imposed in New York on wrongs quite as great as that wrought upon complainant.

[5] Defendants have called attention to one fact not found in any case known or shown to me. The Gill Company has declared war on the union by discharging all members found in its shop. It is said this should deprive complainant of the aid of equity, and Sinsheimer v. United Garment Workers, 77 Hun, 215, 28 N. Y. Supp. 321, is relied on. It is not seen why a person otherwise entitled to protection for

[6] Compare Newton Co. v. Erickson (1911) 70 Misc. Rep. 291, 126 N. Y. Supp. 949, and Bossert v. United Brotherhood (1912) 77 Misc. Rep. 592, 137 N. Y. Supp. 321, for similar difference between trial courts. Justice Holmes wrote in 1894: "The ground of decision really comes down to a proposition of policy of rather a delicate nature concerning the merit of the particular benefit to themselves intended by the defendants, and suggests a doubt whether judges with different economic sympathies might not decide such a case differently when brought face to face with the issue." This was prophetic for New York at least.

his business is deprived of it because he will not employ a certain class of workmen; the nonpreferred workmen are not, therefore, given any right to injure the man who does not prefer them.

In the United States Courts for this circuit, National Fireproofing Co. v. Mason Builders' Ass'n, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148, is controlling. It accepts the New York cases fully, piously regrets the injuries committed, and writes the epitaph of litigation such as this by declaring that, when equal legal rights clash, equity is helpless. This is true; it would have been just as true to point out that the result of legalizing strikes, lockouts, and boycotts under any circumstances must be that those who understand the use of such legal tools can always keep within the law and accomplish their main purpose while inflicting all necessary "incidental" injury.

Considering that the rules as laid down in New York have not been shown to be transgressed, motion denied.

MONTANA WATER CO. v. CITY OF BILLINGS.

(District Court, D. Montana. May 1, 1914.)

No. 9.

1. WATERS AND WATER COURSES (§ 200*) — PUBLIC WATER SUPPLY — FRANCHISES—DUTY OF WATER COMPANY.

Where a city granted complainant a franchise to furnish water to the city and its inhabitants, complainant owed to the community a continuous duty to supply pure and wholesome water, and the city was bound to see that such duty was performed, and if complainant failed to perform for other and unforeseen causes, or failed to promptly repair defaults due to such causes, it was the city's duty to compel full performance, or to avoid the franchise or contract, or both.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 274; Dec. Dig. § 200.*]

2. WATERS AND WATER COURSES (§ 188*)—MUNICIPAL WATER SUPPLY—FRANCHISES—CONTRACT.

Where a city ordinance granted to complainant water company a franchise conferring on it the right and duty to occupy for an indefinite time the streets of the city with a water system, and to vend pure and wholesome water to the city and its inhabitants if they desired to buy, and also contained a contract for 20 years to sell water to the city, which was obligated to buy at specified rates, and also to purchase complainant's system at the end of the term or renew the contract for a similar period, the franchise and contract were separable, and the fact that the city failed to perform its obligation under the contract to buy the system, or renew the contract, did not estop it to claim a forfeiture of the franchise because of complainant's failure to furnish pure water and an adequate pressure and supply.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 287, 288; Dec. Dig. § 188.*]

3. WATERS AND WATER COURSES (§§ 188, 200*)—ORDINANCES—FRANCHISES—CONTRACT—TERMINATION.

Where an ordinance granted a water company a franchise to occupy defendant's streets for an indefinite time with a water system, and to vend pure and wholesome water to defendant and its inhabitants if they

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

desired to buy, and also contained a contract by which the company agreed to sell and the city to buy water for 20 years at a specified price, and to buy the system at the end of the term or renew the contract for a like period, the city was entitled to terminate the contract by the exercise of its own powers, for the company's failure to perform, but was bound to resort to the courts if it desired to terminate the franchise for any such default.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig §§ 274 287, 288; Dec. Dig. §§ 188, 200.*]

4. WATERS AND WATER COURSES (§ 200*)—MUNICIPAL WATER SUPPLY—CONTRACT—TERMINATION.

Where a city contracted to take water from a water company and to buy the system at the end of a specified term or renew the contract, and because of the company's failure to furnish proper pressure and wholesome water the city refused to longer recognize the contract as of binding force, treated it as terminated, and resisted a suit by the company for specific performance, such acts constituted an election on the city's part to terminate the contract, which was not waived by the city's continuing to receive service.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 274; Dec. Dig. § 200.*]

5. WATERS AND WATER COURSES (§ 196*)—MUNICIPAL WATER SUPPLY—CONTRACT—WAIVER.

Where a city contracted to take water from a water company to which it had granted a franchise, and at the end of a specified period to purchase the system or renew the contract, the fact that the city might or did waive the company's breach of the contract by continuing to accept performance did not also constitute a waiver of the city's police power to insist on a performance of the company's continuing duty to furnish a wholesome supply.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 270; Dec. Dig. § 196.*]

6. ESTOPPEL (§ 68*)—GROUNDS—CLAIM IN JUDICIAL PROCEEDING.

Where invalidity of a contract by a city to buy complainant's water system, or renew the contract to accept service for a specified period, was assigned as a reason for defendant's refusal to buy or renew, that did not estop the city from thereafter assigning complainant's failure to perform the continuing obligation of its franchise to supply pure and wholesome water as a ground for such refusal.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165–169; Dec. Dig. § 68.*]

7. SPECIFIC PERFORMANCE (§ 94*)—RIGHT TO RELIEF.

Where a city granted a water company a franchise to use the streets for a water system, and the ordinance also contained a contract by which the city agreed to purchase water from the company for a specified term, and at the end of such term to either buy the system or renew the contract, the water company, having failed to perform its franchise obligation to furnish proper service and pure water, did not come into equity with clean hands, and could not compel specific performance of the city's contract to purchase the plant or renew the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 249–256; Dec. Dig. § 94.*]

In Equity. Suit by the Montana Water Company against the City of Billings to compel specific performance of a contract for municipal water supply and to enforce a renewal clause in the contract. Decree for defendant.

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

Gunn, Rasch & Hall, of Helena, Mont., and O. F. Goddard and W. M. Johnston, both of Billings, Mont., for complainant.

Walsh, Nolan & Scallon and Edw. Horsky, all of Helena, Mont., and James L. Davis, City Atty., of Billings, Mont., for defendant.

BOURQUIN, District Judge. In its present aspect this is a suit to compel specific performance of a contract for a municipal water supply, to enforce a renewal clause. The defenses are invalidity of the contract and nonperformance by complainant.

From the evidence it appears that defendant, a city of this state, was incorporated under a special act of the Legislature of date March 10, 1885. Therein were limitations upon the power to create debts and restrictions upon the method of contracting. The first involved authorization by a vote of electors; the second, advertising and awarding to the lowest responsible bidder. In disregard thereof, defendant's council by ordinance tendered to complainant's predecessor in interest a franchise for works to supply defendant and its inhabitants with water for an indefinite time, and also therein a contract to supply defendant with fire hydrants and water for 20 years at an annual rental fixed therein, which contract included an option to defendant to purchase the water system at the end of said term at a price to be then determined by commissioners appointed as therein provided, and a promise by defendant that if it did not exercise the option, it would renew the contract for 20 years upon terms to be then mutually agreed upon, with a proviso that the "prices" should not exceed those fixed by ordinance, and that renewal would not "annul" any the operation of the ordinance. Terms and conditions were set out in great detail, providing, amongst other things, that pure and wholesome water should be supplied, that the system should have strength to simultaneously throw a certain number of streams a prescribed height if necessary, and that if at any time the beneficiary failed to comply with any material term, condition, or stipulation of the *ordinance,* defendant could forfeit rentals, and, such failure continuing for 60 days, unavoidable delays and accidents excepted, could terminate the *contract.* The ordinance was to take effect upon execution of a contract in accordance with its terms, conditions, and stipulations. The tender was accepted, and a contract in accordance with and incorporating said ordinance executed. The works or system was constructed, and, although not of the required strength, the defendant commenced paying rentals on April 1, 1887, but declaring the deficiency should be supplied as speedily as practicable. Rentals as fixed by the ordinance and contract were paid to February, 1912. In April, 1893, defendant elected to abandon the said special act and to subject itself to the general laws of the state, and thenceforward and now so continues. Then and until July 1, 1895, said laws contained no limitations and restrictions like those aforesaid of the special act, but on the latter date like restrictions were incorporated therein and continue to this day. The first term of 20 years ran its course. Defendant, of 600 inhabitants in the beginning, grew, and the water system with it. There was more or less continuous failure in the required strength of the system, or to furnish the same

if it possessed it, save for the last four or five years of said term. Defendant complained thereof, and some effort was made by the owner of the system to make up the deficiency. From April, 1887, the system was and now is defendant's only source of supply. At no time has defendant assumed to forfeit rentals or to terminate the contract other than by refusal to further perform and by its defense herein. At all times defendant received and receives from complainant such service as the latter has rendered and is rendering. In 1906 defendant determined to construct a city water system. It voted bonds therefor, but they failed of sale. The term expired April 1, 1907, and defendant neither exercised its option to purchase nor renewed the contract, and at no time made any effort in accordance with the latter's terms to do either. Then and at all times hitherto complainant was and now is ready and willing to sell the system or to renew the contract in accordance with the latter's terms. Then and at all times hitherto defendant's position has been one of refusal to perform so far as purchase or renewal in accordance with the terms of the contract are concerned, and without reasons assigned other than by inference and by its defense herein, while complainant's position has been and is as aforesaid, and of claim that the contract was renewed for 20 years by defendant's continuance subsequent to the original term of 20 years to receive and pay for water in accordance with the terms of said contract. Thereafter various tentative propositions were exchanged by the parties, with no satisfactory result. In 1909 a "working agreement" was entered into by them, to provide for additional mains and hydrants, without prejudice to the rights of the parties, which agreement has been abrogated. In the face of defendant's attitude of 1906 and hitherto, the owner of the system (complainant since 1908) hesitated to sufficiently improve the same. From what is described as the Yegan fire in 1909 and thenceforward the system either had and has not the required strength, or there was and is failure to furnish it when necessary. From the beginning the only feasible source of water supply was and now is the Yellowstone river, and therefrom was and is the system's supply. During the original term of 20 years there was more or less periodical impurity and unwholesomeness of the supply; sediment in high-water stages perhaps being most marked. For many years, and gradually increasing with increase of settlement, ranches, resorts, towns, and cities along said river and its tributaries and above the system's intake have discharged sewage and other contaminating matter into said river, in consequence of which the water supplied by complainant is not pure and wholesome, and has not been for all the time since the expiration of the term aforesaid, but on the contrary is, and for the interval last aforesaid has been, impure and unwholesome to a degree menacing and injurious to the health and lives of its consumers. During all this time the owner and complainant did nothing to purify said water other than to construct an inadequate settling basin and to install, about six months prior to final hearing herein, a crude, temporary chlorinating apparatus, both of which have been intermittently employed with poor results. Because of the conditions aforesaid pure and wholesome water cannot be supplied by complainant save by large expenditure for

and construction of adequate facilities and instrumentalities for a purification adjunct to the system.

[1] The defendant now has about 13,000 inhabitants. At the time of the abrogation of the "working agreement" of 1909 and hitherto defendant has enjoyed and now enjoys service from 170 hydrants of complainant's, installed on the former's order, for which service defendant has refused to pay the contract rentals since February, 1912, but offers to pay the reasonable value thereof. In 1913 defendant again voted bonds to construct a city water system, which bonds failed of sale. Upon these facts the conclusion of law is that complainant is not entitled to the relief sought. Briefly, it well may be that, though the contract was invalid in its inception for disregard of the special act's limitations of and restrictions upon the council's powers, since it always was within defendant's general powers, it was capable of ratification or renewal, and was ratified or renewed by defendant's recognition and performance and receipt of benefits under it for a period of time when, by virtue of the general laws aforesaid, defendant had power to make such a contract in the manner this was made, and thereafter its obligation was beyond impairment by subsequent legislation. Assuming this to be so for the purposes hereof, it is believed that complainant's failure to perform the obligation imposed upon it by the franchise to supply the city and its inhabitants with pure and wholesome water deprives it of any right to relief in equity, to specific performance. This failure is of long standing. Until recently, sediment and other impurities were present in high-water stages. Undoubtedly sewage and drainage from cities and other habitations above the system's intake polluted the water from the beginning. This steadily increased and is increasing, to an extent that the water is repellant and unsafe, and for at least the last six years some patrons necessarily have either rejected it and imported water, or filtered or boiled it for use. To epitomize in part the language of the Supreme Court of the United States in a somewhat like case, to supply pure and wholesome water was complainant's most vital obligation. Primarily it is of the highest police duties of municipalities. Nothing is more essential to the health and well-being of the community than its competent discharge. A municipality may invoke the aid of others therein, but it is bound to see that they do not default. And those who contract to perform this municipal duty are held responsible for the source, quantity, quality, protection from pollution, and effective distribution of the water they supply. If, as here, they contract to supply pure and wholesome water, they cannot perform their agreement without living up to these responsibilities. The needs of the community are continuous, and are the measure of the duty. Hence it is not enough that in the beginning or intermittently the contractors give full performance. As in any contract of continuing obligation, they must so perform day by day throughout the life of their franchise and contract. If they fail therein for other than unforeseen causes, or fail to promptly repair defaults due to the latter, it is the duty of the municipality to compel full performance, or to avoid the franchise or contract, or both. See Columbus

v. Mercantile, etc., Co., 218 U. S. 654, 31 Sup. Ct. 105, 54 L. Ed. 1193; Mann v. Water Co., 202 Fed. 863, 121 C. C. A. 220.

[2] It is of complainant's contentions, however, that by refusal to buy or renew at the expiration of the term, defendant failed to perform its obligation under the contract, and so is estopped to complain of complainant's failure in respect to its obligations. If the contract alone was involved, this would be sound, provided complainant had not justified defendant's refusal by prior failure to perform its obligation to supply pure and wholesome water. But the franchise must also be considered.

The ordinance that provided for both franchise and contract also provided for corresponding rights and duties. The franchise conferred upon complainant the right and duty to occupy for an indefinite time defendant's streets with a water system and vend pure and wholesome water to defendant and its inhabitants if they desired to buy. The contract likewise for 20 years to vend such water to defendant obligated to buy it, and also obligated to buy the system at the end of said term, or to renew the contract for a like term.

[3] By a reasonable construction of the ordinance it distinguishes the franchise from the contract. This is more favorable to defendant, though there be incidental advantage to complainant; and hence by settled principles in respect to public grants the ordinance must be so construed. It is more favorable to defendant in that, so construed, defendant can terminate the contract without also terminating the franchise, and so still insist upon service from complainant at reasonable rates, whereas, otherwise, the contract and franchise terminated, all complainant's obligations to service also would be terminated, and neither defendant nor its inhabitants could exact service on any terms or at all. Furthermore this is the practical construction of the ordinance by the parties in all their negotiations, acts, and conduct throughout the years. The ordinance confers upon the city the right to terminate the contract for complainant's failure to perform any of the duties aforesaid, be they of franchise or of contract, or of both. And if defendant's conduct in respect to the contract disables it to terminate the contract for complainant's failure to perform the contract obligation, it cannot disable it to terminate the contract for another reason—for complainant's failure to perform the franchise obligation to supply the inhabitants of defendant with pure and wholesome water. The loss of one right is not the loss of the other. It would seem that the ordinance created the right in defendant to terminate the *contract* by the exercise of its own powers for any failure of complainant to perform; but, to terminate the *franchise* for any such failure, a matter of graver consequences, defendant was left to the usual resort to the courts to that end. Complainant also contends that, in view of the ordinance, defendant's only remedy for complainant's failures is notice thereof to complainant, and, if the failures are not cured, but continue 60 days thereafter, termination of the contract, and that such failures cannot be availed of as a defense herein, citing the Walla Walla Case, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; The Urbana Case (C. C.) 174 Fed. 348, and the Great

Falls Case, 19 Mont. 518, 49 Pac. 15. All said cases are patently distinguishable from the instant suit.

[4] The ordinance herein does not prescribe notice. Complainant knew the quality of the water it was delivering as well as did defendant receiving it. Complaints were made. Complainant was bound to know whether or not it was performing its obligations. If it failed therein for the prescribed 60 days, defendant could of its own motion terminate the contract. Defendant did terminate it by refusing to longer recognize it as of binding force and obligation, by treating it as terminated, or it does terminate it by resisting specific performance because of the said failures. Another contention is that all complainant's failures were waived by defendant's continued receipt of service under the contract. To this it may be again observed that the said failures are not of contract obligations alone, but of franchise obligations as well.

[5] Though defendant might waive the former, of contract rights, by continuing to accept performance by complainant, this would not involve waiver of the latter, of the police power. For either failure the ordinance gives to defendant the right to terminate the contract. So, too, waiver of a failure of yesterday does not estop to complain of a failure of to-day. Furthermore it must be remembered that defendant received the water, though impure, by the force of circumstances. Complainant had the only supply. Complaining of failures therein, defendant publicly moved in the direction of a new system, a long and difficult process of which this suit is a part. Defendant was virtually compelled to take water from complainant, but complainant was not compelled to supply impure water. This is not waiver of complainant's failures therein.

[6] There has been no change of ground or inconsistency of position by defendant, as claimed by complainant, and to which it cites Ry. Co. v. McCarthy, 96 U. S. 258, 24 L. Ed. 693. If invalidity of the contract had been assigned by defendant as the reason for its refusal to buy or renew, that would not estop it from thereafter also assigning complainant's failure to perform the continuous obligation of the franchise to supply pure and wholesome water. The first involves the contract; the second, the franchise. More seems unnecessary.

[7] It may be observed, however, that any controversy like unto this—the well-nigh irrepressible conflict between public service corporations and the communities they serve—has its serious consequences for both parties. Each of them should greatly endeavor, so far as it consistently can, to not only minimize these consequences to itself but to the other as well. Fair dealing and expediency both demand it. And unheeded, to whomsoever is the victory it may be found a Pyrrhic one. With this, however, the courts have no concern.

Here, the fact remains that complainant failed in its most vital obligation, involving the health and well-being of a large community, and is vulnerable to the maxim, "He who comes into equity must come with clean hands."

It is not entitled to specific performance, and decree will be entered for defendant.

THE CIMBRIA.

(District Court, D. New Jersey. May 12, 1914.)

1. SUBROGATION (§ 23*)—ADVANCES TO PAY LIENS—EFFECT OF TAKING MORTGAGE.

While a mortgage on a vessel is not a maritime lien, and the holder is not entitled to share ratably with holders of such liens in the funds arising from a sale of the vessel, one who lends money to be used, and which is used, for the payment of claims secured by maritime liens, is not in the absence of laches deprived of the right to be subrogated to such a lien for the advance, which he would otherwise have, merely because he takes a mortgage or a note from the owner therefor.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 60–66; Dec. Dig. § 23.*]

2. MARITIME LIENS (§ 44*) — ADVANCES TO PAY LIENS — PRESUMPTION THAT CREDIT WAS GIVEN TO VESSEL.

Under Act June 23, 1910, c. 373, 36 Stat. 604 (U. S. Comp. St. Supp. 1911, p. 1191), which creates a presumption that the furnishing of repairs, supplies, or other necessaries to a vessel on the order of the owner, was on the credit of the vessel, the same presumption attaches to advances made to pay the claims of persons who have maritime liens for so furnishing, etc., and such presumption is not overcome by the fact that the owner's note and a mortgage on the vessel are taken for the advances.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 83; Dec. Dig. § 44.*]

In Admiralty. Suit by the Rockland County Trust Company against the steamboat Cimbria. Decree for libelant.

Conway, Williams & Kelly, of New York City, for Rockland County Trust Co.

Hyland & Zabriskie, of New York City, opposed.

RELLSTAB, District Judge. In accordance with the stipulation filed in this cause, the commissioner has reported, not only as to the amount due the libelant, but also whether it was entitled to a maritime lien against the boat.

The boat was sold pursuant to process issued on other libels and did not realize enough to pay all the claims. The commissioner found that libelant had advanced the sum of $3,418.49 to the owner of the boat and was entitled to such sum, with interest from August 22, 1913; but that the amounts found due the other libelants, for services and supplies rendered and furnished since such advances were made, were entitled to be paid first.

This subordination of the advances to the claims of the other libelants was based on the fact that libelant had taken a mortgage upon the vessel to secure such advances, and his determination that such advances "were made on the strength of the mortgage and upon the credit of the New York & Rockaway Beach Transportation Company and not upon the credit of the vessel."

Libelant insists that as to part of such advances, viz., $446, it is entitled to share with the wage libelants, and with the other holders of maritime liens as to the remainder due it.

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

The testimony discloses that the owner of the steamboat obtained a loan from the libelant, to be used in repairing and re-equipping the steamboat; it having been recently damaged in a collision. The loan was evidenced by a promissory note, and was made upon condition that it be secured by a mortgage on the boat, that proper insurance against fire, collision, etc., should be carried, and that the money should be advanced only as the work of repairing, etc., progressed. The mortgage was duly recorded in the register's office of the New York Customs House.

Of the amount loaned, $1,000 was paid direct to the borrower, and the remainder, $2,418.49, was paid out by the lender, upon the borrower's orders, direct to the several persons who had furnished supplies to or worked upon the steamboat; the lender taking separate receipts from such persons. The $1,000 paid direct to the borrower, according to the testimony of its president, was to be used as it saw fit, and the greater part was actually used in paying claims for which no maritime liens would lie.

[1] The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345, cited by the commissioner, is undoubtedly authority for his conclusion that:

"There can be no doubt that the libelant cannot rest on its mortgage and say that the fact that it was executed and recorded gives it either a priority or the right to share equally in the funds arising from the sale of the vessel."

The reason for this is that the libelant's mortgage is not a maritime lien. But why should the lender be deprived of the maritime lien obtained by the application of the loan to the payment of claims maritime in their nature merely because he has also taken a common-law security? It is familiar law that:

"One who lends money on request of the proper authority for the purpose of paying off maritime liens upon a vessel, and who looks to the vessel as his security, has a lien upon the vessel for such advances equal in dignity to the liens which he satisfies." 26 Cyc. 764.

[2] Since the passage of "An act relating to liens on vessels for repairs, supplies, or other necessaries," approved June 23, 1910 (chapter 373, 36 Stat. 604, U. S. Comp. St. Supp. 1911, p. 1191), which creates a presumption that the furnishing of repairs, supplies, and other necessaries to a vessel, upon the order of the owner, is upon the credit of the vessel, it follows that advances to pay any person having a maritime lien for so furnishing, etc., upon the order of the owner of a vessel, are presumed to have been made upon the credit of the vessel, as well as upon that of the owner. The Emily Souder, 84 U. S. 666, 21 L. Ed. 683; Ely v. Murray & Tregurtha Co., 200 Fed. 368, 118 C. C. A. 520.

The contention that the making of a promissory note, at the time of this loan, and the mortgage upon the vessel to secure its payment, evidence an intent not to give credit to the vessel, in my judgment, lacks virility. That the taking of the promissory note evidenced an intent to hold the owners of the boat responsible is manifest, but not any more than the taking of a mortgage upon the vessel is evidence that

the advances secured by such mortgage were also made upon the credit of the vessel.

To admit so much of the advances as paid wages to the status of a wage claim, and the remainder of the advances, directly made by the lender to materialmen and furnishers in payment of their claims for materials and supplies, to the status of the claims of those furnishing repairs, supplies, and other necessaries, in the absence of laches works no harm to the other libelants, be their claims for wages or supplies, as without the payment of such claims they would have continued to be maritime liens, and entitled to share in the proceeds of sale with the other maritime liens, according to their rank. Neither the Rumbell Case, nor any other called to the attention of the court, is opposed to permitting a claim thus bottomed to so prorate when the proceeds are insufficient to pay all claims in full.

In the Rumbell Case, the mortgage considered was given to secure a part of the purchase money upon the sale of the mortgaged vessel, and neither it, nor the indebtedness thus secured, was enforceable as a maritime lien. The facts of that case did not require a decision involving the status of every kind of debt that might be secured by a mortgage, and there is nothing in the opinion that suggests that a maritime claim, secured by a mortgage on the vessel charged with its payment, ipso facto loses its character as such upon the acceptance of the mortgage. On the contrary, the opinion carefully avoids any such intimation. The relation of a purchase-money mortgage to subsequent contracts, admittedly maritime, was the subject then calling for decision, and the deductions drawn from the cases there cited were limited to mortgages of that character and those given to raise money for general purposes. 148 U. S. 1, 15, 13 Sup. Ct. 498, 37 L. Ed. 345.

The reason for such a limitation is obvious. In the case of the purchase-money mortgage, the mortgagee has but changed his relation to the vessel from absolute to conditional ownership. As compared with those who have rendered service to the vessel or furnished it with supplies, he occupies the same position as the absolute owner. Not so, however, is the relation of a stranger to the title who, on the request of the owner, advances money to pay for such service and supplies. He occupies the position of those who have rendered such service, etc., and in their stead obtains a lien paramount to that of the owner or any one in privity with his title. In the case of the mortgage to secure advances made to the owner of the vessel generally, no subrogation of any specific maritime lien having taken place, the holder is confined to his mortgage—a common-law lien.

The present case furnishes an apt illustration of the doctrine here considered. The $1,000 advanced, though a part of the debt secured by the mortgage was not directly applied to the payment of liens maritime. It was turned over to the borrower to use generally, and, as noted, the greater part was actually used in the payment of nonmaritime liens. That it might have been used by the owner in the payment of indebtedness that otherwise might constitute a maritime lien, and that a part may actually have been so used, is not controlling. In the case of advances, the tacit hypothecation obtained by operation of law

depends upon their having taken the place specifically of service and supplies directly rendered or furnished. Where the proof fails to show such direct and specific application, the lender is left to such security as his express contract gives him. As to the remainder of the advances, the evidence clearly establishes, not only a purpose to have them applied to the payment of such service and supplies, but that they were specifically applied thereto.

The St. Mary, 21 Fed. Cas. 215, No. 12,242, is authority for the proposition that the court should "lay out of view the mortgage given upon the vessel, and put the decision upon the original indebtedness"; and The A. R. Dunlap, 1 Fed. Cas. 1095, No. 513, holds that the taking of a mortgage as collateral security by persons furnishing supplies does not prevent their enforcing the lien given by the maritime law. The St. Joseph, 21 Fed. Cas. 174, No. 12,229, is a case to the same effect.

In the present case there is no contention that the libelant unduly delayed in asserting its maritime lien, and as the evidence shows that, of the amount found due the libelant, the sum of $2,418.49 was paid directly to persons who then had maritime liens enforceable for that amount against the vessel in question, libelant has a maritime lien for such sum, and as, of this amount, the sum of $446 was paid to seamen, it is entitled, as to such sum, to the same preference as the wage libelants.

As to the remaining $1,000 paid directly to the owners of the boat, the libelant is not entitled to a maritime lien. 26 Cyc 765. The conclusions reached by the commissioner in this behalf are disapproved, and the libelant may enter a decree in accordance with this opinion.

THE CIMBRIA.

(District Court, D. New Jersey. May 12, 1914.)

MARITIME LIENS (§ 37*)—VESSEL OWNED BY CORPORATION—SUPPLIES FURNISHED BY DIRECTOR.

A stockholder and director in a steamboat company, who took an active part in the management of its business, was in essence a part owner of its vessels, and as against strangers to the title who have maritime liens is not entitled to a maritime lien on one of the company's vessels for supplies furnished or for advances made to pay claims for repairs and supplies.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 58–70; Dec. Dig. § 37.*]

In Admiralty. Suit by John Gallaher against the steamboat Cimbria. On review of report of commissioner. Confirmed in part.

Hyland & Zabriskie, of New York City, for Gallaher.

Conway, Williams & Kelly, of New York City, for Rockland County Trust Co.

RELLSTAB, District Judge. Libelant was a stockholder and director of the New York & Rockaway Beach Transportation Company,

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

the owner of the Cimbria. He was familiar with the financial condition and the business of such company, and participated in its management. He had a desk in the company's office, and carried on no other business during the period covered by his claim. Some of the company's moneys were mingled with his own, deposited by him in his own bank account, and used by him to pay some of the company's bills. His libel alleges that there is due him the sum of $784.33, for which he claims a maritime lien. Of this sum, $146 is for supplies furnished to the boat. The remainder, $638.33, is the aggregate of moneys advanced by him to pay some of the company's indebtedness, incurred in repairing such vessel and furnishing it with supplies.

The commissioner, acting under a stipulation filed in the cause that he should report not only as to the amount due libelant, but also whether he was entitled to a maritime lien against such vessel, reported that he was so entitled for the first named sum, but not for any of the items totaling that last mentioned. With reference to the latter, he said:

"I am satisfied that an officer of a company owning a vessel, standing in the position occupied by this libelant, does not have a maritime lien for the amounts advanced by him for the purpose of the operation of a vessel; also, that this was a mere advance of money by one in authority, rather than the advances of one on the request of one in authority having the right to bind the ship. The New York & Rockaway Beach Transportation Company could not file a claim for money expended by it in paying the debts of the steamer, and on the same line of reasoning I think that a managing director cannot have a lien for funds advanced by his personal check issued to keep the vessel in operation, and this especially in view of the fact that Mr. Gallaher had on at least one occasion the moneys of the company deposited in his personal bank account, and had advanced them for the company's purposes without apparently having rendered any account of them to the company."

A maritime lien does not exist in favor of the owner or any other person who does not render services or furnish supplies to and on the credit of the vessel. It depends upon a tacit hypothecation, implied in law; the theory being that the ship's necessities, in the absence of the owner's personal credit, can only be relieved by pledging her, and therefore excludes owners.

Whether a part owner can, in any circumstances, obtain a maritime lien against his partner, is not settled, the authorities being in conflict; but it is clear, on principle as well as authority, that as against a stranger to the title, having a maritime lien, no such lien can be enforced by one who, as part owner, is himself liable for the debt underlying such lien. Petrie v. The Steam Tug Coal Bluff No. 2 (D. C.) 3 Fed. 531; The Benton, 3 Fed. Cas. 256, No. 1,334.

Maritime liens are an exception to the rule which disfavors secret liens. This exception, when limited to strangers to the title, has sound public policy for its support. To extend the exception, and allow the owner and those standing in privity with him to have a secret lien upon the vessel, would open the door to fraud and collusion, be contrary to such policy, and tend to destroy the very protection which the exception is designed to secure, viz., that strangers to the title of the vessel who, by the rendition of services and the furnishing of supplies on its credit, give it means and opportunity to fulfill the purpose of its being, should have the vessel in its entirety as security. A stockholder of a

corporation owning a vessel, while not holding the legal title, is in essence a part owner of such vessel. See The Queen of St. Johns (C. C.) 31 Fed. 24. In the present case, libelant was more than a mere stockholder. He was a director and actively engaged in transacting the business, involving both the company's finances and its use of the vessel. The depositing of the company's funds in his own personal bank account, and his checking it out in payment of the company's bills, prove such a close identification of himself with the company's affairs as to create the presumption that in his subsequent sale of merchandise to the company, and his advances to pay their bills, which are now asserted as maritime liens, he was looking, not to the boat, but exclusively to the company, from whose receipts he expected to reimburse himself. That a fortuitous happening—collision—frustrated this expectation, is no reason why he should be permitted to transfer the credit to the boat, to the prejudice of strangers who have strict maritime liens. As to these, libelant stands in the place of the owner; and, as against such lienors, his claim must be postponed, whatever may be its merit or standing against the owner, and regardless of whether it would be a lien against "remnants and surplus." The conclusion here reached, while contrary to that reached in The City of Camden (D. C.) 147 Fed. 847, is fully supported by The Murphy Tugs (D. C.) 28 Fed. 429, and The Queen of St. Johns (C. C.) 31 Fed. 24, which, squaring more with my own judgment, I am constrained to follow.

The commissioner has distinguished between the advances made by libelant and the value of the goods furnished by him, allowing a lien for the latter; but as, in my judgment, the libelant must be alligned with the owner, and not with strangers to the title, in the matter of his dealings with the company and its vessel, I am constrained to disallow his claim for supplies furnished, as well as that for advances. I fail to see how he can be entitled to one and not the other; or, rather, how he can be said not to have a lien for the one and still have one for the other. In parting with his money in making advances, he parted with his property just as much as when he turned over the supplies, and his relation to the company and the vessel in selling them the supplies is no different from his relation in advancing money. In both instances he did it as one having an interest in the company, its property, and enterprises, and he must be held to have dealt exclusively on the credit of the owner; and, while against it he is entitled to be reimbursed, he is not entitled to a maritime lien therefor as against strangers to the title who admittedly have maritime liens for the amounts due them.

The conclusions of the commissioner as to the merchandise sold to the company must be disaffirmed, and those relating to advances affirmed. A decree may be entered in conformity with this opinion.

POSITIVE LOCK WASHER CO. v. RELIANCE MFG. CO. et al.

(District Court, N. D. Ohio, E. D. at Cleveland. June 14, 1913.)

No. 105.

1. PATENTS (§ 17*)—INVENTION—ADJUSTABILITY OF PARTS.
The mere adjustability of parts does not constitute invention.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 16, 17; Dec. Dig. § 17.*]

2. PATENTS (§ 328*)—INVENTION—DIE FOR MAKING LOCK WASHERS.
The Barnett patent, No. 529,847, for a die for making lock washers, *held* void for lack of patentable invention.

In Equity. Suit by the Positive Lock Washer Company against the Reliance Manufacturing Company and Frank C. McLain. On final hearing. Decree for defendants.

John W. Bostwick, Jr., of Rahway, N. J., Moffett, Guerin & Wickham, of Cleveland, Ohio, and Russell M. Everett, of Newark, N. J., for complainant.

Fay & Oberlin, of Cleveland, Ohio (Robert M. See, of Cleveland, Ohio, of counsel), for defendants.

DAY, District Judge. The bill of complaint was filed by the Positive Lock Washer Company of Newark, N. J., against the Reliance Manufacturing Company and its secretary and treasurer, Frank C. McLain, engaged in manufacturing at Massillon, Ohio. The bill prays for an injunction and accounting for the infringement of United States letters patent, No. 529,847, for a die for making lock washers, issued November 27, 1894, to F. D. Barnett, and subsequently assigned to the complainant company. The patent expired in November, 1911.

It is contended by the defendants that the three claims of the Barnett patent in suit are invalid, that the patented die is nothing more than an ordinary die ground to conform with the article to be shaped, and that this patented die was produced by Barnett without any invention whatsoever, but simply by the exercise of ordinary skill, and the prior patents disclose dies which are substantially like the Barnett die, though ground to differently shaped metal; furthermore, that the defendants have acted with fairness in the manufacture and use of the dies in controversy.

The patented dies are used in the manufacture of lock washers, which are spiral split rings formed with barbs on the opposite sides of their two ends, and the washers are used to prevent a nut from turning on a bolt. In the manufacture of such washers straight bar steel is set to a rotating mandrel, which coils the bars into spring-like form, and the coil is then removed from the mandrel and fed lengthwise into another machine, which cuts successive convolutions from the coil. These sections so cut from the coil are spiral split rings, and they are sold on the market as plain lock washers. In order to produce a barbed lock washer, it is necessary to stamp a plain spiral washer to form barbs thereon, and the die of the patent in suit may be used for this purpose.

[1] The patented dies which are fixed in a power press comprise

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

a stationary lower die and an upper die held in a reciprocating cam of the press. Each of the two dies is cut with two vertically separated inclined faces to conform with the separated end portions of a plain spiral washer; each die has a shoulder at its center, against which terminates the lower face of the lower die and the diagonally opposite upper face in the upper die. The two faces which terminate against the shoulders are cut with grooves in their inner edges, and both the upper and lower dies are cut into two sections at the shoulders which separate their faces. The plain spiral washer is placed on the lower die, and the upper die forced down against it, the metal at the ends of the washer to be stamped into the grooves of the dies to form barbs, but no other portion of the washer will be affected, because aside from the grooves the die faces conform with the plain spiral washer, so that they will not alter its shape. The barbed lock washer which the Barnett die is designed to form is disclosed by the Turnbull patent, No. 440,870, issued November 18, 1890; the complainant company having been formed to manufacture the Turnbull washer. The Turnbull washer differs from the plain spiral washer merely in having barbs at its ends. After a number of experiments with various sorts of machines, some designed to be automatic, Barnett conceived the idea of stamping the barbs on plain washers. The dies of the patent in suit are sectional. This will permit of their being readily ground and of their being subject to adjustability. If the only utility resided in the adjustability, this would not be a patentable feature, as mere adjustability of parts does not constitute invention. Peters v. Hanson, 129 U. S. 541, 9 Sup. Ct. 393, 32 L. Ed. 742; Doig v. Morgan, 122 Fed. 460, 59 C. C. A. 616; Sipp Elec. & Mach. Co. v. Atwood & Morrison Company, 142 Fed. 149, 73 C. C. A. 367; Smyth Mfg. Co. v. Sheridan, 149 Fed. 208, 79 C. C. A. 166; Stevens v. Rodgers Boiler & Burner Co. (6th C. C. A.) 186 Fed. 631, 108 C. C. A. 495.

[2] At the time the patent was granted to Barnett it was not new to construct dies in sections, so that they could be reground more easily than a solid die, and so that they could be adjusted, if desired. This is shown by patent No. 340,886 to Lovell, granted April 27, 1886; patent No. 53,780 to Burdick; also patent No. 53,781 to the same patentee; likewise patent No. 11,263, granted July 11, 1854, to H. W. Hayden; patent No. 273,302, granted March 6, 1883, to J. Palmer; patent No. 490,395, granted January 24, 1893, to W. W. Miner; and patent No. 54,738, granted May 15, 1866, to C. Kane. All of these prior patents illustrate dies designed to shape metal by compression, and the dies are made in sections for the purpose of facilitating the regrinding of the die faces, and these dies are all capable of having their sections adjusted in conformance with the size of the article being shaped.

It is contended in the rebuttal testimony of complainant's expert that a new mode of operation was disclosed by the Barnett patent, because the closed dies confined merely a part of the article and not the whole of it. It appears from the record, however, that in the operation of the Barnett dies about three-quarters of the washer, being barbed, lies on the dies, and that the pitch of the washer is largely determined by

the coil of the spiral spring before the same is cut into the washer sizes. Barnett having before him all of these prior art patents, had simply the problem of grinding sectional dies and shaping them to conform with the finished Turnbull washer. This did not constitute invention. Butler v. Steckel, 137 U. S. 21, 11 Sup. Ct. 25, 34 L. Ed. 582; Smith v. Nichols, 88 U. S. 112, 119, 22 L. Ed. 566; Dunbar v. Myers, 94 U. S. 187, 199, 24 L. Ed. 34; Pomace Holder Co. v. Ferguson, 119 U. S. 335, 338, 7 Sup. Ct. 382, 30 L. Ed. 406; Peters v. Active Mfg. Co., 130 U. S. 626, 628, 629, 9 Sup. Ct. 643, 32 L. Ed. 1057; Watson v. Cincinnati, St. L. & C. R. R. Co., 132 U. S. 161, 167, 10 Sup. Ct. 45, 33 L. Ed. 295.

The Circuit Court of Appeals for this jurisdiction has considered the question of die invention in Strom Mfg. Co. v. Weir Frog Co., 83 Fed. 170, 27 C. C. A. 502. Judge Severens said, in holding the patent invalid:

"And indeed we do not think it can be doubted that, the form of the article to be produced being given, and the material with which it was proposed to make it stated, it would be quite an elementary operation for an experienced metal worker to construct the rail brace of the patent. As the patentee describes no special process, the only process which can be implied is the old one, which the common experience of those employed in such pursuits would suggest.

"But the implication of the exercise of the common skill of the art which must indispensably be carried into the claims in order to save them as sufficiently descriptive is fatal to their validity, for the striking up of the rail brace from a plate of metal, which the patentee claims as his improvement in the art, is thus shown to be nothing else than the old process of making such forms by means of hammers, stamps, dies, and swages, or other tools familiar to operatives skilled in working with them. It belongs to one of the earliest of the arts, and its history reaches back to the myths of antiquity. It is unnecessary for us to decide whether the process is sufficiently described in these claims; for, if it is, it is only by an implication of the pre-existing art, which would demonstrate that nothing was invented."

The patentee had before him a finished Turnbull washer, presenting all of the details of the form of the washer to be manufactured; and, simply, in the exercise of mechanical skill, he produced a sectional die to perform the function of making these washers.

To my mind, the record does not establish the allegations of unfair competition and trade. The patented washers were manufactured by the complainant under a patent which had expired, and the Reliance Manufacturing Company was free to make such washers; and they are now engaged in making the washers by the ordinary process of forging metal by the action of sectional dies.

Complainant's bill of complaint will be dismissed.

UNITED STATES v. MACKEY et al.

(District Court, E. D. Oklahoma. June 2, 1913.)

No. 1733.

1. INDIANS (§ 27*)—LANDS—SUIT TO ENJOIN TRESPASS—JURISDICTION.
A suit to enjoin defendants from taking oil and gas without right from lands alleged to be the property of an Indian tribe and to be chiefly valuable for such minerals is cognizable in equity, and may be maintained by the United States.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 19, 20; Dec. Dig. § 27.*]

2. NAVIGABLE WATERS (§ 1*)—NAVIGABILITY OF STREAM—ARKANSAS RIVER.
The Arkansas river is a navigable stream so far as concerns the question of title to the bed thereof.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 5–16; Dec. Dig. § 1.*]

3. NAVIGABLE WATERS (§ 37*)—TITLE TO BED OF STREAM—EFFECT OF GRANT TO INDIAN NATION.
The grant by the United States to the Creek tribe of Indians, pursuant to treaty, of lands in the Indian Territory by patent of August 11, 1852, did not vest in such tribe any right or title to the bed of the Arkansas river within the grant, between high-water marks, but the same continued to be held by the United States in trust for the future state, and on the admission of Oklahoma, passed to that state, subject to whatever rights, if any, the local state law, statutory or common, gave to owners of the land bordering on the stream.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201–226, 285; Dec. Dig. § 37.*]

4. NAVIGABLE WATERS (§ 37*)—TITLE TO BED OF STREAM—PATENT TO INDIAN ALLOTTEE.
Under a patent to an Indian allottee of lands bordering on a meandered navigable stream, the boundary is not the meander line, but the title of the grantee extends to actual high-water mark of the stream.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-226, 285; Dec. Dig. § 37.*]

5. NAVIGABLE WATERS (§ 36*)—TITLE TO BED OF STREAM—VALIDITY OF TERRITORIAL STATUTES—CONTRAVENTION OF ORGANIC ACT.
In view of the settled and consistent policy of Congress of leaving to each state when organized the disposition of rights in the beds of navigable streams below high-water mark, the provision of the Organic Act of the Territory of Oklahoma that the legislative power of the territory should extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States did not authorize the territorial Legislature to pass a general act granting to riparian owners on navigable streams title to the bed of the stream to low-water mark, which was not a rightful subject of territorial legislation, and such an act was void and did not become a law of the state under Schedule, § 2, of its Constitution extending laws in force in the territory at the time of admission until altered or repealed.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180–200; Dec. Dig. § 36.*]

6. NAVIGABLE WATERS (§ 36*)—TITLE TO BED OF STREAM—COMMON LAW OF OKLAHOMA.
Under Wilson's Rev. & Ann. St. Okl. 1903, § 4200, providing that the common law, as modified by constitutional and statutory law, judicial decisions, "and the condition and wants of the people," shall remain in

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

force in aid of the general statutes, which provision, being in force in the territory at the time of its admission as a state, became a law of the state, the common law of the state with respect to the rights of riparian owners on navigable streams in the beds of such streams is not the strict common law of England which recognized only tidal streams as navigable, but such law as modified by the decisions of a large number of American courts, with the approval of the Supreme Court of the United States, by which all streams are to be classed as navigable which are in fact so, and as to all such streams the rule is applied that a riparian proprietor owns only to high-water mark.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 180–200; Dec. Dig. § 36.*]

7. COURTS (§ 278*)—JURISDICTION OF FEDERAL COURTS—JURISDICTION OF ENTIRE CONTROVERSY.

Where the jurisdiction of a federal court has been properly invoked, it continues for the purpose of determining rights in property which is the subject of litigation under a cross-bill between codefendants, although the original bill is dismissed and there is no diversity of citizenship between the defendants.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 819; Dec. Dig. § 278.*]

In Equity. Suit by the United States against Phillip Mackey and others. On demurrers to bill and to a cross-bill between codefendants. Demurrer to bill sustained, and demurrer to cross-bill overruled.

Wm. J. Gregg, of Tulsa, Okl., and J. C. Denton, of Muskogee, Okl., for the United States.

Brown & Stewart, of Muskogee, Okl., for defendants Mackey.

Martin, Bush & Murray, of Tulsa, Okl., and Campbell & Beall, of Muskogee, Okl., for defendants Avery and Waterside Oil & Gas Co.

Burwell, Crocket & Johnson and Ledbetter, Stuart & Bell, all of Oklahoma City, Okl., for defendant Pollard-Hagan Oil Co.

F. B. Dillard, of Tulsa, Okl., for Texas Co.

James B. Diggs and Henry McGraw, both of Tulsa, Okl., for defendants Gladys Belle Oil Co., Gipsy Oil Co., and Stunkard.

James H. Chambers, of Oklahoma City, Okl., for intervener State of Oklahoma.

CAMPBELL, District Judge. Louisa Mackey in her lifetime was a freedman citizen of the Creek tribe of Indians, and there was selected by her as a portion of her allotment of the lands of said tribe and allotted by patent to her lots 1, 5, and 6 of the northeast quarter of section 18, township 18 north, range 13 east. Her patents were dated November 10, 1903, approved by the Secretary of the Interior January 8, 1904, and thereupon delivered to her before her death. Upon her death she left as her sole heirs at law Lovely Mackey, her husband, and Mary and Phillip Mackey, her two minor children. Lovely Mackey was duly and regularly appointed guardian of the persons and estates of the said minors, and on June 23, 1910, acting for himself and as guardian for said minors, executed an oil and gas mining lease to one Eysenbach, covering the land above described together with other lands, which by a subsequent series of assignments the defendants Gladys Belle Oil Company, Gypsy Oil Company, Charles Stunkard, and Walter Stun-

kard now claim. In the lease above referred to, the said lots are described as "lots 1, 5, and 6, section 18 north, range 13 east," and they together with other tracts covered by the lease are recited as containing 142 acres, more or less. The lots mentioned are fractional portions of said section, lying along the north bank of the Arkansas river, a meandered stream; the meandered line appearing upon the plat as forming one of the boundaries of each of said lots. In November, 1911, the defendant Lovely Mackey, for himself and as guardian for said minors, executed an instrument purporting to be an oil and gas mining lease to Cyrus S. Avery, one of the defendants, covering the land lying between the meandered line of the Arkansas river as it forms the boundary of the several lots above mentioned and low-water mark of said river; the amount of land being recited as 40 acres, more or less.

It appears that at the institution of this suit, the Gladys Belle Oil Company, claiming under said Eysenbach, and the Waterside Oil Company, claiming under Avery, were engaged in a struggle for the possession of so much of this land as lies between the meandered line and low-water mark of the river; each having acquired actual possession of a portion of said tract and sunk wells thereon. This suit was instituted by the United States, on behalf of the Creek Nation, to enjoin these companies from trespassing upon and mining oil and gas from this land between the meandered line and low-water mark of the river. The theory of the government is that the ownership of the bed of the Arkansas river passed to the Creek Nation by the general grant of lands made to it in the patent executed by the government to the Creek Nation dated August 11, 1852, conveying to that nation the tribal lands which the Creeks have since occupied in what is now Eastern Oklahoma, the Arkansas river having been included within the boundaries of that grant; that inasmuch as in the survey of this land preparatory to allotment the Arkansas river was meandered and the land on each side, not including the river, was surveyed into sections and subdivisions thereof, the allottees of such of these subdivisions as are bounded by the river only took by their patents the land within the particular subdivisions described in the patents, or at most only took to high-water mark on the river; that the title to the river bed still remains in the Creek Nation; and that therefore the defendants who are, as the bill alleges, in possession of this land, taking the oil and gas therefrom, are trespassers upon the rights of the Creek Nation in these lands, and by removing the oil and gas therefrom are irreparably injuring the Nation in its property rights in the river bed.

To this bill the Gypsy Oil Company and the other defendants united in interest with it filed their answer and cross-complaint. In the answer they deny that the land in controversy is unallotted land of the Creek Nation, or that that tribe of Indians has any interest whatever in said land, but assert that the same passed to Louisa Mackey by her patent from the Creek Nation. They admit that the land lies between the meandered line and low-water mark of the river, but contend that it passed to Louisa Mackey by virtue of her patent by right of her riparian ownership to the exclusion of the Creek Nation and the United States. They allege that on November 15, 1911, they went into pos-

session of this land under an assignment of the lease of Eysenbach, above referred to, and have developed and are developing the property; they pray that the same be dismissed.

There is also filed by the Gypsy Oil Company and those united in interest with it a cross-complaint against the defendants, Cyrus S. Avery, Waterside Oil & Gas Company, and Pollard-Hagan Oil Company, in which it is sought to have the court decree that the said Gypsy Oil Company and those united in interest with it have a valid and subsisting oil and gas mining lease and leasehold estate in and to the said premises, with the sole and exclusive right to develop the property and take oil and gas therefrom, and that their title thereto be quieted as against the said Avery, Pollard-Hagan Oil Company, and the Waterside Oil Company, and that the latter be enjoined from asserting any superior rights thereto, and that it have judgment against Avery, the Waterside Oil & Gas Company, and the Texas Company for the value of oil taken from the premises by them.

The Pollard-Hagan Oil Company was by an amendment to the bill made party defendant, and has entered its appearance. The claim of this company is based upon a lease from the state of Oklahoma, and its contention is that, upon the advent of statehood, the title to the bed of the Arkansas river between high-water marks vested in the state, and that by virtue of its lease from the state it is entitled to the possession of the land in controversy for oil and gas mining purposes.

The several parties defendant have filed demurrers to the bill, and the cross-defendants have filed demurrers to the cross-bill. These demurrers were filed before the taking effect of the present equity rules, and will be treated now as motions to dismiss.

The main questions raised are the following:

First. Is the Arkansas river at the point in question a navigable stream?

Second. If it is a navigable stream, did the grant to the Creek Nation by the patent of August 11, 1852, convey to that nation the same title and interest in the bed of the Arkansas river as it acquired thereby to all the lands included within the grant not the beds of navigable streams.

Third. If the Creek Nation acquired the same title to the bed of the Arkansas river between high-water marks that it acquired to all the uplands covered by the patent, did the allotment deed of Louisa Mackey convey from the Creek Nation to her that nation's title in and to the land in controversy.

Fourth. If the title to the bed of the river did not pass to the Creek Nation by the patent from the United States, but remained in the United States in trust for the future state of Oklahoma, then, upon the advent of statehood, what were the rights of Louisa Mackey or her heirs as riparian owners of the upland bordering upon the river? Did their rights as such riparian owners of the soil extend to high-water mark, to low-water mark, or to the middle thread of the stream?

Fifth. If the rights of Louisa Mackey and her heirs as riparian owners of the soil extend to or beyond low-water mark, then the question arises: Did her lease to Eysenbach, under which the Gypsy Oil

Company claims and which was prior in point of time to the Avery lease under which the Waterside Oil Company claims, vest in Eysenbach and his assigns the right to enter for oil and gas mining purposes upon that portion of her land between high and low water marks?

[1] For the purpose of determining the questions raised by the several demurrers, the allegations of the bill and cross-bill are taken as true. If the theory of the government is sound that the title to the bed of the Arkansas river, including the land in controversy, is in the Creek Nation, there can be no question of the capacity of the United States to maintain the suit in behalf of the Creek Nation, if it be one cognizable in equity. From the bill it appears that the defendants, or at least a part of them, have taken possession of the property and sunk oil wells thereon, and are taking large quantities of oil and gas therefrom; and that they threaten to and will continue to do so, to the permanent and irreparable injury of the land, inasmuch as it is alleged that the chief value of the land is the oil and gas thereunder. Against this the bill prays an injunction as well as other relief. This states a cause of action cognizable in equity. Big Six Development Co. v. Mitchell, 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332; 5 Pomeroy's Equity Jurisprudence, § 495.

[2] I. Is the Arkansas river a navigable stream so far as concerns the question of title to the bed thereof? That it is was practically conceded at the oral argument. This question was answered in the affirmative by the Supreme Court of Kansas in the case of Dana v. Hurst, 86 Kan. 947, 122 Pac. 1041, decided last February, for reasons which appear to me to be sound, set forth in a well-considered opinion. We therefore start with the proposition that the Arkansas river is a navigable stream.

[3] II. Did the grant to the Creek Nation by the patent of August 11, 1852, convey to that nation the same title and interest in the bed of the Arkansas river as it acquired by the patent in the uplands covered by the patent?

The land conveyed by this patent was a part of the "Louisiana Purchase." By article 3 of the Treaty between the United States and France, concluded April 30, 1803 (see 8 Stat. p. 202), under the terms of which the lands comprising the Louisiana Purchase were acquired by the United States, it was was provided that:

"The inhabitants of the ceded territory shall be incorporated into the Union of the United States, and admitted as soon as possible according to the principles of the Federal Constitution."

By the Act of May 18, 1796, c. 29, § 9, 1 Stat. 468, now section 2476 of the Revised Statutes (U. S. Comp. St. 1901, p. 1567), it was provided:

"All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed to be highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both."

By the Act of March 3, 1811, c. 46, § 12, 2 Stat. 606, now section 5251, Revised Statutes (U. S. Comp. St. 1901, p. 3522), it was provided:

"All the navigable rivers and waters in the former territories of Orleans and Louisiana shall be and forever remain public highways."

In Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565, it is said:

"We think a proper examination of this subject will show that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory, of which Alabama or any of the new states were formed, except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia Legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with the French Republic of the 30th of April, 1803, ceding Louisiana."

In Weber v. Harbor Commissioners, 18 Wall. 57, 21 L. Ed. 798, it is said of the title to the bed of San Francisco Bay:

"Although the title to the soil under the tidewaters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future state. Upon the admission of California into the Union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government."

In Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224, referring to accretions, it is said:

"By the common law, as before remarked, such additions to the land on navigable waters belong to the crown. But, as the only waters recognized in England as navigable were tidewaters, the rule was often expressed as applicable to tidewaters, only, although the reason of the rule would equally apply to navigable waters above the flow of the tide; that reason being that the public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience. The confusion of navigable with tidewaters, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British Islands, and that of the American Continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many states of doctrines with regard to the ownership of the soil in navigable waters above tidewater at variance with sound principles of public policy. Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several states themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in Martin v. Waddell, 14 Pet. 367 [10 L. Ed. 997], Pollard v. Hagan, 3 How. 212 [11 L. Ed. 565], and Goodtitle v. Kibbe, 9 How. 471 [13 L. Ed. 220]. These cases related to tidewater, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of Genesee Chief, 12 How. 443 [13 L. Ed. 1058], has declared that the Great Lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the states in which the lands were situated."

In the case of Donnelly v. United States, 228 U. S. 243, 33 Sup. Ct. 449, 57 L. Ed. 820, Ann. Cas. 1913E, 710, decided April 7, 1913, the Supreme Court of the United States had before it the question as to whether the Klamath river in California was a navigable stream, as bearing upon the question whether its bed was a part of the Hoopa Valley Indian Reservation. It was decided, for reasons stated in the opinion, that the river was a non-navigable stream; but in the course of the opinion it was said:

"In passing upon the effect of the act admitting Alabama into the Union, this court held, in Pollard's Lessee v. Hagan, 3 How. 212 [11 L. Ed. 565], that the state had the same rights, sovereignty, and jurisdiction over the navigable waters as the original states, and could exercise all the powers of government which belong to and may be exercised by them, excepting with respect to control over public lands owned by the United States; and that the title of the navigable waters, and the soil beneath them, was in the state, and subject to its sovereignty and jurisdiction. In Genesee Chief v. Fitzhugh, 12 How. 443 [13 L. Ed. 1058], it was settled that for purposes of admiralty jurisdiction the tidal test, prevailing in England for determining what is navigable water, is not applicable to this country. In Barney v. Keokuk, 94 U. S. 324, 333 [24 L. Ed. 224], it was held that it is for the states to establish for themselves such rules of property as they may deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent thereto."

The court then quotes the language above set forth from Barney v. Keokuk, supra, and adds:

"The doctrine thus enunciated has since been adhered to. Packer v. Bird, 137 U. S. 661, 669 [11 Sup. Ct. 210, 34 L. Ed. 819]; Hardin v. Jordan, 140 U. S. 371, 382 [11 Sup. Ct. 808, 838, 35 L. Ed. 428]; Shively v. Bowlby, 152 U. S. 1, 40, 58 [14 Sup. Ct. 548, 38 L. Ed. 331]; Water Power Co. v. Water Commissioners, 168 U. S. 349, 358 [18 Sup. Ct. 157, 42 L. Ed. 497]; Scott v. Lattig, 227 U. S. 229, 243 [33 Sup. Ct. 242, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107]. The question of the navigability in fact of nontidal streams is sometimes a doubtful one. It has been held in effect that what are navigable waters of the United States, within the meaning of the act of Congress, in contradistinction to the navigable waters of the states, depends upon whether the stream in its ordinary condition affords a channel for useful commerce. The Montello, 20 Wall. 430 [22 L. Ed. 391]; Leovy v. United States, 177 U. S. 621 [20 Sup. Ct. 797, 44 L. Ed. 914]; United States v. Rio Grande Dam Co., 174 U. S. 690, 698 [19 Sup. Ct. 770, 43 L. Ed. 1136]; South Carolina v. Georgia, 93 U. S. 4, 10 [23 L. Ed. 782]; The Robert W. Parsons, 191 U. S. 17, 28 [24 Sup. Ct. 8, 48 L. Ed. 73]. But it results from the principles already referred to that what shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several states. Thus, the state of California, if she sees fit, may confer upon the riparian owners the title to the bed of any navigable stream within her borders."

In the case of Scott v. Lattig, supra, decided February 3, 1913, it was said:

"Coming to the effect to be given to the admission of Idaho as a state and to the disposal of the fractional subdivisions on the east bank, it is well to repeat that Snake river is a navigable stream, for there is an important difference between navigable and nonnavigable waters in such a connection. Thus, Rev. Stat. § 2476, which is but a continuation of early statutes on the subject (Act May 18, 1796, 1 Stat. 464, c. 29, p. 9; Act March 3, 1803, 2 Stat. 229, c. 27, p. 17), declares: 'All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become com-

mon to both.' And of this provision it was said in Railroad Co. v. Schurmeier, 7 Wall. 272 [19 L. Ed. 74]: 'The court does not hesitate to decide that Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common-law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be, and remain public highways.' Besides, it was settled long ago by this court, upon a consideration of the relative rights and powers of the federal and state governments under the Constitution, that lands underlying navigable waters within the several states belong to the respective states in virtue of their sovereignty and may be used and disposed of as they may direct, subject always to the rights of the public in such waters and to the paramount power of Congress to control their navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations, and that each new state, upon its admission to the Union, becomes endowed with the same rights and powers in this regard as the older ones. County of St. Clair v. Livingston, 23 Wall. 46, 68 [23 L. Ed. 59]; Barney v. Keokuk, 94 U. S. 324, 338 [24 L. Ed. 224]; Illinois Central Railroad Co. v. Illinois, 146 U. S. 387, 434–437 [13 Sup. Ct. 110, 36 L. Ed. 1018]; Shively v. Bowlby, 152 U. S. 1, 48–50, 58 [14 Sup. Ct. 548, 38 L. Ed. 331]; McGilvra v. Ross, 215 U. S. 70 [30 Sup. Ct. 27, 54 L. Ed. 95]. Bearing in mind, then, that Snake river is a navigable stream, it is apparent: First, that on the admission of Idaho to statehood the ownership of the bed of the river on the Idaho side of the thread of the stream—the thread being the true boundary of the state—passed from the United States to the state, subject to the limitations just indicated; and, second, that the subsequent disposal by the former of the fractional subdivisions on the east bank carried with it no right to the bed of the river, save as the law of Idaho may have attached such a right to private riparian ownership. This is illustrated by the statement in Hardin v. Shedd, 190 U. S. 508, 519 [23 Sup. Ct. 685 (47 L. Ed. 1156)]: 'When land is conveyed by the United States bounded on a nonnavigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the state by its admission to the Union. * * * When land under navigable water passes to the riparian proprietor, along with the grant of the shore by the United States, it does not pass by force of the grant alone, because the United States does not own it, but it passes by force of the declaration of the state which does own it that it is attached to the shore.' United States v. Chandler-Dunbar Co., 209 U. S. 447, 451 [28 Sup. Ct. 579, 52 L. Ed. 881], is to the same effect."

In Shively v. Bowlby, supra, it is held, however, that before statehood Congress has power to grant lands in the beds of navigable streams below high-water mark, for certain purposes, as the United States has the entire dominion and sovereignty, national and municipal, federal and state, over the territories so long as they are territories. On this subject the court said:

"We cannot doubt, therefore, that Congress has the power to make grants of lands below high-water mark of navigable waters in any territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States hold the territory.

"But Congress has never undertaken by general laws to dispose of such lands. And the reasons are not far to seek. As has been seen, by the law of England, the title in fee, or jus privatum, of the king or his grantee, was, in the phrase of Lord Hale, 'charged with and subject to that jus publicum which belongs to the king's subjects,' or, as he elsewhere puts it, 'is clothed and superinduced with a jus publicum, wherein both natives and foreigners

in peace with this kingdom are interested by reason of common commerce, trade, and intercourse.' Hargraves Law Tracts, 36, 84. In the words of Chief Justice Taney, 'country' discovered and settled by Englishmen 'was held by the king in his public and regal character as the representative of the nation, and in trust for them;' and the title and the dominion of the tidewaters and of the soil under them, in each colony, passed by the royal character to the grantees as 'a trust for the common use of the new community about to be established'; and, upon the American Revolution, vested absolutely in the people of each state 'for their own common use, subject only to the rights since surrendered by the Constitution to the general government.' Martin v. Waddell, 16 Pet. 367, 409–411 [10 L. Ed. 997]. As observed by Mr. Justice Curtis, 'This soil is held by the state, not only subject to, but in some sense in trust for, the enjoyment of certain public rights.' Smith v. Maryland, 18 How. 71, 74 [15 L. Ed. 269]. The title to the shore and lands under tidewater, said Mr. Justice Bradley, 'is regarded as incidental to the sovereignty of the state—a portion of the royalties belonging thereto, and held in trust for the public purposes of navigation and fishery.' Hardin v. Jordan, 140 U. S. 371, 381 [11 Sup. Ct. 808, 838, 35 L. Ed. 428]. And the territories acquired by Congress, whether by deed of cession from the original states, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as states, upon an equal footing with the original states in all respects; and the title and dominion of the tidewaters and the lands under them are held by by the United States for the benefit of the whole people, and, as this court has often said, in cases above cited, 'in trust for the future states.' Pollard v. Hagan, 3 How. 212, 221, 222 [11 L. Ed. 565]; Weber v. Harbor Com'rs, 18 Wall. 57, 65 [21 L. Ed. 798]; Knight v. United States Land Ass'n, 142 U. S. 161, 183 [12 Sup. Ct. 258, 35 L. Ed. 974].

"The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soil under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation, and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the state, after it shall have become a completely organized community."

In the Pollard-Hagan Case, supra, it is said:

"This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers."

In the light of the foregoing authority, can the grant to the Creek Nation of the land comprised within the boundaries covered by the patent be construed as conveying to the tribe not alone the uplands but also the bed between high-water marks of so much of the Arkansas

river as falls within such boundaries? The granting clause of the patent is as follows:

"Now know ye, that the United States of America, in consideration of the premises and in conformity with the above recited provisions of the treaty aforesaid, have given and granted and by these presents do give and grant unto the said Muskogee or Creek tribe of Indians the tract of country above described, to have and to hold the same unto the said tribe of Indians so long as they shall exist as a Nation and continue to occupy the country hereby conveyed to them."

It is familiar history that the purpose of this grant to the Creeks was to provide them a country west of the Mississippi, to be taken and occupied by them in lieu of the lands formerly occupied by them, which they could no longer occupy in peace because of the encroachments of white settlers, and the friction incident thereto. It was to provide a home for this tribe in the then far West, where as it then appeared they might live unmolested for many years to come. They acquired by the grant a right of occupancy of the tract as a tribal home so long as they should exist as a tribe and continue to occupy it. But this was performing no international obligation, nor was it to effect the improvement of such land for the promotion and convenience of commerce. Can it be said that it was to carry out any other public purpose appropriate to the objects for which the United States held the public lands within the territories? We have seen that the purpose and object for which this land was originally acquired by the United States was that, as soon as the population and conditions should justify, it should be admitted into the Union as a state or states on an equal footing with the original states in all respects. This grant to the Creek Nation of the right of occupancy in the meantime is not inconsistent with the continuance of this ultimate purpose and object of statehood, which has now been accomplished. The Arkansas river, as a navigable stream, was as much a public highway through the tract granted after the grant as it was before. We have seen that, while Congress in disposing of the public lands in the territories has granted the lands above high-water mark to actual occupants to encourage the settlement of the country, a policy entirely consistent with the purpose for which the lands were held, that of comprising future states, it has invariably retained the beds of the navigable streams traversing such lands during the territorial period, so that the title thereto may vest in the state when admitted. As the Supreme Court has said, the public authorities ought to have entire control of the great passageways of commerce and navigation to be exercised for the public advantage and convenience. To so construe the grant to the Creek Nation as to give it ownership and control of the bed of this navigable stream would be a violent departure from the well-defined policy of the United States as to such stream. It would be carrying out no public purpose appropriate to the object for which these lands were originally acquired and held by the United States, that of ultimate statehood. To construe the grant as not conveying the bed of this river interferes with no object or purpose of the grant, that of providing a home for the tribe during its tribal existence, and occupancy of the land.

If, as is now settled, the United States held the bed of this navigable stream in trust for the future state, it is very doubtful whether Congress has the power to provide for a grant thereof to the tribe for a purpose other than those above mentioned as being within its power. By recent familiar legislation Congress has provided for the eventual dissolution of this tribe, and the division of a large portion of its lands among the members, and the sale of the surplus, so as to dispose of all tribal lands. In order to accomplish this, it was necessary to survey and subdivide the tract in like manner as public lands are divided. By Act of Congress of April 7, 1864, c. 48, R. S. § 2115, it is provided:

"Whenever it becomes necessary to survey any Indian or other reservations, or any lands, the same shall be surveyed under the direction and control of the general land office, and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed."

It is significant that when Congress came to make this survey the Arkansas river was treated as a navigable stream and meandered, not being included within the survey. This is a construction of the grant by the officers of the government consistent with the conception that it was never intended that the bed of the stream should pass to the tribe, but was reserved and continued to be held in trust for the future state. I conclude that the Creek Nation by virtue of its patent acquired no right or title to the bed of the Arkansas river between high-water marks, but that the same continued to be held by the United States in trust for the future state until the advent of statehood November 16, 1907, when it vested in the state of Oklahoma, subject to whatever rights if any the local state law, statutory or common, gave to owners of land bordering on the stream.

III. The finding that the Creek Nation never acquired any title to the bed of the river eliminates from further consideration the third question.

[4] IV. What, if any, rights accrued to Louisa Mackey, or her heirs, in the bed of the stream below high-water mark, by virtue of the ownership of the upland bordering upon the stream?

By the patent covering the tract of which one boundary was the river, the allottee took not merely to the meander line, but to the high-water mark of the stream.

"Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the bank of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser. In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows, to a demonstration, that the water course, and not the meander line, as actually run on the land, is the boundary." St. Paul R. Co. v. Schurmeier, 7 Wall. 272, 19 L. Ed. 74.

The actual line marking the boundary is ordinary high-water mark of the stream. Shively v. Bowlby, supra. In the patents issued for fractional tracts of the public lands bordering upon navigable stream, the government only undertakes to convey the upland exclusive of the bed of the stream below such high-water mark, but the grant from the government extends not only to the meander line, but to actual high-

water mark. So, here, the patent from the Creek Nation is intended to convey whatever interest that nation has in the land. We have seen that its interest only extends to high-water mark; but to that extent the allottee takes by virtue of the patent.

In Packer v. Bird, 137 U. S. at page 669, 11 Sup. Ct. at page 212, 34 L. Ed. 819, it is said:

"The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee. As an incident of such ownership, the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the state, either to low or high-water mark, or will extend to the middle of the stream."

[5] Since, then, the allottee's rights as a riparian owner must be determined by the law of the state, it becomes necessary to determine what that law is.

The Legislature of Oklahoma Territory, at its first session in 1890, adopted certain laws of the territory of Dakota, among which was the following:

"Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream, at low-water mark, and all navigable rivers shall remain and be deemed public highways. In all cases where the opposite banks of any stream not navigable belong to different persons, the stream and the bed thereof shall become common to both." Stats. of 1890, § 4173, Snyder's Stats. 1909, § 7254.

This section seems never to have been repealed by subsequent territorial legislation, so that, if it had any force as a law when it was adopted; it had the same force in 1907 when Oklahoma became a state. By section 2 of the Schedule of the state Constitution it is provided:

"All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitation or are altered or repealed by law."

It is contended, however, that the territorial Legislature had no power to so legislate with regard to rights of the owners of lands within the territory bordering on navigable streams. The territorial legislative authority is found in section 6 of the Organic Act of the Territory, which reads:

"That the legislative power of the territory shall extend to all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil."

If this was a rightful subject of legislation, not inconsistent with the Constitution and laws of the United States, then it was valid when adopted, and remained in force as a valid law, and became the law of the state by virtue of the constitutional provision above quoted. If, on the other hand, it was not within the province of a rightful subject

of legislation, or was inconsistent with the Constitution and laws of the United States, it was not in force as a law of Oklahoma Territory when statehood intervened, and did not come within the adopting provision of the state Constitution. State v. Chaney, 23 Okl. 788, 102 Pac. 133. It will be noted that the evident purpose of the act is not merely to provide for some temporary right in the riparian owner to use the land only during the territorial period, but attempts to fix by law the extent of land which he shall take under his grant. No case is cited by counsel, nor do I find any, in which the precise question involved is decided; that is, as to the validity of such a territorial statute. But on principle, in the light of the decisions of the Supreme Court of the United States, I am convinced that the defining of the rights of riparian owners in the beds of navigable streams is not a rightful subject of territorial legislation. The United States has the entire dominion and sovereignty, national and municipal, federal and state, over all the territories, so long as they remain in a territorial condition. Shively v. Bowlby, supra. The territorial Legislature is but the creature of Congress, and can have no greater power of legislation than Congress. In Shively v. Bowlby, supra, the law is thus concisely stated:

"The new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tidewaters, and in the lands under them, within their respective jurisdictions. The title and rights of riparian or littoral proprietors in the soil below high-water mark, therefore, are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution. The United States, while they hold the country as a territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high-water mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union. Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future state when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the Constitution in the United States."

It cannot therefore be reasonably urged that when Congress gave to the Legislature of Oklahoma Territory, by the organic act, power to legislate upon all rightful subjects of legislation, it intended to clothe it with power to pass a law amounting to a grant to riparian owners of so much of the bed of navigable streams as might lie between high and low water mark, in front of the lands they held under patents from the Government. If, as said by the Supreme Court, Congress has always pursued the policy of leaving the disposition of the soil under the navigable waters to the control of the states when organized and admitted into the Union, it cannot be that that would be a rightful subject of legislation which would enable a territorial Legislature to violate this established policy. I cannot escape the conclusion that this territorial statute was void, and, being void, did not become a law

of the state by the adopting provision of the Constitution above quoted.

This provision of the territorial law of 1890 was copied into Snyder's Compiled Law of Oklahoma of 1909, but the provisions of law under which this compilation was made are not such as to lend any validity to the section as a law of the state, if, as I have concluded, it had no validity as a territorial law.

Since these demurrers were argued and submitted, the Revised Laws of Oklahoma, 1910, have been published and have taken effect, but not until after the Legislature at its last regular session had provided that section 6639 thereof, which carried into these laws this provision of the territorial Legislature, should not be adopted as a part of the said revised laws. In the act, approved March 22, 1913 (Laws 1913, c. 75), adopting the Revised Laws of 1910, it is provided:

"* * * That section 6639 of the Revised Laws, being a provision defining the rights of the owners of land abutting upon navigable waters, shall not be adopted or become a part of said revised laws under the provisions of this act; provided, further, that this act shall not be construed to alter, change, impair, disparage, vest or divest any right or interest of the United States government, the State of Oklahoma, any of the Five Civilized Tribes of Indians or nation, or any riparian, or abutting owner of any of the river beds, or streams, of the state of Oklahoma, or to change any interest, or ownership of the sand, gravel, oil, gas, or other mineral substance, or product, which may now exist, or which may hereafter be discovered in or under such river beds or streams."

[6] There being no state statute settling this question, it must be determined by the common law as adopted by the state of Oklahoma when it was admitted into the Union. By enactment of the territorial Legislature, prior to statehood, in force at the time of admission, it was provided that:

"The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma." Wilson's Statutes of Oklahoma 1903, § 4200.

We have seen that by section 2 of the Schedule of the state Constitution this became the law of the new state. The common law as thus adopted, so far as the question now under consideration is concerned, has not been modified by any constitutional or statutory law of the state, nor does it appear that this question has ever been determined by the Supreme Court of the state. It is therefore one of first impression here, so far as controlling decisions are concerned, and depends solely upon the construction of the common law as it now exists in Oklahoma, as applied to the admitted facts. The Arkansas river at the point in controversy is not affected by the ebb and flow of the tide. If therefore we are to apply the strict rule of the common law as it existed in England at the time this country was colonized, the rights of the owners of the upland bordering upon this stream, so far as ownership of the soil is concerned, must be considered as extending to the middle thread of the stream, to the exclusion of the state, subject only to the public right of navigation. Shively v. Bowlby, supra. There being no constitutional or statutory law or judicial decisions of Oklahoma modifying this feature of the common law, it only remains to

determine whether, in view of the condition and wants of the people of the state, this original doctrine of the common law, as it prevailed in England, must be considered as modified by such condition and wants, and, if so, to what extent.

[7] The statute above quoted, adopting the common law, was borrowed from Kansas. In 1882 the question of the rights of a riparian owner upon a navigable stream in the bed of the river below high-water mark came before the Supreme Court of that state in the case of Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330, and in a well-considered opinion by Justice Brewer, then on the supreme bench of that state, it was held that a riparian owner owns only to the bank and not to the center of a navigable stream. Speaking of the Kansas river in that state, which the court finds to be a navigable stream, he says:

"The stream having been meandered, the lines of the surveys are bounded by the bank; the patents from the United States passed title only to the bank; Spitlog, as riparian owner, owned only to the bank. The title to the bed of the stream is in the state. Stevens v. Bld. Co., 34 N. J. Law, 532 [3 Am. Rep. 269]; Pollard's Lessee v. Hagan, 3 How. U. S. 212 [11 L. Ed. 565]. It is true a distinction was recognized in England, and that streams were considered navigable only in so far as they partook of the sea, and to the extent that their waters were affected by the ebb and flow of the tide, and only so far was the title of the riparian owner limited to the bank. Above such point, even although the stream was large enough to be used, and in fact was used, for purposes of navigation, the riparian owner owned the soil ad medium filum aquæ. So that really there were three distinct characters of streams recognized: First, those smaller streams, which could not be used for any purpose of navigation, in which the title to the soil was in the riparian owner, and along which the public had no rights of highway or otherwise; an intermediate class, in which the riparian owner owned to the middle of the channel, but along whose stream the public had all the rights of a highway; and, third, that which was called technically the navigable streams, where the title to the bed of the stream was in the sovereign, and all rights were in the public. The same doctrine of riparian ownership to the center of the stream in rivers unaffected by the ebb and flow of the tide is recognized in some states of the Union; but the better and more generally accepted rule in this country is to apply the term 'navigable' to all the streams which are in fact navigable, and in such case to limit the title of the riparian owner to the bank of the stream. Especially is this true in the states where the lands have been surveyed and patented under the federal law. See the following authorities: Rld. Co. v. Schurmeier, 7 Wall. 272 [19 L. Ed. 74]; McManus v. Carmichael, 3 Iowa, 1; Haight v. Keokuk, 4 Iowa, 199; Tomlin v. Rld. Co., 32 Iowa, 106 [7 Am. Rep. 176]; Flanagan v. City of Philadelphia, 42 Pa. 219; Bridge Co. v. Kirk, 46 Pa. 112 [84 Am. Dec. 527]; People v. Tibbets, 19 N. Y. 523; People v. Canal Appraisers, 33 N. Y. 461."

The Iowa case, McManus v. Carmichael, supra, cited by Justice Brewer, presents an exhaustive discussion of this matter by Justice Woodward of the Iowa Supreme Court, reviewing most if not all the conflicting state decisions on the subject up to that time, and in concluding he says:

"This large portion of attention has been given to the subject, from a conviction that the common-law rule is not applicable to the Mississippi river, and because the subject has not been discussed as it should be; the courts assuming the old rule, in many cases, sub silentio. By thus reviewing it, we trust that it is made manifest that less weight is to be given the old rule than the mind would, at first, suppose, and that the way has been opening for its entire rejection from the noble waters of the west."

In Arkansas the "common law of England, so far as the same is applicable, and of a general nature," is made the rule of decision except as modified or repealed by statute. Mansfield's Digest, § 566. In 1890 the Supreme Court of that state had before it the question of the rights of riparian owners in the bed of the White river, a navigable stream within that state. The question arose in St. Louis, Iron Mountain & Southern Ry. Co. v. Ramsey, 53 Ark. 314, 13 S. W. 931, 8 L. R. A. 559, 22 Am. St. Rep. 195, and involved the taking of gravel from the bed of the stream by the railway company. It was there said:

"The main question to be determined is how far the ownership of the appellees in the land between the banks of the river, in front of their tract, extends, by virtue of their ownership of the land upon the bank of the river, under the patent from the government of the United States. At common law, 'as a general principle, the soil of ancient navigable rivers, where there is a flux and reflux of the sea, belongs to the crown, and that of other streams to the subject; that is, to the owners of the adjacent grounds, to each respectively, as far as the middle of the stream.' Wool. Waters, 44. The ebb and flow of the tide in a river was at common law the most usual test of its navigability, but was not a conclusive test. Id. 40. The soil under navigable streams, at common law, belonged to the king as parens patriæ, for the same reason that the waters did; that is, as a trust for the public use and benefit. Id. cc. 1, 2; Ang. Tidewaters, 19–87; Hale, De Jure Mar. in 6 Cow. 539; Chapman v. Kimball, 9 Conn. 38 [21 Am. Dec. 707]. Many of the states of the United States have held to the common-law test of the navigability of rivers, and to the doctrine that only those rivers are navigable, in a legal sense, in which the tide ebbs and flows; and there has been much discussion and conflict of authority upon this question, a majority in number, perhaps, of the courts of last resort maintaining the common-law doctrine. But the more reasonable test, as we conceive, of the navigability of a river, is its use as a navigable stream, or its capability of being used as such. The ebb and flow of the tide is merely an arbitrary test, since many waters where the tide flows are not in fact navigable, and many, especially on this continent, where it does not flow, are navigable. 'It is navigability in fact that forms the foundation for navigability in law.' McManus v. Carmichael, 3 Iowa, 1; The Genesse Chief v. Fitzhugh, 12 How. 443 [13 L. Ed. 1058]. While in England the ebb and flow of the tide is the most convenient, certain, and usual test of the navigability of rivers, as the tide in fact does ebb and flow in all the navigable rivers, it is wholly inapplicable in this country, where there are large fresh-water rivers, thousands of miles long, flowing almost across the entire continent, bearing upon their bosom the commerce of the outside world in part, as well as of the continent. The largest river in England, the Severn, is only about 300 miles, and the Thames is only about 200 miles, in length. If we apply the principle of the common law, that the soil under the navigable waters belongs to the sovereign for the benefit and use of the public, and are not governed by the common-law test of the navigability of streams, but by their navigability in fact, we are constrained to maintain that the true doctrine is that the beds of navigable rivers belong to the government, notwithstanding that the tide does not ebb and flow in them. * * * The owner of land on the margin of a navigable stream in this state, holding under a grant from the United States government, does not take ad medium filum aquæ, but to high-water mark, as limited and defined above, and the beds of all navigable rivers in the state belong to the state in trust for the use of the public."

In the case of Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224, the Iowa case of McManus v. Carmichael, supra, was referred to, and the decisions of the United States Supreme Court bearing upon this question reviewed; the court, by Justice Bradley, saying:

"The exhaustive examination of this question by the Supreme Court of Iowa, in 1856, in the case of McManus v. Carmichael, 3 Iowa, 1, really leaves nothing to be said."

And Justice Bradley adds that the application of the strict rule of the common law to the different conditions existing in this country—that is, with regard to the ownership of the soil in navigable waters above tidewater—is at variance with sound principles of public policy.

The condition and wants of the people of Oklahoma, so far as the rights of riparian owners upon navigable streams in the soil of the beds thereof are concerned, must be considered as identical with that of the people of the neighboring states of Kansas, on the one side, and Arkansas, on the other; in both of which the rights of the riparian owners are held only to extend to high-water mark, the title to the bed between high-water marks being in the state. This doctrine has the support of the best-considered opinions of the state Supreme Courts, and, as we have seen, has the approval of the Supreme Court of the United States. Louisa Mackey, by virtue of her patent from the Creek Nation and the United States covering lands bordering on the Arkansas river, acquired thereby no right in the bed of that stream below high-water mark; the title thereto being in the state of Oklahoma. Louisa Mackey by her patent acquired title on the river side of each fractional tract or lot conveyed to her, not only to the meander line, but to the actual high-water mark. By the lease to Eysenbach, under which the Gypsy and Gladys Belle Oil Companies claim, describing these fractional lots by number, as they are described in the patents, there was conveyed to the present holders and owners of the lease the right to occupy for oil and gas mining purposes, not only up to the meander line, but up to high-water mark of the river. East Omaha Land Co. v. Jeffries (C. C.) 40 Fed. 386. It follows that, while the fact may be that there was a strip of land lying between the actual high-water mark and the meander line as run upon the land, it passed as effectually to Eysenbach by virtue of his lease as the remainder of the land included within the boundaries of said lots, and hence the subsequent lease to Avery must be considered as subordinate to it.

Inasmuch as the tract of land in controversy is that lying between the meander line and the low-water mark of the stream, it will be seen that if, as is probably the case, the meander line is not identical with the high-water mark, but is landward from actual high-water mark, then, as to the strip of land between high-water mark and the meander line, the Gypsy Oil Company and those united in interest with it must be held to prevail.

The bill of the United States on behalf of the Creek Nation must be dismissed. But it does not necessarily follow that the cross-bill must be dismissed. It is true the case is left without such diversity of citizenship as is required in cases where diversity of citizenship is relied upon as ground of federal jurisdiction in the initial pleading. The jurisdiction of the court to determine the matters raised by the cross-bill does not depend upon the citizenship of the parties, but on the subject-matter of the litigation. The property is in the actual custody of

the court, and this draws to it the right to decide upon the conflicting claims to its ultimate possession and control. Morgan's Co. v. Texas Central Ry., 137 U. S. at page 201, 11 Sup. Ct. 61, 34 L. Ed. 625.

As the proof may develop that a portion of the land in controversy lies between the meander line and actual high-water mark, in which case the Gypsy Company and those united in interest with it would be entitled to the possession of that much of the same for oil and gas purposes, the cross-bill will not now be dismissed.

Assuming, as we must, so far as the present consideration is concerned, that the Pollard-Hagan Company has a valid lease from the state, it is entitled to prevail as to so much of said tract as is below actual high-water mark of the river.

Orders will be entered in accordance with this opinion.

UNITED STATES v. SHAUVER.

(District Court, E. D. Arkansas, Jonesboro Division. May 25, 1914. On Motion for Rehearing, July 9, 1914.)

1. CONSTITUTIONAL LAW (§ 48*)—STATUTES—VALIDITY.
A federal court will declare an act of Congress unconstitutional only when the question is practically free from real doubt, and the mere fact that the statute goes to the verge of the constitutional power is not enough, but it must appear clearly that it is beyond that power before a court will declare the act void.
[Ed Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

2. STATES (§ 4*)—POLICE POWER—RESERVED POWERS OF STATES.
The states retain the police power which they, as sovereign nations, possessed prior to the adoption of the national Constitution, so far as such power pertains to the internal affairs of the states.
[Ed. Note.—For other cases, see States, Cent. Dig. § 2; Dec. Dig. § 4.*]

3. UNITED STATES (§ 5*)—POLICE POWER.
The United States possesses power analogous to the police power of the states which every sovereign nation possesses as to its own property, and power to carry into effect powers conferred on it by the Constitution.
[Ed. Note.—For other cases, see United States, Cent. Dig. § 4; Dec. Dig. § 5.*]

4. GAME (§ 3½*)—POWER TO PROTECT MIGRATORY BIRDS—STATUTES—VALIDITY.
Act March 4, 1913, c. 145, 37 Stat. 847, protecting migratory birds and game, cannot be sustained as an exercise of the implied powers of the national government, though it is impossible for any state to enact laws for the protection of migratory wild game, and only the national government can do it with any fair degree of success.
[Ed. Note.—For other cases, see Game, Cent. Dig. § 2; Dec. Dig. § 3½.*]

5. GAME (§ 3½*)—MIGRATORY BIRDS—"PROPERTY OF UNITED STATES."
Migratory birds are not, when on their usual migration, the property of the United States, within Const. art. 4, § 3, subsec. 2, empowering Congress to adopt rules respecting the territory or other property of the United States, but they are the property of the states in their sovereign capacity, as the representatives, and for the benefit of all their people in common, and Act March 4, 1913, c. 145, 37 Stat. 847, protecting migratory birds,

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

cannot be sustained as an exercise by Congress of the right to adopt regulations for its property.

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

For other definitions, see Words and Phrases, vol. 6, p. 5729.]

6. GAME (§ 3½*)—MIGRATORY BIRDS—PROTECTION.

Act March 4, 1913, c. 145, 37 Stat. 847, protecting migratory birds and game, is invalid because not authorized expressly or by necessary implication by the Constitution.

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

On Rehearing.

7. COMMERCE (§ 15*)—INTERSTATE COMMERCE—REGULATION—MIGRATORY BIRDS.

The act cannot be sustained as an exercise by Congress of the power to regulate interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 17, 34, 35; Dec. Dig. § 15.*]

Harvey C. Shauver was indicted for a violation of the migratory birds provision of Act March 4, 1913, c. 145, 37 Stat. 847. Demurrer to indictment sustained.

W. H. Martin, Asst. U. S. Atty., of Hot Springs, Ark., and J. H. Acklen, of Nashville, Tenn., for the United States.

E. L. Westbrooke, of Jonesboro, Ark., for defendant.

TRIEBER, District Judge. The defendant demurs to the indictment in this cause, which charges him with a violation of that part of the Appropriation Act for the Department of Agriculture, approved March 4, 1913 (37 Stat. 828, 847, c. 145), known as the "migratory birds" provision, and the regulations made by the Department of Agriculture in pursuance thereof, and which have been approved by the President. That provision reads:

"All wild geese, wild swans, brant, wild ducks, snipe, plover, woodcock, rail, wild pigeons, and all other migratory game and insectivorous birds which in their northern and southern migrations pass through or do not remain permanently the entire year within the borders of any state or territory, shall hereafter be deemed to be within the custody and protection of the government of the United States, and shall not be destroyed or taken contrary to regulations hereinafter provided therefor. The Department of Agriculture is hereby authorized and directed to adopt suitable regulations to give effect to the previous paragraph by prescribing and fixing closed seasons, having due regard to the zones of temperature, breeding habits, and times and line of migratory flight, thereby enabling the department to select and designate suitable districts for different portions of the country, and it shall be unlawful to shoot or by any device kill or seize and capture migratory birds within the protection of this law during said closed seasons, and any person who shall violate any of the provisions or regulations of this law for the protection of migratory birds shall be guilty of a misdemeanor and shall be fined not more than $100 or imprisoned not more than ninety days, or both, in the discretion of the court. The Department of Agriculture, after the preparation of said regulations, shall cause the same to be made public, and shall allow a period of three months in which said regulations may be examined and considered before final adoption, permitting, when deemed proper, public hearings thereon, and after final adoption shall cause the same to be engrossed and submitted to the President of the United States for approval: Provided, however, that nothing herein contained shall be deemed to affect or interfere with the local laws of the states and territories for the protection of nonmigratory game or

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

other birds resident and breeding within their borders, nor to prevent the states and territories from enacting laws and and regulations to promote and render efficient the regulations of the Department of Agriculture provided under this statute."

In pursuance of this authority the Department of Agriculture has adopted suitable regulations, which have been approved by the President. The only ground of the demurrer is that the act is unconstitutional.

That the national Constitution is an enabling instrument, and therefore Congress possesses only such powers as are expressly or by necessary implication granted by that instrument, is not questioned. Unless, therefore, there is some provision in the national Constitution granting to Congress either expressly or by necessary implication the power to legislate on this subject, the act cannot be sustained.

[1] The deference due from the judiciary to the other co-ordinate departments of the government has made the courts, when the constitutionality of an act of the legislative department is attacked, to yield rather than encroach on the legislative domain. Only if the question is practically free from real doubt will the courts declare an act of the Legislature unconstitutional. The fact that the statute goes to the verge of the constitutional power is not enough; it must appear clearly that it is beyond that power to justify a court to declare it void. These principles are so well settled by an unbroken line of decisions of all the American courts that it is unnecessary to cite authorities to sustain them.

[2] It is equally well settled that as to all internal affairs the states retained their police power, which they, as sovereign nations, possessed prior to the adoption of the national Constitution, and no such powers were granted to the nation. Cooley, Const. Lim. 574; Patterson v. Kentucky, 97 U. S. 501, 503, 24 L. Ed. 1115; Covington, etc., Bridge Co. v. Kentucky, 154 U. S. 204, 210, 14 Sup. Ct. 1087, 38 L. Ed. 962; United States v. Boyer (D. C.) 85 Fed. 425, 434.

[3] But it is now equally well settled that the United States does possess what is analogous to the police power, which every sovereign nation possesses, as to its own property (Camfield v. United States, 167 U. S. 518, 525, 17 Sup. Ct. 864, 42 L. Ed. 260), and to carry into effect those powers which the Constitution has conferred upon it (In re Debs, 158 U. S. 564, 581, 15 Sup. Ct. 900, 39 L. Ed. 1092; Light v. United States, 220 U. S. 523, 536, 31 Sup. Ct. 485, 55 L. Ed. 570; Hoke v. United States, 227 U. S. 308, 323, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. [N. S.] 906, Ann. Cas. 1913E, 905). It is not claimed by counsel for the government that the power to enact such legislation exists under the commerce clause of the Constitution, but it is claimed that subsection 2 of section 3, art. 4, of the Constitution, which is as follows, grants the necessary power:

"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; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."

[4] It is also claimed that it is one of those implied attributes of sovereignty in which the national government has concurrent juris-

diction with the states; that it is a dormant right in the national government; and, where the state is clearly incompetent to save itself, the national government has the right to aid. To sustain the latter proposition stress is laid on the fact that it is impossible for any state to enact laws for the protection of migratory wild game, and only the national government can do it with any fair degree of success; consequently the power must be national and vested in the Congress of the United States. A similar argument was presented to the court in Kansas v. Colorado, 206 U. S. 46, 89, 27 Sup. Ct. 655, 664 (51 L. Ed. 956), but held untenable. Mr. Justice Brewer, speaking for the court, disposed of it by saying:

"But the proposition that there are legislative powers affecting the nation as a whole, which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the amendment, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the tenth amendment. This amendment, which was seemingly adopted with prescience of just such a contention as the present, disclosed the wide-spread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that, if in the future further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act. * * * Its principal purpose was not the distribution of power between the United States and the states, but a reservation of the people of all powers not granted."

This disposes of that contention.

[5] Are migratory birds, when in a state on their usual migration, the property of the United States or of the states where they are found? If they are the property of the nation, the states would have no power to regulate, control, or prohibit the hunting or killing of them. But the rule of law which all the American courts have recognized is that animals feræ naturæ, denominated as game, are owned by the states, not as proprietors, but in their sovereign capacity as the representatives and for the benefit of all their people in common. This principle has not only been maintained by all the highest courts of the states in which the question has arisen, but has had the approval of the Supreme Court of the United States in every case which has come before it. Martin v. Waddell, 16 Pet. 367, 10 L. Ed. 997; McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248; Smith v. Maryland, 18 How. 71, 74, 15 L. Ed. 269; Manchester v. Massachusetts, 139 U. S. 240, 258, 11 Sup. Ct. 559, 35 L. Ed. 159; Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385; Geer v Connecticut, 161 U. S. 519, 16 Sup. Ct. 600, 40 L Ed. 793; The Abby Dodge, 223 U. S. 166, 32 Sup. Ct. 310, 56 L. Ed. 390.

In McCready v. Virginia, it was said:

"In like manner, the states own the tide waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the state represents its people, and the ownership is that of the people in their united sovereignty."

It is true that this quotation was not absolutely necessary for the determination of the issues in that case, but the question of ownership of the fish in tide water was indirectly involved, and the learned Chief Justice who delivered the opinion of the court evidently deemed it necessary to determine it.

In Manchester v. Massachusetts, a statute of Massachusetts regulating the fishing of menhaden in Buzzard's Bay was involved, and it was there held:

"We think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast; that bays wholly within its territory, not exceeding two marine leagues in width at the mouth, are within this limit; and that included in this territorial jurisdiction is the right of control over fisheries, whether the fish be migratory, free swimming fish, or free moving fish, or fish attached to or imbedded in the soil."

In that case the court also quoted with approval from Dunham v. Lamphere, 3 Gray (Mass.) 268:

"That, in the distribution of powers between the general and state governments, the right to the fisheries and the power to regulate the fisheries on the coasts and in the tide waters of the state were left, by the Constitution of the United States, with the states, subject only to such powers as Congress may justly exercise in the regulation of commerce, foreign and domestic."

In Martin v. Waddell, after a careful review of the English authorities, it was expressly held that:

"The public common of piscary belongs to the people in their united sovereignty, and the state holds it in trust for them."

Geer v. Connecticut may well be considered the leading case on this subject, as it reviews very learnedly all the law pertaining thereto. Mr. Justice White (now Mr. Chief Justice) reviewed, not only the law as it existed under the common law, but, under the laws of Solon, the law as it is found in the Institutes of Justinian, the civil and Salic laws, and the Code Napoléon, and sustained a statute of the state of Connecticut prohibiting the killing of certain game at any time, when intended to be conveyed beyond the limits of the state. After reviewing all the authorities, the learned Justice summarizes the law as follows:

"The foregoing analysis of the principles upon which alone rests the right of an individual to acquire a qualified ownership in game, and the power of the state, deducible therefrom, to control such ownership for the common benefit, clearly demonstrates the validity of the statute of the state of Connecticut here in controversy. The sole consequence of the provision forbidding the transportation of game, killed within the state, beyond the state, is to confine the use of such game to those who own it, the people of that state."

In Silz v. Hesterberg, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75, the constitutionality of a New York statute prohibiting the possession of game at certain times was attacked as violative of the national Constitution. That the state was the owner of all the game in the state, whether migratory or not, was not questioned by those attacking the statute; but it was claimed that the state had no power to prohibit the possession of game in the closed season, when imported from a foreign country or another state, where the killing was not prohibited. The

statute was sustained as a proper exercise of the police power to protect the game in the interest of the food supply of the people of that state.

In The Abby Dodge the principle laid down in the McCready Case that "each state owns the beds of all tide waters within its jurisdiction, unless they have been granted away," also "the tide waters themselves, and the fish in them, so far as they are capable of ownership while running," is reaffirmed.

In Judson on Interstate Commerce, § 11, the author states the law to be:

"Thus the wild game within a state, at common law, belongs to the sovereign, and in this country to the people in their collective capacity, and the state, therefore, has a right to say that it shall not become the subject of commerce."

Even after the game has been reduced to possession there is but a qualified ownership in it, subject to the control of the state. Phelps v. Racey, 60 N. Y. 10, 19 Am. Rep. 140; Commonwealth v. Savage, 155 Mass. 278, 29 N. E. 468; Organ v. State, 56 Ark. 270, 19 S. W. 840; State v. Geer, 61 Conn. 144, 22 Atl. 1012, 13 L. R. A. 804, affirmed in 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793; State v. Northern Pac. Express Co., 58 Minn. 403, 59 N. W. 1100; State v. Rodman, 58 Minn. 393, 59 N. W. 1098; American Express Co. v. People, 133 Ill. 649, 24 N. E. 758, 9 L. R. A. 138, 23 Am. St. Rep. 641; Ex parte Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129; People v. Collison, 85 Mich. 105, 48 N. W. 292; In re Deininger (C. C.) 108 Fed. 623.

The act of Congress of May 25, 1900 (31 Stat. 187, c. 553 [U. S. Comp. St. 1901, p. 3181]), known as "the Lacey Act," the constitutionality of which has been sustained (Rupart v. United States, 181 Fed. 87, 104 C. C. A. 255), in effect legalizes the statutes of the states for the control of wild game within their borders whether migratory or not (People v. Hesterberg, 184 N. Y. 126, 76 N. E. 1032, 3 L. R. A. [N. S.] 163, 128 Am. St. Rep. 528, 6 Ann. Cas. 353). The claim that the migratory birds are the property of the United States must therefore be held untenable.

[6] It is also argued that Congress has frequently exercised the power to regulate matters which could only have been done under the general police power, and the validity of these acts, when attacked as beyond the power of Congress, has been upheld. Counsel refer to the Lottery Acts, the Anti-Trust Acts, the national railway legislation, the Safety Appliance Act, the Quarantine Laws, the Pure Food and Drug Act, the White Slave Act, the act regulating mailable articles, and other acts of similar nature. But every one of these acts was upheld under some provision of the Constitution, either that of the Post Office Department, the commerce clause, the taxing power, or some other grant. Whenever Congress or the head of a department went beyond that power, as by including intrastate carriage with interstate, the acts were declared unconstitutional. Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550; Illinois Central Ry. Co. v. McKendree, 203 U. S. 514, 27 Sup. Ct. 153, 51 L. Ed. 298; Employers' Liability Cases, 207 U. S. 463,

28 Sup. Ct. 141, 52 L. Ed. 297; Butts v. Merchants' Transp. Co., 230 U. S. 126, 33 Sup. Ct. 964, 57 L. Ed. 1422.

It may be, as contended on behalf of the government, that only by national legislation can migratory wild game and fish be preserved to the people, but that is not a matter for the courts. It is the people who alone can amend the Constitution to grant Congress the power to enact such legislation as they deem necessary. All the courts are authorized to do when the constitutionality of a legislative act is questioned is to determine whether Congress, under the Constitution as it is, possesses the power to enact the legislation in controversy; their power does not extend to the matter of expediency. If Congress has not the power, the duty of the court is to declare the act void. The court is unable to find any provision in the Constitution authorizing Congress, either expressly or by necessary implication, to protect or regulate the shooting of migratory wild game when in a state, and is therefore forced to the conclusion that the act is unconstitutional.

The demurrer to the indictment will be sustained.

On Motion for Rehearing.

E. Marvin Underwood, Asst. Atty. Gen., and W. C. Herron, both of Washington, D. C., for the United States.

E. L. Westbrooke, of Jonesboro, Ark., for defendant.

TRIEBER, District Judge. The motion for a rehearing is based upon three grounds:

1. It is claimed that, the act having been enacted by Congress and approved by the executive, the court should respect their action, unless it is so plain that they transcended their powers that the duty to declare the act void cannot be avoided.

2. It is claimed that the United States is the owner of all migratory birds when they leave one state and go into another, and as such Congress has the power, under the provisions of subsection 2, section 3, article 4, of the Constitution, to make all needful regulations respecting them.

3. It is claimed that the act is authorized by the commerce clause of the Constitution.

As to the first proposition, the court fully agrees with the learned counsel for the government, and so held in its former opinion.

As to the second proposition, no authorities have been cited to the court which have not been considered by it in its former opinion, and although in full sympathy with all measures tending to preserve the wild game for the benefit of all the people, the court can find no valid reason for changing the conclusions reached at the former hearing.

[7] The last contention was not insisted on at the former hearing, but, on the contrary, it was conceded that the act cannot be sustained under the commerce clause of the Constitution. But it is now argued that:

"A migratory bird, from one state into another, passes from the ownership of the former into that of the latter state. If this be true, a thing recognized by the courts as an article of commerce, when passing between individuals, passes from the ownership of individuals in their collective capacity to other

individuals in their collective capacity, the ownership of the state being merely ownership in trust for their respective citizens."

This same contention was made in Geer v. Connecticut, 161 U. S. 519, 530, 16 Sup. Ct. 600, 605 (40 L. Ed. 793), and was decided adversely. The court there said:

"But the errors which this argument involves are manifest. It presupposes that, where the killing of game and its sale within the state is allowed, it thereby becomes commerce in the legal meaning of that word. In view of the authority of the state to affix conditions to the killing and sale of game, predicated as is this power on the peculiar nature of such property and its common ownership by all the citizens of the state, it may well be doubted whether commerce is created by an authority given by a state to reduce game within its borders to possession, provided such game be not taken, wnen killed, without the jurisdiction of the state. The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose. * * * Passing, however, as we do, the decision of this question, and granting that the dealing in game killed within the state, under the provision in question, created internal state commerce, it does not follow that such internal commerce became necessarily the subject-matter of interstate commerce, and therefore under the control of the Constitution of the Uhited States."

After quoting from Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23, and The Daniel Ball, 10 Wall. 557, 19 L. Ed. 999, it proceeds:

"The fact that internal commerce may be distinct from interstate commerce destroys the whole theory upon which the argument of the plaintiff in error proceeds."

The principle there established has never been questioned nor modified by any later decisions of that court. On the contrary, it has been consistently adhered to. The latest case on that subject is Silz v. Hesterburg, 211 U. S. 31, 41, 29 Sup. Ct. 10, 53 L. Ed. 75, where Geer v. Connecticut, supra, is reaffirmed.

For this court to disregard these decisions of the highest tribunal of the land would be an assumption of authority not only unwarranted, but improper. The Supreme Court is the only tribunal which possesses that power, and it exercises it very sparingly. Fortunately, this question can be reviewed by that court on error, and it is hoped that the government will take proper steps to have it done.

The motion for a rehearing is denied.

In re TRION MFG. CO.

(District Court, N. D. Georgia. March 21, 1914.)

No. 389.

1. GAMING (§ 14*)—SALES FOR FUTURE DELIVERY—ILLEGALITY.

That a customer giving orders to a member of a cotton exchange for the purchase and sale of cotton did not intend to deliver or accept deliveries of cotton sold or bought while the rules of the exchange contemplated actual deliveries did not render the transaction a gambling transaction.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 25, 26; Dec. Dig. § 14.*]

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

2. CORPORATIONS (§ 410*)—ULTRA VIRES ACTS—SPECULATIONS.

The acts of the president of a corporation organized to manufacture cotton goods, with power to engage in a general mercantile business in connection with its factory for the sale of general merchandise to its employés and others, in buying and selling in the name of the corporation cotton futures as a mere matter of speculation, are ultra vires, and the broker conducting the transactions has no claim against the corporation on account thereof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1629–1632; Dec. Dig. § 410.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Trion Manufacturing Company, a bankrupt. From an order of the referee, rejecting a claim of Springs & Co. against the bankrupt, it appeals. Approved and confirmed.

John R. Abney, of New York City, for claimant.
Maddox & Doyal, of Rome, Ga., for trustee.

NEWMAN, District Judge. The matter now before the court is brought here on a petition to review by Springs & Co., who sought to prove a claim in bankruptcy against the bankrupt estate. The referee declined to allow proof of claim on the ground: First that it was purely a gambling transaction, and that the amount of the claim sought to be proven could not be proven as a claim against the bankrupt estate for that reason. He also put his refusal to allow proof of this claim upon additional grounds, that is to say, that the transactions were ultra vires of the corporation.

[1] A. S. Hamilton appears to have been the president and treasurer of the Trion Manufacturing Company, and as such he engaged in the transactions in question with the firm of Springs & Co., of New York. The referee finds that with the exception of $67.37, a spot cotton transaction, all of the other items of the account were wagering or gambling transactions. After discussing the matter at some length the referee holds that the claim that the rules of the New York Cotton Exchange, which were in evidence, provide that actual deliveries are contemplated in all trades made on the exchange, was insufficient to support the claim. The referee says that there is no evidence that the Trion Manufacturing Company ever agreed to be bound by such rules, and that, while under certain circumstances he thinks these rules might be binding as between Springs & Co. and the other brokers on the exchange with whom they traded, they would not be binding upon the Trion Manufacturing Company in the absence of an agreement to that effect.

The referee quotes a number of authorities as to the validity of transactions of this kind. At the time, however, the last decision of the Circuit Court of Appeals for the Fifth Circuit, in the case of D. W. James v. Haven & Clement, had not been handed down. That case, decided on March 10, 1914, 211 Fed. 972, 128 C. C. A. —, was the second decision made by this Circuit Court of Appeals in that case, and after two trials and two verdicts by the juries in favor of the plaintiff.

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

The court had charged the jury on the second trial of the case of James v. Haven & Clement as follows:

"The defendant, as I understand it, contends, in the first place, that this was a wagering contract purely; that there was no intention on his part to deliver any cotton, or to have any delivered to him; that he was simply gambling on futures. This is the substance of his claim and of his counsel's, as I understand it.

"He also states that what is called 'ringing out' in the cotton contracts on the New York Cotton Exchange is of such a character that it should defeat the plaintiff's right to recover against him, even if he is otherwise entitled to recover. As to this matter of 'ringing out' or 'ringing up,' as it seems to be sometimes called, it has been before the Supreme Court of the United States, and the highest court of the state of New York, and is fully sustained as a legal method of transacting this business. The Supreme Court of the United States says this: 'The ring settlement is reached by a comparison of books among the clerks of the members buying and selling in the pit, and picking out a series of transactions which begins and ends with dealings which can be set against each other by eliminating those between—as, if A. has sold to B. 5,000 bushels of May wheat, and B. has sold the same amount to C., and C. to D. and D. to A. Substituting D. for B. by novation, A.'s sale can be set against his purchase, on simply paying the difference in price.' That is to say, I understand this method of doing business to be treated by the courts, both the Supreme Court of the United States and the Supreme Court of New York, as an entirely legitimate method of transacting this part of the business. Unless you find something in what has been shown here in the evidence as to this ringing out or ringing up, it appears to me that it should have nothing to do with this transaction, and should not interfere with the plaintiff's right to recover, provided he is otherwise entitled to recover.

"Now, the claim has been made, if I understand the claim by the defendant in this case, that, although, as I have just instructed you, this method of transacting the business has been sustained by the courts, and this court should recognize it as legitimate, it is claimed by the defendant that what is called 'ringing out' extinguished these contracts that were made by Haven & Clement for Mr. James; that when the ringing out was made and the matter carried through, all these contracts that they had made for Mr. James were thereby extinguished. You have heard the testimony about that, and what was said about it by counsel on both sides. It is claimed on the part of the plaintiff that this is not true; that the contracts provided that they shall remain in force until they are finally executed, notwithstanding this arrangement; that a contract to deliver on the part of a particular broker who sold to Haven & Clement, or their contract if they sold, existed, and could be enforced under the rules of the Exchange notwithstanding these contracts had, as they call it, been rung out. That is a matter for you to determine under the evidence. I instruct you, under the law as I understand it to be fully established by the courts of the United States and of the state where this occurred, that it is a legitimate way of doing business, whether or not it was followed legitimately in this particular case, or whether or not, as contended to you by counsel for the defendant, it was done in such a way as to extinguish any claim Mr. James might have had, or his brokers on his part, for what was due him. Of course, that is not legitimate. It has been assumed that the matter is so arranged; for example, one of the courts in referring to it likens it somewhat to a clearing house of the banks in cities where the banks have a clearing house arrangement by which they settle their differences without having to give each one a separate check to square things up."

The Circuit Court of Appeals said in their opinion that "no reversible error is shown by the record."

In view of this last decision and the decisions which have preceded, by the Supreme Court of the United States and other courts, and also recently by the Appellate Division of the Supreme Court of New York in the opinion in the case of Springs et al. v. James, 137 App. Div.

110, 121 N. Y. Supp. 1054, the referee was probably in error in his decision against Springs & Co. in this case on the ground that the transactions were mere wagering or gambling contracts on which there could not be a recovery.

[2] This record shows, however, and I think conclusively that Mr. Hamilton was trading in the name of the Trion Manufacturing Company, that is, buying and selling cotton futures as a mere matter of speculation, which, in my opinion, he could not legally do. The corporation could not be bound by any such acts of his as are shown here. These acts were clearly ultra vires. No power is shown in the charter to authorize the corporation to go into such business. It was a corporation to manufacture cotton goods. While the power is given to buy and sell cotton, this could not carry with it the implication that it was authorized to speculate in cotton. To hold that these transactions would probably be binding as against an individual would not be to hold at all that an officer of a corporation could bind the corporation by making such transactions. The referee finds them, with the one exception named, to be speculative pure and simple, that is, speculating on the rise and fall of cotton. It seems to me that the whole character of the transactions, and the evidence with reference thereto, show that Mr. Hamilton was doing this buying and selling of cotton futures as a matter purely of speculation.

Counsel for Springs & Co. places his claim of authority on the part of Mr. Hamilton to carry on this business with his clients largely upon the language of the charter which authorizes them to go into a mercantile business. The record in this case shows that the purpose of this amendment to the charter, authorizing the corporation to engage in a general mercantile business, must have been that they might carry on, in connection with their factory, stores for the sale of general merchandise to their employés and others, which they did to a very large extent. They had power, also, to buy and sell cotton, as stated, but that cannot be held certainly to authorize speculation in cotton futures.

It is further claimed that a corporation has a right to "hedge," as it is called. The finding of the referee as to the facts in this case, which seems to me to be supported by the evidence, would not make any of the items of this claim an effort to protect the corporation against the rise and fall of cotton, but to be speculation pure and simple on the part of Hamilton.

The last finding of the referee is this:

"The trustee sets up that Springs & Co. had paid to A. S. Hamilton for his personal use certain sums, and charged the same to the Trion Manufacturing Company. Under the evidence I do not think any of those items have been proven, except the item of $1,244.67 on August 6, 1906, which amount I find was transferred from the account of the Trion Manufacturing Company to the individual account of A. S. Hamilton. Inasmuch as the evidence shows that Springs & Co. received from Trion Manufacturing Company large sums of money on transactions which are herein found to have been illegal, I find that the trustee of the Trion Manufacturing Company would have the right to set off the sum of $1,244.67 against the amount found due to the claimants by Trion Manufacturing Company. As this amount is largely in excess of the sum of $67.37 found to be due claimants as above, I therefore disallow the claim of Springs & Co. entirely."

This conclusion of the referee seems to be supported by the evidence, and consequently the finding should be that Springs & Co. cannot recover for any amount whatever.

It is therefore ordered that the action of the referee in this matter be, and the same is hereby, approved and confirmed.

THE HENRY R. TILTON.

(District Court, D. Massachusetts. October 31, 1913.)

No. 720.

1. SALVAGE (§ 28*)—AMOUNT OF AWARD—DAMAGES—DERELICT.

A fishing vessel, which took charge of an abandoned derelict loaded with lumber, at sea where she was a menace to navigation, and towed her into port, the service requiring 28 hours in winter weather with the men who were placed on board exposed to the seas which washed over the derelict, *held* entitled to an award of $1,250 and expenses incurred; the salved value being appraised at $3,500, and the value of the salving vessel about $70,000.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 69, 71; Dec. Dig. § 28.*]

2. SALVAGE (§ 52*)—ACTION—COSTS.

Salvors of a derelict do not lose their right to costs because they filed a libel at once and turned the vessel over to the marshal without attempting to ascertain the owners or negotiating with the insurers of the cargo as requested.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 135–137; Dec. Dig. § 52.*]

In Admiralty. Suit for salvage by the Bay State Fishing Company against the schooner Henry R. Tilton and cargo. Decree for libelants.

Currier, Rollins, Young & Pillsbury, of Boston, Mass., for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for claimant.

MORTON, District Judge. This is a libel for salvage by the owner and crew of the steam trawler, Swell, to recover salvage compensation for services rendered the three-masted schooner, Henry R. Tilton.

[1] The facts are as follows: On Sunday, December 22, 1912, the Swell was proceeding from the fishing banks off Cape Cod, toward Boston, with a cargo of fish. Early in the afternoon, when about 85 miles southeast of the north point of Cape Cod, she came across the Henry R. Tilton, a water-logged derelict, abandoned by her crew. The Tilton was laden with lumber and would probably have floated for an indefinite time. She was in or near a region much traversed by vessels of all kinds and was likely to become a dangerous menace to navigation. Part of the deck load of lumber had probably been washed overboard, and the forward part of it had been thrown aft by the sea; the underdeck load had, to some extent, loosened, and had battered out bulkheads and knocked a hole in the stern through which water poured

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

in and out. A fairly heavy sea seems to have been running, but nothing at all unusual; and the weather was fair.

A boat's crew from the Swell, consisting of five men, went aboard the Tilton, and, after working for an hour or an hour and a half, succeeded in fastening a wire towing hawser to the Tilton's bow. This work was attended with a good deal of discomfort and perhaps some danger, because the schooner, besides being low in the water, was somewhat down by the head, and the sea washed over where the men were fastening the hawser on. About 3 o'clock that afternoon, the Swell started to tow the Tilton toward Boston. It looked as if the single hawser would not stand the strain; the towing was suspended, and a second similar hawser was run. The Tilton's steering gear had been broken; but temporary repairs were made with no great difficulty. Part of the Swell's crew, usually numbering five, was kept on the Tilton until late in Sunday night. They were relieved about every five hours. The seas occasionally washed over the Tilton amidships and frequently came aboard forward. As she was full of water, there was no shelter for the crew. It was undoubtedly exposing and disagreeable work, but seems to have had no serious element of danger in it, except such as might arise from the exposure. The temperature was below freezing, but not unusually cold for the time of year.

The total crew of the Swell numbered 19, comprising 12 deck hands, 2 engineers, 2 firemen, 1 cook, a first officer, and a captain. Of course, keeping four or five men on the Tilton greatly increased the work of the Swell's crew.

Early Monday morning the wind freshened to a strong breeze, which lasted all day Monday and rendered it unsafe to keep men on the Tilton. All men were taken off the Tilton early Monday morning and remained off until Monday night, when, the weather having moderated, a crew of five from the Swell again went on board the Tilton. During Monday little progress was made toward port, the Swell doing little more than hold onto the Tilton; but to do so, while requiring courage and skill, seems not to have been unusually difficult or dangerous. Four or five men were kept on board the Tilton from Monday evening until Boston Harbor was reached about 8 o'clock Tuesday morning.

After being brought into Boston Harbor, the Tilton was first anchored and was later towed to a wharf. The Swell discharged her cargo of fish, valued at about $2,600, Tuesday morning about 9 o'clock. The value of the Swell was in the neighborhood of $70,000. The Swell was delayed by the salvage work about 28 hours, and burned in that time about 14 tons of coal, costing about $60. The following payments were made on account of the Tilton, viz.:

Towage	$15 00
Watchmen	10 00
Wharfage	53 25
Custom house fees	5 50
Labor	11 50
	$95 25

Notice was given by the insurers of the cargo at the office of the Bay State Fishing Company, about 9 o'clock Tuesday morning, that

they were interested in the matter and wished to be communicated with in reference to settling the claim for salvage. This was before the libel was filed. Later that same day, without any effort to confer with the insurers, as owners of the cargo, a libel was filed against the Tilton for salvage, and the marshal took charge of her. Nobody representing the owners of the Tilton communicated with the libelant until about January 2d. In the meantime, after the filing of the libel, there had been conferences between counsel representing the underwriters on the cargo and counsel for the libelant, in reference to an agreement on the value of the Tilton. The parties were unable to agree, and an appraisal was had at an expense of $81. The appraiser valued the Tilton at $500 and her cargo at $3,000, which sums counsel for the owners of the cargo had expressed a willingness to agree to before the appraisal was made.

The questions argued are: First, as to the amount of salvage; second, whether the salvors should pay the cost of appraisal; third, whether the salvors, by failing to communicate with the owners of the cargo and to settle the salvage out of court, had disentitled themselves to costs on the libel.

As to the amount of salvage, the respondents offer by their answer $1,100. I think this would be enough but for the fact that the Tilton, if not towed in or destroyed, was likely to become a source of great danger to other vessels. I agree entirely with what was said by Judge Benedict in The Anna, 6 Ben. 166, Fed. Cas. No. 398:

"For the taking in charge and saving of a wreck so situated, the reward should be such as to insure at all times the rendering of any amount of labor, the incurring of any risk, and the deviation of any vessel from any voyage in order to supply the wreck with a crew, and make her presence safe."

See, too, The Agnes Manning (D. C.) 59 Fed. 481; The Theta (D. C.) 135 Fed. 129; The Myrtle Tunnel (D. C.) 146 Fed. 324.

These cases so closely resemble the one at bar that no further discussion of the principles on which the award should be made is necessary. The suggestion in The Agnes Manning, supra, that prior awards had apparently been on too low a basis to secure the service desired, deserves consideration. At the same time, the moiety which the libelants contend for, amounting to $1,750, seems an excessive reward, considering the services rendered to the owners and to the public, the time occupied, and the amount of property involved. Under all the circumstances, I think that the libelants are entitled to $1,250 as salvage, and to expenses amounting to $155.25; and I so find.

[2] As to costs: An appraisal is required in salvage cases by rule of this court passed March 13, 1867, unless the parties agree upon value. The libelants were wrong in their estimate of value, but I do not find that they were unreasonable in believing that the Tilton and her cargo were worth more than the sum found by the appraiser, and in insisting on their right to an appraisal. This item is to be included in the costs.

It is said that the libelants acted so unfairly and oppressively in bringing this libel without first attempting to arrive at an agreement as to the amount of salvage with the owners of the cargo that costs

ought not to be awarded on the libel. The owners of the Tilton were not represented in Boston and did not communicate with the salvors for more than a week after the Tilton was brought in. The salvors knew, or could easily have discovered, who the owners were, but made no effort to look them up or communicate with them. The insurers or owners of the cargo made no offer before the libel was filed; the offer made by them in their answer I regard as inadequate. There is no claim that they would have offered more before the libel was filed. Somebody had to undertake at once the responsibility for and the care of the Tilton. I do not think that it was incumbent upon the salvors of the derelict to hunt up the owners, nor that the libelants, in bringing this libel and having the marshal take charge of the Tilton, before discussing the question of salvage with the insurers of the cargo, acted unreasonably or oppressively. The libelants may take the usual costs. I am not asked to apportion the award among the different persons entitled to share in it; if necessary, a reference may be had as to such apportionment.

Decree for libelants for salvage amounting to $1,250, expenses amounting to $155.25, and costs including the appraisal.

MORRIS et al. v. SOUTHERN ICE CO.

(District Court, N. D. Georgia. February 21, 1914.)

1. TRIAL (§ 251*)—INSTRUCTIONS—CONFORMITY TO THEORY OF CASE.
In an action to recover damages for false representations as to the value of stock given in exchange for an industrial plant, where the case was tried on the theory that the plant was sold for $100,000 and that the sellers were induced to take one-half of the price in stock, and no claim was made that the plant was of less value than it was represented to be, an instruction authorizing the jury to take into consideration the value of the plant was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587–595; Dec. Dig. § 251.*]

2. FRAUD (§ 59*)—SALES OF CORPORATE STOCK—FALSE REPRESENTATIONS—MEASURE OF DAMAGES.
Where the sellers of an ice plant stated repeatedly they would not take less than $100,000, and the buyer was willing to give this sum, but induced the sellers to take a part thereof in stock in a corporation concerning the value of which it made false representations, the measure of recovery was the difference between the represented value and the real value of the stock, and the value of the ice plant was immaterial.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60–62, 64; Dec. Dig. § 59.*]

3. NEW TRIAL (§ 41*)—HARMLESS ERROR—INSTRUCTIONS—"LEGAL FRAUD."
In an action for damages for false representations as to the value of stock given in exchange for property, conceding that it was error to read to the jury Civ. Code, Ga. 1910, § 4623, which provides that misrepresentation of a material fact made willfully to deceive or recklessly without knowledge, and acted on by the opposite party, or, if made by mistake and innocently and acted on by the opposite party, constitutes legal fraud, it did not injure defendant, where all the court said about it was that it had been requested to charge that section, and the jury had al-

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

ready been instructed that there must be willful misrepresentation as to the value of the stock.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 67-71; Dec. Dig. § 41.*

For other definitions, see Words and Phrases, vol. 5, p. 4063.]

4. FRAUD (§ 62*)—ACTIONS FOR DAMAGES—WEIGHT AND SUFFICIENCY OF EVIDENCE.

In an action for damages for false representations that stock of the par value of $50,000 given in exchange for property was worth its par value, evidence *held* to show that the stock was worth about 80 cents on the dollar, and hence a verdict for $15,000 was excessive to the extent of $5,000.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 62.*]

At Law. Action by W. M. Morris and others against the Southern Ice Company. Verdict for plaintiffs, and defendant moves for a new trial. Motion granted, unless plaintiffs consent to reduce the verdict.

C. P. Goree and Westmoreland Bros., all of Atlanta, Ga., for plaintiffs.

Anderson & Rountree, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. [1, 2] This motion for a new trial is based upon several grounds. The most important one, perhaps, is contained in the requests of the defendant which the court refused to give, which were based on the idea that, where a suit like this is brought to recover damages for false representations as to the value of stock given in exchange for an industrial plant, the jury should be allowed to find the value of the plant as an offset to the value of the stock given for, or in part for, the plant. I denied this request, and I think correctly so. The case was tried upon the idea advanced by the plaintiffs; that is, that they sold the East Atlanta Ice Company's plant to the defendant for $100,000, and the claim was, which was stated repeatedly, that they had said they would not take less than $100,000 in cash for the plant, and that afterwards they were induced to take $50,000 of this $100,000 in the preferred stock of the Southern Ice Company, then being organized. No claim whatever was made during the trial that the East Atlanta ice plant was of less value than it was represented to be. On the contrary, the statement appears in the record that they fully complied with their contract. Perhaps no statement was ever made that it was worth in cash the $100,000, but the case was tried upon the assertion that the amount to be paid by the defendant for this plant was $100,000, and that they took $50,000 of that $100,000 in stock of the defendant upon the representations of the defendant, through its agent, Mr. Howe, that the stock was worth par in the market; that this was stated as a fact; and that said Howe further stated to the plaintiffs that they need not investigate it, but could rely upon his word for the truth of the statement, and this statement was false and known to be false.

Now, as stated, the whole case was tried upon this ground. When the court came to charge the jury, the requests with reference to the

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

right to show the value of the ice plant were handed to the court, and were then refused.

In the first place, I do not think that, where a case has been tried upon an entirely different line, it would be permissible to change the character of the case by a request such as this, made after the case is ended and the court is about to submit it to the jury, and no evidence having been offered on the subject. In the next place, I do not think that the case made here is one in which the evidence would have been admissible even if it had been suggested at the beginning of or during the trial. What the plaintiffs claimed was that they sold the plant for $100,000, taking, however, $50,000 of it in the preferred stock of the Southern Ice Company upon the distinct representation by the defendant that it was worth the $50,000 in the market. It was in a sense therefore claimed to be a purchase by them of $50,000 of the stock from the Southern Ice Company for $50,000, upon the representation that it was worth that amount, and the true measure of the recovery would be the difference between the par value of the stock and its real value at the time of this transaction. I do not think that the value of the ice plant had anything to do with the case. According to the plaintiffs' testimony the defendant was willing to give the $100,000 for it.

There was no exception whatever taken to the charge of the court in this respect, nor was there, indeed, any exceptions whatever to the charge as given.

[3] Another ground of the motion for a new trial is that the court read to the jury, at the request of counsel for the plaintiffs section 4623 of the Code of Georgia. All the court said about it was that it had been requested by the plaintiff to charge the section of the Code, which was then read, and the court said "that is the other section of the Code." I think it may be conceded that the reading of this section of the Code, certainly a part of it, to the jury was error. It was not excepted to by the defendant in any way whatever, nothing was said about it, and I think the instructions of the court before that to the jury were such that it could not have had any effect on the minds of the jury or any effect in causing the verdict which they returned. I had already instructed them that there must be willful misrepresentation of material facts to authorize a recovery, and had put the fact distinctly to them that the case turned upon the determination of the question made by the conflict between the testimony of Morris and Jenkins on the one hand and Howe on the other. The jury had already been instructed distinctly and clearly that in this case there must be willful misrepresentation of a fact and that fact was conceded to be as to the value of this preferred stock.

I do not believe the reading of this section of the Code, about which complaint is now made, in the way in which it was read to the jury, injured the defendant in any way whatever in this case.

I do not think any of the other grounds of the motion are meritorious as to the manner in which the case was tried or submitted to the jury. There is a matter, however, which is material, and that is the amount of the verdict.

[4] The whole record shows that the plaintiffs must have understood that the stock they were taking was in a company being then organized. Exactly when they got the stock does not appear from the record. The plaintiffs turned over the ice plant to the defendant company about the 1st of January, 1912. The receipt given by the Southern Ice Company for the property is dated in May, 1912. It seems to be a fair inference that, during the latter part of the winter and the spring of 1912, this trade was being finally consummated. Mr. Jenkins, one of the plaintiffs, places the value of the stock on the 1st of May at about 77 cents. This value would make the verdict $3,500 too much. And the testimony of Mr. Goulding Marr, introduced by the plaintiff, taken in Nashville November 10, 1913, shows that the stock was sold in March, 1912, as low as 77 and as high as 80½, and in April, 1912, as high as 84. A letter was put in evidence by the plaintiffs, written by J. H. Howe, from Nashville, Tenn., May 11, 1912, the last paragraph of which is as follows:

"You state in your letter that you understand some of it (referring to the preferred stock in question here) is selling in Atlanta for 80¢. No sales as low as this have come to my knowledge. At this time I would be glad to give that price for a hundred shares of it."

This evidence of the plaintiffs indicates that the stock at that time was worth at least 80 cents on the dollar in the market. Of course, this company being in course of organization, as stated, the plaintiffs could hardly have believed its value would be definitely fixed until it was issued and marketable. Mr. Jenkins evidently had his stock on hand on May 9, 1912, when he wrote to Mr. Howe, and, if the stock was then worth 80 cents, it could hardly have been worth very much less from the time it had any definite value. I think the fair value of this stock must be considered to have been, along about the time it was delivered to the plaintiffs, or from the 1st of January along up to May 11th, about 80 cents on the dollar. This would make the largest amount which the plaintiffs are entitled to recover $10,000. In my opinion the verdict, beyond such an amount as that valuation would authorize, is excessive, and not justified by the evidence. Putting the fair value of the stock at 80 cents would make a difference between this and the par value of the $50,000 of stock, $10,000.

If the plaintiffs will write off from their verdict $5,000 and allow it to stand for $10,000, the motion for a new trial will be overruled. Otherwise it must be granted upon the ground that the verdict, to the extent indicated, is excessive and unauthorized.

THE KORANNA.

(District Court, S. D. New York. May 7, 1914.)

1. SHIPPING (§ 132*)—SUIT FOR INJURY TO CARGO—BURDEN OF PROOF.
When damages which are attributable to causes excepted in the bill of lading are sustained in the transportation of merchandise, the burden of proof is upon the shipper to show that the loss occurred through the negligence of the carrying vessel.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471–487; Dec. Dig. § 132.*]

2. SHIPPING (§ 132*) — SUIT FOR INJURY TO CARGO — STOWAGE — EVIDENCE — FOREIGN CERTIFICATE OF SURVEY.
A certificate of survey executed in a foreign port, showing that the cargo of a vessel was inspected on loading and was properly stowed, *held* admissible in a suit against the vessel for injury to the cargo alleged to have been due to improper stowage.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471–487; Dec. Dig. § 132.*]

3. SHIPPING (§ 132*)—DAMAGE TO CARGO—ALLEGED IMPROPER STOWAGE.
Evidence considered, and *held* insufficient to sustain a libel for damage to a part cargo of cocoanut oil in casks, on a voyage from Ceylon to New York from leakage caused by breaking of the casks alleged to have been due to improper stowage, but rather to show that it was due to the insufficiency in strength of the casks for such a voyage.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471–487; Dec. Dig. § 132.*]

In Admiralty. Suit by Henry P. Winter and others, doing business under the firm name of Winter & Smillie, against the steamship Koranna and the Bucknall Steamship Lines, Limited. Decree for respondents.

Hunt, Hill & Betts, of New York City (George Whitefield Betts, Jr., and John W. Crandall, both of New York City, of counsel), for libelants.

Convers & Kirlin, of New York City (John M. Woolsey and Cletus Keating, both of New York City, of counsel), for respondents.

HAZEL, District Judge. On September 23, 1910, the English steamer Koranna brought to the port of New York from Colombo, Ceylon, a large quantity of cocoanut oil in pipes or casks loaded into the after hold of the steamer, 25 of which, weighing 65,125 pounds, were consigned to libelants, a firm doing business in the city of New York. The voyage, lasting nearly two months, began in the monsoon, and the evidence shows that the steamer rolled considerably in the Indian Ocean and later, in the Atlantic Ocean encountered gales and storms. On her arrival in New York about 18 of the pipes or casks of cocoanut oil were in bad condition evidently, as claimed, having received damage from external causes; 13 were nearly empty; while the others contained only about one-half of their original contents. An inspection made at that time disclosed one cask practically demolished, ten with staves depressed or bulged at the bilges, and others with the staves or chimes broken or squeezed out of place.

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

[1] Libelants claim that the injury to the casks was caused by negligent stowage, and in support of such claim introduced testimony to show that the bilges of the pipes, which were stowed in three tiers, one on top of the other, were permitted to contact with each other or with the deck; while the respondents claim that negligent stowage is not shown, and that the evidence in its entirety establishes that the pipes were stowed in accordance with the usage and custom of the port of Colombo, and that the abnormal leakage was due solely to imperfections in the construction of the pipes. It is my conclusion that the libelants have not established their case by a fair preponderance of the evidence. It is well settled, I think, that, whenever damages which are attributable to causes excepted in the bill of lading are sustained in the transportation of merchandise, the burden of proof is upon the libelant to show that the loss occurred through the negligence of the carrying vessel as she is not permitted to exempt herself from the consequences of her negligence or lack of diligence and care in the transportation of property. The Lennox (D. C.) 90 Fed. 308; The Konigin Luise, 185 Fed. 478, 107 C. C. A. 578. As this case is one where concededly the loss was from an expected peril, the material question is: Was the custody stowage, or care of the cargo improper and fraught with misconduct amounting to negligence? If the pipes of cocoanut oil in question were stowed at the beginning of the voyage in accordance with an established usage in transportation for a long voyage, then, giving effect to the printed bill of lading in evidence herein, providing that the carrier shall not be liable for drainage, leakage, breakage, contact with other goods, or for insufficient packing, the libelants are without remedy and cannot recover.

[2] There is some testimony indicating that the bilges of the casks were not sufficiently separated and were permitted to come in contact, that coir dolls and yarn were used between the tiers instead of scantlings and quoins, and it is argued that the failure to use scantlings or quoins was negligence, as the coir dolls and yarn, because of their yielding qualities, were unable to keep the casks from touching. I am, however, satisfied from the evidence given in behalf of the steamer that there was proper clearance between the casks, and that they were not stowed with contacting bilges, and that the pipes or casks were placed in the customary way in accordance with the rules of the Chamber of Commerce of the port of Colombo. The certificate of survey was introduced in evidence, over objection, to show that the lower tier was inspected at the time of loading to make certain that it was properly quoined; and I am of opinion that said certificate, executed in a foreign country, was properly admitted. The Boskenna Bay (D. C.) 22 Fed. 662; The J. F. Spencer, 3 Ben. 339, Fed. Cas. No. 7,315; The Peerless, 1 Lush. 41, Fed. Cas. No. 4,494. There was, however, other testimony upon this point.

[3] The witness Hemming substantially testified, as careful reading of his testimony will disclose, that the bottom tier of pipes (which contained the only injured ones) was properly quoined up at each end with a piece of timber 4 feet long and 4 inches square, while small quoins, wedges, or chocks were used in the ordinary way to hold the

casks in place. The witness Batcheller gave testimony to a similar effect, while the witness Ricardo, foreman of the stevedores who unloaded the vessel on her arrival, and the witness Lynch, testified in substance that the first tier of casks had quoins 4 inches square and 2 feet in length with a clearance of 3 inches underneath, and that the upper tiers were separated by beds of coir yarn. In some particulars the testimony relating to the stowage is discrepant, and respondents' witnesses in some instances have contradicted each other; but nevertheless the evidence in its entirety convinces me that the steamer was not negligent in stowing or caring for the cargo in question.

There was evidence to show that a platform had been erected in the hold with stanchions extending through the spaces left by the variable circumference of the casks, upon which were stowed pipes of cocoanut oil and other merchandise. It appears, however, that the platform had a clearance of fully three or four inches above the upper tier of pipes, and I find no reliable testimony to establish the claim that it sagged or came in contact with the casks underneath.

There is much testimony in support of respondents' contention that the casks lacked strength and durability for so long a voyage. It is indisputable that the pipes of other shipments stowed in the same hold in the same way and subject to similar strains arrived in good condition, while libelants' casks were considerably damaged. Several coopers, who were witnesses, swore that the staves of the casks from which the oil leaked were old and rotted, and could easily be indented; also staves were found bearing score marks indicating repeated use. Three of the casks in question were inspected by the court on the sidewalk in front of the courthouse, and it was quite apparent that part of the staves were pressed in at the quarters and were old and tender to pressure, and that the bilges were impaired. It is quite true that cocoanut oil soaks into the wood and gives it a moldy appearance; but in the casks inspected by me the newer staves, which were easily distinguishable from the older ones, looked strong and lasting, while those that had evidently been previously used were decidedly weak and dilapidated, leaving the impression in my mind that the leakage was caused by improper cooperage in combining old and worn-out staves with new ones, thus producing casks which were unable to withstand the weight of their contents and the strains of the voyage.

Accordingly, the clause in the bill of lading exempting the carrier from liability for drainage, leakage, breakage, contact with other goods, or insufficiency of packing, must be given effect, and, as it has not been proven by a fair preponderance of the evidence that the loss or damage which is the subject of this controversy was sustained by reason of the negligence of the vessel, the libel is dismissed, with costs.

STANDARD ROLLER BEARING CO. v. BERGDOLL.

(District Court, E. D. Pennsylvania. May 18, 1914.)

No. 2674.

1. EVIDENCE (§ 441*)—PAROL EVIDENCE TO VARY WRITING.
Under an agreement by defendant to pay any and all indebtedness of a company to plaintiff up to but not exceeding a specified amount at any one time, and to pay in full on or before the 20th day of each month for goods delivered during the preceding month, if the company was unable or failed to meet its obligations, it could not be shown to defeat a recovery that plaintiff promised not to sell or deliver goods to the company unless the goods furnished each month were paid for during the following month, especially where there were no allegations of fraud, accident, or mistake, since the federal courts do not, in actions at law, reform writings and in equity only for fraud, accident, or mistake.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719, 1723–1763; Dec. Dig. § 441.*]

2. GUARANTY (§ 39*)—LIABILITY—CONDITIONS PRECEDENT—NOTICE.
Where a written agreement by defendant to pay plaintiff any and all indebtedness of a company up to a specified amount, and to pay it for all goods delivered during each month on or before the 20th of the following month, did not expressly or impliedly provide for notice, it was not a defense to a recovery thereon that defendant never received notice from plaintiff showing the dates of sales to the company and never saw an account showing the sales.
[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 48; Dec. Dig. § 39.*]

At Law. Action by the Standard Roller Bearing Company against Louis J. Bergdoll. On motion for judgment for want of a sufficient affidavit of defense. Motion granted.

Henry P. Brown, of Philadelphia, Pa., for plaintiff.
John Weaver, of Philadelphia, Pa., for defendant.

BUFFINGTON, Circuit Judge. [1, 2] In this case the Standard Roller Bearing Company, a corporate citizen of New Jersey, brought suit against Louis J. Bergdoll, a citizen of Pennsylvania, to recover some $12,000 for axles sold by it to the L. J. Bergdoll Motor Company between July 5, 1912, and February 28, 1913. The allegation of the plaintiff was that the defendant was liable for said goods by his contract with the plaintiff. That contract provided:

"July 5, 1912.

"Memorandum of agreement between Louis J. Bergdoll and Standard Roller Bearing Company, both of Philadelphia, Pa.:

"Whereas, in accordance with the memorandum of agreement between the above parties dated April 13, 1912, the Standard Roller Bearing Company furnished to the L. J. Bergdoll Motor Co. automobile axles and parts to an aggregate value on June 30, 1912, of $13,025.13; and whereas, the said L. J. Bergdoll Motor Company has given to the Standard Roller Bearing Company its promissory notes indorsed by Louis J. Bergdoll in full payment of the said $13,025.13 with interest; and whereas, the aforesaid memorandum of agreement of guaranty on the part of Louis J. Bergdoll was limited to the sum of $14,000.00 at any one time; and whereas, the L. J. Bergdoll Motor Co., is desirous of continuing to purchase axles from the Standard Roller Bearing Com-

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

pany, and to give to the said Standard Roller Bearing Company its guarantee of payment therefor:

"Now therefore, Louis J. Bergdoll, in consideration of the sum of one dollar to him in hand paid and other good and valuable considerations, hereby personally agrees to pay the Standard Roller Bearing Company and any and all indebtedness of the L. J. Bergdoll Motor Co., to the said Standard Roller Bearing Company, up to but not exceeding the amount of $14,000.00 at any one time, said amount being estimated to be the limit of any one month's requirements. The said Louis J. Bergdoll further agrees to pay the Standard Roller Bearing Company in full on or before the 20th day in each month for the axles delivered during the preceding month, provided the L. J. Bergdoll Co. is unable or fails to meet its obligations to the Standard Roller Bearing Company. This agreement to apply to indebtedness incurred on and after July 1st, 1912. [Signed] Louis J. Bergdoll."

In answer to the suit the defendant sets up: First, that he signed this paper on the faith and credit of a precedent statement of plaintiff's president that plaintiff "would not sell goods to the Louis J. Bergdoll Motor Company unless they could be paid on the 20th of the following month for the goods that they had furnished during the previous month, and that unless the goods were paid for during the following month they would not make any further deliveries." And, second, "that he never received any notice from the plaintiff company showing the dates of the sales to the Louis J. Bergdoll Motor Company, and he never saw an account showing the sales between July 5, 1912," until the statement in the present case was filed, and the only notice of his principal's default was on March 8, 1913.

By the paper in question the defendant became surety for and "personally agrees to pay the Standard Roller Bearing Company any and all indebtedness of the L. J. Bergdoll Company to the said Standard Roller Bearing Company up to and not exceeding the amount of $14,000 at any one time," and he "further agrees to pay the Standard Roller Bearing Company in full on or before the 20th day in each month for the axles delivered during the preceding month, provided the L. J. Bergdoll Company is unable or fails to meet its obligations to the Standard Roller Bearing Company." This agreement is complete, definite, and self-explanatory. Its undertakings are unambiguous, and to change them is to vary what the parties wrote into their contents by what they did not see fit to write into it. The federal courts do not, in actions at law, reform writings, and in equity only on grounds of fraud, accident, or mistake, grounds which are not alleged in the present case.

As to notice it suffices to say the contract neither expressly or impliedly provides for notice. The undertaking of the defendant was unqualified in terms "up to and not exceeding the amount of $14,000."

In accordance with these views the motion for judgment must prevail. The clerk will liquidate the judgment on the basis agreed on at the argument.

CINCINNATI RY. SUPPLY CO. v. HARTLIEB et al.

(Circuit Court of Appeals, Sixth Circuit. June 2, 1914.)

No. 2549.

1. BANKRUPTCY (§ 345*)—SALE OF MATERIALS—FRAUD.

Where, at the time a bankrupt purchased certain materials from claimant to be paid for in cash on delivery, it had reasonable expectation of paying therefor, and later expected and promised to pay the debt out of the proceeds of a loan it was negotiating, its failure to do so did not entitle the seller to a preference on the ground that the purchase was fraudulent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. § 345.*]

2. SALES (§ 196*)—TERMS—WAIVER.

Claimant sold certain materials to defendant on February 1st on cash terms, and seven days later made the second sale, a third in eight days, and a fourth in five days, without any of them being paid for. Claimant's sales agent visited the buyer's plant at least once every ten days or two weeks during a period of four months, and never during all that time did he make any demand for payment of the goods, and it was not until after the buyer had failed to keep repeated promises to pay that the claimant brought replevin just prior to the buyer's bankruptcy. *Held*, that such course of conduct operated as a waiver of the condition that payments should be made in cash on delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 510; Dec. Dig. § 196.*]

3. SALES (§§ 82, 196*)—"REASONABLE TIME."

Reasonable time to pay for property delivered under a contract of sale means such promptitude as the situation of the parties and the circumstances of the case will allow, and does not mean indulgence in unnecessary delay or in a delay occasioned by a vain hope and fruitless effort to obtain the money from a defaulting buyer, and, when the delay is to be accounted for by such consideration, it is accepted as an acquiescence in the delivery and acceptance of the buyer as a debtor.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 229–233, 510; Dec. Dig. §§ 82, 196.*

For other definitions, see Words and Phrases, vol. 7, p. 5976.]

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Application by the Cincinnati Railway Supply Company for an order requiring J. F. Hartlieb and others, as trustees in bankruptcy of the Platt Iron Works Company, to pay claimant the purchase price of certain materials alleged to have been sold to the bankrupt on terms cash on delivery and not paid for, though manufactured. From a judgment denying such relief, claimant appeals. Affirmed.

The opinion of Hollister, District Judge, referred to near the end of the opinion, is as follows:

[1] The evidence does not show such a condition of insolvency at the time the intervener's debt was contracted, or such knowledge of insolvency, as to warrant the inference that the Platt Iron Works Company had no reasonable expectation of paying the debt, and therefore in law intended not to pay. On the contrary, the evidence shows the Platt Iron Works Company did expect to pay, and that at times between February, when the debt was contracted,

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

and June, when the only demand for the goods was made by the intervener (and that by a suit in replevin in the Montgomery common pleas), was in negotiation with persons in New York for the loan of large sums of money to it. The evidence shows the company expected to pay this debt out of the proceeds and so advised the intervener; hence, there is no room for the application of the doctrine of Talcott v. Henderson, 31 Ohio St. 162, 27 Am. Rep. 501; Donaldson v. Farwell, 93 U. S. 631, 23 L. Ed. 993, and similar cases.

This point was not made before the referee. It was there contended that, the sales being for cash (as they were, whether so marked on the order or bill, or not), the title did not pass, because of the noncompliance by the vendee with the condition precedent to the passing of the title, namely, payment for the goods; and therefore that the vendor could reclaim the goods, or, if they could not be found in specie, could follow them wherever they could be traced, even though they had changed their form and had become a part of manufactured goods, as in Erie R. R. Co. v. Dial, 140 Fed. 689, 72 C. C. A. 183 (C. C. A., 6th). The impossibility of tracing the particular copper and tin, which were the subjects of the sales, was made abundantly apparent by the testimony.

[2] But assuming that they could be traced, or even assuming that the actual goods were still in the hands of the trustee, it has been established by a long line of authorities that such a condition precedent may be waived by circumstances showing an intention to deliver notwithstanding the condition which could have been insisted on, and to look to the vendee as a debtor only.

These goods were sold in February. The sales agent of the intervener was at the works of the vendee as frequently as once every ten days or two weeks during a period of about four months and never during all that time made any demand for the goods, and it was not until it appeared the repeated promises of the vendee to pay seemed unlikely of fulfillment that the only demand for the goods was made, which was in the shape of a suit in replevin.

Copper and tin being expensive, it was the practice of the vendee to purchase only sufficient for its current needs. The vendor knew this. The copper and tin were used with zinc and antimony, etc., to make brass, which, in the forms it ultimately took, was used for and became parts of engines and other machinery built up of parts, of which the vendee was the manufacturer. The metal in question was thus used mostly during February and probably all of it was used before the end of March. The vendor knew the manner in which the metal sold by it would be dealt with. The first sale was February 1st. Seven days elapsed before the next sale. The third sale was eight days after that, and the fourth five days later.

If the vendor intended to rely upon its right to retake its metal in case of nonpayment in cash, in accordance with the terms of the contract, why did it, knowing the metal would lose its initial form and substance and be converted into manufactured goods of brass in small forms and shapes of less than two pounds in weight, continue to make deliveries after previous deliveries without enforcing its right to retake the goods on failure to pay within a reasonable time after each shipment?

It is abundantly proved that the vendor was relying upon the promises of the vendee to pay its debt and not upon such right as may have existed at the time of the transaction, of requiring payment at the time of delivery, or within a reasonable time thereafter, and in default thereof to take possession of the goods.

[3] It is said in Frech v. Lewis, 218 Pa. 141, 144, 145, 146, 67 Atl. 45, 46, 47 (11 L. R. A. [N. S.] 948, 120 Am. St. Rep. 864, 11 Ann. Cas. 545): "By reasonable time is to be understood such promptitude as the situation of the parties and the circumstances of the case will allow. It never means an indulgence in unnecessary delay, or in a delay occasioned by the vain hope and fruitless effort to obtain the money from the defaulting buyer. When the delay is to be accounted for by the latter consideration, it is accepted as an acquiescence in the delivery and the acceptance of the buyer as a debtor." And again: "Reliance upon a subsequent promise to pay, that leads the seller to refrain from asserting his right to retake the property, is in itself a waiver of the right, and makes absolute a delivery which in the first instance was conditional. The right of plaintiff to recover back his property after he had delivered it resulted from the buyer's failure to keep his first promise; his

failure to keep subsequent promises to pay could neither prolong nor revive that right."

The point is made that there was no consideration for the abandonment by the vendor of its initial right to repossess itself of its goods upon vendee's failure to comply with the condition of payment. It is significant that this question was not discussed in any of the numerous cases holding that the circumstances determine whether the vendor's initial right of retaking the goods has been abandoned by him. But the changed relation of the parties are not such as depend upon a new consideration, for the transaction is either one of conditional sale, if the vendor insists upon the condition, or an unconditional sale, depending upon his right to make it one or the other, at his election. If he elects to waive his right of immediate payment, then the relation of debtor and creditor arises, a relation created by the voluntary act of the vendor and growing out of the voluntary abandonment of the right to treat the sale as conditional. It is a matter of grace to the vendee involving the voluntary considerations and impulses which impel the making of a gift. Besides, the vendor may prefer to treat the goods as sold and make his profit out of the sale rather than to take back the goods. Indeed, this is exactly what happened in this case as all the facts show. That advantage to the vendor would be a consideration for his conduct in electing to treat the property as sold unconditionally. There is no room to doubt the correctness of the referee's conclusion under the circumstances of this case, and the petition for review will be dismissed at the intervener's costs.

W. J. Rielly, of Cincinnati, Ohio, for appellant.

G. R. Young, of Dayton, Ohio, for appellees.

Before WARRINGTON and DENISON, Circuit Judges, and SESSIONS, District Judge.

PER CURIAM. Appellant sought through intervention to recover certain copper and tin metal which it had delivered to the bankrupt between February 1 and 21, 1911, and the money equivalent for any that had been sold. The grounds for recovery stated were that the terms of sale were cash on delivery; that, the bankrupt having failed to pay any portion of the purchase price, appellant, after demand and refusal to return the property, had on June 29, 1911, instituted proceedings in replevin, but during pendency of the action, July 24, 1911, bankruptcy proceedings were begun against the debtor, receivers appointed, and the intervener was enjoined from further prosecution of its action. The defenses were that demand for return of the metal was not made until after it had been manufactured into castings; that neither the metal nor the castings could be identified; and that the intervener had waived compliance with the terms of sale. This the intervener in substance denied, and alleged that the bankrupt, knowing that by reason of nonpayment it had no title under the terms of sale, converted the property to its own use shortly after delivery, and that, through repeated representations of its ability and inclination to pay, had caused intervener to delay commencement of proceedings to recover the property.

The referee to whom the cause was submitted heard the testimony and made findings in substance as follows: Amount claimed was correct, and terms of sale were cash on delivery. Most, if not all, of the metal was used in the casting of small parts of bankrupt's products during February, the month of delivery, certainly within 60 days thereafter and before demand was made for its return. It was impossible to tell whether or not any of these parts were still on hand;

nor could they be traced into any particular account, or their proceeds into any particular fund. Soon after the first shipment, and at frequent later intervals, intervener urged payment of the amount due, but was put off with promises. No demand was ever made for return of the goods until June 29, 1911, when the sheriff of Montgomery county undertook to execute a writ of replevin issued at the suit of intervener; but, after seizing certain copper, he released it upon learning that it was not the copper in question, and returned the writ indorsed "goods not found in my county." In previous dealings between these parties in respect of sales on similar terms, payments were not made until the lapse of some 30 days after the respective deliveries. It had been the practice of bankrupt not to order such metals in advance of its needs, and intervener must have known that the metal in question would be quickly converted into castings.

After carefully considering the facts and making his findings, the referee delivered a creditable opinion denying relief. Judge Hollister, upon review, confirmed the findings and order of the referee in an opinion which meets with our approval. His opinion appears herewith, and the order so entered and sustained below is affirmed, with costs.

WELLS FARGO & CO. v. JOHNSON, Treasurer of State of South Dakota.

FARGO v. SAME.

(Circuit Court of Appeals, Eighth Circuit. April 24, 1914.)

Nos. 4039, 4040.

(Syllabus by the Court.)

1. TAXATION (§ 40*)—VALIDITY—UNIFORMITY.

In 1910 the Constitution of South Dakota provided that "all taxation shall be equal and uniform," that "all taxes to be raised in this state shall be uniform on all real and personal property according to its value in money to be ascertained by such rules of appraisement and assessment as may be prescribed by the Legislature by general law, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property. And the Legislature shall provide by general law for the assessing and levying of taxes on all corporation property, as near as may be, by the same methods as are provided for assessing and levying taxes on individual property." While the property of individuals and of the great majority of the taxpayers in the state was assessed according to its actual value in money, without considering the earnings of its respective owners, and taxes were levied at a uniform rate on all assessments, the Legislature required the State Board of Assessment and Equalization, in making the assessments upon the property of each express company doing business in that state, to "take into consideration the gross earnings of said company within the state for the year ending on the 30th day of April preceding" (Laws of South Dakota 1907, c. 64, § 17), and the board did so and measured the assessments of the property of such companies by the companies' earnings far more than by other matters considered.

Held, the provision of section 17 quoted violated the provisions of the Constitution quoted, and the assessments of the property of the express companies were void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 68–89; Dec. Dig. § 40.*]

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

2. COURTS (§ 92*)—OPINIONS—DICTA.
"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."

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 335; Dec. Dig. § 92.*]

3. TAXATION (§ 608*)—INJUNCTION—GROUNDS.
Systematic, repeated, continuing violations of the Constitution or the law in the making of assessments and the levying of taxes, like continuing trespasses, justify an injunction against the continuance of such a course and the collection of taxes so levied.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230–1241; Dec. Dig. § 608.*]

Appeal from the District Court of the United States for the District of South Dakota; Jas. D. Elliott, Judge.

Complaints by Wells Fargo & Co. and by James C. Fargo, individually and as president of the American Express Company, to enjoin George G. Johnson, as Treasurer of the State of South Dakota, from collecting certain taxes. From decrees dismissing the complaints (205 Fed. 60), plaintiffs appeal. Reversed and remanded, with directions.

C. O. Bailey, of Sioux Falls, S. D. (Bailey & Voorhees, of Sioux Falls, S. D., and Joseph W. Welsh and Charles W. Stockton, both of New York City, on the briefs), for appellants.

Royal C. Johnson, Atty. Gen., of South Dakota, and L. T. Boucher, of Aberdeen, S. D., for appellee.

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

SANBORN, Circuit Judge. These are appeals from decrees which dismissed complaints to enjoin the treasurer of South Dakota from collecting taxes levied against the plaintiffs by the state board of assessment and equalization of the state of South Dakota in the year 1910. The plaintiffs are express companies, and they claim that the assessments of their property made by the board in 1909 and 1910, on which it levied the taxes in those years, were made in violation of the Constitution of the state of South Dakota, in that in making them it took into consideration their earnings in the state while the earnings of the great majority of the taxpayers of the state were not considered in assessing their property for taxation, that these assessments were made in violation of the statutes of that state, in that the board based them on a certain percentage of the respective amounts the plaintiffs paid to the railroad companies for transportation services in South Dakota, instead of founding them on the values of their personal and real properties, and for other reasons. They brought suits on these grounds to enjoin the collection of the taxes in 1909 against them. Those suits were heard and decided in their favor by Judge Willard, and decrees for injunctions were rendered, from which no appeals were ever taken. Before the decision of those cases was made the board had made the

assessments of 1910, which the court below has sustained in these cases, and that ruling is assigned as error. These cases were heard together, and whatever is said concerning one of them in this opinion which is not clearly applicable to that one alone is equally applicable to the other.

[1] The Constitution of South Dakota in force in 1909 and 1910 provides in article 6, § 17, that "all taxation shall be equal and uniform," and in article 2, § 2, that:

"All taxes to be raised in this state shall be uniform on all real and personal property, according to its value in money, to be ascertained by such rules of appraisement and assessment as may be prescribed by the Legislature by general law, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property and the Legislature shall provide by general law for the assessing and levying of taxes on all corporation property, as near as may be, by the same methods as are provided for assessing and levying of taxes on individual property."

Section 17 of chapter 64 of the Laws of South Dakota 1907, which was in force in 1909 and 1910, provides that the board shall:

"On the first Monday in July each year assess all the property of every express and sleeping car company doing business in this state and used in the operation and maintenance of its business, and in doing so shall take into consideration the gross earnings of said company within the state for the year ending on the thirtieth day of April preceding the statements made by said companies and by the board of railway commissioners and any and all other matters necessary to enable them to make a just and equitable assessment of said property in the same ratio as the property of individuals."

And that:

"Said board shall levy a tax upon said property, which tax shall be equal to the average amount of state, county, school, municipal, road, bridge and other local taxes levied upon other property for the preceding year."

Section 16 of the act provided that every express company doing business within the state must transmit to the state auditor, on or before July in each year, a statement of the gross earnings of the total business of the company transacted in the state for the year ending April 30th preceding, and of the value of its office furniture, fixtures, and real estate within the state. Wells Fargo & Co. made a statement to the auditor in June, 1910, that its gross earnings within the state for the year ending April 30, 1910, were $131,096.28, and that the value of its office furniture, fixtures, and real estate was $18,473.98. The board assessed the value of its property $289,877, and assessed a tax of 28 mills on the dollar upon it, which made its tax $8,116.65. The American Express Company made a similar report, and received a similar assessment. It is admitted in the answer, and the testimony for the defendant was, that in making these assessments of the plaintiff's property the board considered, among other things, the earnings of and the business done by the companies in the state of South Dakota, and defendant's counsel in their brief in this court say:

"As has been said, the board of assessment of South Dakota did consider, among other things, the income of appellant, so far as they could ascertain it, the contracts of appellant with the railway companies, the uses to which its property was put, and the intangible, as well as the tangible, assets in this state, in fixing this valuation. If this was wrong, then the tax must fall; but we contend it was not wrong."

It is conceded that the board was without either constitutional or statutory authority to tax either the gross or net earnings of the company in the state of South Dakota in lieu of all other taxes or of taxes on its property, and that the limit of its lawful power was to assess and tax its "real and personal property according to its value in money, * * * so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property," as the Constitution requires. The value of real and personal property in money is the amount that can be realized from it by a sale of it within a reasonable time, and that is the valuation at which the local assessors were required to assess, and presumptively did assess, the property of individuals and of the vast majority of the taxpayers in the state of South Dakota. Counsel argue that the assessors of such property are not prohibited from considering the earning power of that property for the purpose of ascertaining its actual value. But this contention is fallacious and irrelevant in this case. In the first place, while such assessors may and doubtless do consider the rental value, and in that sense the earning power, of some kinds of real and personal property, it is common knowledge that the customary and lawful measure of the value of such property which they use is the selling value of the property; and, in the second place, it was not the earning power of plaintiffs' property in South Dakota that the board considered as a measure of its value, but the earnings of the plaintiffs themselves, the earnings of the owners of the property.

The first question in this case, therefore, is whether or not taxation at a uniform rate, at the rate of 28 mills on the dollar in this case, of the real and personal property of one taxpayer on a valuation measured by its selling value in money and of the real and personal property of another taxpayer on a valuation measured by the earnings of the owner of the property, as well as by its selling value, is equal and uniform taxation of the real and personal property of both, so that each "person and corporation shall pay a tax in proportion to the value of his, her or its property," as the Constitution requires. This question seems susceptible of but one answer; it seems impossible that such assessments could produce equal and uniform taxation according to the value in money of the property assessed. Counsel for the defendant, however, invoke the familiar rule that the national courts follow the settled construction by the highest judicial tribunal of a state of its Constitution and laws where no question of general or commercial law or of the Constitution or laws of the United States is involved, and insist that the Supreme Court of South Dakota decided, in State ex rel. American Express Co. v. State Board of Assessment and Equalization, 3 S. D. 338, 53 N. W. 192, that a statute which authorized the board to consider the gross earnings of a corporation in making the assessment of its property did not violate the Constitution of that state. The opinion in that case has been carefully and repeatedly read and searched in vain for any presentation, discussion, reference to, or decision of the question whether or not a statute which required the board to take into consideration the gross earnings of one class of taxpayers in assessing their real and personal property for taxation, while the assessors of the property of other classes were not required to and did not take their

earnings into consideration in assessing their property, was violative of the provisions of the Constitution which have been cited. The only constitutional question mentioned in that opinion is whether or not the taking into consideration by the board of the contracts of the express company with the railroads, which related to transportation to and from some places without as well as those within the state, was an invasion of the right to conduct interstate commerce, and therefore a violation of the Constitution of the United States. 3 S. D. 350, 53 N. W. 192.

[2] It is true that the court considered and decided that the board did not violate the statute under consideration in that case by taking into consideration in making its assessment the gross earnings of the express company (3 S. D. 347, 53 N. W. 192), which by its terms that statute expressly authorized the board to consider, as does the statute now in hand, but the position was nowhere taken, discussed, considered, or decided that the statutory grant of this authority to the board was in violation of the Constitution of the state. The result is that the decision of this question may not be lawfully avoided by this court on the ground that the highest judicial tribunal of the state has settled it, and the authoritative words of Chief Justice Marshall govern here:

"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, 293, 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; Evans v. Victor, 204 Fed. 361, 367, 122 C. C. A. 531, 537.

An attempt is also made to sustain the constitutionality of this statute and the validity of the assessments of the plaintiffs' property under it by the decisions in State v. United States Express Co., 114 Minn. 346, 131 N. W. 489, 37 L. R. A. (N. S.) 1127; United States Express Co. v. Minnesota, 223 U. S. 335, 348, 32 Sup. Ct. 211, 56 L. Ed. 459, and Postal Telegraph Cable Co. v. Adams, 155 U. S. 688–697, 15 Sup. Ct. 360, 39 L. Ed. 311. But the Constitution of Minnesota expressly authorized the Legislature of that state to impose a tax upon the gross earnings of express companies (article 9, § 17), and it contained no such requirements or restrictions as those that have been cited from the Constitution of South Dakota. The Legislature of Minnesota, under the Constitution of that state, passed an act providing for a 6 per cent. tax on the gross earnings in Minnesota of express companies in lieu of all other taxes. Revised Laws Minnesota 1905, §§ 1013, 1019. The state sued the express company to recover this 6 per cent. of certain earnings which the express company had derived from business which that company claimed constituted interstate commerce, and hence was exempt from taxation by the state under the commercial clause of the Constitution of the United States. The Supreme Court of Minnesota, in the case first cited above, adjudged this claim, and held that a part of these earnings were, and a part were not, exempt from taxation by the state under the Constitution of the United States. 114 Minn. 346, 131 N. W. 490, 37 L. R. A. (N. S.) 1127. In the discussion of this question the court reaffirmed its previous decisions that

these taxes on gross earnings of corporations in lieu of all other taxes pursuant to the express authority of the Constitution of Minnesota were in reality taxes on the property of the corporation measured by their gross earnings. 114 Minn. 346, 131 N. W. 491, 492, 37 L. R. A. (N. S.) 1127. When this case reached the Supreme Court, the only question it presented there was whether or not any of the gross earnings upon which the Minnesota court had sustained the tax were exempt from taxation under the commercial clause of the Constitution of the United States, and that court held that they were not. 223 U. S. 347, 348, 32 Sup. Ct. 211, 56 L. Ed. 459. In the course of its opinion the Supreme Court of the United States recited the fact that the Minnesota court had construed the tax to be a tax upon the property of the company measured by its gross earnings within the state, and remarked that it was not prepared to say that this conclusion was not well founded in view of the provisions and purposes of the law.

In Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 696, 15 Sup. Ct. 268, 360, 39 L. Ed. 311, the only question before the court was whether or not a tax levied by the state of Mississippi was violative of the commercial clause of the Constitution of the United States, and upon that issue alone are the remarks of the court either authoritative or material. Thus it appears from a review and analysis of these decisions upon which defendant's counsel seem to rely: (1) That the only question at issue or decided in any of them was whether or not certain taxes were levied in violation of the commercial clause of the Constitution of the United States; (2) that the construction in the Minnesota case that a tax on the gross earnings in a state of a corporation is a tax on its property therein, measured by the gross earnings, was based on express authority in the Constitution of that state to tax the gross earnings, and on the fact that such tax was levied in lieu of all other taxes on its property; and (3) that there is nothing in the adjudications or opinions in these cases to the effect that, in the absence of express authority in the Constitution of a state to levy taxes on the gross earnings of a corporation, and in the face of positive declarations therein that all taxes "shall be equal and uniform," that "all taxes raised in this state shall be uniform on all real and personal property according to its value in money * * * so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property," and that "the Legislature shall provide by general law for the assessing and levying of taxes on all corporation property, as near as may be, by the same methods as are provided for assessing and levying taxes on individual property," a statute which requires the taxation of the property of a corporation on an assessment of its property by the consideration of the gross earnings of the corporation in the state and the value of its property, while the property of the vast majority of the taxpayers of the state is taxed upon assessments measured by the actual value of their property without any consideration of the earnings of its owners, is not violative of these constitutional restrictions, or that an assessment made in accordance with such a statute is not void. And so the question recurs and demands its answer.

It is conceded that the people of a state may, by express provisions in its Constitution, authorize their legislative and executive officers to

measure the assessable value of the taxable property of a corporation by its gross earnings in the state. That is not the question which this case presents. The question here is, May such officers measure the assessable value of the real and personal property of the corporation by the earnings of that corporation in the state, or by a consideration of the earnings of the corporation without such constitutional authority, in defiance of the stringent and mandatory restrictions of the Constitution of South Dakota? In a simple case the answer seems not to be doubtful. If each of two individuals owns real and personal property of the same actual value and has gross earnings of $100,000 a year, and one of them is taxed on an assessment of his real and personal property, measured by its actual value in money without a consideration of his earnings, and the other on an assessment of his like property measured by his gross earnings and the actual value in money of his property, or if the value of the property of one is assessed without, and that of the other with, a consideration of his gross earnings, that taxation certainly cannot be equal and uniform; it cannot be such that each will pay a tax in proportion to the value of his property, for the consideration of the gross earnings is required by the South Dakota statute to have, and it unavoidably would have, an effect upon the assessment. If an individual and a corporation are in the same business, as commission merchants, grocers, wholesale dealers in dry goods, or as carriers, or in any other occupation, and the real and personal property of the former is assessed at its actual value in money measured by or with a consideration of his gross earnings, while the real and personal property of the latter is assessed at its value in money measured without regard to its gross earnings, those taxes must be other than uniform, so that every person and corporation shall pay a tax in proportion to the value of his, her of its property. Under the Constitution and laws of South Dakota the assessment of the property of individuals is required to be and is measured by its actual value in money without any consideration of the gross earnings of its respective owners. The Constitution commands that:

"The Legislature shall provide by general law for the assessing and levying of taxes on all corporation property, as near as may be, by the same methods as are provided for assessing and levying taxes on individual property."

Section 17 of chapter 64 of the Laws of South Dakota requires the assessment of the property of express companies to be, and in this case it has been, measured by its actual value in money with a consideration of the earnings of the company in that state, and no logical or lawful way of escape is perceived from the conclusion that this is not "as near as may be" the same method provided for the assessment of the property of individuals because an assessment of the property of these corporations at their actual value in money, without a consideration of their gross earnings, might have been prescribed and followed.

The Constitution requires taxation to be uniform "so that every person and corporation shall pay a tax in proportion to his, her, or its property." The assessment of the property of individuals is required to be and is measured by its actual value in money without consideration of the gross earnings of its respective owners. Section 17 of chapter 64 requires the assessment of the property of express com-

panies to be, and in this case it has been, measured by its actual value in money with a consideration of the earnings of the companies and a substantially uniform tax of 28 mills on the dollar has been levied upon these asesssments. Taxes so raised cannot be uniform so that every person and corporation shall pay a tax in proportion to his, her or its property, and no doubt remains that the portion of section 17 of chapter 64, which required the board to take into consideration the gross earnings of express companies within the state in making assessments of their property for taxation, violated the Constitution of South Dakota, nor that the assessments so made and the taxes levied upon them in 1910 were equally violative of that Constitution, unauthorized and void, and that must be the decree in this case.

There are other considerations that confirm our minds in this conclusion. The Constitution of South Dakota has been amended since 1910 so that it no longer requires that all taxes shall be "uniform on all real and personal property according to its true value in money" and so that it provides that "gross earnings and net income shall be considered in taxing corporations," amendments clearly not made without just reason.

There were five express companies doing business in South Dakota in 1909 and 1910 under contracts with railroad companies to pay to the latter from 45 per cent. to 55 per cent. of their gross earnings from the transportation of express business over their lines. As the amounts paid to the railroad companies by the respective express companies were approximately one-half of the amounts of their gross earnings from the transportation of the express business over these railroads in South Dakota, the amounts so paid furnished a ready measure of the gross earnings of the respective companies from their transportation business over these railroads. The amount paid to the railroad companies by Wells Fargo & Co. was $181,193.72, and its assessment was 1.59 of that amount or $289,877. The amount paid to the railroad companies by the American Express Company was $120,689.56, and its assessment was 1.60 of that amount or $193,260, and this although the value of the office furniture, fixtures and real estate of the former was reported to be $18,473.98 and the number of miles it operated in South Dakota 1,621, while the reported value of the office furniture, fixtures, and real estate of the latter was $9,151.73 and the number of miles operated by it in South Dakota 1,363. The amount paid the railroad companies by the United States Express Company was $6,812.22, and its assessment was 1.59 of that amount, or $10,899. The amount paid the railroad companies by the Western Express Company was $1,507.28, and its assessment was 1.51 of that amount or $2,262, and the amount paid the railroad companies by the Great Northern Express Company was $6,626.47, and its assessment was 1.71 of that amount, or $11,278. How comes it that the assessments of three of these companies who were doing the larger part of the express business in the state were the same percentage within 1 per cent. of the respective amounts they paid to the railroad companies? There is but one rational explanation of this fact, and that is that the board measured the assessments of these companies by the amounts these companies paid to the railroad companies, respectively, that is to say, by

their gross earnings from their transportation business over the railroads, on the theory that the amounts paid to the railroads were about 50 per cent. of their respective gross earnings. It is incredible that the board could have estimated or guessed at the value of the property of these companies in any other way so accurately that their estimates would come within $^{1}/_{160}$th of the same percentage of each of the respective amounts which the express companies paid to the railroad companies. There is, it is true, testimony in this record tending to show that in making these assessments the board considered not only: (1) The reports of the railroad companies which showed the amounts paid to them by the express companies and the reports of the express companies of their earnings; but also (2) the mileage of their respective systems; (3) the number of their respective offices in the state; (4) the values of their respective furnitures, fixtures, horses, wagons, and safes; and (5) of other things they could obtain relevant to the value of their respective properties. But the uniform relation of the assessments of the three principal companies mentioned to the respective amounts they paid to the railroad companies is more persuasive than the testimony of many witnesses that the effect upon the assessments of their property of the consideration of all things except the amounts paid by them to the railroad companies, was negligible, and that those amounts, taken as the representatives of one-half of the earnings of these express companies from their transportation business in the state, were the real measures of the assessments made upon their property by the board. And when to these compelling facts is added the consideration that there has already been an adjudication after full hearing on the merits that this board measured the assessments it made against these express companies in the preceding year by their earnings indicated by their payments to the railroad companies, no doubt remains that the assessments under consideration were measured by the earnings of the companies, and not by the value of their property in money, and the conclusion that they are unconstitutional and void becomes irresistible.

[3] Finally counsel for the defendant argue, as we understand their brief, that although the law under which the asesssments were made is unconstitutional and the assessments and taxes are void, still the plaintiffs are entitled to no injunction against their collection: (1) Because they failed to state in their reports to the board the value of all their property in the state, or used in the state as required by subdivision 5 of section 16 of chapter 64 of the Laws of South Dakota of 1907; but their failure so to do, if they so failed, and there is positive and persuasive testimony in the record that they did not, is not such iniquity as repels a plaintiff from the precincts of a court of equity. (2) Because neither mere illegality, nor irregularity, nor injustice is sufficient to sustain an injunction to restrain the collection of a tax; but these taxes are not irregular, or illegal, or unjust only. The record has convinced us that they are unjust, and excessive, that they are irregular and unlawful, but they are also unconstitutional and void, and their collection would constitute a taking of the property of the plaintiffs without due process of law, in violation of the national Constitution, and the action of the board in making the assessments and levying

the taxes was either a gross mistake equivalent to a fraud or an actual fraud, and mistake and fraud are immemorial grounds of equity jurisdiction. (3) Because the plaintiffs have an adequate remedy at law; but this is the second time this board has made in the same way unlawful assessments of the property of these plaintiffs which effect an unjust and unconstitutional discrimination in taxation against them and their property. Its action has been systematic and repeated, and a systematic, repeated, continuing violation of the Constitution or the law to the injury of a plaintiff, like a continuing trespass, presents ample reason for an injunction against its continuance. Atchison, Topeka & Santa Fé Ry. Co. v. Sullivan, 173 Fed. 456, 471, 97 C. C. A. 1; Cummings v. National Bank, 101 U. S. 153, 158, 25 L. Ed. 903; Raymond v. Chicago Traction Company, 207 U. S. 20, 36, 37, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757; Railroad & Telephone Companies v. State Board of Equalizers (C. C.) 85 Fed. 302, 307, 318; Fargo v. Hart, 193 U. S. 490, 503, 24 Sup. Ct. 498, 48 L. Ed. 761; Reagan v. Farmers' Loan & Trust Company, 154 U. S. 362, 391, 14 Sup. Ct. 1047, 38 L. Ed. 1014; Nashville, C. & St. L. Ry. v. Taylor (C. C.) 86 Fed. 168, 184; Louisville Trust Company v. Stone, 107 Fed. 305, 46 C. C. A. 299. (4) Because the plaintiffs have an adequate remedy at law; but the plaintiffs now have and are entitled, as against these unconstitutional taxes, to the right to keep the amount required to pay them. The rights of the parties have been litigated and determined. The only remedy at law the plaintiffs have is either to defend against a proceeding to collect the taxes on the same grounds which have been presented and sustained in these suits, or to pay the amounts of these taxes under protest, and bring actions at law to recover them back. Neither of these remedies is as prompt, as certain, or as complete as the immediate decree of this court and its injunction to which the plaintiffs have established their right in this litigation.

The decrees below must be reversed, and the cases must be remanded to the court below, with instructions to render decrees for the plaintiffs in accordance with the views expressed in this opinion.

In re MILLER PURE RYE DISTILLING CO. OF PENNSYLVANIA. CONTINENTAL-EQUITABLE TRUST CO. et al. v. NOLAN. TANEY v. SAME.

(Circuit Court of Appeals, Third Circuit. May 26, 1914.)

Nos. 1835, 1836.

1. CORPORATIONS (§ 182*)—PROPERTY—RIGHTS OF STOCKHOLDERS.

Where a partnership engaged in operating a distillery formed a corporation and became its sole stockholders transferring the property of the firm to it, they had no title to whisky subsequently manufactured by the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 686–690; Dec. Dig. § 182.*]

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

2. BANKRUPTCY (§ 140*)—TRUSTEE—RIGHTS AS TO PLEDGED PROPERTY—VALIDITY.

The owners of all the stock in a distilling corporation contracted to sell the same to N. and, in order to facilitate his performance of the contract, allowed him to enter on the corporation's premises and take part in the management of the business. Without having been elected president of the corporation, he obtained money from a bank on notes executed by him as president and pledged, as collateral security, warehouse receipts for whisky distilled by and belonging to the corporation. Failing to comply with his contract, the stockholders of the corporation executed another contract to sell their stock to a New Jersey corporation organized by N., after which he was duly elected president of the original corporation and as such gave a new note in its name to the bank and repledged the warehouse receipts as security therefor. *Held*, that the pledge was valid as against the trustee in bankruptcy of the original corporation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*

Rights and liabilities of pledgees of stock, see note to Frater v. Old Nat. Bank, 42 C. C. A. 135.]

3. BANKRUPTCY (§ 293*)—ADMINISTRATION OF ESTATE—JURISDICTION.

Where, on the bankruptcy of a corporation organized to operate a distillery, it was the owner of certain whisky represented by warehouse receipts pledged to a bank subject to the pledge, the bankruptcy court had jurisdiction to determine the rights of the bankrupt and of the pledgee to dispose of claims of stockholders, and such jurisdiction was not affected by a subsequent sale of the whisky and the substitution of the proceeds in its place.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. § 293.*]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

In Bankruptcy. Proceedings to determine rights of the legal representatives of the deceased partners of the firm of Miller & Mooney, Joseph A. Taney, as trustee in bankruptcy of the Miller Pure Rye Distilling Company of Pennsylvania, and J. Bennett Nolan, to the proceeds of a sale of certain whisky alleged to belong to the estate of the Distilling Company in bankruptcy. From a judgment entered on a master's report awarding a specified proportion of the proceeds to claimant Nolan and the balance to the bankrupt's trustee, the other claimants appeal. Affirmed.

See, also, 176 Fed. 606.

C. W. Van Artsdalen, Francis Shunk Brown, and Joseph Hill Brinton, all of Philadelphia, Pa., for appellants.

Joseph R. Dickinson and J. Bennett Nolan, both of Reading, Pa., for appellees.

Before BUFFINGTON and McPHERSON, Circuit Judges, and WITMER, District Judge.

J. B. McPHERSON, Circuit Judge. This controversy arises upon the distribution of a fund produced by the sale of 669 barrels of whisky. There are three claimants: (1) The legal representatives of the deceased partners in the firm of Miller & Mooney; (2) Joseph A. Taney, the trustee in bankruptcy of the Miller Pure Rye Distilling Company (the Pennsylvania corporation); and (3) J. Bennett Nolan,

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

who represents the First National Bank of Reading. The whole fund is claimed by the representatives of Miller & Mooney, and also by the trustee in bankruptcy, while Nolan's claim is restricted to $^{338}/_{669}$ thereof. These three claims were presented before the referee in bankruptcy, and afterwards were all involved in a bill in equity filed in the district court by the trustee; the sole object of the bill being to meet a possible objection that might be raised to the jurisdiction of the bankruptcy court. All parties agreed that the whole dispute—whether it should be heard in equity or in bankruptcy—should be referred to a master (George Wharton Pepper, Esq.) in order that he might "decide the questions in relation to the ownership of the whisky involved in the said bill in equity and the said petition, and the ownership and disposition of the proceeds derived from the sale of all or any part thereof, and all other questions involved therein, and file a report in each cause together with findings of fact and law."

The master's report recommended the dismissal of the bill on the ground that the controversy was completely within the jurisdiction of the bankruptcy court, and no objection has been made to this conclusion. He also reported, and the District Court decreed, that $^{338}/_{669}$ of the fund should be awarded to Nolan, and the balance to the trustee in bankruptcy, rejecting the claim presented on behalf of the firm of Miller & Mooney. The present appeals are taken by the representatives of the firm, and by the trustee; each appellant claiming the whole fund.

The case depends essentially upon questions of fact, and has been argued earnestly and with much ability. In our opinion the carefully considered report of the learned master has correctly disposed of the questions involved, and we think it a needless labor to repeat in other language what he has already said so well. We content ourselves with adopting his findings and conclusions:

This fund represents the proceeds of sale of 669 barrels of whisky, sold under order of the referee in bankruptcy, entered on March 2, 1911, and assented to by all parties. The fund therefore stands in the place of the whisky, and is to be disposed of in accordance with what are determined to have been the property rights of the parties in the whisky before it was sold.

The claim is made by the personal representatives of the decedents, Miller and Mooney, that the whisky, prior to the death of Miller, was a partnership asset of a firm composed of Miller and of the executors and trustees under the will of Mooney, and that no other person or persons ever acquired any right thereto. If this claim is sustained, the fund on deposit should be awarded to the personal representatives of Miller and Mooney.

The claim is made by Taney, trustee in bankruptcy of the Miller Pure Rye Distilling Company, that the whisky was, at the date of the bankruptcy, a corporate asset of the bankrupt corporation, and that no other person or persons had any rights therein or thereto. If this claim were sustained, the funds on deposit should be awarded to the trustee in bankruptcy.

J. Bennett Nolan claims to have acquired title to 338 barrels of the whisky purchased by him at a pledgee's sale of a certain warehouse certificate theretofore issued in the name of the Miller Pure Rye Distilling Company, and pledged to secure a loan evidenced by a note with the usual collateral clauses and purporting to have been issued by the Miller Pure Rye Distilling Company, by S. V. Nagle, president. If this claim were sustained, a proportionate part of the fund on deposit should be awarded to J. Bennett Nolan.

Findings of Fact.

(1) Prior to April 14, 1902, a partnership composed of Cornelius J. Miller and the executors and trustees under the will of James Mooney, deceased,

owned a tract of land at Ryeland, Berks county, Pa., and a distillery and a bonded warehouse erected thereon. The partners were engaged in the distilling and selling of whisky under the firm name of Miller & Mooney.

(2) On or about April 21, 1902, a corporation styled the Miller Pure Rye Distilling Company was duly organized under the laws of Delaware. On or about January 16, 1903, this corporation became a domestic corporation of the state of Pennsylvania by compliance with the laws of the commonwealth, and acquired the ownership of the tract of land specified in finding No. 1, together with the distillery, warehouse, and other improvements thereon erected.

(3) Thereafter, to wit, during March, April, and May of 1903, the said corporation (hereinafter called the Pennsylvania Company) distilled the 669 barrels of whisky involved in these proceedings, and stored the same in the bonded warehouse upon the premises above referred to. At the date of this distillation, the Pennsylvania Company was the holder of a license from the court of quarter sessions of Berks county to operate the distillery and carry on the distilling business under the laws of the commonwealth.

(4) On June 30, 1903, the whisky distilled and stored as above set forth was the property of the Pennsylvania Company, and no title thereto or right therein had been transferred to Miller and to the executors and trustees under the will of Mooney. Miller and said executors and trustees were, however, at that date and at all times prior to January 29, 1907, the owners of all the capital stock of the Pennsylvania Company and had such interest in the said whisky, and such interest only, as resulted from their stock ownership.

(5) On June 30, 1903, Miller and the executors and trustees under the will of Mooney executed with Siegfried V. Nagle the following agreement:

"Whereas, Cornelius J. Miller is the owner of one hundred and fifty-one (151) shares of the capital stock of the Miller Pure Rye Distilling Company, a corporation organized under the laws of the state of Delaware, and the executors and trustees of the estate of James Mooney, deceased, are the owners of one hundred and forty-nine (149) of the capital stock of said corporation.

"And whereas, the said Miller and said executors and trustees of the estate of James Mooney are willing to sell said stock at the price or sum of three hundred dollars per share, and Siegfried V. Nagle is desirous of obtaining an option to buy from them all of said stock, and to pay for the same said price within the period of one year from and after this date.

"Now this agreement witnesseth: That for and in consideration of the sum of one dollar by each party unto the others in hand well and truly paid, the receipt whereof is hereby acknowledged, the said Miller, the executors and trustees of the estate of James Mooney, deceased, and said Siegfried V. Nagle do hereby agree to and with each other as follows, to wit:

"1. The said three hundred (300) shares of stock the said Miller and said executors and trustees of the estate of James Mooney, deceased, covenant and represent to be the whole and entire issue of shares of capital stock of said Miller Pure Rye Distilling Company, and they agree to sell the same to the said Siegfried V. Nagle at any time within one year from and after the date hereof at the price or sum of three hundred dollars per share.

"2. The said Miller and the said executors and trustees of the estate of James Mooney, deceased, agree that upon such purchase of said stock being made by said Nagle, all the indebtedness of said corporation will at the time of such purchase have been fully settled and paid off.

"3. The said Miller and the said executors and trustees of the estate of James Mooney, deceased, forthwith agree that the property and plant of said corporation shall remain as at present, pending the exercise of the option of purchase hereby given and granted to said Nagle.

"4. The said Nagle agrees to pay to said Miller and said executors and trustees of the estate of James Mooney, deceased, upon the ensealing and delivery hereof, on account of said purchase, the sum of one thousand dollars, and to pay unto them a further sum of two thousand dollars on account of said purchase at the expiration of thirty days from the date hereof, and to pay unto them a further sum of two thousand dollars on account of said purchase at the expiration of sixty days from the date hereof; which sums shall be forfeited to and become the absolute property of said Miller, and of the said executors and trustees of the estate of James Mooney, deceased, if

the other and further payments hereinafter provided for to be made by said Nagle or any of them be not made by him at the times and on the dates provided. Further payments on account of said purchase shall be made by said Nagle to said Miller and to said executors and trustees of the estate of James Mooney, deceased, as follows:

"Ten thousand dollars on or before September 30, 1903.

"Ten thousand dollars on or before October 30, 1903.

"Ten thousand dollars on or before November 30, 1903.

"Ten thousand dollars on or before December 30, 1903.

"Five thousand dollars on or before January 30, 1904.

"5. After the payment of the ten thousand dollars provided to be made on September 30, 1903, the said shares of stock shall be deposited in escrow with the Equitable Trust Company of Philadelphia, to hold and deliver pursuant to the terms of this agreement upon the performance of the covenants herein contained.

"6. The said Miller and the executors and trustees of the estate of James Mooney, deceased, now holding in their own names or in the names of said corporation, warehouse receipts for certain whisky now stored in the United States bonded warehouses at the distillery, they further agree that they will turn over these warehouse receipts to the said Nagle or to his assigns, upon the payment to them of the manufacturing price plus the carrying charges, both of which amount to forty thousand dollars ($40,000) always provided, that the said Nagle may withdraw such whisky and take up such warehouse receipts in such amounts less than forty thousand dollars ($40,000) as he may see fit; provided that the said Nagle or his assigns may avail himself or themselves only during the period of one year from the date of this instrument and further provided that said Nagle shall pay unto said Miller, and said executors and trustees of the estate of James Mooney, deceased, interest at the rate of six per cent. (6%) per annum from the date hereof on the value of the whisky in bond.

"7. After the payment of the ten thousand dollars provided to be made on or before September 30, 1903, fifteen thousand dollars ($15,000) having been paid by said Nagle, the said Nagle shall be responsible for all the expenses of operating the distillery of said corporation, and all the output thereof shall be accounted for to him upon the final settlement, he being entitled to credit therefor.

"8. It is hereby agreed that this agreement and all the provisions thereof and rights thereunder shall apply to the respective parties thereto and to their heirs, executors, administrators, successors and assigns."

(6) S. V. Nagle, the second party to the above-mentioned agreement of June 30, 1903, shortly after its execution, to wit, on or about July 13, 1903, caused a corporation to be organized under the laws of New Jersey under the name of the Miller Pure Rye Distilling Company. This corporation is hereinafter referred to as the New Jersey Company. The reason for its incorporation does not appear with sufficient clearness to enable the master to make any finding upon the subject.

(7) Shortly after the execution of the agreement on June 30, 1903, Nagle, in his individual capacity and not as an officer of the New Jersey Company, entered upon the premises of the Pennsylvania Company with the knowledge and consent of the other parties to the agreement. He took part in the conduct of the distilling business and discharged the various duties in relation thereto which are ordinarily discharged only by a corporate officer. In point of fact, however, Nagle never became a stockholder of the Pennsylvania Company and never became an officer or director thereof until elected president subsequent to January 29, 1907. During the time that he was discharging duties of management with the knowledge and consent of the other parties to the above-mentioned agreement, large quantities of whisky were sold to various purchasers, and warehouse receipts were issued to such purchasers, all bearing the signature "Miller Pure Rye Distilling Company, S. V. Nagle, President." Nagle continued to act as if he were an officer of the Pennsylvania Company until a date in 1905, at which time he was forcibly ejected from the premises, as is hereinafter set forth.

(8) On January 27, 1904, the First National Bank of Reading discounted

two notes drawn in favor of the Miller Pure Rye Distilling Company, one for $8,170.78, of which W. H. Danby was the maker, and the other for $1,172.60, of which C. H. Conan was the maker. In discounting these notes, the bank supposed that it was giving credit to the Pennsylvania Company and had no knowledge of the existence of the New Jersey Company, or any intention of dealing with the latter corporation. The proceeds of the discounts were placed to the credit of the Miller Pure Rye Distilling Company and were drawn out by checks signed "Miller Pure Rye Distilling Company, S. V. Nagle, President." The notes were not paid at maturity and at some time prior to July, 1905, a note for $8,600 and a second note for $2,650, both notes signed "Miller Pure Rye Distilling Company, by S. V. Nagle, President," were given by Nagle to the bank in substitution for the earlier notes and were accepted by the bank in the belief that they were in fact the obligations of the Pennsylvania Company. As collateral security for the payment of the larger notes, Nagle delivered to the bank certificate No. 5339, dated May 16, 1905, for 350 barrels of whisky. The barrels of whisky corresponding to the certificate numbers on said certificate are included in the barrels of whisky in controversy in this cause. The certificate was signed "Miller Pure Rye Distilling Company, S. V. Nagle, President," was drawn in favor of the Miller Pure Rye Distilling Company, and indorsed "Miller Pure Rye Distilling Company, S. V. Nagle, President."

(9) Between June 30, 1903, the date of the agreement hereinbefore referred to, and December, 1905, Nagle paid large sums of money to the other parties to said agreement in partial discharge of his obligations thereunder. He did not fully comply, however, with the provisions of the agreement, and because of his failure to meet all the payments required by its terms he was ejected from the premises of the Pennsylvania Company in December, 1905, and Miller and the executors and trustees under the Mooney will thereupon took possession.

(10) Thereafter a new negotiation took place between Nagle and Miller and the executors and trustees under the Mooney will which resulted in the making, on January 29, 1907, of the following agreement between Miller and the executors and trustees under the Mooney will and the New Jersey Company, "By Siegfried V. Nagle, Prest.":

"Whereas, Cornelius J. Miller is the owner of one hundred and fifty-one (151) shares of the capital stock of the Miller Pure Rye Distilling Company, a Pennsylvania corporation, and A. H. Rufe and the Equitable Trust Company, as the executors and trustees of the estate of James Mooney, deceased, are the owners of one hundred forty-nine (149) shares of the capital stock of said corporation.

"And whereas, the said Cornelius J. Miller and said executors and trustees of the estate of James Mooney, deceased, are willing to sell said stock at the price of one hundred dollars ($100) per share, or the sum of thirty thousand dollars ($30,000) for the entire three hundred (300) shares and the Miller Pure Rye Distilling Company of New Jersey is desirous of purchasing the same at said price,

"And whereas, the said Cornelius J. Miller and the said executors and trustees of the estate of James Mooney, deceased, do covenant and represent that the said three hundred (300) shares is the full and entire issue of the capital stock of the Miller Pure Rye Distilling Company of Pennsylvania,

"And whereas, there are certain whiskies in the plant of the Miller Pure Rye Distilling Company of Pennsylvania at Ryeland, Pennsylvania, which are owned by the said Cornelius J. Miller and the said executors and trustees of the estate of James Mooney, deceased, which they are willing to sell, and which the said Miller Pure Rye Distilling Company of New Jersey is desirous of also purchasing,

"Now this agreement witnesseth: First, that for and in consideration of the sum of thirty thousand dollars ($30,000) paid by the said Miller Pure Rye Distilling Company of New Jersey to the said Cornelius J. Miller and the said executors and trustees of the estate of James Mooney, deceased, the receipt whereof is hereby acknowledged, the said Cornelius J. Miller and the said executors and trustees of the estate of James Mooney, deceased, do hereby sell, assign, transfer and deliver to the said Miller Pure Rye Distilling

Company of New Jersey the said three hundred (300) shares of the capital stock of the Miller Pure Rye Distilling Company of Pennsylvania, the same being the entire issue of the capital stock of said company, and the said Cornelius J. Miller and the executors and trustees of the estate of James Mooney, deceased, do hereby covenant and agree to deliver possession of the plant and property, except the whisky hereinafter mentioned, of the Miller Pure Rye Distilling Company of Pennsylvania, at Ryeland, Pennsylvania, and all other property of the said company, wherever situate, to the Miller Pure Rye Distilling Company of New Jersey on the execution of this agreement.

"Second. With the exception of the taxes due by the said Miller Pure Rye Distilling Company of Pennsylvania for the years nineteen hundred and five (1905) and nineteen hundred and six (1906), which the purchaser, the Miller Pure Rye Distilling Company of New Jersey, hereby assumes and agrees to pay, the said Cornelius J. Miller and the executors and trustees of the estate of James Mooney, deceased, hereby covenant and stipulate that there are no debts, taxes, liens, mortgages or charges against or due and owing by the said Miller Pure Rye Distilling Company of Pennsylvania, with the exception of the aforesaid taxes, but that the said company and its property are free and clear of any debt or encumbrance.

"Third. The said Miller Pure Rye Distilling Company of New Jersey agrees to purchase the whisky owned by the said Cornelius J. Miller and the executors and trustees of the estate of James Mooney, deceased, and now in the plant of the said Miller Pure Rye Distilling Company of Pennsylvania, at Ryeland, Pennsylvania, and agrees to pay therefor the following prices seventy-seven cents (77¢) per original proof gallon, together with interest at six per cent. (6%) from the fifteenth day of December, nineteen hundred six (1906), to the date the whisky is paid for, all whiskies distilled in the years nineteen hundred (1900) and nineteen hundred one (1901)—all excessive outage is hereby guaranteed to be made good to the purchaser, the Miller Pure Rye Distilling Company of New Jersey, by the sellers, the said Cornelius J. Miller, and the said executors and trustees of the estate of James Mooney, deceased, and fifty-two and a half cents (52½¢) per original proof gallon, together with interest at six per cent. (6%) from the fifteenth day of December, nineteen hundred six (1906) to the date of the payment for the whisky for all whiskies distilled in the year nineteen hundred three (1903)—all excessive outage is hereby guaranteed to be made good to the purchaser, the Miller Pure Rye Distilling Company of New Jersey, by the sellers, the said Cornelius J. Miller and the said executors and trustees of the estate of James Mooney, deceased, and one dollar ($1) per barrel together with interest from the fifteenth day of December, nineteen hundred six (1906) to date of payment for the whisky for all whiskies distilled in the year eighteen hundred ninety-nine (1899). And it is agreed between the parties hereto that the said purchaser, the Miller Pure Rye Distilling Company of New Jersey, may withdraw said whiskies in any amount or amounts, as it pays for the same, and the said sellers, Cornelius J. Miller and the said executors and trustees of the estate of James Mooney, deceased, agree to the issue and the delivery of the said Miller Pure Rye Distilling Company of New Jersey of warehouse receipts for said whiskies as the same are paid for by it.

"Fourth. It is further agreed by and between the parties hereto that none of the aforesaid whiskies except those distilled in the year nineteen hundred (1900) and the year nineteen hundred one (1901) shall be withdrawn under any other signature than the following:

"'Miller Pure Rye Distilling Company of Pennsylvania,
"'Countersigned, C. Percy Wilcox.' "'Per S. V. Nagle, President.

"It is also agreed by the Miller Pure Rye Distilling Company of New Jersey, for and in consideration of the prices for which the said whiskies in this agreement are sold to it, that it will pay for the same within one (1) year from the date hereof, and the said Miller Pure Rye Distilling Company of New Jersey agrees to pay the sum of five thousand dollars ($5,000) at the end of said year to Cornelius J. Miller and said executors and trustees of

the estate of James Mooney, deceased, as liquidated damages, in case of failure to pay for said whiskies within the stipulated time.

"Fifth. The Miller Pure Rye Distilling Company of New Jersey agrees to place, maintain and keep twenty thousand dollars ($20,000) fire insurance upon the said whiskies mentioned in this contract until the same are paid for, and the said policy or policies are to be in the names of Cornelius J. Miller and the executors or trustees of the estate of James Mooney, deceased, and delivered to them at the execution of this agreement, and upon any renewals of said policies.

"Sixth. The Miller Pure Rye Distilling Company of New Jersey hereby agrees to indemnify the said Cornelius J. Miller and the executors and trustees of the estate of James Mooney, deceased, for any loss, payment of expense arising from their contract already made with the Philadelphia and Reading Railroad for the repair of the siding at the plant of the Miller Pure Rye Distilling Company of Pennsylvania, at Ryeland, Pennsylvania.

"Seventh. It is agreed between the parties hereto that this agreement cancels, annuls and makes void the contract dated June 30, 1903, between Cornelius J. Miller and the executors and trustees of the estate of James Mooney, deceased, and Siegfried V. Nagle, which contract was subsequently assigned by the said Siegfried V. Nagle to the Miller Pure Rye Distilling Company of New Jersey, and that the said parties of that contract and to this contract are hereby released and discharged from all liability and obligations under the same, and at the execution of this agreement said agreement and assignment are to be delivered up for cancellation."

As will appear by reference to this agreement, the parties contracted with one another upon the assumption that Miller and the executors and trustees under Mooney's will (and not the Pennsylvania Company) were the owners of the whisky now in controversy. The master has already found that the whisky, when originally distilled and stored, was the property of the Pennsylvania Company. He is unable to find any evidence which justifies him in concluding that at any subsequent time it ceased to be the property of the Pennsylvania Company and became the property of Miller and Mooney's representatives.

(11) Under the agreement of January 29, 1907, the New Jersey Company became the owners of the capital stock of the Pennsylvania Company and S. V. Nagle was elected president.

(12) The note for $8,600, held by the bank as the obligation of the Pennsylvania Company, was renewed from time to time, and each time the certificate for 350 barrels of whisky was repledged, until October 30, 1907, when the last renewal of the note was made and the certificate again repledged. Default was made in payment of this note and notice of public sale of the collateral was duly given by the bank, and a pledgee's sale was held on February 5, 1908, and at said sale J. Bennett Nolan was the highest bidder for three hundred and thirty-eight barrels of the three hundred and fifty barrels of whisky represented by the above-specified certificate. Nolan duly complied with the terms of sale.

(13) The Pennsylvania Company was duly adjudged a bankrupt by the United States District Court for the Eastern District of Pennsylvania on February 19, 1908. On March 24, 1908, Joseph A. Taney was duly elected trustee and qualified as such.

(14) On March 2, 1911, an order was made by the referee in bankruptcy with the consent of all parties in interest, authorizing the sale of the whisky in question. The sale took place and the net proceeds, amounting as above set forth to $9,166.23, were paid to the Equitable Trust Company to hold the same until ownership should be determined, at which time the trust company was to pay over the fund in accordance with such determination, together with such interest, not less than two per cent., as they might receive thereon.

Findings of Law.

1. The whisky in controversy in this cause was, when originally made and stored, the property of the Pennsylvania Company and continued to be the property of that corporation until the adjudication of bankruptcy.

2. Nagle, although he did not formally become president of the Pennsylvania Company until subsequent to January 29, 1907, was allowed to hold himself out as an officer and agent of that corporation by Miller and the executors and trustees under the Mooney will prior to and at the date of the transactions with the First National Bank of Reading, set forth in the findings of fact.

3. The bank was justified in believing, and did in fact believe, that Nagle was acting for the Pennsylvania Company when the bank made the original discounts hereinbefore specified and subsequently accepted the notes given in substitution for the discounted notes, and received the collateral pledged as security for the notes so substituted. As a result of the conduct of the stockholders and officers of the Pennsylvania Company and of the conduct of Nagle, the bank became and was entitled by estoppel to assert liability on said notes against the Pennsylvania Company, and to hold and dispose of the collateral pledged as security therefor with the same effect as if Nagle had in fact received formal authority to pledge the credit of the Pennsylvania Company and to use its property as collateral.

4. The representatives of Miller's estate (who, because of Miller's death during the pendency of this proceeding, have been substituted upon the record) and the representatives of Mooney's estate had no right, title, or interest in or to the whisky in controversy, except as holders of all the stock of the Pennsylvania Company. Such stock ownership confers no right upon them which they can assert as against the creditors of the bankrupt.

5. In virtue of the pledgee's sale hereinbefore specified, J. Bennett Nolan became specifically entitled to 338 barrels of the 350 represented by the pledged certificate, and is now entitled to participate in the distribution of the fund in the proportion borne by the number of barrels bought by him to the whole number of barrels represented by the fund on deposit.

6. Subject to the rights of Nolan, as herein determined, the residue of the fund on deposit is the property of the trustee in bankruptcy and should be awarded to him.

Disposition of Requests for Findings of Fact and Law.

(The decision of the master on these requests need not be quoted).

Discussion.

The case as it presents itself to the master is not a difficult one to decide. When reduced to its simplest terms, the case stands thus:

[1, 2] Miller and Mooney, partners, own certain property and are engaged in distilling whisky. They become incorporated. Stock is issued to represent the partnership assets and the partners become the sole stockholders. In their corporate capacity they manufacture the whisky in controversy. Reciting themselves to be the owners of all the stock in the corporation, they make, in their own names, an executory contract for the sale of their stock and for the sale of the whisky in question. In order to facilitate Nagle's performance, they allow him to enter upon the premises while the contract is pending and to take part in the management of the business, for the purpose of earning the money with which to make the payments which the contract specifies. Nagle makes large payments on account, but fails of complete performance. He resorts to double dealing for the purpose of raising money. He organizes a New Jersey corporation and gives it the same name as that of the Pennsylvania Company. It may be that in so doing his purpose is to deceive; but this is by no means certain. He obtains money from the bank on paper which the bank understands to be the paper of the company which owns the distilling plant and is actually engaged in the distilling business, i. e., the Pennsylvania Company. He gives to the bank as collateral security warehouse receipts for the whisky which had been distilled by the Pennsylvania Company and is held on deposit in its bonded warehouse. Failing in performance of the executory contract, Nagle later negotiates another contract, this time between the stockholders of the Pennsylvania Company and the New Jersey Company. In pursuance of this contract, the New Jersey Company (or, through that corporation, the person who advances the purchase money) becomes the owner of the stock of the Pennsylvania Company.

The whisky is recited to be the individual property of the stockholders, and as to it the contract is an executory agreement of sale which the New Jersey Company never performs. Nagle, however, becomes the duly elected president of the Pennsylvania Company, and, in substitution for the paper theretofore held by the bank, gives a new note in the name of the Pennsylvania Company, per himself as president, and repledges the warehouse receipt for the whisky. The Pennsylvania Company is adjudged a bankrupt; the whisky is sold under a consent order; and the price realized on the sale is substituted for the property sold. The representatives of Miller and Mooney make the attempt which is always the favorite attempt of partners or stockholders in such cases, namely, to have a firm or corporate asset withdrawn from the reach of the firm or corporate creditors and treated as an asset of their separate estates. The general creditors represented by the trustee advance the contention which is usual in such situations, namely, that the property in question is assets for the payment of all creditors and is not to be appropriated to the payment of one claiming through a secured creditor who advanced money on the faith of a pledge.

In making this outline statement of the situation, the master is, of course, determining various disputed questions of fact. The conclusions of fact reached by him, however, are not only in harmony with what he believes to be the right of the testimony, but are in accord with what is likely to happen in cases of this sort.

The representatives of Miller and Mooney have little to say in support of their contention, except to refer to the fact that in the agreement of January 29, 1907, they asserted that the whisky was their individual property. It is clear, however, that they distilled the whisky in their corporate capacity. The property was therefore in the first instance an asset of the corporate estate, although the first request for a finding of law submitted on their behalf declares that the title to it was transferred to the partners prior to June 30, 1903. It is entirely natural that the partners should have thought of it and spoken of it as their own property, exactly as Miller spoke and thought of it in his testimony at the foot of page 233. Their loose thinking, however, could not alter the fact; and the fact was that the whisky was corporate property and could become separate property only in virtue of a valid transfer. There is absolutely no evidence that any such transfer was ever made and no evidence that the master regards as sufficient that a transfer was even intended. There is evidence that the stockholders of the Pennsylvania Company intended to except the whisky from the sale of January 29, 1907, and to make provision for its acquisition by the New Jersey Company only upon payment of a consideration additional to the consideration given for the stock of the Pennsylvania Company. As a matter of substance, this reservation of the whisky has no other than a business significance. As a matter of form, it is consonant with the erroneous theory of the stockholders that the property had been their separate property from the beginning. The fact that they so regarded it is a final answer to the suggestion made in argument that in January, 1907, the stockholders are to be regarded as having in effect declared a dividend on this whisky among themselves. This suggestion is (as already pointed out) in conflict with the first request for a finding of law, and in the opinion of the master possesses no merit other than that of ingenuity. The arrangement that whisky distilled prior to January 1, 1904, should be withdrawn from the warehouse only upon the counter signature of a representative of the Miller and Mooney estates was an arrangement made to safeguard the reservation of the whisky from the executed sale of January 29, 1907. The effect of this arrangement and of the contract of that date was merely to prevent Nagle and the New Jersey Company from acquiring title to the whisky without making payment. It did not operate, as between the corporate estate of the Pennsylvania Company and the separate estates of Miller and Mooney, to convert the whisky from an asset of the former to an asset of the latter.

The elimination of the claim of the representatives of Miller and Mooney leaves for consideration only the issue between the trustee in bankruptcy and the purchaser at the pledgee's sale. The findings of fact already made dispose of the contention of Nolan to the effect that Nagle, prior to the agree-

ment of January 29, 1907, had any actual authority to pledge the credit and the property of the Pennsylvania Company. It is clear to the master, however, that, when the stockholders and officers of the Pennsylvania Company gave Nagle so liberal an opportunity to work out his contract with them, they gave him also, perhaps unwittingly, an equal opportunity to deceive innocent third persons as to his real relation to the property of the Pennsylvania Company and the business transacted there. In the case of the bank, all the elements of an equitable estoppel are present. The conduct of the officers and stockholders of the Pennsylvania Company was such as to create, naturally, on the part of the officers of the bank, a belief that Nagle was in responsible charge of the distillery and had the authority requisite to raise money for it and to secure the loan by a pledge. The officers of the bank were in fact misled exactly as might have been anticipated that they would be; and, being misled, they acted to their disadvantage. The Pennsylvania Company, its stockholders, its subsequent creditors, and the trustee in bankruptcy are estopped to deny the validity of the debt and of the pledge.

Apart, however, from the rights of the bank growing out of estoppel is the right resulting from the giving by Nagle to the bank on the 30th of October, 1907, of the note for $8,600 of that date, accompanied by a repledge of the warehouse receipt as collateral. There is no doubt that at the date of this transaction Nagle was the formally elected president of the Pennsylvania Company. He was cognizant of all past dealings with the bank; he knew that the bank regarded itself as having a claim against the Pennsylvania Company; he must have known that the proposition to substitute the obligation of the New Jersey Company would not have been acceptable to the bank, and that the note which he then gave had for its consideration the discharge of the pre-existing obligation. Under these circumstances, there arose on that date a legal liability on the part of the Pennsylvania Company to the bank, and not merely an equitable obligation growing out of estoppel. The repledging of the warehouse certificate was effective to make the bank a pledgee of the whisky represented thereby.

It has been assumed as the basis of Nolan's right that the Pennsylvania Company might make an effective pledge of whisky on storage in its own bonded warehouse by issuing warehouse receipts therefor and delivering the receipts to a creditor as collateral security. The question whether or not a distiller has such a right is a question not free from difficulty. The master, however, feels bound by the decision of the Circuit Court of Appeals for the Third Circuit in Taney, Trustee, v. Penn National Bank of Reading (1911) 187 Fed. 689, 109 C. C. A. 437 (since affirmed by the Supreme Court 232 U. S. 174, 34 Sup. Ct. 288, 58 L. Ed. —— Jan. 26, 1914) and upholds the validity of the pledge in accordance with that decision.

[3] From the master's view of the facts and of the law, it follows that at the moment of bankruptcy, the whisky in controversy was the property of the Pennsylvania Company, subject to the rights of the pledgee in a proportionate part thereof. There is no doubt in the opinion of the master that the bankruptcy court had jurisdiction to determine the rights of the bankrupt and of the pledgee and to entertain and dispose of the petition of Miller and Mooney's representatives. The subsequent sale of the whisky and the substitution of a fund on deposit had no effect upon the jurisdiction of the court. Out of abundant caution and in order to remove all possible doubt about the question of jurisdiction, the trustee filed a bill in equity in the United States District Court for the Eastern District of Pennsylvania as of October Sessions, 1911, No. 717. The purpose of the bill was merely to assert the rights of the trustee to the fund on deposit as against the claim of the representatives of Miller and Mooney and of Nolan. According to the view taken by the master, the filing of this bill was really unnecessary because the situation was not one in which the trustee was seeking to establish the right of the bankrupt to the property in the hands of a third person. While orders of reference to the master were made in both causes, the master files his report in the bankruptcy cause only and suggests that the bill in equity should be dismissed.

The master recommends to the court that an order be made dismissing the petition of the representatives of Miller and Mooney, and awarding three

hundred and thirty-eight six hundred and sixty-ninths (338/669) of the fund on deposit to J. Bennett Nolan and the residue of the fund to Joseph A. Taney, trustee in bankruptcy of the Miller Pure Rye Distilling Company.

In each case the appeal is dismissed at the costs of the appellant, and the decree of the District Court is affirmed.

MERCHANTS' NAT. BANK OF NEW HAVEN, CONN., et al. v. UNITED STATES ex rel. SARIO et al.

(Circuit Court of Appeals, Second Circuit. April 22, 1914.)

No. 241.

1. UNITED STATES (§ 67*)—CONTRACTORS' BONDS—ACTIONS—LIMITATIONS.
Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1911, p. 1071), requires contractors with the United States to give a bond, and provides that any party furnishing labor and materials may intervene in any action thereon by the United States, or, if no suit is brought by the United States within six months, such party may sue thereon in the name of the United States, provided that, where suit is brought by such a party, it shall be commenced within one year after the performance and final settlement of the contract and not later, and provided further that only one action shall be brought, and any creditor may file his claim and be made a party thereto within one year, and provided further that personal notice shall be given to all known creditors of their right to intervene, and in addition notice of publication for at least three successive weeks; the last publication to be at least three months before the time limited therefor. *Held*, that the action must be brought a sufficient length of time before the expiration of the year to permit publication, as therein required, three months before the expiration of the year, since the provisos as to the time for bringing the action and the time for publication are conflicting, and the last in order of arrangement therefor controls.
[Ed. Note.—For other cases, see United States, Cent. Dig. § 50; Dec. Dig. § 67.*]

2. STATUTES (§ 189*)—CONSTRUCTION—ASCERTAINING INTENT.
A literal interpretation of any part of a statute will not be adopted if it would operate unjustly or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 268; Dec. Dig. § 189.*]

3. STATUTES (§ 228*)—PROVISOS—INCONSISTENCY WITH ENACTING PART.
Where a proviso appended to the enacting part of a statute is repugnant to it, it repeals, to the extent of the repugnancy, the enacting part.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 310; Dec. Dig. § 228.*]

4. STATUTES (§ 228*)—PROVISOS—APPLICATION.
The operation of a proviso is usually and properly confined to the clause or provision immediately preceding.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 310; Dec. Dig. § 228.*
Construction and operation of provisos, exceptions, and saving clauses, see note to United States v. R. F. Downing & Co., 76 C. C. A. 381.]

5. DISMISSAL AND NONSUIT (§ 20*)—VOLUNTARY DISMISSAL—RIGHTS OF OTHER PARTIES.
A party bringing an action on the bond of a contractor with the United States under Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp.

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

1911, p. 1071), which forbids more than one suit and authorizes any creditor to be made a party thereto, will not be permitted to discontinue the suit, thereby preventing relief to other creditors, unless there is no intervener ready to proceed with the suit.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 37; Dec. Dig. § 20.*]

6. UNITED STATES (§ 67*)—CONTRACTORS' BONDS—ACTIONS—SETTING ASIDE SERVICE.

Where, in an action on the bond of a contractor with the United States under Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1911, p. 1071), notice to other creditors had not been published, as required by the statute, and the time for such publication had long since expired, the objection might be made by appearing specially and moving to set aside the service of the summons and complaint, though it might have been taken by answer.

[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 Eastern District of New York.

This cause comes here upon appeal from an order made by the District Court of the United States for the Eastern District of New York, denying motions made by the plaintiffs in error (intervening plaintiffs below) for judgment against the defendants in error (who were defendants below), for reason of the failure of the defendants to appear or answer. Affirmed.

Hitchings & Dow, of New York City (Fayette B. Dow, of New York City, of counsel), for plaintiffs in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. [1] An action was brought by the United States, for the use of Sario, against the construction company and the sureties on its bond to recover for services which Sario had rendered at the request of the company in the prosecution of its work under the contract with the government to build the macadam road at Ft. Terry. The bond, which the construction company gave the United States for the faithful performance of the work, bound the company, among other things, to "promptly make full payments to all persons supplying it labor or materials in the prosecution of the work provided for in said contract." The action was brought under the Act of Congress of February 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1911, p. 1071). That act, after providing that any person entering into a formal contract with the United States for the construction of any public work shall execute the usual penal bond, goes on to provide as follows:

"And any person, company, or corporation who has furnished labor and materials used in the construction or repair of any public building or public work, and 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

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

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, upon 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 amount in controversy in such suit, 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. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: 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."

In brief summary the act makes provision as follows:

(1) It authorizes any person who has furnished labor and materials on public work, and who has not been paid, to intervene in any action brought by the United States on the bond.

(2) If no suit is brought on the bond by the United States within six months from the completion of the contract, then a person supplying the contractor with labor and materials, and who has not been paid, is authorized to bring suit in the name of the United States, in the district in which the contract was to be performed for his use.

(3) But such suit must be commenced within one year after the performance and final settlement of the contract and not later.

(4) And only one such suit can be so instituted by a creditor, and any creditor may file his claim in such action and be made a party thereto within one year from the completion of the work.

(5) Such notice as the court may order is to be given to all known creditors, and also notice must be published in a newspaper as provided for in the act.

(6) The action is to be brought in the District Court, and the amount involved is immaterial.

The work contracted for was completed and a final settlement was had on or about October 6, 1911. No suit on the bond was instituted by the United States. But Sario commenced an action in the name of the United States for his use on September 30, 1912, a few days prior to the expiration of one year from the final settlement above mentioned, and a summons was served on all of the defendants—the construction company and the sureties on its bond. No one of the defendants ever appeared or answered the complaint.

On October 5, 1912, the Merchant's National Bank petitioned to be permitted to intervene and be made a party plaintiff, as did also John Pintall. The bank claimed as assignee of the claim of the Eureka Trap Rock Company for $2,031, which was alleged to be the value of crushed stone which the Eureka Company had furnished the construction company for use in the building of the road. Pintall's claim was for $88.12 and was for labor in running a steam roller used on the work.

The plaintiff Sario, for reasons which do not appear, never proceeded with his action. But the intervening plaintiffs moved the court below, by orders to show cause, for judgments against the defendants, or for such other and further relief as might be just and proper in the premises. The orders to show cause were duly served but were ignored by the construction company and by Randall. The defendant Walton, however, appeared specially, and securing a separate order to show cause moved to set aside the service of the summons and complaint on the ground that no notice by publication had been made by Sario in the original suit. The court below sustained the objection and said:

"When the original suit was brought, it was impossible for the complainant to comply with the statutory requirement as to publication, for the suit was brought only four days prior to the expiration of the period of limitation prescribed, while the act specified that the notice by publication shall be published 'for at least three successive weeks; the last publication to be at least three months before the time limited' for the action. If, therefore, the requirement as to publication of notice is mandatory and not merely directory, the right of recovery fails."

The appellants contend that, in denying them the relief they asked, the court below fell into error. They insist that the provision in the statute requiring publication of notice is not a mandatory condition precedent. They also insist that the construction which was placed on the statute was unsound because it abrogated a right clearly and expressly given by statute and forced such a hardship upon creditors as could hardly have been intended by Congress. They assert that such a construction is wholly unnecessary from the language of the statute itself, and that it creates an anomaly in the law. They contend also that the statute contains a clear grant of the right to bring suit any time within one year from the final settlement of the contract, and therefore that the absolute right given by the statute is nullified by the decision below holding that there must have been a publication of the pending of the action for three successive weeks; "the last publication to be at least three months before the time limited." They urged that a party cannot be compelled to publish notice of the pendency of an action at any time prior to the expiration of the time within which he has a right to commence the

suit. That, while the statute states that the action shall be commenced "within one year" after the final settlement of the contract, the decision below makes it necessary to commence it at least 15 weeks prior to the expiration of one year.

The question presented does not seem to have been passed upon in the appellate courts. The provision in question came before the District Court for the Northern District of California in United States v. United Surety Co. (D. C.) 192 Fed. 992 (1912), and it was held that a creditor's failure to institute a suit under the act in sufficient time to allow the full notice required to be given to creditors was not a jurisdictional defect which could be made a subject of demurrer. It also came before the District Court in the Middle District of Pennsylvania in United States v. Stannard (D. C.) 206 Fed. 326 (1913), where it was held that the provision was mandatory and that the last publication must be completed three months before the expiration of the year from final settlement or the creditor's right would be barred. The attention of the court in the latter case does not appear to have been called to the decision rendered in the prior case, or at least no reference was made to it in the opinion. In the first case the court simply held that the failure to publish the notice for the full time was not a jurisdictional defect which could be taken advantage of on demurrer. In the second case the court held that the objection did not have to be set up by demurrer but could be properly raised by affidavit of defense. In the first case the court regarded the requirements as to notice and publication as limitations upon the right to maintain the suit. It also believed the provisions were not jurisdictional, as jurisdiction attaches on filing of the complaint, and the provisions in question relate to steps not required to be taken until the action has been commenced.

"Very clearly," the court added, "they are no part of the cause of action, since a compliance with them, for the reason stated, cannot be alleged; hence a demurrer does not lie for such omission. If, however, they are mere limitations, then perhaps they may be waived, unless timely objection is made; and since the question is not jurisdictional, nor one which can arise on demurrer, I am of opinion that it is a proper subject-matter for the answer or by some appropriate objection at the trial. That defendants have a right to interpose the objection in some form and at some time I entertain no doubt; but just how it shall be raised, and what effect it may exert on the rights of the parties if made, it is not now necessary to inquire."

[2-4] It has been held on more than one occasion by the Supreme Court that if a literal interpretation of any part of a statute would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be neglected. Heydenfeldt v. Daney Gold, etc., Co., 93 U. S. 634, 638, 23 L. Ed. 995; Hawaii v. Mankichi, 190 U. S. 197, 213, 23 Sup. Ct. 787, 47 L. Ed. 1016. Such undoubtedly is the rule, and we should unhesitatingly follow it in any case to which it applied. But in our opinion the construction of the statute does not mean what the appellants contend. To assert that the statute gives a creditor a right to bring suit within one year is to ignore the proviso. The rule on that subject is that, when a proviso which is appended to the enacting part of a statute is repugnant to it, it repeals to the extent of the repugnancy the enacting

part. See Maxwell on Interpretation of Statutes (5th Ed.) p. 254. And the operation of the proviso is usually and properly confined to the clause or provision immediately preceding. United States v. Bernays, 158 Fed. 792, 86 C. C. A. 52; Hackett v. Chicago City Railway Co., 235 Ill. 116, 85 N. E. 320; Sullivan v. Bailey, 125 Mich. 104, 83 N. W. 996. In the case of a partial inconsistency which cannot be harmonized, the proviso prevails, as we have said, to the extent of the inconsistency; the reason being that effect is to be given to the later expression of the legislative will. It so happens, however, that in the statute under consideration the inconsistency which is found to exist does not arise between the so-called enacting part of the statute and the proviso. It arises between two separate provisos. The prior proviso contains the provision that the suit which the enacting part of the statute authorizes the creditor to bring in case the United States does not sue within six months shall be commenced within one year from final settlement, and the subsequent proviso contains the provision as to publication of notice. But we think in such a case the difficulty is settled by the rule that in case of conflicting provisions, if both were enacted at the same time, the last in order of arrangement controls. United States v. Jackson, 143 Fed. 783, 75 C. C. A. 41, reversing (C. C.) 140 Fed. 266; Hall v. Equator Mining, etc., Co., 11 Fed. Cas. No. 5,931; Howard v. Bangor, etc., R. Co., 86 Me. 387, 29 Atl. 1101; Omaha Real Estate, etc., Co. v. Reiter, 47 Neb. 592, 66 N. W. 658. Applying that principle to conflicting provisions, we hold that the year within which the creditor may bring his suit is cut down by the subsequent proviso to the extent of the inconsistency between the earlier and the later provision. We hold that the statute intends that there shall be one suit only, which (if the United States does not sue within six months) may be brought by any individual creditor. And, in order to be sure that all other creditors shall have a fair opportunity to intervene in that single suit, the statute makes it a condition of the creditor's right to sue that he shall commence his action at such time only that a three months' notice to all the other creditors can be published before the expiration of the year from final settlement within which they are allowed to intervene in such single suit.

[5] It was suggested upon the argument that such a construction as we think the established rules of interpretation require us to put upon the statute would afford an opportunity for sharp practice and would favor the surety companies at the expense of the laborers. It is the duty of the court to give effect to the statute as Congress has enacted it, and if it is defective the appeal must be to Congress to amend it. But we do not think that the sharp practice which counsel fear is possible will ever be permitted. The idea which counsel seemed to entertain was that when a creditor has commenced his suit in the manner authorized by the statute and published his notice within the prescribed time, thus starting the one suit which the act allows, the surety may settle with him for his claim immediately after the first publication, and thus kill off the suit at a time when it will be too late to bring another. There can be no real basis for such a fear. When what we may describe perhaps as "a free for all suit" of this sort has

once been commenced, in conformity to the provisions of the statute, it could not be thus smothered. Discontinuance would be sanctioned by no court until it appeared that no intervener stood ready to take it up and carry it through. The courts would protect the rights of intervening creditors and maintain their right to go on with the action. As the courts protected the right of the assignee of a chose in action, who was obliged at common law to enforce his right in the name of the assignor as the legal plaintiff for his own benefit, so will they protect the rights of the intervening creditor proceeding in an action brought under this statute. As the assignor in whose name the action was brought was not permitted by any act to interfere with or defeat the right of the assignee, so we may be sure that no court will permit any creditor, bringing the action which this statute authorizes, to defeat the right of any other creditor having a right under the statute to go on and prosecute the suit to final judgment.

[6] But it is insisted that the question as to publication was not properly raised in the case at bar. That the defendant Walton, who had appeared specially, should have made his objection by demurrer or by answer and not by affidavit and by motion to set aside the service of the summons and complaint. For reasons stated in a former part of this opinion, in considering the case of United States v. United Surety Co., it would seem that the objection of noncompliance with the statutory requirement as to publication is not one to be taken upon demurrer. That it may be taken by answer may be true. But we know of no reason why a party appearing specially may not make the objection upon motion and affidavit. The complaint and summons had been served within the one-year period, but "no notice of publication" which the statute made necessary to the maintenance of the suit had ever been given, and the time within which it could be given had already expired 12 months before. The court could upon motion, the facts having been established by affidavit, set aside the service of the summons and complaint.

The case of Montgomery v. Boyd, 65 App. Div. 128, 72 N. Y. Supp. 611, to which our attention was called, is inapplicable to the facts of this case. In that case the defendants appeared only for the purpose of moving to vacate an order for the service of the defendants by publication, and they attacked the order upon the ground that the complaint did not state a cause of action against them. The court denied the defendant's motion and held that the question as to the sufficiency of the complaint should not be determined upon motion except in a case where, from a bare inspection of the complaint, it could be seen that there was no cause of action alleged, and consequently that the complaint was frivolous. In the case at bar the defendant Walton was not attacking the sufficiency of the complaint, and the court below did not pass on the sufficiency of it.

Order affirmed.

In re McCRUM.

(Circuit Court of Appeals, Second Circuit. April 18, 1914.)

No. 143.

1. BANKRUPTCY (§ 288*)—ADMINISTRATION OF ESTATE—RECOVERY OF ASSETS—ASSIGNEE FOR BENEFIT OF CREDITORS.

A bankrupt's trustee, who has been appointed within four months after a general assignment by the debtor for the benefit of creditors, may recover the assets so assigned in summary proceedings in the bankruptcy court without a plenary suit; the assignee under such circumstances being regarded as a mere naked bailee for the creditors, and his possession that of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 1*)—WHAT CONSTITUTES—"GENERAL ASSIGNMENT."

A "general assignment" for the benefit of creditors is one which passes all, or substantially all, the bankrupt's property, owned at the time of the assignment, to a third party in trust to collect the amounts owing to the assignor, with power to sell and convey the property, distribute the proceeds among the assignor's creditors, and return the surplus if any to such assignor.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 4, pp. 3052–3054.]

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 29*)—BANKRUPTCY (§ 288*)—ASSIGNMENT FOR CREDITORS—RECOVERY OF PROPERTY BY TRUSTEE—SUMMARY PROCEEDINGS.

The bankrupt and H., being in business together, transferred to T. certain personal property belonging to the bankrupt individually, together with his interest in certain real property; H. also transferring to T. certain personalty belonging to him individually, together with his interest in certain realty. The conveyances were absolute on their face; T. executing a receipt to the bankrupt and H., in which he agreed to take the properties and convert them from time to time into money and apply the proceeds equally and ratably to the liabilities of the bankrupt and H. No property was transferred by the bankrupt solely for the benefit of his individual creditors, and the property so conveyed by him did not constitute substantially all his property. *Held*, that the transfer was not an assignment for the benefit of creditors of the bankrupt, and hence, certain creditors protected by the transfer having objected to a surrender of the property by T. to the bankrupt's trustee, T. held the same as an adverse claimant, and the trustee was therefore not entitled to recover the same in summary proceedings.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. §§ 107–112; Dec. Dig. § 29;* Bankruptcy, Cent. Dig. § 447; Dec. Dig. § 288.*]

4. BANKRUPTCY (§ 100*)—BANKRUPTCY ADJUDICATION—CONCLUSIVENESS—EFFECT.

Where an involuntary petition was filed against an alleged bankrupt on the ground that he had made an assignment for the benefit of creditors, no creditor having appeared to deny the act of bankruptcy on which the adjudication was based, and there being no proof at the time to determine whether the assignment transferred the whole or substantially all the bankrupt's property, the adjudication was not res judicata of the

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

issue as to whether the transfer constituted an assignment for the benefit of creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 131, 141–144; Dec. Dig. § 100.*]

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 Lloyd G. McCrum. A petition of Alfred C. Coxe, Jr., bankrupt's trustee, to compel Oscar L. Telling to deliver over property in his possession, was denied on the ground that the District Court had no jurisdiction by summary proceedings to compel such delivery. On petition to revise such order of denial. Petition dismissed, and order affirmed.

Petition to review an order denying a petition of the trustee in bankruptcy to compel Oscar L. Telling to deliver over property in his possession on the ground that the District Court had no jurisdiction by summary proceedings to compel the delivery of the properties.

Lloyd G. McCrum, the bankrupt, and one George D. Howell made a joint deed to Oscar L. Telling on March 13, 1912, transferring to him certain real estate in Pennsylvania. At the same time McCrum delivered to Telling certificates of stock in Pennsylvania and West Virginia corporations of the value of $271,950. McCrum's interest in the real estate conveyed was $10,300.

George D. Howell also transferred to Telling certain other real estate and certain stocks. The value of the property thus transferred by McCrum and Howell aggregated $636,529.

McCrum and Howell were the officers and chief stockholders of the McCrum-Howell Company, and had indorsed its notes. The company was incorporated, and McCrum's indorsement of its notes amounted to about $2,000,000. In addition to the indorsements he was indebted over $300,000.

The deeds given Telling were absolute on their face and were at once recorded. Telling had the stock transferred into his own name. He executed a single receipt to McCrum and Howell in which he agreed to take the properties and to convert them from time to time into money and apply the proceeds equably and ratably to the liabilities of McCrum & Howell. No property was transferred by McCrum solely for the benefit of his own individual creditors.

Attached to Telling's receipt was a schedule setting forth by items the properties he received with their values. The scheduled value of the properties thus received was double the amount of debts scheduled. There was nothing to show that the scheduled property comprised all or substantially all of the estate of either McCrum or Howell. The record does not show, inferentially or otherwise, that the property conveyed or transferred by Howell to Telling comprised all the property of which Howell was possessed at the time of the transaction. But, on the contrary, it affirmatively appears that he had at that time other property of considerable value which he did not transfer or convey.

No consideration of any kind was paid by Telling for the transfer of the property, and Telling claims no personal interest in the property.

On May 29, 1912, an involuntary petition in bankruptcy was filed against McCrum in the office of the clerk of the United States District Court for the Southern District of New York. The act of bankruptcy charged in the petition was the execution of the deed of trust to Telling for the benefit of creditors. McCrum appeared and consented to the entry of an order of adjudication, and on June 6, 1912, the District Court entered an order adjudging him to be a bankrupt. And on September 6, 1912, Alfred C. Coxe, Jr., was appointed a trustee. Thereupon the trustee made a summary application to compel Telling to deliver over the property transferred to him by McCrum. Telling made a special appearance and filed an answer denying the jurisdiction of the court, and the court decided that it had no jurisdiction by summary proceed-

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

ings to compel the transfer of the property by Telling to the trustee in bankruptcy. In his answer Telling alleged that the deeds and stocks were all delivered to him in Pennsylvania, and that the receipt and declaration of trust under which he was holding the properties was also executed in that state, and he asserts a right to administer the trust estate under the laws of Pennsylvania, the domicile of his trust. He claims that the rights of the various persons entitled under his trust can only be adjudicated in a plenary action, begun in the jurisdiction of his trust domicile, and after all parties interested in the trust estate have been given their day in court.

The District Court was of the opinion that Telling was an adverse claimant, and that there was a real controversy by a trustee who claimed title on behalf of his beneficiaries, and that there was not a merely colorable claim. He accordingly denied the petition and dismissed the proceedings.

Rosenberg & Levis, of New York City (Robert P. Levis and James N. Rosenberg, both of New York City, of counsel), for Alfred C. Coxe, Jr., trustee.

Curtis, Mallet-Prevost & Colt, of New York City (Wm. Edmond Curtis and Henry A. Stickney, both of New York City, and Cornelius C. Webster, of counsel), for respondent.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The question which this court has to decide is whether the bankruptcy court has summary jurisdiction to compel property to be transferred to a trustee in bankruptcy when the property has been transferred by the bankrupt in conjunction with another person, for the benefit of creditors of the two persons; the transfer having been made within four months of the bankruptcy and for the benefit of creditors, there not being included in such transfer either the whole or substantially the whole of the bankrupt's estate.

[1] A trustee in bankruptcy who has been appointed within four months of a general assignment made by a debtor for the benefit of his creditors has a right to obtain an order from the bankruptcy court, and in a summary proceeding, compelling the assignee to submit his accounts and to turn over to him all money and property in his hands which belonged to his assignor. No plenary suit is necessary in a case of that sort. The assignee under such conditions is not an adverse claimant, but merely the agent of the assignor for the distribution of the proceeds of the property, and as such agent his possession is that of the principal. He is a mere naked bailee for the creditors and has no right to retain the possession as against the trustee in bankruptcy. In re Stewart, 179 Fed. 222, 102 C. C. A. 348; In re Smith (D. C.) 92 Fed. 135; In re Stokes (D. C.) 106 Fed. 312; In re Thompson (D. C.) 122 Fed. 174, affirmed in 128 Fed. 575, 63 C. C. A. 217; Black on Bankruptcy, § 439; Remington on Bankruptcy, § 1611.

The present proceeding was instituted by the petitioner upon the theory that the trustee Telling was a general assignee of the bankrupt McCrum for the payment of McCrum's creditors, and therefore was holding merely as a naked bailee or agent of McCrum, and as such might be compelled to turn over in a summary proceeding all the property which he had received and was holding in trust.

It appears that the transfer made by McCrum to Telling was not a

transfer of all the property which the former possessed on March 13, 1912; that being the date on which the assignment was made. The instrument of transfer does not upon its face purport to transfer all the property of McCrum, and the latter's own testimony shows various items of property which were not included and which it is claimed had a value of $53,410, although McCrum's counsel insists that the real value is about $15,000. This property included shares of stock and certain pieces of real estate. Some of the stock not included in the assignment was at the time of the transfer in possession of third parties as collateral for loans. We are satisfied that while the property withheld may not total $53,410 as claimed it is considerably in excess of the value of $15,000. It is not important to determine the exact value of the property withheld. It is enough to know that a substantial amount of his property was not transferred, and we are satisfied that such was the fact. In arriving at a conclusion as to the value of the property transferred and the value of the property withheld, petitioner's counsel adopted the maximum value when the stocks appeared in the class of property transferred and the minimum value when the identical stocks appeared in the class of property not transferred. Thus 250 shares of stock of the Tower Hill Coke Company and 300 shares of stock of the Isabella Coke Company, which were not included in the transfer are valued at $5 and $10 per share, respectively. But in determining the value of property transferred 2,233 shares and 4,200 shares respectively of these identical stocks are valued at $50 and $14 a share respectively.

[2] The question then arises whether the transfer by McCrum to Telling can be regarded as a general assignment. A "general assignment for the benefit of creditors" is one which passes all the property or substantially all the property, real and personal, which the assignor owned at the time of the assignment. And an assignment which conveys only a portion of the property is a partial assignment. United States v. Hooe, 3 Cranch, 73, 90, 2 L. Ed. 370 (1805); United States v. Howland, 4 Wheat. 108, 114, 4 L. Ed. 526; Bock v. Perkins, 139 U. S. 628, 641, 11 Sup. Ct. 677, 35 L. Ed. 314; Missouri-American Electric Co. v. Hamilton-Brown Shoe Co., 165 Fed. 283, 287, 91 C. C. A. 251 (1908). A general assignment for the benefit of creditors is not only an assignment of all or substantially all of one's property, but it must be made to another party in trust to collect the amounts owing to the assignor, with power to sell and convey the property, to distribute the proceeds of all the property among the creditors of the assignor, and to return the surplus, if any, to the debtor. And it has been held that a conveyance of his property by a debtor directly to his creditor, or to his creditors, for their benefit, is not a general assignment for the benefit of creditors because it raises no trust. Anniston Iron & Supply Co. v. Anniston Rolling Mill Co. (D. C.) 125 Fed. 974 (1903); Missouri-American Electric Co. v. Hamilton-Brown Shoe Co., supra.

[3] In the case at bar, however, the transfer was in trust with power to sell and to distribute the proceeds to pay "the debts of said Howell and McCrum" and "the personal debts of either of them" and then

return "to said Howell and McCrum" all of said property not disposed of under the terms of the trust deed. It has also been urged upon us that the transfer made by McCrum cannot be regarded as a general assignment for the benefit of creditors because it was not made solely for the benefit of McCrum's creditors, but was made to benefit as well persons who were not his creditors. It is not, however, necessary to determine, and it would be improper for us to determine in this proceeding, whether the trust instrument properly construed confers or does not confer upon the individual creditors of Howell any interest in the property turned over to Telling by McCrum. It is quite enough to know that the transfer by McCrum cannot be regarded as a general assignment because it did not transfer the whole or substantially the whole, of McCrum's property.

But even if the trustee Telling was a general assignee taking the whole of McCrum's property, he would, notwithstanding, upon the facts of this case, have to be regarded as an adverse claimant; and therefore not subject in this summary proceeding to be compelled to transfer the property to the trustee in bankruptcy. He admits that he claims no beneficial interest for himself, but contends that under the assignment made to him he holds the property assigned by McCrum not alone for the creditors of McCrum, but also for the benefit of the creditors of Howell, and that in like manner he holds the property assigned by Howell not alone for the creditors of Howell but also for the benefit of the creditors of McCrum. The creditors who are creditors of Howell alone upon his personal debts and who claim an interest in the property of McCrum under this assignment to Telling are entitled to have their adverse claim adjudicated in a plenary suit. The District Judge was clearly right in holding that:

"So far as Telling's position is concerned, if there is but one Howell creditor hostile to the summary proceeding, that is enough to make Telling an adverse claimant."

The petitioner admitted in the argument in this court that there were not one but five Howell creditors hostile to this summary proceeding, with claims amounting to $24,700. We are informed that these opposing claimants urge no reason for their objection to this summary proceeding other than the fact that it is more convenient for them to have the assets in Pittsburgh. This, it is said, is in absolute disregard of the convenience of the New York creditors whose claims aggregate a very much larger amount. But it is not a question of convenience, and we are not concerned with the reason of the opposing creditors or whether they have any reason at all for the position they have seen fit to take. The law gives opposing claimants an absolute right to have their claims adjudicated in a plenary action if they so prefer. In this case at least five do so prefer. Their reason for their preference is their own matter and does not affect their right.

We are told that to accord recognition to Howell's creditors as adverse claimants of an interest in the property which McCrum transferred to the respondent Telling is to assume that the securities so transferred are available for Howell's creditors, and that no court will permit an insolvent's property to be used to pay a third party's debts.

The argument is beside the point at issue. The ultimate question of whether creditors of Howell are entitled to be paid any portion of the assets turned over by McCrum to Telling is entirely foreign to this proceeding. The question that can be raised here is one of remedy between a summary proceeding and a plenary suit. Whether the interest which the written instrument gives the creditors of Howell in the property of McCrum is voidable by the trustee of McCrum is not before us and was not before the court below. The question is whether the fact that the instrument of transfer to Telling purports to give an interest to the creditors of Howell, and that those creditors are not holding as agents for the bankrupt or his creditors, and the further fact that they are insisting and standing upon their rights under the instrument, does or does not make their claim an adverse claim which they have a right to have determined in a plenary suit. We do not think that such a claim as is here asserted can be properly classed as merely a "colorable" claim. A claim is open to the objection of being colorable when it is merely asserted; there being no foundation upon which it rests. A colorable claim is one which is a mere pretext and without reality. But in the case at bar there is a genuine claim. It rests upon a basis of fact and reality. Whether the basis is such as to make the claim a valid one cannot be inquired into in a summary proceeding unless the claimant is willing to have it so decided. He has a right to insist, if it pleases him to so elect, to have the question determined in a plenary action.

The claim made by Telling involves, as the court below found, several debatable questions of fact and law. There is involved a determination of the effect of joint absolute conveyances with simultaneous declarations of trust by the assignee in favor of the creditors of both assignors; the effect of the avoiding of the assignment as to one assignor upon the rights acquired by the creditors of the other assignor. The question arises as to what are the rights and interests of these last-mentioned creditors under the trust and whether the single trust can be severed without confiscating their rights. In case the assignment and trust are set aside there is further involved the interest of the assignor, Howell, and the duties of the assignee as to him. The respondent therefore claims he is entitled to have the matter decided in a regular plenary action upon summons and pleadings and not in a summary proceeding in the bankruptcy court. In this view we concur.

The respondent in his capacity as a trustee representing creditors who have an adverse claim is an adverse claimant in their behalf. In re Baudouine, 101 Fed. 574, 41 C. C. A. 318 (1900) we held that testamentary trustees who were without any beneficial interest in the property themselves and who were asserting a right to maintain control of the income from land held under a spendthrift trust and to pay it to the bankrupt beneficiary, as against the petition of his trustee in bankruptcy, were adverse claimants and entitled to be heard in a plenary suit. We said that in defending their trust duties they were hostile to the trustee in bankruptcy, and that, if they were entitled to be heard at all, they were entitled to contest his title as fully as though they were the equitable owners of the fund. So in the present case the

trustee Telling, who, as we have seen, is not a general assignee for the benefit of McCrum's creditors, but is a trustee of a fund for McCrum's creditors and also for other creditors than McCrum's, is, in defending his trust duties, hostile to the trustee in bankruptcy.

[4] It was urged upon us that the assignment to Telling was the act of bankruptcy charged in the petition which was filed against McCrum, that no creditor appeared in opposition denying this act of bankruptcy, and that McCrum was accordingly regularly adjudicated a bankrupt. We are asked to accept the fact that he was thus adjudicated a bankrupt as conclusive of the question that the assignment was a general one. In other words, the claim is that that particular question is to be regarded as res adjudicata. It is enough to say that McCrum was not adjudicated a bankrupt on the theory that his assignment was a general one. There was no proof taken at the time of the adjudication to determine whether his assignment transferred the whole or substantially the whole of his property to Telling. And the court did not determine whether or not the assignment was a general one for the benefit of his creditors. After the filing of the petition in bankruptcy, McCrum filed an appearance in the bankruptcy court and without admitting the allegation of the petition merely waived his right to plead and consented to the order of adjudication. And even in contested proceedings an adjudication is res adjudicata and conclusive upon those who have not actually taken part in the contest only as to the status of the bankrupt and not as to the commission of a particular act of bankruptcy, although it be the one alleged in the petition. The rule on this subject is correctly laid down in Remington on Bankruptcy, § 445, where it is stated as follows:

"That the adjudication in bankruptcy, though to be sure it is in a proceeding in rem 'binding on the whole world,' is not binding on others than those actually engaged in the litigation except as to the status of the debtor as a bankrupt; that the constructive presence of all creditors does not obtain except as to the subject of the debtor's status; that therefore, except as to parties who have actually litigated the issues, the adjudication in bankruptcy is not binding in subsequent litigation on the matters of insolvency nor even on the matter of the commission of the very act of bankruptcy on which the adjudication is based; that the doctrine of res adjudicata does not apply, because the subjects of the two proceedings are different; in the proceedings on the bankruptcy petition the subject being the status of the debtor, whilst on subsequent litigation the subject is the property or a debt entitled to share in the property."

And see Manson v. Williams, 213 U. S. 453, 455, 29 Sup. Ct. 519, 53 L. Ed. 869; Tilt v. Kelsey, 207 U. S. 43, 52, 28 Sup. Ct. 1, 52 L. Ed. 95; John Silvey & Co. v. Tift, 123 Ga. 804, 51 S. E. 748, 1 L. R. A. (N. S.) 386.

The petition to review is dismissed, and the order of the District Court is affirmed.

MURRAY v. CITY OF POCATELLO.

(Circuit Court of Appeals, Ninth Circuit. May 11, 1914.)

No. 2345.

WATERS AND WATER COURSES (§ 188*)—WATER COMPANIES—ANNULMENT OF FRANCHISE.

Complainant city (then town) in 1892 by ordinance granted a franchise for 50 years to defendant and others, whose interests he afterwards acquired, to construct and maintain waterworks to supply the town and its inhabitants with water "to be conveyed from creeks * * * known as Mink and Gibson Jack creeks," and to be in quantity sufficient to supply both the public and private uses of the citizens of the town and of pure and healthful quality. Afterward rates were agreed upon and established. In 1901, the town having become a city and largely increased in population, an ordinance was passed reciting that, the then supply of water having become inadequate, defendant agreed "to bring in the waters of Mink creek" and to make all extensions warranted by the growth of the city, involving a large expenditure of money, in consideration of which the city confirmed the previous grant, agreed to rent a certain number of additional hydrants, that the prevailing rates should not be changed for five years, and only at intervals of five years thereafter, and then only on specified conditions, and that the city would not grant a more favorable franchise to another nor own a water system of its own until it had offered to purchase defendant's system at a price to be fixed as therein provided. The ordinance was accepted by defendant. The bill alleged, and the proof showed, that defendant had brought in but a small part of the waters of Mink creek, had failed to make the required extensions or to keep existing pipes in repair; that, on the contrary, he had reduced the supply by making regulations restricting the use of water and placing "reducers" in the supply pipes to the extent of preventing the city from obtaining water for street sprinkling or fire protection and the inhabitants for domestic purposes, to the injury of their health and property. *Held*, that such ordinance required defendant to bring in all the waters of Mink creek as well as to make the specified extensions, for which he received consideration in the concessions made by the city, and that, on the facts shown, the city was entitled to a decree annulling the ordinance.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 287, 288; Dec. Dig. § 188.*]

Appeal from the District Court of the United States for the Eastern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by the City of Pocatello against James A. Murray, doing business under the name of the Pocatello Water Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 206 Fed. 72.

N. M. Ruick and Hawley, Puckett & Hawley, all of Boise, Idaho, for appellant.

D. Worth Clark, Jesse R. S. Budge, and W. H. Witty, all of Pocatello, Idaho, for appellee.

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

ROSS, Circuit Judge. By an ordinance, numbered 46, adopted and approved on the 4th day of January, 1892, the board of trustees of the

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

then town of Pocatello, in the state of Idaho, granted to F. D. Toms, John J. Cusick, and James A. Murray, their associates, successors, and assigns, the right to construct, maintain, and operate a complete system of water mains, pipes, and conduits in, along, and under the streets and alleys of the town, for the purpose of furnishing it and its inhabitants with water.

By the terms of the ordinance the franchise was to continue for 50 years from its passage and approval, and among the conditions imposed upon the grantees were the following:

They were to begin work within four months, prosecute it with reasonable diligence, and complete the plant ready for the delivery of water within a certain specified time, which water, the ordinance declared, should "be conveyed from the creeks on the Ft. Hall Indian reservation, known as Mink and Gibson Jack creeks, and shall be in quantity sufficient to supply both the public and private use and purpose of the citizens and inhabitants of the town of Pocatello, and shall be of pure and healthful quality," and which water should be "conveyed to a point above the town of Pocatello and shall be confined in a suitable and substantial reservoir or reservoirs"; the pipes or mains on a certain named street to "have a pressure of at least 150 feet perpendicular fall." The ordinance provided for one designated main pipe of at least eight inches in diameter, and for certain designated laterals for the distribution of the water, and further declared that "thereafter main pipes and laterals may be laid as the occasion or consumption demand." It further provided for the giving of a bond on the part of the grantees in the sum of $10,000 "to indemnify the said town of Pocatello against all loss and damage done or occasioned by reason of the construction, maintenance, and operation of said water system," and further declared that, upon a failure of the grantees, their associates, successors, or assigns to perform the conditions thereby imposed upon them, the town should have the right to "revoke, avoid, and annul this ordinance and all rights, privileges, and franchises hereby granted."

Subsequently a corporation, styled the Pocatello Water Company, Limited, was organized, to which were assigned the rights conferred upon Toms, Cusick, and Murray by ordinance 46, following which assignment the town of Pocatello, on the 7th day of June, 1898, adopted an ordinance numbered 59, which confirmed to and continued in that corporation, as such assignee, the rights and privileges theretofore conferred upon its assignors by ordinance 46, reciting in its preamble that the said assignors had fully complied with the terms and conditions of ordinance 46, and further reciting that reasonable and just rates for the water furnished had been established by a commissioner duly appointed under the laws of the state, and that for the better distribution of the water, and in order to keep the same pure and wholesome, it was necessary for the company to abandon its wooden flume and supplant it with steel, at a cost of about $30,000, proceeded to make certain stipulations in respect to the rates (not necessary to be here enumerated), and concluded with the provision that:

"Within thirty (30) days from the passage and approval of this ordinance the said company shall commence the improvements and the laying of said line

of pipe mentioned in the preamble, and carry on the same to speedy and effective completion without unnecessary delays, interruptions, or discontinuances, and such compliance with this ordinance shall entitle the company to the benefit of its provisions as in virtue of an executed contract; but if more than thirty (30) days shall elapse without such commencement by said company this ordinance shall lapse and be declared null and void."

Subsequent to this the town of Pocatello became the city of Pocatello, with an increased population, and, the appellant here being then the owner and in the operation of the system by which the city and its inhabitants were supplied with water under and by virtue of ordinances 46 and 59, the city adopted ordinance No. 86, which this suit was brought to annul, and which suit resulted in a decree annulling it, from which decree the present appeal was taken. The last-mentioned ordinance is as follows:

"Ordinance No. 86.

"An ordinance confirming and continuing certain privileges and franchises formerly granted to F. D. Toms, John J. Cusick and James A. Murray, to and in James A. Murray, the legal successor of said parties, making a contract by the city of Pocatello with James A. Murray for supplying said city with water for public and private use; fixing the rates to be charged for said water; providing a means of ascertaining the value of said water system, as a basis of readjusting rates in the future, or in the event of a sale; and waiving the right on the part of said city to build, own or acquire a competitive water system, except under stated conditions or of granting to others more favorable terms or franchises than that now held and granted to said James A. Murray.

"Preamble.

"Whereas, the town or village of Pocatello, on the 4th day of January, 1892, conferred and granted to F. D. Toms, John J. Cusick and James A. Murray, their associates, successors and assigns, the right, authority and permission to construct, maintain and operate an entire and complete system of water mains, pipes and conduits, and also a right of way over, along and under all and every street, alley and public highway within the corporate limits of the town or village of Pocatello for a period of fifty (50) years, for the purpose of laying along, over and under said streets, alleys and public highways, water mains, pipes and conduits for the purpose of furnishing and supplying the said town or village of Pocatello, and the inhabitants thereof with a sufficiency of pure and healthful water, and annexing certain conditions precedent to said grant; and, whereas, the said F. D. Toms, John J. Cusick and James A. Murray, and their associates, successors and assigns, fully complied with said condition precedent, and obtained vested rights under said grant; and, whereas, the city of Pocatello is a city of the second class and is the legal municipal successor of the said town or village of Pocatello; and, whereas, a commissioner duly appointed and constituted, did on or about the first day of September, 1896, make and establish rates and charges for water and water service by the Pocatello Water Company, Limited, a corporation, then owner and holder of said privileges and franchises, for both public and private uses, which said rates were confirmed and continued by the provisions of ordinance No. 56 (59) approved June 8th, A. D. 1898; and, whereas, the rates and charges so fixed and continued are now deemed and considered to be fair, equitable, reasonable and just, and will continue to be fair, equitable, reasonable and just, in the near future; and, whereas, the said James A. Murray has succeeded to and is now the owner and holder of all property of whatever kind and nature formerly owned or held by said Pocatello Water Company, including said water system complete, and all rights, privileges and franchises appurtenant thereto, or used therewith; and, whereas, the present supply of water furnished by said water system is deemed inadequate for the present and future need of said city, and said James A. Murray agrees to bring in the waters of Mink creek, and to make all extensions of

street mains warranted by the growth of said city, thereby necessitating the laying of several miles of pipe at a large additional expenditure of money; and, whereas, said James A. Murray, before incurring so great an additional outlay, as a condition precedent to the expense of laying said pipe line, desires to be protected against unreasonable or arbitrary changes in the rates and charges for water and water service, and asks some reasonable assurance that such unreasonable or arbitrary changes shall not be made; and, whereas, the demand of said James A. Murray is considered reasonable and just, and it is deemed to be for the best interest of the city of Pocatello to extend and give the assurance asked for: Now, therefore, be it ordained by the mayor and council of the city of Pocatello:

"Section 1. That the privileges and franchises originally given, granted and conferred to and upon F. D. Toms, John J. Cusick and James A. Murray, their associates, successors and assigns, as recited in Pocatello town or village ordinance No. 46, passed and approved January 4th, 1892, are hereby ratified, continued and confirmed unto James A. Murray, and to his successors and assigns according to the terms of said original grant, he, the said James A. Murray, being the legal successor of the said F. D. Toms, John J. Cusick and James A. Murray, therein named.

"Sec. 2. The schedule of rates and charges for water and water service, both public and private, supplied and furnished by the Pocatello Water Company, to the city of Pocatello, and the inhabitants thereof heretofore fixed and adopted by the commission duly appointed and constituted, whose report was received, filed and adopted on or about the first day of September, 1896, and now in full force and effect within the said city of Pocatello, is hereby declared to be fair, equitable, reasonable and just, and shall hereafter continue to be the schedule of rates and charges for water service by the said James A. Murray, for both public and private uses, except as hereinafter stated, to wit: [Schedule of water rates omitted as unnecessary.] Provided, that in cases where consumers are paying for either residence or lawn sprinkling privileges no charge shall be made for one horse or cow, and where consumers are paying for both lawn and residence privileges no charge shall be made for one horse and one cow or for two horses or two cows.

"Sec. 3. The foregoing rates and charges are hereby adopted by the city of Pocatello, by and for itself, and as trustees for the use and benefit of all private consumers of water within the corporate limits of said city for a period of five years from and after the passage and approval of this ordinance. At the expiration of said time, if the earnings of said water system, shall exceed five per cent. above reasonable expenses upon the value of said water system as then agreed upon, or as may be ascertained as hereinafter provided, then the rates as set forth in the 'Schedule of Water Rates' of section two of this ordinance may be readjusted so as to yield not less than five per cent. above reasonable expenses on the valuation, but no readjustment shall hereafter be made that will yield less than five per cent. above reasonable expenses, on the value of the investment ascertained as hereinafter provided for in section four.

"Sec. 4. If, at the expiration of five years, or at any time thereafter, it should be deemed necessary to readjust rates under the provisions of section three, and if the city of Pocatello and the said James A. Murray, or his successors or assigns, cannot agree upon the value of said water system, for the purpose of such readjustment, then the value of said water system shall be ascertained and determined in the following manner, to wit: A committee of four experienced and disinterested hydraulic engineers who must be members of the American Society of Civil Engineers, shall be selected, two by the city of Pocatello, and two by said James A. Murray, or his successors or assigns, and the following questions shall be submitted to them: For what sum can the water system of James A. Murray be now duplicated? If a majority of the four cannot agree they shall elect a fifth, and if they cannot agree upon a fifth, they shall request the president of the American Society of Civil Engineers to appoint a fifth member. The decision of a majority of the committee so selected shall fix the value of said water system for the purpose of readjusting said rates and such decision shall be final.

"Sec. 5. The city of Pocatello shall not hereafter grant to an individual,

corporation or association any terms or franchises for the construction or operation of a water system more favorable than the terms and franchises now held, confirmed and continued in said James A. Murray; nor shall the city of Pocatello build, acquire, own or operate a water system of its own, until it has in good faith offered to purchase the water system of the said James A. Murray, or his successors or assigns, at a price to be ascertained as follows: If the owners of said water system and the city of Pocatello cannot agree upon the price then a committee of experienced and disinterested hydraulic engineers, who must be members of the American Society of Civil Engineers, shall be selected in the manner set forth in section four of this ordinance, who shall fix the value of said water system for the purpose of such sale, and the decision of a majority of such committee shall be final. At intervals of five years from the approval of this ordinance and during the period of ninety days, immediately following the completion of each five year interval, the city may purchase the water system of the said James A. Murray or his successor or assigns, under the conditions specified in this section, but at no other time except by mutual consent of the city and the owner of said water system. In fixing the value of said water system whether for the purpose of selling or of readjusting rates, the water system of the said James A. Murray, or his successors or assigns, shall be held to mean and include all of the pipes, mains, hydrants, conduits, ditches, reservoirs, dams, water rights, rights of way, natural and acquired advantages, franchises, implements, storage grounds, material on hand, and all rights and property of what kind soever, either in use or on hand and belonging to the said James A. Murray, in his capacity of furnishing water for any and all purposes to himself and to his customers, at Pocatello, Idaho, saving and excepting account books, and records; and each article of property aforesaid shall be separately considered and evaluated by said committee, and in the event of the city of Pocatello purchasing said water system under this ordinance, said James A. Murray shall transfer all his rights, title and interest in and to said property to said city, and the said city shall receive and pay for the whole plant as aforesaid, the said James A. Murray stepping out, and leaving all said property undisturbed and ready for the city to step in.

"Sec. 6. Within ninety days from and after the passage and approval of this ordinance, the said James A. Murray shall commence or cause to be commenced the improvements mentioned in the preamble hereto, and shall carry the same to effective and speedy completion, without unnecessary delays, interruptions or discontinuances, such compliance with this ordinance shall entitle said James A. Murray, his successors or assigns, to the benefits of its provisions, as in virtue of an executed contract; but if more than ninety days shall elapse without such commencement this ordinance shall be and the same is hereby declared null and void.

"Sec. 7. That in consideration of the improvements named in this ordinance, the city of Pocatello hereby agrees to rent, receive and pay for, not less than forty-five (45) fire hydrants, at the schedule rate named in section 2 hereof; and within ninety days after the passage and approval of this ordinance to designate points on the water mains at which the extra hydrants shall be placed as soon as may be, the hydrants to be subject to rental from and after the date of their being placed in position.

"Sec. 8. If at any time the said James A. Murray, or his successors or assigns, fails to supply sufficient water for the needs of the city of Pocatello and the inhabitants thereof, then it shall be optional with the city of Pocatello to secure a further supply of water from any other source, directly or indirectly, without reference to the provision of this ordinance: Provided, however, that said James A. Murray shall have a reasonable time in which to complete the improvements as may hereafter become necessary to supply sufficient water as aforesaid before the provisions of this section shall apply.

"Sec. 9. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

"Passed this 6th day of June, 1901.

"T. O. Smith, City Clerk.

"Approved this June 6th, 1901.

"Theo. Turner, Mayor."

The amended bill alleges, among other things, that the defendant Murray violated his agreement contained in ordinance 86 by failing to bring into the city the waters of Mink creek, or any part thereof, "in excess of 46/100 of one second foot per second of time, notwithstanding that during the low-water season of each and every year since the passage of said ordinance there has been flowing in said Mink creek at the point where defendant diverts said 46/100 foot of water per second of time, more than 3½ second feet of water per second of time," and further alleges that a large part of the water of Mink creek that he does divert is lost by leakage because of the defective condition of the pipes of the system; that the defendant has failed to make the necessary extensions of street mains required by the growth of the city, or to even keep in repair the pipes of the existing system, but has promulgated rules and regulations restricting the use of water by the city and its inhabitants during the summer months to such an extent as to prevent the city from keeping its streets sprinkled, and to the extent of preventing the inhabitants of the city from obtaining water for culinary and domestic purposes, or for lawn sprinkling, and that during the months of June, July, August, and September of each and every year for many years past the city and its inhabitants have suffered great inconvenience and annoyance, and the health of the inhabitants has been jeopardized and the property within the city rendered liable to loss by fire by reason of the neglect and wrongful conduct of the defendant in failing to bring into the city the waters of Mink creek, and by other acts specifically alleged; that, because of the defendant's neglect to bring into the city the waters of Mink creek, the said system's supply of water became so depleted during the summer of 1911 that the reservoirs thereof became empty and the city and its inhabitants were for more than one month practically without any water supply for any purpose whatsoever, and that the city was obliged to and did pump water from the Portneuf river. the water of which, while pumped at great expense, was really unfit for domestic uses; that in addition to his neglect to bring into the city the waters of Mink creek and his promulgation of unreasonable restrictions concerning the use of the waters of the system, and in order to avoid the expense of laying pipes to bring into the city the waters of Mink creek and to otherwise improve the said water system in order to meet the needs of the city and its inhabitants, the defendant has inserted in the pipes leading to the private residences and business houses in the city contrivances known as "reducers," and has otherwise tampered with the said pipes so as to obstruct the free flow of water through the same, whereby the inhabitants of the city, during the summer months, are not furnished with a sufficient supply of water for culinary and domestic purposes, or for lawn sprinkling, which has not only subjected them to great annoyance and inconvenience, but has injured the health of the people of the city, as well as the property thereof.

The principal question in the case is whether, by ordinance 86, Murray was required to bring into the city all the waters of Mink creek, or only the comparatively insignificant part of them which the evidence shows he did bring in, to wit, 46/100 of one second foot per second of

time. The question, we think, admits of no doubt. The original ordinance, that numbered 46, provided that the water to be supplied thereunder to the town and its inhabitants should come "from the creeks on the Ft. Hall Indian reservation, known as Mink and Gibson Jack creeks," and should "be in quantity sufficient to supply both the public and private use and purpose of the citizens and inhabitants of the town of Pocatello." Later, however, as the evidence shows, the town grew from a village into a small city, so that, according to the evidence, at the time of the adoption of ordinance 86, its population was about 10,000. And not only does the evidence show, but ordinance 86 expressly recites, the fact that the water theretofore supplied under and by virtue of ordinances 46 and 59 had become insufficient for the then necessities of the city and its inhabitants; that ordinance expressly declaring in its preamble that:

"Whereas, the present supply of water furnished by said water system is deemed inadequate for the present and future need of said city, and said James A. Murray agrees to bring in the waters of Mink creek, and to make all extensions of street mains warranted by the growth of said city, thereby necessitating the laying of several miles of pipe at a large additional expenditure of money," etc.

The only obligations imposed by the provisions of ordinance 86 on the appellant Murray, with which he was not already charged under the two former ordinances, are found in the above-quoted portion of the preamble of ordinance 86, and in section 6 thereof, by which the grantee recognized the inadequacy of the supply of water for the then condition of the city and its people, as well as for their future use, and agreed to bring in the waters of Mink creek and to make all extensions of street mains warranted by the growth of the city, which by section 6 he agreed to commence doing within 90 days, and to "carry the same to effective and speedy completion without unnecessary delays, interruptions, or discontinuances." For those additional obligations on his part the city, by ordinance 86, expressly confirmed and continued in effect his then existing rights and privileges under the two preceding ordinances, expressly declared that the then existing water rates were fair and should not be changed for a period of five years, and then only upon certain conditions and in a manner therein specified, expressly declared that no other person or corporation should be granted a franchise upon more favorable terms, and that the city itself would not construct or operate a system in competition with the grantee without first having in good faith offered to purchase his plant at a price to be fixed by a board of engineers in the manner specifically prescribed, and further agreed that the city would rent and pay for, at the schedule rates, at least 45 hydrants to be installed in the system by the grantee. Manifestly those concessions on the part of the city and obligations assumed by it were not in consideration of anything the grantee was already under obligation to do. He was already obliged, as has been shown, by ordinance 46 to bring into the city, for its use and the use of its inhabitants, a part of the water of Mink creek and to provide the necessary reservoirs and certain specified mains and lateral pipes, but, when the growth of the city became such as to render the former supply and service insufficient, the grantee, in consideration

of the further concessions and valuable agreements on the part of the city, agreed by ordinance 86 to bring into the city, not a part of the water of Mink creek, which, as has been stated, he was already under obligation to do and was then doing, but to "bring in the waters of Mink creek," which is an altogether different thing, and embraces all of the waters of that stream. His failure to do so and to provide the necessary conduits for them clearly justified, in our opinion, the judgment of the court below annulling ordinance 86, especially in view of the further facts, disclosed by the evidence and found by the trial court to be true, that the appellant, instead of enlarging his mains and bringing into the city the waters of Mink creek as he contracted to do, to relieve the shortage in the supply of water which the evidence shows and the court found exists during the summer season, actually equipped the system with a device called in the record "reducers," by which the half-inch opening from the main into the service pipe of each consumer was reduced to one-fourth of an inch, and the two-inch goosenecks from which water was delivered into the city sprinkling carts were reduced to about one-half an inch.

The judgment is affirmed.

In re FEDERAL BISCUIT CO.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 239.

1. ATTACHMENT (§ 261*)—DISCHARGE BY BOND—OPERATION AND EFFECT.

The discharge of the lien of an attachment by the giving of a bond to take its place, under the New York statutes, does not vacate the writ of attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 929–944; Dec. Dig. § 261.*]

2. ATTACHMENT (§ 276*)—DISSOLUTION—OPERATION AND EFFECT.

The dissolution of an attachment releases the attached property, though no order of dissolution may be entered in the court where the action is pending.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 973–978; Dec. Dig. § 276.*]

3. BANKRUPTCY (§ 200*)—DISSOLUTION OF ATTACHMENT LIENS BY ADJUDICATION.

A lien acquired by attachment in a state court within four months prior to the filing of a petition in bankruptcy is dissolved by the filing of the petition under Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), providing that all levies, attachments, etc., obtained through legal proceedings against a person who is insolvent within four months prior to the filing of the petition, shall be deemed null and void in case he is adjudged a bankrupt and the property shall be deemed wholly discharged and released therefrom; the effect of that section not being confined to attachment issuing from courts of the United States.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 289, 296–300, 306–316; Dec. Dig. § 200.*]

4. BANKRUPTCY (§ 198*)—ATTACHMENT—DISSOLUTION.

An attachment was granted against a bankrupt within four months before the filing of a petition in bankruptcy to release the lien on which

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

a bond was given by a bonding company which insisted upon security. A. executed an indemnity of agreement to the bonding company, and the bankrupt conveyed property in trust to secure A. *Held*, that the writ of attachment should not be vacated so as to discharge the surety, though there had been no discharge of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 289, 296-316; Dec. Dig. § 198.*]

5. BANKRUPTCY (§ 391*)—STAYING PROCEEDINGS IN STATE COURTS.

Under Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), forbidding injunctions staying proceedings in any state court, except where authorized by any law relating to bankruptcy, and Bankr. Act July 1, 1898, c. 541, § 11, 30 Stat. 549 (U. S. Comp. St. 1901, p. 3426), providing that a suit on a claim, from which a discharge would be a release pending at the time of the filing of the petition, shall be stayed until after an adjudication, and may be further stayed until 12 months after the date of the adjudication, or if, within that time, the bankrupt applies for a discharge, until the question of such discharge is determined, the court had no power to grant a stay for a longer period than 12 months after the date of the adjudication, where the bankrupt did not apply for a discharge within that time.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 637-655; Dec. Dig. § 391.*]

6. EQUITY (§ 62*)—MAXIMS—EQUITY FOLLOWS THE LAW.

As a general rule equity follows the law, and a person capable of holding the legal title to property is capable of holding the equitable title, while one incapable of holding the legal title is equally incapable of having a trustee hold it for him.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 183; Dec. Dig. § 62.*]

7. BANKRUPTCY (§ 163*)—VOIDABLE PREFERENCES—TRANSFERS TO SECURE SURETY.

Where a bankrupt conveyed property in trust to secure A., who executed an indemnity bond to a bonding company which gave a bond to secure the discharge of the lien of an attachment granted within four months before bankruptcy, the transfer was valid unless intended to create a preference or defraud creditors or unless the bonding company had reason to believe that such was its object, since, as equity follows the law, the trustee had the same right to hold the property in trust that the bonding company would have had had it been transferred directly to it, and there is nothing in the bankruptcy act to interfere with a creditor's right to dictate the terms on which he will part with his money or property, or demand such security as will satisfy him at the time a debt is created.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. § 163.*]

Petition to Revise an Order of the District Court of the United States for the Southern District of New York. Affirmed.

On November 9, 1911, one Edward C. Vick commenced an action in the Supreme Court of the state of New York to recover from the Federal Biscuit Company the sum of $5,300, the amount due him as commissions on the sale of stock of the biscuit company. In that action a writ of attachment was granted Vick against the property of the biscuit company.

Thereafter an attempt was made to obtain the bonding of the attachment. Application was made to the Massachusetts Bonding & Insurance Company for such an undertaking, but the application was denied unless some reputable and responsible party would agree to indemnify the company for all loss which might ensue. It was thereupon agreed that one John A. Anger, of New York City, would execute an indemnity agreement, provided the Federal Biscuit Company would secure him. This that company agreed to do, and it accordingly transferred to a trustee all the right, title, and interest which it

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

had and might thereafter acquire in its plant at Lawrence, Mass. The trustee was to hold the same for the benefit of Mr. Anger, and, in the event of it becoming necessary to pay out any money by virtue of the indemnity agreement, he was to dispose of the property and apply so much of the proceeds as was necessary to reimburse Anger for any money he was obliged to pay under the agreement, together with his expenses and disbursements. Robert M. Richter was made the trustee, and the property was deeded to him, and he executed a declaration of trust. Subsequently he executed a second and further declaration of trust for the repayment to Anger of $589.59; that being the amount Anger had paid for rent on behalf of the Federal Biscuit Company.

No part of the rent which Mr. Anger advanced has been repaid, nor has he been reimbursed for the expenses or disbursements which he has incurred.

As a result of the foregoing agreements the attachment was released, and the property under levy was discharged.

On January 6, 1912, an involuntary petition in bankruptcy was filed against the Federal Biscuit Company, and Cornelius W. Wickersham was appointed receiver, and later was made trustee in bankruptcy of the estate; the company having been adjudicated a bankrupt on January 18, 1912.

On August 28, 1912, a motion was made in the United States District Court for the Southern District of New York for an order to vacate the warrant of attachment, to cancel the bond executed by the Massachusetts Bonding Company, to cancel the indemnity bond executed to Anger, and to direct Richter to convey to the trustee in bankruptcy the real property, which was conveyed in trust as an indemnity to Anger. The motion was granted, and with it a stay of all proceedings in the state court. From that order Vick appealed to this court, and the order was reversed, except so much of it as stayed the action in the state court. See In re Federal Biscuit Co., 203 Fed. 37, 121 C. C. A. 373 (1913.)

On August 27, 1912, a motion was again made in the District Court to vacate the warrant of attachment, to cancel the bond executed by the bonding company, and also the bond executed by Anger, as well as the trust agreement executed by Richter. This motion was denied.

R. P. Levis, of New York City, for petitioner.

Jno. M. Gardner, of New York City, for respondent Vick.

J. Deyo and Phelan Beale, both of New York City, for other respondents.

Before LACOMBE, COXE and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This court was called upon to pass upon this same motion in February, 1913. The court below had then entered an order in which it granted the relief asked, and we reversed its action in part. We then said:

"So much of the order, therefore, as grants a stay will be affirmed. We think this measure of relief all that is called for at the present time and sufficient to determine the rights of the parties. The other portions of the order are, however, set aside without prejudice to further proceedings if necessary." In re Federal Biscuit Co., supra.

The motion was a year later renewed, and this time the learned District Judge, to whom the application was made, denied the motion and said:

"In the first place, I do not see why the decision of the Circuit Court of Appeals does not require the denial of this motion. This seems to be a mere renewal, on the same facts, of the motion granted by an order of Judge Hough which was afterwards reversed by the Court of Appeals."

The appeal taken from the order denying the motion raises the question whether the facts are the same now as they were when this matter

was last before us, and, if they are not the same, whether the difference is such as to make it proper for us to modify in any respect our former action. But we have failed to discover that anything has occurred since the case was last before us which should change the conclusion we reached at that time.

[1] It is said that the attachment obtained by Vick in his suit against the bankrupt in the state court should be vacated, and it is conceded that the attachment was levied within four months of the filing of the petition in bankruptcy. The District Judge in his opinion says:

"I do not see the necessity of an order vacating the attachment in the suit in the state court brought by Vick. That attachment was vacated and discharged by the bond given to take its place by the Massachusetts Bonding Company."

It is possible that the District Judge did not have the matter clearly presented to him, and we are free to say that we do not think it was clearly presented in the argument in this court. It is important to distinguish between the discharge of the lien of the attachment by the bond given to take its place and the vacation of the writ. The two things are quite distinct, and the District Judge apparently did not have his attention called to the distinction, and it was not clearly pointed out in the argument before us. The bond given by the Massachusetts Bonding Company bonding the attachment in the suit in the New York Court was authorized under the New York statutes, and the purpose of the statute as explained in Christal v. Kelly, 88 N. Y. 285, 292 (1882), by Chief Judge Andrews was the following:

"It was intended for the benefit of defendants whose property had been, or might be, attached under process, to enable them to substitute, for the property which had been or might be attached, security for the payment of any judgment which might be recovered in the action, and thereby relieve their property from the actual or apprehended lien of the process."

[2] And the effect of the dissolution of an attachment is to release the attached property, though no order of dissolution may be entered in the court where the action is pending.

[3] A lien acquired by an attachment of an insolvent debtor is a lien "obtained through legal proceedings" and is, by the express terms of the Bankruptcy Act, § 67f, dissolved by the filing of a petition in bankruptcy by or against the debtor, if that occurs within four months after its date. And the effect of the statute in dissolving attachments is not confined to those issuing from courts of the United States, but applies as well to the process of the state courts. See Black on Bankruptcy, § 376, and Bank of Columbia v. Overstreet, 10 Bush (Ky.) 148.

The discharge of the lien of attachment is one thing, the vacation of the writ is another. The discharge of the lien does not necessarily vacate the writ. See King v. Block Amusement Co., 126 App. Div. 48, 111 N. Y. Supp. 102 (1908), affirmed 193 N. Y. 608, 86 N. E. 1126. The question whether the writ shall be vacated is important as affecting the liability of the surety.

[4] The question whether the writ of attachment should be vacated was considered in the New York case above cited. It was decided in the Appellate Division of the Supreme Court, and affirmed by the Court

of Appeals, that a warrant of attachment issued within four months of the filing of a petition in bankruptcy against defendant and discharged by an undertaking for which the surety takes no security would not be vacated after the adjudication in bankruptcy so as to discharge the surety. We think the same ruling should be applied under the facts of the case at bar, although in this case there has been no discharge of the bankrupt, and property of the bankrupt is held in trust for the indemnity of the surety.

[5] The statutes of the United States prevent the courts of the United States from issuing injunctions to stay proceedings in any court of a state except in cases "where such injunction may be authorized by any law relating to proceedings in bankruptcy." Revised Statutes U. S. § 720 (U. S. Comp. St. 1901, p. 581). And it is provided in the Bankruptcy Act, § 11, that:

"A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined."

In pursuance of this provision of the Bankruptcy Act the United States District Judge for the Southern District of New York on September 25, 1912, issued an order staying Vick, his attorneys and agents, from taking any further action in the suit in the courts of the state of New York. That stay was for an indefinite period. But under the statute it is not within the power of the court to grant a stay for a longer period than 12 months after the date of the adjudication of bankruptcy except in cases where the bankrupt applies for a discharge. If he has made no application for a discharge, and the time has passed within which an application can be made, there evidently is no right longer to restrain the proceedings in the state court, and, upon the facts being properly brought to the attention of the District Court, that court should vacate the stay previously granted. But while it was stated in argument that the bankrupt has never been discharged, and that the matter of his discharge is not pending, and that he has not even applied for a discharge, there is nothing in the record before us to show these facts.

[6, 7] As a general rule equity follows the law. If a person is capable of holding the legal title to property, he is capable of holding the equitable title. If he is incapable of holding the legal title, he is equally incapable of having a trustee hold it for him. The principle is illustrated by the decisions under the statutes of mortmain. The courts held that the statutes could not be evaded by giving a legal title to a trustee to hold for a corporation. See Perry on Trusts, § 63; Lewin on Trusts, 36. The same principle is illustrated in the law relating to aliens. If a subject held a legal title to land for an alien cestui que trust, the crown could at any time claim the equitable interest. Vin. Ab. Alien, A, 8; Dumoncel v. Dumoncel, 13 Ir. Eq. 92; Barrow v. Wadkin, 24 Beav. 1. We find another illustration in the law relating to slaves. The courts held that, if a slave could not himself hold prop-

erty, it could not be held for him by a trustee. Skrine v. Walker, 3 Rich. Eq. (S. C.) 262; Pool v. Harrison, 18 Ala. 514. A different principle was applied in the case of charitable trusts, but that exception to the rule is without bearing upon the question with which we are now concerned. Applying the principle first stated to the facts of this case, it would seem to follow that the trustee Richter's right to hold the property in trust is exactly the same as would be the right of the bonding company to retain the property from the trustee in bankruptcy, if the property had been transferred directly to it by way of securing it against the possibility of loss or if it had been transferred directly to Anger to secure him. If either Anger or the bonding company would have been entitled to hold, then Richter it would seem would be entitled to hold, otherwise not. But if the real estate transferred to Richter had been transferred directly to the bonding company, the transaction would have been valid, unless the trustee in bankruptcy proved that the transfer was intended to create a preference or to defraud creditors, or that the bonding company had reason to believe that that was the object of the conveyance. The Bankruptcy Act, § 67, provides that:

"All conveyances, transfers, assignments, or incumbrances of his property or any part thereof, made or given by a person adjudged a bankrupt * * * within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration."

And the act goes on to provide that property so transferred shall remain a part of the assets of the bankrupt, and it is made the duty of the trustee to reclaim the same for the benefit of the creditors. The act also provides against the transfer of property by an insolvent within four months of the filing of the petition in bankruptcy, if the transfer operates as a preference and the person recovering it or to be benefited thereby, or his agent acting therein, had reasonable cause to believe that the enforcement of the transfer would effect a preference.

There is no evidence in the record which establishes the fact that the transfer of the property to Richter to secure Anger, and thus secure the bonding company, was invalid either under the provision which avoids transfers made to hinder and delay creditors or under the provision relating to preferences.

We understand that a suit brought by the trustee is now pending in a court in Massachusetts to set aside the transfer to Richter. What evidence the trustee may have to invalidate the transfer he will undoubtedly present to that court. It has not been presented to the District Court and therefore is not before us. We are therefore unable now, as we were unable when the case was last before us, to see why the court below should order a cancellation of the bond executed by the bonding company, or a cancellation of the bond executed and delivered by Anger to the bonding company, or a cancellation of the trust agreement executed by Richter to secure Anger. There is not in the record any evidence of positive fraud or bad faith on the part of the bonding company or of Anger or of Richter. There is no evidence that the transfer of the real estate to Richter was intended to create a

preference or to defraud creditors. The transfer of the property to Richter to secure Anger, and Anger's agreement with the bonding company and that company's agreement with Vick were all contemporaneous acts. The security related to a present and not a past transaction, and there was a present consideration to support each one of the agreements. At a time when a debt is created the creditor has the right to dictate the terms on which he will part with his money or property, and he may demand that he shall be first secured to such an extent as will satisfy him.

It has been held that there is nothing in the Bankruptcy Act to interfere with the exercise of that right. In re Busby (D. C.) 124 Fed. 469. And it seems to be a settled principle of bankruptcy law, both in the United States and in England, that advances made in good faith to a debtor to assist him in his business do not violate either the terms or the policy of the Bankruptcy Act. See Darby v. Boatmen's Saving Inst., 1 Dill. 141, Fed. Cas. No. 3,571.

The order is affirmed, but without prejudice to further proceedings, if necessary.

WELLS v. LINCOLN. LINCOLN v. WELLS.

In re WENATCHEE HEIGHTS ORCHARD CO.

(Circuit Court of Appeals, Ninth Circuit. May 11, 1914.)

No. 2358.

1 BANKRUPTCY (§ 467*)—PROVABLE CLAIMS—OFFICER OF BANKRUPT CORPORATION.

The finding of a referee, confirmed by the District Court, allowing the claim of an officer of a corporation against its estate in bankruptcy, affirmed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 467.*]

2. BANKRUPTCY (§ 360*)—ALLOWANCE OF CLAIMS—EFFECT OF RECEIPT OF PREFERENCE OR FRAUDULENT CONVEYANCE.

Under the provisions of Bankr. Act July 1, 1898, c. 541, § 57g, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), as amended by Act Feb. 5, 1903, c. 487, § 12, 32 Stat. 799 (U. S. Comp. St. Supp. 1911, p. 1503), that claims of creditors who have received voidable preferences, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section 67e, have been made or given, "shall not be allowed unless such creditors shall surrender such preferences, conveyances," etc., and of section 65a, that "dividends of an equal per cent. shall be declared and paid on all allowed claims except such as have priority or are secured," the fact that a creditor received a conveyance of property from a bankrupt with intent to hinder, delay, or defraud other creditors, does not authorize the court, after he has reconveyed such property to the trustee and his claim has been allowed, to postpone its payment until other creditors have been paid in full.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 547; Dec. Dig. § 360.*]

Appeals from the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

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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 the Wenatchee Heights Orchard Company, bankrupt. Cross-appeals by L. V. Wells and J. B. Lincoln, trustee, from an order (209 Fed. 84) allowing the claim of said Wells, but postponing its payment until payment of all other claims. Modified on appeal of claimant, and, as modified, affirmed.

See, also, 212 Fed. 787.

Corwin S. Shank and Horatio C. Belt, both of Seattle, Wash., for claimant.

Raymond D. Ogden, and Walter Schaffner, both of Seattle, Wash., for trustee.

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

ROSS, Circuit Judge. These are cross-appeals—the trustee complaining of the judgment of the court below approving the order of the referee in bankruptcy allowing the claim of the appellant against the bankrupt's estate, and the appellant and claimant Wells contending that the judgment is erroneous, in that, while approving the order of the referee allowing Wells' claim in the sum of $56,389.16 against the estate, it denied him "the right to receive any dividends on his said claim out of the proceeds realized" from certain property afterwards to be mentioned, until the claims of all other creditors of the bankrupt should be fully satisfied.

[1] In respect to the appeal of the trustee, it is sufficient to say that both the referee and the court below found against the contention that the claim of Wells was invalid, with which conclusion the evidence does not justify us in interfering.

[2] The property referred to was property conveyed by a certain corporation, styled "Wenatchee Heights Orchard Company," in which Wells was largely interested, and of which he and one McPherson had control, to another corporation, styled "Summit Investment Company," which they caused to be incorporated, and which they also controlled, for the purpose, as the referee found from the evidence in the case, of hindering and delaying the other creditors of the Wenatchee Heights Orchard Company in the collection of their demands, but which the court below, in reviewing the evidence, held was done for the purpose, on the part of Wells and his associate, of defrauding the other creditors of the Wenatchee Heights Orchard Company. The record shows that subsequent to the adjudication of the Wenatchee Heights Orchard Company as a bankrupt all of the said property was reconveyed to the trustee by the Summit Investment Company mainly through the action of Wells.

Assuming, as the court below held in effect, that there was actual fraud on Wells' part in the transfer of the property from the Wenatchee Heights Orchard Company to the Summit Investment Company, the real question in the case is whether that fraudulent intent of Wells justifies the postponement of his adjudged valid claim against the bankrupt's estate until after the claims of all of its other creditors are fully satisfied. We are of the opinion that the existing Bankruptcy

Act, as well as the decisions of the courts, requires a negative answer to the question.

The Bankruptcy Act of 1867 as originally enacted did by section 39 thereof provide that, where an insolvent debtor should be adjudged a bankrupt under its provisions, the assignee in bankruptcy might recover back the money or other property paid, conveyed, sold, assigned, or transferred contrary to the provisions of the act, "provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, or that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy." Act March 2, 1867, c. 176, 14 Stat. 536. The latter proviso was by the act of June 22, 1874 (18 Stat. 178, 181, c. 390), so amended as to read as follows:

"Provided, that the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in cases of actual fraud an his part, be allowed to prove for more than a moiety of his debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy."

So, as correctly stated for the appellant Wells, the framers of the present Bankruptcy Act had before them the original act of 1867, providing that in case of actual fraud on the part of a creditor he should lose his entire debt, as well as the amendment of 1874, reducing such penalty in such cases to one-half of the debt; and yet, in passing the present act, Congress omitted any such provision, and while declaring void, as it did by section 67 (e), all conveyances, transfers, assignments, and incumbrances of property made "with the intent and purpose * * * to hinder, delay, or defraud * * * creditors," regardless of any such fraud, or of any fraud in connection with an attempt to obtain a preference, provided in effect that all valid claims against the bankrupt should stand on an equal footing after the surrender of all preferences and fraudulent conveyances that had been obtained—section 57 (g) of the present act expressly declaring that "the claims of creditors who have received preferences, voidable under section sixty, subdivision b, or to whom conveyances, transfers, assignments, or incumbrances, void or voidable under section sixty-seven, subdivision e, have been made or given, shall not be allowed unless such creditors shall surrender such preferences, conveyances, transfers, assignments, or incumbrances;" and section 65 (a) providing that "dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured"—the bankruptcy courts being given by section 2 (2) power to "allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates." Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418).

In Keppel v. Tiffin Savings Bank, 197 U. S. 356, 25 Sup. Ct. 443, 49 L. Ed. 790, after alluding to the fact that Congress plainly intended by the amendment of June 22, 1874, of the act of 1867, to make a change in the rigor of the rule previously obtaining, the Supreme Court distinctly held that it cannot be assumed that it intended to inflict the penalty formerly imposed because the present act contains the

provision that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences," saying (197 U. S. at page 373, 25 Sup. Ct. 449, 49 L. Ed. 790):

"When, therefore, Congress, in adopting the present act, omitted to re-enact the provision of the act of 1867 from which alone the penalty or forfeiture arose, it cannot in reason be said that the omission to impose the penalty gives rise to the implication that it was the intention of Congress to re-enact it. In other words, it cannot be declared that a penalty is to be enforced because the statute does not impose it."

In the case last cited the Supreme Court further said (197 U. S. page 363, 25 Sup. Ct. 445, 49 L. Ed. 790):

"It is argued, however, that courts of bankruptcy are guided by equitable considerations, and should not permit a creditor who has retained a fraudulent preference until compelled by a court to surrender it to prove his debt, and thus suffer no other loss than the cost of litigation. The fallacy lies in assuming that courts have power to inflict penalties although the law has not imposed them."

See, also, Page v. Rogers, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332.

In its last act upon the subject, Congress seems indeed to have proceeded upon the principle applicable to courts of equity thus expressed by the Supreme Court in the case of U. S. Rubber Co. v. American Oak Leather Co., 181 U. S. 434, 452, 21 Sup. Ct. 670, 677 (45 L. Ed. 938):

"There is a wide difference between the case of a fraud ab initio, such, for instance, as a scheme to enforce a false or pretended indebtedness, so as to remove the assets of an alleged debtor from the reach of his bona fide creditors, and the case of an attempt by bona fide creditors to secure preferences for themselves, but using methods forbidden by statute or by the policy of law. In the former case, undoubtedly, a court of equity will refuse to permit the guilty parties to derive any profit or advantage from the fraudulent arrangement. In the latter case, a court of equity will not declare a forfeiture of just debts, or, by postponing them till all other creditors are satisfied, practically confiscate them, but will, while defeating the attempt to obtain a forbidden preference, leave such creditors to use and enjoy the same rights and remedies possessed by other creditors."

The cause is remanded to the court below, with directions to strike out the modification therein made of the referee's order, and, as thus modified, the judgment will stand affirmed, with costs in favor of the appellant, L. V. Wells, and against the appellee, J. B. Lincoln, as trustee in bankruptcy of the estate of Wenatchee Heights Orchard Company, a corporation, bankrupt.

MEIER & FRANK CO. v. SABIN.

(Circuit Court of Appeals, Ninth Circuit. May 25, 1914.)

No. 2369.

1. SALES (§§ 460, 465*)—CONDITIONAL SALES—VALIDITY.
Since there is no statutory provision in Oregon requiring the filing or recording of conditional sales nor that they be in writing, they may be verbal, if otherwise valid under the statute of frauds, and sufficiently definite and certain to comply with the ordinary rules of contract.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1348, 1353; Dec. Dig. §§ 460, 465.*]

2. BANKRUPTCY (§ 140*)—PROPERTY PASSING TO TRUSTEE—CONDITIONAL SALES—VALIDITY—DEFINITENESS.
Where a conditional contract for the sale of certain restaurant furniture recited that the property sold was described in the list attached, marked Exhibit A, but no list was attached, nor was the property otherwise identified in the agreement, and the invoice of the account kept by the seller on cards was nowhere identified as showing the goods intended to be covered by the agreement, it was invalid and subject to vacation at the instance of the buyer's trustee in bankruptcy exercising the rights of a lien creditor as authorized by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500).
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

3. SALES (§ 476*)—CONDITIONAL SALE CONTRACT—TERMINATION.
Where a contract of conditional sale purported to reserve title to goods sold to the amount of $1,500, and goods to that amount were sold, delivered to the buyer, and paid for, the contract was thereby discharged, and the seller, by virtue thereof, had no claim against goods of a similar character thereafter sold and delivered to the buyer without reference to the contract.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1407-1410; Dec. Dig. § 476.*
What constitutes a contract of conditional sale, see note to Dunlop v. Mercer, 86 C. C. A. 448.]

Appeal from the District Court of the United States for the District of Oregon; Chas. E. Wolverton, Judge.

Bill by R. L. Sabin, as trustee in bankruptcy of the Italian Restaurant Company, against the Meier & Frank Company, to determine the trustee's right in certain personal property in its possession, to remove a cloud on such title, and to restrain defendant from levying on the property, or in any manner interfering therewith, and from prosecuting certain suits to recover the same. Judgment for complainant, and defendant appeals. Affirmed.

Joseph & Haney and B. H. Goldstein, all of Portland, Or., for appellant.

Sidney Teiser, of Portland, Or., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This is a bill to determine the rights of the appellant to certain personal property in the possession of the ap-

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

pellee as trustee in bankruptcy of the Italian Restaurant Company, a corporation, which, previous to its bankruptcy, had been conducting the business of a restaurant in the city of Portland, state of Oregon. In disposing of the assets of the bankrupt corporation by the trustee, the appellant interposed an adverse claim to certain property in the possession of the trustee. The matter came before the referee in bankruptcy, and a hearing was had, but the appellant filed no reclamation petition, and upon a ruling by the referee that the title had passed, and that there was no conditional contract of sale out against the property, he directed the trustee to sell it. Thereupon the appellant brought suit against the trustee in the state court to recover the property. In the lower court the trustee claimed that, by the proceedings before the referee, the question of appellant's claim of title to the property had become res judicata. The court held that the evidence was not sufficient to establish such a judgment. As no appeal was taken from this feature of the court's judgment, that question is not before this court.

The property in controversy consists of furnishings, furniture, crockery, utensils, and other articles used in a restaurant. Appellant's claim of title was based originally upon a written agreement, dated November 26, 1912, wherein the appellant, as seller, agreed for the consideration of $1,500 to sell and transfer to the Italian Restaurant Company certain personal property described in a list which it was recited in the agreement was attached and marked Exhibit A. It was provided in the agreement that $750 of the consideration should be paid upon the execution and delivery of the contract, and the balance in monthly payments of $100, and that the title to the property should remain in the seller until each and all of the payments mentioned should have been made by the purchaser. The sale, if valid, was a conditional sale, but no list or exhibit of the property was attached to the agreement, nor was the property otherwise identified in the written agreement. There is evidence tending to prove that it was not the intention of the parties to attach a list to this contract, but that the contract should cover such goods as might be bought by the restaurant company from Meier & Frank Company in furnishing and fitting up the restaurant. There is also evidence that the total value of the goods and merchandise sold and delivered to the restaurant company amounted to $3,129.33, and that payments on the account had been made amounting to $1,564.60. The court below found the identification of the property was too indefinite and uncertain to constitute a conditional sale of any property in the possession of the trustee.

[1] There is no statutory provision in the state of Oregon requiring the filing or recording of conditional sales; nor are they required to be in writing. If otherwise valid under the statute of frauds, they may be verbal; but there is no relaxation of the rule requiring certainty in the terms and subject of the contract. Gregory v. North Pacific Lumber Co., 15 Or. 447, 452, 17 Pac. 143; Lee v. Cole, 17 Or. 559, 561, 21 Pac. 819; Flanagan Bank v. Graham, 42 Or. 403, 418, 71 Pac. 137, 790; Ayre v. Hixson, 53 Or. 19, 31, 98 Pac. 515, 133 Am. St. Rep. 819, Ann. Cas. 1913E, 659; Pomeroy's Equity Jurisprudence,

§ 1235. The finding of the court below must therefore stand, unless it is clearly erroneous.

[2] Section 8 of the act of June 25, 1910, amending section 47 of clause 2 of the act of 1898 (36 Stat. 840), provides that "such trustee, as to all property in the custody * * * of the bankruptcy court, shall be deemed vested with all rights, remedies, and property of a creditor holding a lien by legal or equitable proceedings thereon." Under this provision of the statute the trustee is not limited to such objections to a transaction between the bankrupt and a creditor as the bankrupt might have had, but he may make any objection that a creditor holding a lien might make. An agreement, therefore, which prior to this amendment would have been valid between the parties, may not be valid as against the trustee.

As has already been stated, the written agreement recites that the property sold was described in the list attached and marked Exhibit A; but no list was attached, nor was the property otherwise identified in the agreement. As the agreement stands, it is therefore meaningless and without effect; but it is possible that the bankrupt might not be permitted to make this objection if it were shown that the bankrupt had received the goods and had identified them by taking them into possession. But the trustee in bankruptcy, standing in the shoes of the bankrupt, with all the rights, remedies, and powers of a lien creditor with respect to all property in the custody of the bankrupt court, occupies a different position. He must carefully scrutinize all claims to property coming into his possession and maintain the custody of the court until a superior right of possession to the specific property is clearly established; and when such right is claimed to rest in an agreement between the bankrupt and the person claiming title, as under a conditional sale, the identification of the property must appear in the agreement. This identification, as we have seen, was not in the written agreement in this case, but, to meet this obviously necessary requirement, the appellant claims that there was a verbal identification of the property; that the sum of $1,500 was the estimated value of the goods to be delivered as required until the restaurant had been completely furnished and outfitted; that, as deliveries were made, the goods were to be invoiced and the invoices attached to the agreement; that the true consideration was to be the total purchase price of all such goods as were fixed and determined by the invoices. But, as no invoices were attached to the agreement, the claim is made that the goods sold were identified by the account kept by the appellant on indexed cards. A transcript of what purports to be an account on indexed cards is in the record, but there is no identification of the goods on these cards as the goods intended to be referred to in the agreement. The agreement is dated November 26, 1912. The index cards contain items charged in November and December, 1912, and January and March, 1913. It is clear that these charges are not identified by the agreement.

[3] It is further objected by the trustee that, even if the property has been sufficiently identified, the contract is no longer available to the appellant in support of a claim of title to it; that the contract of

conditional sale was for goods to the amount of $1,500; that this amount was the actual value of the purchase and the real consideration for the agreement; that goods to this amount were sold and delivered to the purchaser and were paid for, and the contract thereby discharged; that the title to such goods became thereupon vested in the purchaser. To this title the trustee in bankruptcy succeeded by virtue of the adjudication of bankruptcy. The remainder of the goods sold and delivered to the purchaser was in excess of the contract price of $1,500, and the sale thereof outside of the contract of conditional sale. These goods were therefore sold and delivered unconditionally, and the title thereto passed to the purchaser at the time of the sale, and by the bankruptcy proceedings the title to these goods became vested in the trustee in bankruptcy.

We are of the opinion that this last objection to appellant's claim of title to the property in controversy should be sustained, as well as the first objection.

The decree of the court below is affirmed.

PETERSON v. SABIN.

In re ROHRBACHER AUTOMATIC AIR PUMP CO.

(Circuit Court of Appeals, Ninth Circuit. May 25, 1914.)

No. 2354.

BANKRUPTCY (§ 178*) — CHATTEL MORTGAGE — SALE OF PROPERTY BY MORTGAGOR—FRAUD.

Where a bankrupt in good faith and for a present consideration executed a chattel mortgage on all its property in its designated place of business, etc., the mortgage providing that the bankrupt should have the right to sell and dispose of a portion of the property without liability to account for the proceeds to the mortgagee, it was not thereby rendered invalid in toto as against the bankrupt's trustee, but only to the extent of the property which the bankrupt was so authorized to sell.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264–274, 283, 284; Dec. Dig. § 178.*]

Petition to Revise Order and Judgment of, and Appeal from, the District Court of the United States for the District of Oregon.

In the matter of bankruptcy proceedings of the Rohrbacher Automatic Air Pump Company. J. H. Peterson petitions to revise in matter of law an order and judgment in favor of R. L. Sabin, as trustee of the bankrupt's estate, holding invalid in toto a chattel mortgage executed by the bankrupt to said petitioner, who also files a transcript of record upon appeal. Reversed and remanded.

Wood, Montague & Hunt, C. E. S. Wood, P. P. Dabney, and M. M. Matthiessen, all of Portland, Or., for petitioner and appellant.

Sidney Teiser, of Portland, Or., for respondent and appellee.

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

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

ROSS, Circuit Judge. The sole question for decision in this case is whether a chattel mortgage, given by the bankrupt corporation while a going concern, and duly executed and recorded, covering all the property of the mortgagor in its designated place of business in the city of Portland, consisting of machinery, tools, equipment, supplies, office furniture, and fittings, and safe, and the good will of the business, and "any and all patents owned by it [the mortgagor], and contracts and royalties, and its leasehold interest in said premises known as No. 173 East Water Street, Portland, Oregon," to secure certain money at the time borrowed of the mortgagee, the petitioner and appellant here, is void in toto because of the stipulated fact that the parties to the mortgage agreed, at the time of its execution, that the mortgagor "should continue to conduct its business of manufacturing and selling pumps at wholesale and retail, and that such pumps should be made out of materials then on hand and that the proceeds of such sales, together with the proceeds of the sale of such pumps as were on hand at the time the mortgage was executed should be used by the mortgagor as it saw fit," the stipulation further setting forth that the power of sale thus reserved was not intended to and did not extend to the machinery, tools, equipment, office furniture, and fittings, and safe covered by the mortgage, and further setting forth that the assets of the mortgagor at the time of the execution of the mortgage consisted, not only of such machinery, tools, equipment, office furniture, and fittings, and safe, but also "of numerous pumps already manufactured, and also considerable supplies and materials, a large portion of which were subsequently made into pumps, and which, together with the pumps on hand at the time of the execution of the mortgage, were sold without objection, and with the implied consent of the mortgagee." It was further stipulated between the parties "that the actual intention with which the mortgage was given was not fraudulent, but by this stipulation it is not intended either to admit or deny that there was not an implied fraudulent intent," and, further, that the said "J. H. Peterson at the time of advancing said $3,000, and of accepting said mortgage as security for its repayment, had no actual knowledge that said Rohrbacher Automatic Air Pump Company had any creditors other than those whose claims were to be satisfied by said loan," which money, the stipulation states, was borrowed "to be applied upon its debts." Unless it be that the Oregon law is otherwise, we think the mortgage in question should be held void only in so far as concerns that portion of the mortgaged property that the respective parties agreed the mortgagor should have the right to sell and dispose of without accounting for the proceeds thereof to the mortgagee.

The Supreme Court, in the case of Etheridge v. Sperry, 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 171, having under consideration a chattel mortgage executed in the state of Iowa, thus concluded its opinion:

"The matter is not one of purely general commercial law. While chattel mortgages are instruments of general use, each state has a right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the

transfer of property are primarily, at least, a matter of state regulation. We are aware that there is great diversity in the rulings on this question by the courts of the several states; but whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each state as decisive in respect to any case arising therein. Union Bank of Chicago v. Kansas City Bank, 136 U. S. 223 [10 Sup. Ct. 1013, 34 L. Ed. 341]. Indeed, if this were an open question, we could not be blind to the fact that the tendency of this commercial age is towards increased facilities in the transfer of property, and to uphold such transfers so far as they are made in good faith; and it is at least worthy of thought whether the rulings made by the Supreme Court of Iowa do not tend to make chattel mortgages more valuable for commercial purposes, without endangering the rights of unsecured creditors. The law now generally requires a record of all such instruments, and that, like the recording of a real estate mortgage, gives notice to all parties interested of the fact and extent of incumbrances. Why should a transaction like this be condemned, if made in good faith and to secure an honest debt? The owner of a stock of goods may make an absolute sale of them to his creditor, in payment of a debt. If an absolute, why not a conditional, sale, with such conditions as he and his creditor may agree upon? As between the parties no court would question this right, or refuse to enforce the conditions. The interests of the general public are not prejudiced by any such transaction between debtor and creditor. In deed, they are rather promoted by any arrangement under which the mortgagor can continue in business, for in 99 cases out of a hundred the taking of possession by a creditor results in closing the business, and turning the debtor out of employment. The only parties who can claim to be injuriously affected are unsecured creditors. But they are notified by the record of the exact relations between the mortgagor and mortgagee; and surely subsequent creditors have no right to complain if they deal with the mortgagor with full knowledge of such relations. Existing creditors may, of course, challenge the good faith of the transaction, but if they cannot disturb an absolute sale when made in good faith, why should they be permitted to challenge a conditional sale if made in like good faith? The fact that fraudulent relations are possible is hardly a sufficient reason for denouncing transactions which are not fraudulent. So, if the question were open, or a new one, unaffected by any settled law of the state, we incline to the opinion that the question is not one of law, so much as it is one of fact and good faith."

We are to inquire, therefore, whether the question here presented has been directly or in effect determined by the Supreme Court of Oregon. That court has distinctly held that where a mortgagee has given the mortgagor unlimited power to dispose of the mortgaged property for his own use, the mortgage is void as to the creditors of the mortgagor, even though there was no actual fraudulent intent on the part of either of the parties to the mortgage. Orton v. Orton, 7 Or. 478, 33 Am. Rep. 717; Jacobs Bros. & Co. v. Ervin, Assignee, et al., 9 Or. 52.

So, also, has it been adjudged by that court that where such power of disposition by the mortgagor is limited to a part only of the mortgaged property the mortgage is void in toto if executed with an actual and positive fraudulent intent on the part of the mortgagor, knowingly acquiesced in by the mortgagee. Greig v. Mueller et al., 66 Or. 27, 133 Pac. 94, 46 L. R. A. (N. S.) 722, decided June 10, 1913. In the present case, however, it is expressly agreed that no actual fraud entered into the transaction in question.

The only decision of the Supreme Court of Oregon relied upon by the respondent and appellee as having determined the question here involved is that of Bremer & Co. v. Fleckenstein & Mayer, 9 Or. 266.

The facts of that case are, in substance, that one Haas mortgaged to Fleckenstein & Mayer a stock of wines, liquors, and cigars, and certain barroom fixtures. Haas being at the time indebted to Bremer & Co., the latter shortly after the mortgage was executed sued Haas and attached the mortgaged property, in which action Bremer & Co. recovered judgment for $289, with interest and costs taxed at $24.20. Fleckenstein & Mayer brought suit to foreclose their mortgage, in which suit the mortgaged property was sold under execution for $1,240, $200 of which was the proceeds of the wines, liquors, and cigars included in the mortgage, and the remainder the proceeds of the mortgaged fixtures and furniture. All of this money was paid into the hands of Fleckenstein & Mayer, against whom Bremer & Co., not having been made a party to the foreclosure proceedings, brought suit to recover the $289, with interest and costs, due from Haas, and obtained a decree against Fleckenstein & Mayer for $200 and the costs of the suit, which decree was affirmed by the Supreme Court of Oregon, the court saying:

"Haas was allowed to continue in possession of the mortgaged property, and keep his place of business open as usual, from the date of the execution of the chattel mortgage on June 2, 1879, until it was attached by respondents on July 7, 1879, with the full knowledge and consent of the appellants [which] is not denied. That the mortgage covered all his stock in trade, and that he continued to sell it off at retail during said period, with the knowledge and consent of the appellants, is not disputed. That he sold on credit as well as for cash during this period fully appears from the testimony. That he replenished his stock from time to time during this period, with the proceeds of such sales, and even patronized the appellants while so doing, is clearly proven. Haas testifies that Mayer, one of the appellants, told him not to sell at wholesale, but at retail only, at the time the mortgage was executed. Mayer himself was a witness, and did not dispute this. On the contrary, he seems to concede that Haas was to sell at retail, but claims he was only to sell for cash, and not to sell at wholesale. His testimony also fairly justifies the inference that Haas was to use such portion of the proceeds of sales made after the execution of the mortgage as might be necessary to meet his own personal expenses incurred in conducting the business, and keep his stock replenished. And this was just what he evidently did with the amounts received by him on account of sales of the mortgaged stock. Here, then, we find Haas, after the execution of the mortgage to appellants, carrying on his business in the same manner as before, selling off the mortgaged stock in trade, and paying his own expenses, and keeping up his stock by fresh purchases out of the proceeds of such sales, rendering no account to the holders of the mortgage, and in reality under no more restraint than if it had not been in existence. And yet its obvious effect was to ward off his other creditors, and hinder and delay the collection of their demands against him, and the appellants must be presumed to have so intended. We have no hesitation in declaring that such an arrangement was a fraud upon the other creditors, and cannot be upheld."

It is evident from the foregoing opinion that the trial court had held the mortgage void as to the wines, liquors, and cigars, but not as to the fixtures, for it only gave the complainant judgment for $200—the amount realized from the sale of the wines, liquors, and cigars—and Bremer & Co. not having appealed, the only question presented to the Supreme Court was whether the mortgage was void to the extent it was so declared by the court below. It is manifest, therefore, that the question now before us was not decided in the case of Bremer & Co.

v. Fleckenstein & Mayer, nor has it been determined in any other decision of the Supreme Court of Oregon that has been cited, or that we have been able to find.

We, therefore, think the case in hand should be disposed of in accordance with the views of the Supreme Court of the United States as expressed in Etheridge v. Sperry, supra, and which we think accords with the substantial justice of the case.

It results that the judgment must be, and hereby is, reversed, and the cause remanded to the court below for further proceedings in accordance with the views indicated.

TIERNAN et al. v. CHICAGO LIFE INS. CO.

CHICAGO LIFE INS. CO. v. TIERNAN et al.

(Circuit Court of Appeals, Eighth Circuit. May 11, 1914.)

Nos. 3904, 3905.

1. APPEAL AND ERROR (§ 671*)—RECORD—MATTERS PRESENTED FOR REVIEW.
Where the evidence was not in the record, the referee's findings were neither confirmed, rejected, nor modified, nor the exceptions thereto or to his conclusions of law passed upon, and it was impossible to tell from the record whether the judgment was based solely on the pleadings, on the pleadings and the report of the referee, or involved also a consideration of the evidence, the merits of the case could not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867–2872; Dec. Dig. § 671.*]

2. APPEAL AND ERROR (§ 209*)—RESERVATION OF GROUNDS OF REVIEW—SUFFICIENCY OF EVIDENCE.
When an action at law is tried by the court upon a written waiver of a jury, the sufficiency of the evidence to support the judgment will not be reviewed, in the absence of a request by the complaining party at the close of the evidence, for a finding or judgment in his favor or special findings by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1290–1298, 1300, 1303; Dec. Dig. § 209.*]

3. APPEAL AND ERROR (§ 848*)—REVIEW—SUFFICIENCY OF FINDINGS TO SUPPORT JUDGMENT.
When a jury has been waived in writing, and the findings of the referee have been confirmed by the trial court as reported or as modified by it, the sufficiency of the facts found to warrant the judgment will be reviewed as though the findings were wholly made by the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3372–3376; Dec. Dig. § 848.*]

4. COURTS (§ 352*)—UNITED STATES COURTS—PROCEDURE—CONFORMITY TO STATE PRACTICE.
When there is a written waiver of a jury, and the cause has been referred to a referee under the authority of a state statute, the referee and the trial court should follow the local practice and modes of proceeding as near as may be in accordance with the Conformity Act.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 926–932; Dec. Dig. § 352.*

Conformity of practice in common-law actions to that of state court, see notes to O'Connell v. Reed, 5 C. C. A. 594; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 392.]

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

5. REFERENCE (§ 99*)—FINDINGS OF REFEREE—CONCLUSIVENESS.
Under Gen. St. Kan. 1909, § 5894 (Code Civ. Proc. § 300), providing that a trial before referees is conducted in the same manner as a trial by the court, and that the report stands as the decision of the court and judgment may be entered thereon, and that, when the referee is to report the facts, the report has the effect of a special verdict, the referee's findings of fact, as reported, stand beyond question except when and to the extent assailed by one or both of the parties.
[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 148–156; Dec. Dig. § 99.*]

6. REFERENCE (§ 100*)—REPORT—EXCEPTIONS—PROCEDURE.
Under Gen. St. Kan. 1909, § 5894 (Code Civ. Proc. § 300), providing that a trial before a referee is conducted in the same manner as a trial by the court, and that the referee must state the facts found and the conclusions of law separately, and section 5891 (section 297) providing relative to trials by the court that, if requested, the court shall state in writing the conclusions of fact found separately from the conclusions of law, the trial court should have considered the exceptions to the referee's findings and conclusions and should have confirmed, rejected, or modified the findings or recommitted the questions involved to the referee.
[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 157–168; Dec. Dig. § 100.*]

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

Action by Robert S. Tiernan and another, partners as Tiernan & Stout, against the Chicago Life Insurance Company, in which defendant interposed a cross-demand. To review a judgment denying a recovery to both parties, each party brings error. Reversed and remanded.

William P. Dillard, of Ft. Scott, Kan. (Willard W. Padgett, of Ft. Scott, Kan., on the brief), for Robert S. Tiernan and others.

Charles Blood Smith, of Topeka, Kan., and John Barton Payne, of Chicago, Ill. (Winston, Payne, Strawn & Shaw, of Chicago, Ill., on the brief), for Chicago Life Ins. Co.

Before HOOK, ADAMS, and SMITH, Circuit Judges.

HOOK, Circuit Judge. Tiernan & Stout sued the Chicago Life Insurance Company for $592,322.86 as damages for the breach of an agency contract. The answer of the defendant company contained a denial of the breach charged and a cross-demand for $14,346.96 for moneys paid and advanced on plaintiffs' account. A jury was waived by written stipulation, and with consent of the parties the cause was referred to a referee, who was directed to report findings of fact and conclusions of law and to return the testimony into court. The referee heard the cause, returned all the evidence before him, reported his findings of fact and conclusions of law, and recommended judgment for plaintiffs for $64,826.87 and interest. The defendant excepted to 10 of the 42 findings of fact, to 6 of the 13 conclusions of law, and to the refusal of the referee to make certain findings requested. The defendant also moved the trial court for judgment in its favor "upon the pleadings and record in the cause." The plaintiffs were satisfied with the findings of fact but excepted to four of the conclusions of

law and moved that the report be modified accordingly and confirmed as modified. At the hearing of the motions and exceptions, the trial court held that neither party was entitled to recover from the other, and entered judgment in conformity with that holding. Each of the parties prosecuted a writ of error.

[1] At the threshold we are confronted by an insuperable obstacle to the consideration of those assignments of error which relate to the merits of the controversy. We are unable to determine with sufficient certainty whether the judgment of the trial court proceeded solely upon the pleadings, or upon the pleadings and the report of the referee, or involved also a consideration of the evidence. The various recitals in the transcript tend to support each supposition. If evidence was considered by the court, even though it was undisputed, long-settled principles of procedure in trials of actions at law without a jury prevent us, in the present state of the record, from reviewing its sufficiency. The court made no special findings of its own. The record before us consists solely of the pleadings, the stipulation and order of reference, the report of the referee exclusive of the evidence, the motions and exceptions of the parties above described, and the judgment, and no question based on the evidence whether before the referee or the court is so presented that we can take cognizance of it. In one aspect of the transcript it would seem that the court put aside the findings and conclusions of the referee and decided the cause partly upon its own consideration of evidence. By the judgment entry the findings of the referee were neither confirmed, rejected, nor modified, nor were the exceptions thereto or to his conclusions of law passed upon. The motion of defendant, which was for judgment "upon the pleadings and record in the cause," is variously referred to in the judgment entry as one for judgment "notwithstanding the said report of said referee," for judgment "on the pleadings, the undisputed evidence and findings of the referee, notwithstanding said report," and for judgment "on the pleadings and findings of the referee, notwithstanding the report of the referee to the contrary." As last characterized, the motion is recited in the judgment entry as being sustained, but immediately following is the further recital, somewhat inconsistent:

"That, in view of the opinion of the court upon the motion of defendant for judgment in its favor, it is unnecessary for the court to consider or pass upon the report of the special referee or upon the exceptions of either party thereto."

If, as last recited, the court did not consider the report at all, then, unless evidence was considered, the judgment must have been upon the pleadings. In that case a question of law would arise for our notice, but counsel agree that the pleadings alone will not sustain the judgment of the court. We are also of that opinion. The difficulty we have is emphasized by the two opinions of the trial court, copies of which have been transmitted with the record as required by a rule of this court. In Loeb v. Columbia Township Trustees, 179 U. S. 472, 482, 21 Sup. Ct. 174, 179 (45 L. Ed. 280), the Supreme Court, in construing a like rule of their own, said that, while they could not refer to the opinions to ascertain "the evidence or the facts found below

upon which the judgment was based," they could do so in order to be "informed of the grounds upon which the court below proceeded. Unless the rule had at least that object, why should it have been adopted?" When there is, as here, so much uncertainty in the record proper, we think we may refer to the opinions of the trial court to discover the character of the matters considered in rendering judgment. In the first opinion the court said:

"Under all the facts and circumstances of this case, the terms of the contract between the parties being considered, I am of the opinion," etc.

Again:

"The evidence further shows from a voluminous correspondence conducted by plaintiffs," etc.

Again:

"However this position does not find support in the evidence or findings of fact of the referee."

It concludes with the statement that:

"The motion for judgment in favor of defendant on the pleadings, the undisputed evidence and findings of the referee, notwithstanding the report to the contrary, must be sustained."

In the second opinion, by which defendant was denied recovery on its cross-demand, its motion for judgment sustained in the first opinion is styled a "motion for judgment on the pleadings." As already observed, if the judgment was on the pleadings alone, it cannot be sustained. If evidence was considered by the trial court, we cannot review it because the evidence is not here, and, if it were here, the proper foundation for a review was not laid. If the pleadings and findings of fact were the basis of the judgment, still we cannot review it because no disposition of the exceptions to the findings was made.

[2-4] The following principles indicate the limitations upon our power of review and the proper practice of trial tribunals in cases like that at bar. It is a rule so well settled as not to require the citation of authority that, when an action at law is tried by a court upon a written waiver of a jury, the sufficiency of the evidence to support the judgment will not be reviewed by an appellate court in the absence of a request by the complaining party at the close of the evidence for a finding or judgment in his favor or special findings by the trial court of the facts established. An opinion of the trial judge analyzing the facts cannot be taken as a special finding. Keeley v. Ophir Hill, etc., Co., 95 C. C. A. 96, 169 Fed. 598. It was at one time questioned whether there could be a review in an appellate court of the United States where the facts were found by a referee (Boogher v. Insurance Co., 103 U. S. 90, 95, 26 L. Ed. 310), but it is now settled that when a jury has been waived in writing, and the findings of the referee have been confirmed by the trial court as reported or as modified by it, the question whether the judgment rendered was warranted by the facts found will be reviewed by the appellate court as though the findings were wholly made by the trial court itself (C., M. & St. P. R. Co. v. Clark,

178 U. S. 353, 364, 20 Sup. Ct. 924, 44 L. Ed. 1099). In Board of Commissioners v. Sherwood, 11 C. C. A. 507, 64 Fed. 103, this court said:

"The record shows that the circuit court 'adopted each finding of fact made by the referee as findings of fact made by the court,' and in view of that statement we have treated the case precisely as if it came to this court on a special finding of facts made by the trial court. Boogher v. Insurance Co., 103 U. S. 90 [26 L. Ed. 310]. The questions open for review on the writ of error that has been sued out are those, and none other, which might have been reviewed if the trial had actually taken place before the court under a written stipulation waiving a jury, and the court had made a special finding of the facts."

When the trial court has referred a cause to a referee instead of trying it itself, it is important in determining its power over the subsequent proceedings to know whether the reference was at common law or was under the local practice of the state where the court was held. In Dundee Mortgage Co. v. Hughes, 124 U. S. 157, 160, 8 Sup. Ct. 377, 378 (31 L. Ed. 357), it was said:

"It is undoubtedly true that under a common-law reference the court has no power to modify or to vary the report of a referee as to matters of fact. Its only authority is to confirm or reject, and, if the report be set aside, the cause stands for trial the same as if it had never been referred."

On the other hand, state statutes have frequently been regarded as the source of authority for references of actions at law in the courts of the United States, and in some cases though no specific mention of the statutes was made in the order. Boatmen's Bank v. Trower Bros. Co., 104 C. C. A. 314, 181 Fed. 804; Dietz v. Lymer, 10 C. C. A. 71, 61 Fed. 792, on rehearing 11 C. C. A. 410, 63 Fed. 758; United States v. Ramsey (C. C.) 158 Fed. 488; Dundee Mortgage Co. v. Hughes, supra. When there is a written waiver of a jury, and the cause has been referred to a referee under the authority of a state statute, the referee and the trial court should thereafter follow the local practice and modes of proceeding "as near as may be" in accordance with the Conformity Act as generally construed. See United States v. Ramsey, supra.

[5, 6] It is clear, we think, that the reference of the case at bar was under the Kansas statute. The order recites a cause for reference mentioned in the statute and also the consent of both parties as therein authorized. Section 5892, G. S. Kan. 1909 (Code Civ. Proc. § 298), provides that all or any of the issues in an action whether of fact or of law or both, may be referred. Section 5894 (section 300) provides:

"A trial before referees is conducted in the same manner as a trial by the court. * * * They must state the facts found and the conclusions of law separately, and their decisions must be given and may be reviewed in like manner. The report of the referees upon the whole issue stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the referee is to report the facts, the report has the effect of a special verdict."

The findings of fact by a referee, as reported to the court, stand beyond question except when and to the extent assailed by one or both of the parties. Campbell v. Phillips, 28 Kan. 753; Martsolf v. Barnwell, 15 Kan. 612, 617. Section 5891 (section 297), relating to trials of questions of fact by the court, has a reflex bearing upon the proper practice before referees. It provides that the court shall, if one of the

parties request it, "state, in writing, the conclusions of fact found, separately from the conclusions of law." In Vickers v. Buck, 70 Kan. 584, 79 Pac. 160, it was held "error for the court to refuse the request, or to refuse to make such separate findings so definite that the party may have a fair opportunity to except to the decision of the court upon the conclusions of law involved in the trial." In the case at bar we think the foregoing considerations and the interests of justice required the trial court to consider the exceptions and to confirm, reject, or modify the findings of fact or to recommit the questions involved to the referee. Only in that way would the letter and intent of the statute be observed and the rights of the parties to a review be secured.

The judgment is reversed, and the cause remanded for further proceedings in conformity with this opinion.

HILL v. WESTERN ELECTRIC CO. et al.

In re RANKIN.

(Circuit Court of Appeals, Sixth Circuit. June 2, 1914.)

No. 2581.

1. BANKRUPTCY (§ 460*)—APPEAL FROM ADJUDICATION—PARTIES—DISMISSAL.
Where, after a motion to dismiss an appeal from a bankruptcy adjudication because the bankrupt was not joined as a party, he voluntarily entered his appearance, waiving notice of the appeal, and in terms submitted himself to the jurisdiction of the court as fully as though he had been duly and formally cited, and also waived time for filing the brief and other proceedings, he thereby became a party to all intents and purposes as though originally joined, and the motion to dismiss would be denied.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 919; Dec. Dig. § 460.*

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 60*)—ACTS OF BANKRUPT—APPOINTMENT OF RECEIVER.
Bankr. Act July 1, 1898, c. 541, § 3a, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), as amended by Act Feb. 5, 1903, c. 487, § 2, 32 Stat. 797 (U. S. Comp. St. Supp. 1911, p. 1493), provides that acts of bankruptcy by a person shall consist of his having (4) made a general assignment for his creditors, or, being insolvent, applied for a receiver or trustee for his property, or, because of insolvency, a receiver or trustee has been placed in charge of his property under the laws of the state. *Held* that, where an alleged bankrupt was insolvent in fact at the time he presented a petition for the appointment of a receiver for his property in order to prevent the cancellation of a contract for the sale of an electric plant, such act constituted an act of bankruptcy, regardless of the fact that his purpose in making such application was not to liquidate his assets and distribute them among his creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. § 60.*]

Appeal from the District Court of the United States for the Northern District of Ohio; William R. Day, Judge.

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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 proceedings to adjudge E. H. Rankin a bankrupt. On petition of the Western Electric Company and others. From an adjudication (210 Fed. 529), J. C. Hill, receiver of the Elyria Gas Power Company, appeals. Affirmed.

A. T. Hills, of Cleveland, Ohio, for appellant.
J. C. Fisher, of Cleveland, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This is an appeal from an order adjudging E. H. Rankin a bankrupt. Section 25a, Bankruptcy Act; section 130, Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 [U. S. Comp. St. Supp. 1911, p. 194]). An involuntary proceeding was begun by petition of certain of his creditors alleging, among other things, that, within four months, Rankin had committed an act of bankruptcy by applying to the court of common pleas of Portage county, Ohio, "for the appointment of a receiver for his property in behalf of creditors, being then insolvent." Rankin had been engaged in business at Hiram (in the county before mentioned), under the name of the Hiram Electric Company. The proceeding was resisted by appellant as receiver of the Elyria Gas Power Company, which was a creditor of the bankrupt. It was admitted in the answer of appellant that Rankin had applied for the appointment of a receiver of certain of his property in the action before referred to, wherein Rankin was plaintiff and the Hiram College and its board of trustees were defendants; and, while in effect admitting that a receiver had been appointed, it was denied in the answer (though not alleged in the petition) that the appointment was made on account of the insolvency of Rankin, and such insolvency was denied for want of knowledge. It was in substance alleged in the answer that the application for the receiver was made for the purpose only of preventing the college and the trustees, as vendors of certain property held by Rankin under a conditional sale contract, from wrongfully taking possession of the same with certain additional property under a claimed right to forfeit the contract. In the reply of the petitioning creditors, the right of appellant to oppose adjudication was denied on the ground that his company, the Elyria Gas Power Company, claimed to be a secured creditor; but nothing is shown as to the extent of the alleged security. At the hearing Rankin's petition for such appointment of a receiver was offered in evidence, together with a stipulation, in which it was agreed: (1) That Rankin would, if permitted, testify that at the time he filed such petition he believed his assets to be worth $11,000 and his liabilities to be $10,000, and that his application for a receiver "was not made with the purpose on his part of liquidating his assets and distributing them to creditors"; and (2) "that, in fact, said Rankin was at the time insolvent, and his assets were worth not more than $7,500, and his liabilities were about $10,000."

[1] The bankrupt was not made a party to the proceedings taken on the appeal to this court, and the appellees have moved to dismiss for

that reason. It is to be observed that this does not involve the objection made below, though not here, to the right of appellant, as a creditor, either to oppose the adjudication or to maintain the appeal. Since the date of the motion to dismiss, Rankin has voluntarily entered his appearance in the present proceeding, waiving notice of the appeal, and in terms submitted himself to the jurisdiction of the court "in this matter as fully as though he had been duly and formally cited on the said appeal," and has also waived "time for filing of brief and other proceedings herein." No objection has been made to this, and, on the contrary, counsel for the motion to dismiss have since confined their attention to the merits of the order of adjudication. The bankrupt has presented no objection to the action of the court below; and the issue is contested here only by the appellant and appellees as creditors of the bankrupt. In these circumstances we are disposed to treat the record as including the bankrupt at least as a party appellee. Richardson v. Green, 130 U. S. 104, 114, 115, 9 Sup. Ct. 443, 32 L. Ed. 872; Dayton v. Lash, 94 U. S. 112, 24 L. Ed. 33. He has been given ample opportunity to be heard on the appeal, and so the rule and the reason for requiring his presence (that is, that the successful party shall be at liberty to enforce the decree against parties who do not desire to have it reviewed, and the appellate tribunal shall not be required to decide the same question on the same record more than once) are practically satisfied (Masterson v. Herndon, 77 U. S. [10 Wall.] 416, 417, 19 L. Ed. 953; Davis v. Mercantile Trust Co., 152 U. S. 590, 593, 14 Sup. Ct. 693, 38 L. Ed. 563; In re Dandridge & Pugh, 209 Fed. 838, 126 C. C. A. 562 [C. C. A. 7th Cir.]), although the time within which Rankin might have appealed has long since expired. Questions like this are regulated by the rule governing appeals in equity in the courts of the United States. General Order in Bankruptcy, No. 36 (89 Fed. xiv, 32 C. C. A. xxxvi). The rule in equity, as well as the federal statutory policy, is liberal in allowing amendments respecting any defect in process or pleading. 1 Foster, Fed. Prac. (3d Ed.) §§ 160, 161, et seq.; Browning v. Boswell, 209 Fed. 788, 791, 126 C. C. A. 512 (C. C. A. 4th Cir.). It is not suggested that the practice in this respect in equity or bankruptcy is less liberal than it is at law (Carey v. Donohue, 209 Fed. 328, 330, 126 C. C. A. 254 [C. C. A. 6th Cir.]); and the course we are now pursuing is well within the reason of the kindred rule recognized in appellate courts in cases at law (Teel v. Chesapeake & O. Ry. Co. of Virginia, 204 Fed. 914, 917, 123 C. C. A. 210 [C. C. A. 6th Cir.], and citations). The motion to dismiss must therefore be overruled.

[2] The remaining question concerns the order of adjudication. Section 3a of the Bankruptcy Act provides:

"Acts of bankruptcy by a person shall consist of his having * * * (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state. * * *"

Under the issue presented and the order entered thereon in this case, as stated, Rankin did, while insolvent, apply for a receiver for his

property, and so, according to the letter of the statute, did commit an act of bankruptcy. The record does not show that he possessed any other property than that described in his petition in the Portage common pleas and embraced in the application for receivership. The property described in the petition consisted of an electric lighting plant located in the village of Hiram. Rankin purchased the plant from Lloyd M. Hill, subject to a contract between Hill and the Hiram College, in substance binding the former to pay the latter the purchase price through supply of light to the college buildings and campus at an agreed rate per kilowatt. Rankin subsequently improved the plant and obtained from the village a grant to use the streets for electric lighting. The plant, however, was damaged by lightning; and, under the contract before mentioned, title to the original plant and to any improvements made upon it was reserved and given to the college until the purchase price was paid, with the further right to take exclusive possession and to terminate the contract in case of default. Rankin alleged in his petition that the college proposed to retake the property and put an end to the contract, that he was without means to replace the generator and repair the damage caused by lightning, and was owing debts which he was unable to pay, and for which suits were then pending to recover judgments against him and to levy upon his property. It is thus observable that this property and its management apparently involved the business and assets which Rankin was engaged in and using to supply electric light both to the college and the village; and, in the presence of such averments and the stipulation as to his actual insolvency, it is vain to say that his application was not within the spirit as well as the letter of the statute defining the act of bankruptcy charged. The language of the statute is specific, and to permit a debtor in effect to qualify it by an intent founded on a false notion of his solvency and ability to protect his creditors would be to subvert rather than to administer the law.

It is settled that to make a general assignment for the benefit of creditors is to commit an act of bankruptcy regardless of the solvency or insolvency of the assignor, because the language of the statute discloses an intent to make such an assignment alone an act of bankruptcy. West Co. v. Lea, 174 U. S. 590, 592, 595, 19 Sup. Ct. 836, 43 L. Ed. 1098; Bryan v. Bernheimer, 181 U. S. 188, 193, 21 Sup. Ct. 557, 45 L. Ed. 814. The language thus construed is immediately associated with that now in dispute; and, since the adjudication under review was based upon the debtor's admitted application for a receivership while insolvent, there can be no escape from the principle involved in those decisions. Despite the stipulation that Rankin would testify that, when applying for a receiver, it was not his purpose to liquidate his assets and distribute "them to creditors," the appointment was certain to remove the possession and control of his property to the receiver for administration according to orders of the court appointing him; and, in view of the conceded insolvency of the debtor, it cannot for a moment be presumed that the court would have declined to enforce the rights of the college and the creditors. The case does not differ, then, from what it would have been if Rankin had

admitted insolvency in his petition for a receiver; and hence every reason exists for testing his acts by the paramount rule of the bankruptcy law. Exploration Mercantile Co. v. Pacific H. & S. Co., 177 Fed. 825, 840, 101 C. C. A. 39 (C. C. A. 9th Cir.). See, also, Blackstone v. Everybody's Store, 207 Fed. 752, 755, 125 C. C. A. 290 (C. C. A. 1st Cir.), where the applicable rule is tersely stated, though the fact of insolvency failed of proof. And see reasoning of Judge Wallace in Re Spalding, 139 Fed. 244, 246, 71 C. C. A. 370 (C. C. A. 2d Cir.), although the case itself is not in point; 1 Loveland on Bankruptcy (4th Ed.) § 155, p. 333; Collier on Bankruptcy (8th Ed.) 1910, p. 84.

We therefore concur in the conclusion reached in this case by Judge Day ([D. C.] 210 Fed. 529); and accordingly the order below is affirmed, with costs.

ERIE R. CO. v. BURKE.

(Circuit Court of Appeals, Second Circuit. April 16, 1914.)

No. 209.

RAILROADS (§ 356*)—PERSONS ON TRACK—INJURIES—CARE REQUIRED.

Plaintiff, while walking across one of defendant's main tracks at a place where the railroad company for years had permitted the public to cross, though not a regular public crossing, slipped and caught his foot between a switch point and a rail, and, being unable to extricate himself, was run down by an approaching engine, and suffered the loss of a leg. It also appeared that the public use of the place where plaintiff crossed the tracks had been open, constant, and notorious for a long period, and had been with the acquiescence of the railroad company without any attempt to withdraw its permission to the public to so use its premises. *Held*, that plaintiff was not a trespasser, and that the railroad company was bound to exercise reasonable care to prevent injuring persons in plaintiff's situation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1228–1234; Dec. Dig. § 356.*

Care required of railroads as to trespassers on or near tracks, see note to Louisville & N. R. Co. v. Womack, 97 C. C. A. 566.]

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

Action by Martin Burke against the Erie Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant herein was the plaintiff below, and the plaintiff herein was the defendant below, and they will hereafter be so referred to.

The plaintiff asserts that he is a citizen and subject of the kingdom of Great Britain and that for a number of years he has been a resident of the state of Ohio.

The defendant is a corporation, organized, incorporated, and doing business under the laws of the state of New York and which operated and still operates a railroad in the city of Cleveland in the state of Ohio.

The action was brought to recover for personal injuries which the plaintiff received in an attempt to cross the tracks of the defendant company in Cleveland. The plaintiff in his petition alleged that on August 11, 1909, in the early dusk of the evening, while going to his work as an employé of the

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

American Steel & Wire Company, he stepped onto the right of way of the defendant in the act of walking across one of its main tracks in order to get to his place of work, and while so proceeding slipped and caught his right foot between the rails of one of the switch tracks and main tracks and was held fast so that he could not extricate himself; that while he was in this situation the employés of the defendant in charge of an engine and several cars negligently ran down upon him; that he was only able to throw himself outside of the rail leaving the foot and lower part of his leg between the rails cutting off his foot; that before he stepped upon the track he looked in both directions and the locomotive which ran over his leg was not then in sight; that the employés in charge of the locomotive, knowing that the right of way at the place where the accident occurred was extensively used as a footpath, were guilty of negligence; and that if they had been in the exercise of ordinary care they could have seen the plaintiff in his perilous position with his foot caught, waving his arms and hallooing and whistling, in ample time and sufficiently far distant from him to have avoided running over him.

He demanded a judgment for $20,000.

Moot, Sprague, Brownell & Marcy, of Buffalo, N. Y., for plaintiff in error.

Henry W. Brush, of Buffalo, N. Y., and C. W. Dille and Sylvester V. McMahon, both of Cleveland, Ohio, for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This is an action to recover for personal injuries. The plaintiff in undertaking to cross the tracks of the defendant railroad caught his right foot in a switch point in the defendant company's railroad track. Four wheels of a locomotive engine in charge of the defendant's employés ran over the lower part of his leg. The leg was subsequently amputated about 5½ inches below the knee, and the plaintiff was obliged to be in a hospital for weeks and went about on crutches for 12 months.

The railroad company claims that the plaintiff was nothing more than a trespasser or at best a mere licensee toward whom it owed no duty except to refrain from wantonly or willfully injuring him. The defendant asserts that the plaintiff was not upon its tracks upon invitation, express or implied, nor because of any business connected with it, but was there upon his own volition, uninvited, concerning a matter which was personal to himself and in which the defendant had no interest; that as the plaintiff was using the tracks for his own convenience alone, and not for any purpose of business connected with the defendant and was in a place of known danger, he was there at his own risk and assumed the attendant perils.

The courts have held in numerous decisions that a licensee enters upon the premises at his own risk and enjoys the license subject to its concomitant perils. The rule has been so laid down in the courts of Ohio, where this accident occurred (Kelly v. Columbus, 41 Ohio St. 263), and by the courts of New York where this action was brought (Sterger v. Van Sicklen, 132 N. Y. 499, 30 N. E. 987, 16 L. R. A. 640, 28 Am. St. Rep. 594). And in a case in the Ninth Circuit the Circuit Court of Appeals decided, in Smith v. Day, 100 Fed. 244, 40 C. C. A. 366, 49 L. R. A. 108 (1900):

"That one going voluntarily in the prosecution of his own business on premises where blasting was being done by contractors, knowing that blasting was

going on, assumed the risks incident to the prosecution of the work with ordinary care, though he was there by sufferance or permission of the contractors."

It is said in New Jersey that a licensee is only relieved from being a trespasser and that he must assume all the ordinary risk attached to the nature of the place or the business carried on. Phillips v. Library Company of Burlington, 55 N. J. Law, 307, 27 Atl. 478. In 29 Cyc. 449, the law is stated as follows:

"The rule is well settled that an owner of premises owes to a licensee no duty as to the condition of such premises unless imposed by statute, save that he should not knowingly let him run upon a hidden peril, or wantonly or willfully cause him harm."

The question we have to consider is whether the defendant company under the circumstances of this case was governed by the principle above stated and was under no obligations to the plaintiff except to refrain from wantonly or willfully causing him harm.

The court in the charge to the jury instructed them in reference to this matter as follows:

"The general rule of law is, gentlemen, that, if a person goes upon the tracks of a railroad without permission or license to do so, he becomes a trespasser, and under such circumstances the single duty devolving upon the railroad company is to avoid injuring such person unnecessarily if he is observed to be upon the tracks or premises of the railroad company. In such situation as that, where a person has intruded himself upon the roadway or tracks of a railroad company, the railroad company owes no duty until the intruder or trespasser is observed, and then such acts or steps must be taken by those in charge of the train as to avoid injuring the person if possible.

"Of course, gentlemen, if a trespasser or intruder upon the tracks of a railroad company is menaced by an approaching train, and if he is perceived, then the railroad company is liable if those in charge of the train wantonly or recklessly do an injury to such person; but this rule of law need not concern you, because it is not applicable to the facts in this case. It is not claimed—except so far as it may be claimed by the defendant—that the plaintiff was a trespasser, but what I mean to say is that the rule of law applying to a trespasser does not obtain herein, but another rule of law, and the one I shall shortly call your attention to; preliminarily, you should understand that a railroad company in operating its cars and trains has ordinarily the right to presume that its tracks are free from trespassers, and when a moving train is away from a crossing it cannot be expected to extend a higher duty toward persons having no right to be on the tracks than to avoid wantonly, willfully, and unnecessarily injuring them. * * *

"There is, however, another rule which you should understand, and that is that where a railroad company has allowed the public to go upon its tracks along its right of way for a particular distance in order to reach a particular place, and to go across the tracks—such permission being express or implied, the railroad company is bound to use ordinary care to avoid injuring those persons present on the tracks—those persons whom it has reasons to anticipate may be there in the course of the existence of the license. * * *

"In such a situation the railroad company is required to exercise reasonable care in the movement of its trains at the point where persons are known to cross; the right to refuse such crossing, or such use of the tracks and exclude the persons from its right of way is with the railroad company; but, having permitted such use, or assented thereto, or having refrained from objecting or interfering or enforcing such objection, it is bound to take notice of the danger to those who may cross or walk along the tracks at that point, and exercise caution and reasonable care in the operation of its trains, to the end that no injury may result. In such situation, gentlemen, ordinary care is required of the railroad company as well as of the person using the license.

The theory of the law, as I have stated, is that, if the company has knowledge of the manner in which its tracks are used by pedestrians, and having by its acquiescence for a long period of time agreed to such custom or use, it is obliged to manage its trains with care, and to give warnings, or even reduce its speed, if circumstances should require, in order to avoid injury to others.

"But, gentlemen, the use of the tracks for crossings or walking along must have been definite, long, open, and continuous, and generally known. * * *

"I read the law, in the rule which applies to a trespasser and to a bare licensee, so that it becomes important, from the facts disclosed by this record that you should scrutinize the evidence carefully and ascertain whether there was a mere license—a bare license, as the cases call it, to pass along these tracks, or to cross over them, or whether the implied license or permission was of such nature as to justify applying the rule that reasonable care should have been exercised by the railroad company in moving its trains at this point.

"I direct you again to carefully scrutinize the evidence upon this subject of implied license or permission to use this right of way, for you will remember that the defendant claims, and has given evidence to support the claim, that no such use had ever been made of this right of way as claimed by the plaintiff. * * *

"If you reach the conclusion that the plaintiff was a trespasser at the time of the accident, and that he was not perceived by the engineer and fireman in time to stop the train and avoid the injury, then the plaintiff is not entitled to recover.

"If you reach the conclusion that he was a bare licensee upon the right of way of the defendant, for his own convenience solely, and there was no implied license, as I have endeavored to define that term, then, likewise, the plaintiff is not entitled to recover, unless there is a feature in this case which justifies you in reaching the conclusion that the injuries could have been avoided after his presence became known.

"Should you reach the conclusion, however, that there was an implied license, that the public and persons living in that locality had, by reason of the acquiescence of the defendant railroad company, the right to use that way going to their work places and in coming therefrom, and used it in large numbers—that it was customarily used as a place of ingress and egress to the various plants in that locality—then, manifestly, the plaintiff had the right to use it at the time of the accident in question, as it was his custom to use it.

"Should you reach that conclusion, then you take up the next question, viz., whether the defendant railroad company failed in a duty which it owed the plaintiff.

"As I have already stated, the single claim of negligence is not that the train was proceeding at this point at a rapid rate of speed, not that bells were not rung to give warning to those that might be on the right of way—for, concededly, the train was running slowly—but the claim is that the engineer should have seen this man in his predicament, and should have stopped his train before striking him."

We find no error in this charge to the jury.

There are cases, it is true, which seem to recognize no distinction between the liability to implied licensees upon the premises of a railroad company, at places where the company is legally entitled to the exclusive occupation, and those who go upon the premises as mere naked trespassers. We shall not now undertake to review the cases at length or to collate the authorities. We shall content ourselves with a reference to a few cases which seem to us to lay down the principle which should be applied to such cases as the one at bar.

The Court of Appeals in New York had the question under consideration in 1883, in Barry v. New York Central, etc., R. Co., 92 N. Y. 290, 44 Am. Rep. 377. In that case the plaintiff was run over by a

train of whose approach no warning was given, while crossing a railway at a place which the people of the vicinity had openly and continuously used as a crossway for some thirty years. The court in its opinion said:

"There can be no doubt that the acquiescence of the defendant for so long a time, in the crossing of the tracks by pedestrians, amounted to a license and permission, by the defendant, to all persons to cross the tracks at this point."

And it held that these circumstances imposed a duty upon the defendant in respect of persons using the crossing, to exercise reasonable care in the movement of its trains. The company had a lawful right to use the tracks for its business, and could have withdrawn its permission to the public to use its premises as a public way, assuming that no public right therein existed; but, so long as it permitted the public use, the court held it was chargeable with knowledge of the danger to human life from operating its trains at that point, and was bound to such reasonable precaution in their management as ordinary prudence dictated to protect wayfarers from injury.

The same court reasserted this doctrine in 1909 in Lamphear v. N. Y. Central, etc., R. Co., 194 N. Y. 172, 86 N. E. 1115. In this case, as in the former, there was evidence of the constant public use of the path for many years.

In 1896 the question came before the Circuit Court of Appeals in the Sixth Circuit in Felton v. Aubrey, 74 Fed. 350, 20 C. C. A. 436. In an opinion written by Judge Lurton and concurred in by Judges Taft and Hammond, the rule was stated as follows:

"The rule we deduce from the cases best reasoned and most consistent with sound public policy is this: If the evidence shows that the public had for a long period of time, customarily and constantly, openly and notoriously, crossed a railroad track at a place not a public highway, with the knowledge and acquiescence of the company, a license or permission by the company to all persons to cross the track at that point may be presumed. * * * Persons availing themselves of such an implied license would not be trespassers, and the railroad company would come under a duty in respect to such licensees to exercise reasonable care in the movement of its trains at points where it was bound to anticipate their presence."

And see to the same effect Tutt v. Illinois Central R. Co., 104 Fed. 741, 44 C. C. A. 320; Garner v. Trumbull, 94 Fed. 321, 36 C. C. A. 361; Cahill v. Milwaukee & St. Paul R. Co., 74 Fed. 285, 20 C. C. A. 184.

There was evidence in the case at bar from which a jury might find that the public had been permitted for years with the acquiescence of the railroad company to use the tracks at the place of this accident in the manner this plaintiff used them at the time when this injury occurred. And if the jury found that such use by the public had been open, constant, and notorious for a long period of time, and that at the time of the accident the railroad company was not in the exercise of reasonable care in the movement of its train at that point, then it was the duty of the jury to bring in a verdict for the plaintiff.

The case of Delaware & H. R. Co. v. Wilkins, 153 Fed. 845, 83 C. C. A. 27, decided by this court in 1907, is distinguishable from the case now before us. We did not in that case pass upon the question wheth-

er a railroad was under any, and, if so, what obligation, to one using its tracks at a place where the public had made use of them for years. On the contrary, we expressly disclaimed doing so, saying:

"It will not be necessary, however, to discuss the law or the facts bearing upon that branch of the case."

We held that upon the facts of that case it was error to deny the motion made at the close of the case to direct a verdict in favor of the defendant because of the plaintiff's intestate's contributory negligence. The intestate had been killed while walking as a licensee along the railroad track. He was aware of the approach of the train, and stepped outside the rails to stand until it should pass him. In doing so he stood so close to the track that he was hit by the bucking beam of the engine pilot, though a single step back would have placed him in a position of safety. We thought upon the facts that he was negligent as a matter of law. The evidence also showed in that case that while the track and roadbed had been used to a considerable extent continuously for several years as a short cut to the marble yards where the intestate worked, and the fact had been known to the railroad company, the company had endeavored by putting up signs and by scattering coarse stones along the roadbed to put a stop to it.

In the case at bar it was not claimed by counsel for the railroad company that the plaintiff was, as a matter of law, negligent.

Judgment affirmed.

THE ROSALEEN.

(Circuit Court of Appeals, Second Circuit. April 7, 1914. On Motion to Recall and Amend Mandate, May 21, 1914.)

No. 176.

1. COLLISION (§ 100*)—MOVING AND ANCHORED VESSELS—EXCESSIVE SPEED IN FOG.

A ferryboat *held* in fault for a collision in a fog with a scow anchored at a place in the Hudson river, where she or another had been for two years, for moving at too high speed, so she was unable to stop after seeing the scow; the scow also *held* in fault for failing to sound her fog bell.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 213–215; Dec. Dig. § 100.*

Collision rules—speed of steamers in fog, see note to The Niagara, 28 C. C. A. 532.]

2. COLLISION (§ 115*)—PERSONS LIABLE—OWNER OR CHARTERER.

A scow had been demised by her owner by a charter to a towing company which kept her or another permanently anchored in the river to receive ashes from its tugs. She was not equipped for such employment, having no bell and only one man on board. The company provided a bell but no additional men. *Held* that, where she was adjudged partly in fault for a collision with a passing vessel in a fog for failing to sound her bell, the charterer and not the owner was liable for the damages adjudged against her.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 244–247; Dec. Dig. § 115.*]

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

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

This case comes here on appeal from a decree of the District Court, Eastern District of New York, holding libelant's ferry boat Albany solely in fault for a collision between herself and the scow Rosaleen. The Albany alone suffered damage from the collision. The scow was at the time chartered (the charter constituting a demise) to the Moran Towing Company which was brought in on petition by the owner of the scow. Modified.

J. K. Symmers, of New York City, for appellant.
D. R. Englar, of New York City, for the scow.
C. I. Clark, of New York City, for Towing Co.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1] The scow lay at anchor, on anchorage ground between 700 and 1,000 feet from the libelant's ferry slips at Guttenberg, West New York. She was there for the purpose of receiving ashes from the tugs of the Moran Company. The Rosaleen had been there for a considerable time, and she or some other scow had been continuously anchored in the same place for two years or more. To the eastward of the scow, at a distance variously estimated at from 300 to 400 feet, lay the United States cruiser Prairie, which had been anchored there for about two days. At 5:40 a. m. October 19, 1910, the ferryboat left the Guttenberg slip for Forty-Second street, New York, she passed outside—to the northward and eastward of the Prairie. On her return trip the tide was flood, and to make a convenient entrance into her slip, its long rack being on the north side, she passed between the two anchored vessels. She then left Guttenberg on her second trip; how she passed them does not clearly appear. She left Forty-Second street on her return trip at 6:34, and proceeded up a little to the west of the center of the river, intending, as the tide was still flood, to pass between them. Up to this time the weather had been clear. According to the narrative of her witnesses when about halfway between Weehawken and Guttenberg she encountered a thick low-lying fog, slowed down, and proceeded cautiously. As the Albany drew near her slip she heard the fog bell of the Prairie, but did not see her, heard no sound from the Rosaleen, and endeavoring to pass between the two found herself too far to the westward, as the Rosaleen was sighted about a length away. The efforts of the master of the Albany to avoid her by starboarding or by stopping and reversing were ineffectual and collision followed.

That there was a fog at the time and place is most clearly established. The master of the scow testified that the fog was very light, that he could see men walking on shore and others walking on the deck of the Prairie, but the time he made these observations was several minutes before collision, as he was going into his cabin for breakfast, with which he was occupied just before collision. The direct testimony of the witnesses from the Albany is fully corroborated. An extra lookout was stationed when halfway between Weehawken and Guttenberg, her bell was sounding; the fog bell at the Guttenberg slips was rung

and heard; the Prairie was sounding her bell, and her log indicates fog beginning at 6 a. m. and growing thicker. No one on the Albany saw the Prairie on this trip.

The District Judge held the Albany in fault for going at too high a speed in a fog, and we are inclined to the same opinion. Manifestly she was going at such a speed that she could not stop within the distance at which she could sight the Rosaleen. It is well settled by authority that, in such atmospheric conditions as the Albany's testimony indicates prevailed at the time, her speed should be so slow as to avoid collision with another vessel herself obeying the rules. The Rosaleen was undoubtedly in fault for not giving fog signals, and if she had been a new comer on the field of operations, of which the Albany had no notice, we should be inclined to hold her solely in fault for the collision. But her presence was well-known to the Albany; her general location, 300 to 400 somewhat to westward of the Prairie, was also known. When the Albany heard the Prairie's bell twice as she did, she was advised that she was drawing near the other anchored vessel, which for some unknown reason was giving no sound. Such a condition of affairs called for extra precautions and a further reduction of speed until she could make out exactly where the Rosaleen lay. Under these circumstances, the Albany must be held in fault.

[2] The fault of the Rosaleen is also manifest and inexcusable, she should have sounded her fog bell at regular intervals, she did not sound it at all. We cannot say that her fault did not contribute to the collision. Had the Albany heard the Rosaleen's bell ahead to the left at the same time she heard the Prairie's bell ahead to the right, it is not improbable that she might have laid a safe course between the two sounds.

The only remaining question is: Who shall respond for the half damages chargeable against the Rosaleen? The charter was a demise of the vessel; her employment and navigation was wholly within the control of the charterer. Her so-called "master" was little more than a caretaker; he was certainly not her navigator. When the owner turned the vessel over to the charterer, she was not equipped to lie alone at anchor for long periods of time; she had only one man and no bell. She was sufficiently equipped to be towed by a tug which could herself sound signals and maintain lookout and anchor watch, but not for the service to which the charterer put her. The charterer thoroughly understood this, for the first thing it did when it made the Rosaleen a permanently anchored scow was to furnish her with a bell and a small boat in which the man on board could get to the shore. But the bell was not enough without a man to sound it, and no man was provided to stand watch and watch with the owner's man. The latter had to sleep sometimes; he had to go ashore for supplies. On some such excursion ashore a fog might come up which would make it impossible to get back to the scow again for hours. Having put the boat to a use for which she was not fitted, without itself making her fit, we think the charterer is responsible for the natural results of such carelessness.

The decree is modified so as to impose half damages on the charterer with half costs of this appeal to libelant.

Before COXE and ROGERS, Circuit Judges, and HAND, District Judge.

On Motion to Recall and Amend Mandate.

PER CURIAM. After the claimant brought in the respondent, the case stood precisely as though the libelant had sued both claimant and respondent at the same time. As between libelant and respondent, the court has already decided that each should have half costs, and that decision need not be disturbed. The only question that can arise is regarding the claimant's own costs. It may be that the scow was prima facie responsible for the damage and that the libelant had the right to sue her, but, if so, it was through the fault of the respondent that she was put in this position, and the costs of the ensuing litigation were due to the respondent's fault alone. It makes no difference whether the whole costs are charged against the respondent and the respondent has leave to charge half those costs against the libelant, or whether the claimant recovers half costs from the libelant and half from the respondent. In any case the result is the same. The mandate, therefore, will be amended to read as follows:

That the decree of the said District Court be and the same hereby is modified so that the libelant shall recover of the respondent one-half its damages with interest and one-half its costs in this court and in the District Court; that the respondent may set off one-half its costs in this court and in the District Court, and that the claimant of the scow Rosaleen shall recover from the libelant and from the respondent each one-half its costs in this court and in the District Court.

PACIFIC COAST COAL CO. v. BROWN.

(Circuit Court of Appeals, Ninth Circuit. June 1, 1914.)

No. 2275.

On motion for rehearing. Denied.

For former opinion, see 211 Fed. 869.

PER CURIAM. In denying the petition for rehearing it need hardly be said that neither in the decision nor in the opinion filed herein did this court refuse to follow the construction placed by the Supreme Court of Washington upon a statute of the state. In none of the decisions of the Supreme Court of that state referred to by counsel do we understand the court to have held that the amended statute of the state found in section 7381 of Rem. & Bal. Code makes of such an employé as Righi in the present case the representative of the master. On the contrary, that court in the late case of Delaski et al. v. Northwestern Improvement Co., 61 Wash. 255, 112 Pac. 341, decided December 16, 1910, distinctly adjudged that the state statute *is the measure* of the company's duty. The statute of the state of 1891 (Laws of 1891, c. 81, § 9) expressly required every coal mine in the state to be kept "free from standing powder smoke and gases of every kind," which the Supreme Court of the state held, and, as we said in the opin-

ion heretofore filed herein, imposed upon the operator thereof the imperative duty of complying with that law. But the Legislature of the state saw fit to modify that statute and in lieu of it enacted section 7381 of Rem. & Bal. Code, which provides as follows:

"The owner, agent or operator of every coal mine, whether operated by shafts, slopes or drifts, shall provide in every coal mine a good and sufficient amount of ventilation for such persons and animals as may be employed therein, the amount of air in circulation to be in no case less than one hundred cubic feet per minute for each man, boy, horse or mule employed in said mine and as much more as the inspector may direct, and said air must be made to circulate through the shafts, levels, stables, and working places of each mine and on the traveling roads to and from all such working places. Every mine shall be divided into districts or splits, and not more than seventy-five persons shall be employed at any one time in each district or split: Provided, that where the inspector gives permission in writing a greater number than seventy-five men, but not to exceed one hundred men may be employed in each of said splits: Provided also, that in all mines already developed, where, in the opinion of the mining inspector, the system of splitting the air cannot be adopted except at extraordinary and unreasonable expense, such mine or mines will not be required to adopt said split air system, and the owner or operator of any coal mine shall have the right of appeal from any order requiring the air to be split, to the examining board provided for in section 7372, and said board shall, after investigation, confirm or revoke the orders of the mining inspector. Each district or split shall be ventilated by a separate and distinct current of air, conducted from the downcast through said district, and thence directed to the upcast. On all main roads where doors are required, they shall be so arranged that when one door is open the other shall remain closed, so that no air shall be diverted. In all mines where fire damp is generated, every working place shall be examined every morning with a safety lamp by a competent person, and a record of such examination shall be entered by the person making the same in a book to be kept at the mine for that purpose, and said book must always be produced for examination at the request of the inspector."

The case of Delaski et al. v. Northwestern Improvement Co., supra, involved that provision of said section 7381, requiring the owner, agent, or operator of every such mine to provide therein a good and sufficient amount of ventilation for such persons and animals as may be employed in the mine, specifying the minimum amount of air required to be kept in circulaton; and the court there found and held that the evidence in that case showed that the operator of the mine had failed to comply with those provisions, resulting in the inhalation of poisonous gases by the miner, on account of whose death therefrom the action was brought. But the court in that case was not called upon to consider, and did not consider, the concluding clause of section 7381 of the Washington Code, which reads, as has been seen:

"In all mines where fire damp is generated, every working place shall be examined every morning with a safety lamp by a competent person, and a record of such examination shall be entered by the person making the same in a book to be kept at the mine for that purpose, and said book must always be produced for examination at the request of the inspector."

In the present case the person so designated was the fire boss of the sixth level of the mine.

No decision of the Supreme Court of Washington has been cited, and we have found none, which holds that the person so required to examine every working place in the mine every morning with a safety

lamp and make the specified record is the representative of the master. Therefore, under the ruling of the Supreme Court in the case of Alaska Mining Co. v. Whelan, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390, and of other courts referred to in the opinion heretofore filed herein, the fire boss, Righi, must be regarded as a fellow servant of the defendant in error.

Petition for rehearing denied.

PACIFIC PHONOGRAPH CO. v. SEARCHLIGHT HORN CO.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1914.)

No. 2314.

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Suit by the Searchlight Horn Company against the Pacific Phonograph Company for infringement of letters patent No. 771,441, for a horn for phonographs or similar machines granted to Peter C. Nielson October 4, 1904. From an order granting a preliminary injunction, defendant appeals. Affirmed.

Louis Hicks, of New York City, N. Y., and Dan Hadsell, of San Francisco, Cal., for appellant.

John H. Miller and Wm. K. White, both of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

PER CURIAM. For the reasons set forth in the opinion filed in Sherman-Clay & Co. v. Searchlight Horn Co., 214 Fed. 86, 130 C. C. A. —— (Case No. 2306) and Id., 214 Fed. 99, 130 C. C. A. —— (No. 2307), the order granting a preliminary injunction is affirmed.

REMBUSCH v. BENNETHUM et al.

(District Court, E. D. Pennsylvania. May 19, 1914.)

No. 667, April Session, 1911.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SCREEN FOR SHOWING MOVING PICTURES.

The Rembusch patent, No. 937,550, for a screen for use in exhibiting moving pictures and stereopticon views, and consisting of a sheet of plate glass having its back silvered and its front, whereon the picture is thrown by a lantern, ground, was not anticipated by the use in the sign art of mirrors having letters or designs etched or ground on their front, nor is it invalid because of the English patent to Zechmann for a similar article; the evidence showing that Rembusch's invention was perfected prior to the issuance of the English patent or the filing of the specification describing the same. Also *held* infringed.

In Equity. Suit by Frank J. Rembusch against George Bennethum, Sylvester Weis, and George Weis. On final hearing. Decree for complainant.

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

Wm. Steell Jackson, of Philadelphia, Pa., and Arthur M. Hood, of Indianapolis, Ind., for plaintiff.

J. Milton Miller, of Reading, Pa., and Charles N. Butler, of Philadelphia, Pa., for defendants.

BUFFINGTON, Circuit Judge. In this case Frank J. Rembusch, the grantee of patent No. 937,550, issued to him on October 19, 1909, for a screen, charged George Bennethum and others with infringement thereof. The object of the invention is, as recited in the specification, to "provide a screen which offers a total obstruction to the passage of light through it, and in this manner improves the distinctness, clearness, and brilliancy of images thrown upon the screen." The specification also says the screen is "of special service in connection with apparatus for exhibiting moving pictures and stereopticon views." As thus applied, Rembusch's screen consists of a sheet of plate glass having its back silvered and its front, whereon the picture is thrown by a lantern, ground. The proofs, as well as the demonstration made at bar, show that images are produced on this screen with greater clearness and distinctness than on a sheet. The screen has proved a commercial success, and, for the short time it has been on the market, sales thereof have been large. There is no doubt of either its novelty or utility, but the validity of the patent is challenged on the ground of lack of invention.

In the prior art it was common to cut or make letters, ornamental designs, or borders on the ground side of a plate of glass and silver its rear side. Such a sign, exhibited at the Philadelphia Centennial of 1876, was shown in court. Indeed, the patentee, who was in the mirror business, frankly says:

"I have manufactured these ornamental mirrors. * * * I mean to say the letters and figures were chipped or ground in, and it was this grinding or chipping that made the letters visible, on account of the depression made in the surface of the glass. * * * Probably since 1894, and in 1899 and 1900, I manufactured a great many glass signs and used the sand blast, chipping, etching, and all these other various processes extensively."

Such being the prior art, the case narrows itself to the question whether it involved invention to produce Rembusch's screen. Now, while grinding one surface of a plate and silvering the other were, as mechanical steps in the process of sign making, known, that fact never suggested to any one the use of such a plate for any other purpose. A ground and silvered plate was only a preparatory step toward making signs, and in taking that step letters or ornaments were chipped or ground in the front face. When the article was finished—and the real nature of a prior use must be judged by the use to which the finished article was put—we find, not a plate with an unbroken ground front and an invisible mirror behind, but one with a broken ground front, and so broken in order to make visible the mirror behind it. The purpose in view was to allow the mirror by reflection to clearly delimit, define, and illuminate the intaglio letters or designs cut in the ground front. The ground surface surrounding these letters simply served to define the letters or designs, and by the dullness of its surface intensify the reflection from the mirror through the letters or designs. In other

words, the front of the plate was only ground solid initially for the purpose of thereafter changing it. This change, however, would render it wholly unfit for use in the moving picture art, where the light of the lantern would be reflected through the letters or designs on the broken ground face of the plate.

During all the following years, although the use of sheets or screens for reproducing lantern slides was common, no one thought of putting a mirror back of ground glass to make a lantern screen. As a substitute for old-fashioned blackboards we find plates of glass with ground-glass fronts and backs painted black, to make chalk marks more distinct. But even this led no one to make a ground-faced, submirrored screen. To us it is clear that the genesis of such a screen was creation rather than progression—origin, not improvement. It was a veritable finding of something new, something that did not exist before. It coupled a ground-glass front and a mirrored back in a novel co-operating use. The ground front made a screen for a lantern, a use to which ground glass had never been put. Its unbroken surface was now for the first time used to completely prevent a mirror from reflecting light thrown upon it. So, also, the mirror was given a new use, in that its reflective powers were now used to intensify and increase the outline and detail of figures now for the first time thrown on an unbroken ground front. Theretofore a mirror had been used visibly for reflection; Rembusch showed its concealed, invisible use for reflection. Until Rembusch disclosed the use of a ground front mirror as a screen, the grinding of the whole front of a mirror would have unfitted it for any use then known. The proofs show that the invention was the result of study, experiment, and time. We are clear the device embodies invention in the true sense. Its use by the defendant Bennethum is established, and, as plaintiffs disclaim any purpose to hold the other defendants for damages, the question of joint tort-feasors becomes academic.

It, however, appears that the same discovery made by Rembusch in this country was made abroad by one Zechmann, to whom British patent No. 17,285 of 1908 was granted. It is conceded that such patent "discloses the invention of the patent in suit, and, if it were a pertinent reference, it would be anticipatory." Zechmann's complete specification was accepted February 25, 1909; his complete specifications and drawings were first printed and placed on sale March 18, 1909; and his patent granted July 6, 1909. Rembusch having, as we have seen, made a new and useful invention, not theretofore known or used by others in this country, he was, by R. S. § 4886 (U. S. Comp. St. 1901, p. 3382), entitled to a patent if his invention was "not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof," or "more than two years prior to his application."

Without entering into a discussion of Zechmann's effective dates, and taking for comparison the earliest day connected with any discovery on his part, viz., February 25, 1909, we may say that the evidence satisfies us, and we so find as a fact, that prior thereto Rembusch had made the discovery or invention embodied in his patent. He states

that, through some experiments he was making in using a magic lantern and attempting to reflect light rays, he, in the fall of 1907, used a mirror on account of its reflecting powers, and that he was then led to grind its face. In doing so he found that the reflected light was enhanced thereby, and he then saw the possibility of using such a screen in stereopticons and moving pictures. He was at that time engaged in the manufacture of mirrors, and he experimented in various ways, covering the mirror face with shellac, paint, and silk. During 1908 he ground different plates with various grades of emery, carborundum, and sand, and tested the results with a magic lantern in the laboratory, in his factory, and at his home. His wife corroborates his testimony. She states he talked to her in the fall of 1907 about his experiments, and she later saw him use the magic lantern at the factory and their home. She says that in the spring of 1908, a date she fixes by a church dedication in August following, her husband described to her the idea of a reflecting screen, consisting of ground glass with a mirror back. Porter, a partner of Rembusch, says that in December, 1908, Rembusch told him of his idea of getting up a screen for moving pictures, and he then showed him a piece of glass sand-blasted on one side and silvered on the other. He states that in January or February, 1909, Rembusch used this piece of glass with a magic lantern. These experiments were followed by the making by Rembusch & Porter's firm of such a screen on a large scale in May, and its installation in a moving picture theater in June, 1909. There is other and corroborating proof to which we need not refer. It thus appears that Rembusch's invention was complete in December, 1908, and was then embodied in workable form. We simply refer to the subsequent and prompt utilization of the invention in a commercial screen to corroborate and sustain the fact of the completeness of the invention at the earlier date.

In accordance with these views, we find the patent valid and infringed. A proper decree may be drawn and submitted.

McLOUGHLIN v. KNOP, Civil Sheriff, et al.

(District Court, E. D. Louisiana. April 25, 1913.)

No. 14662.

1. BANKRUPTCY (§ 211*)—JURISDICTION OF STATE COURTS—FORECLOSURE OF MORTGAGE.

A state court has no jurisdiction to foreclose a mortgage after bankruptcy has intervened, without leave of the bankruptcy court and making the trustee a party.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323; Dec. Dig. § 211.*]

2. BANKRUPTCY (§ 217*)—POWERS OF BANKRUPTCY COURT—ENJOINING STATE COURTS.

Under Bankr. Act July 1, 1898, c. 541, § 2, 30 Stat. 545 (U. S. Comp. St. 1901, p. 3420), stating the powers of courts of bankruptcy, and section 11 providing that a suit founded upon a claim from which a discharge would be a release, which is pending against a person at the time of the

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

filing of the petition against him, shall be stayed until after an adjudication or the dismissal of the petition, and, if such person is adjudged a bankrupt, may be further stayed until 12 months after the date of such adjudication, or until the question of discharge is determined, and Judicial Code (Act March 3, 1911, c. 231, § 265, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]) providing that injunctions shall not be granted to stay proceedings in any state court except where authorized by any law relating to bankruptcy, the bankruptcy court may not only enjoin the officers of the state courts but may stay the proceedings of the courts themselves when necessary to enforce their jurisdiction to administer bankrupt estates.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 323, 330, 340; Dec. Dig. § 217.*]

3. BANKRUPTCY (§ 211*)—JURISDICTION OF STATE COURTS—FORECLOSURE OF MORTGAGE.

The state courts have concurrent jurisdiction to sell the property of a bankrupt for the purpose of foreclosing a mortgage, and, where their jurisdiction has attached prior to bankruptcy, it should not be disturbed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323; Dec. Dig. § 211.*]

4. BANKRUPTCY (§ 211*)—JURISDICTION OF STATE COURTS—FORECLOSURE OF MORTGAGE.

A state court acquired jurisdiction to foreclose a mortgage by the filing of the suit and the granting of an order for executory process before the filing of petitions in bankruptcy, though the land was not seized until after the filing of the petition, as executory process is an action in rem to enforce a pre-existing lien, and is in the nature of an equitable levy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323; Dec. Dig. § 211.*]

5. BANKRUPTCY (§ 217*)—JURISDICTION OF STATE COURTS—FORECLOSURE OF MORTGAGE.

Under Bankr. Act July 1, 1898, c. 541, § 70, subd. "e," 30 Stat. 566 (U. S. Comp. St. 1901, p. 3452), providing that the trustees may avoid any transfer which any creditor might have avoided and recover the property or its value, and that, for the purpose of such recovery, any court of bankruptcy and any state court which would have had jurisdiction if bankruptcy had not intervened shall have concurrent jurisdiction, where a state court had obtained the custody of land for the foreclosure of a mortgage before the intervention of bankruptcy, the trustee, who claimed that the bankrupt had placed the land in the name of a third person for the purpose of putting it beyond the reach of creditors, should obtain any protection by injunction or stay of proceedings to which he might be entitled in the state court, and a bill to recover such real estate and to enjoin the proceedings in the state court would be dismissed, though the trustee had intervened in the state court and his prayer for an injunction had been denied, as the state court, in a plenary suit, would doubtless give due consideration to his contentions.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 323, 330, 340; Dec. Dig. § 217.*]

In Equity. Bill by James J. McLoughlin, trustee, against Louis Knop, Civil Sheriff, and others. Bill dismissed, without prejudice.

John Dymond, Jr., of New Orleans, La., for complainant.
W. O. Hart, of New Orleans, La., for Civil Sheriff.
Benjamin Ory, of New Orleans, La., for Gaspar Pietri.

FOSTER, District Judge. In this matter the trustee of the bankrupt estate of James J. Woulfe filed his bill for the purpose of recov-

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

ering certain real estate listed on the bankrupt's schedules. The bill alleges that the said real estate had been previously placed by Woulfe in the name of a third person, John Wells, for the purpose of putting it beyond the reach of creditors; that Woulfe was adjudicated a bankrupt on February 27, 1913; that thereafter the civil sheriff of the parish of Orleans had seized the said property on March 1, 1913, under a writ issued by the civil district court of the parish of Orleans at the instance of Mrs. P. J. O'Reilly, in a proceeding to foreclose a mortgage via executiva; that the civil sheriff had again seized the said property on March 3, 1913, at the instance of Gaspar Pietri, in a similar proceeding in the same court; and that the trustee had applied to the state court for an injunction to restrain the civil sheriff and said plaintiffs, which had been denied.

On this showing, and on considering an affidavit of John Wells to the effect that he had no interest in the property and had not signed the mortgage notes, the civil sheriff and the parties plaintiff in the said two suits were cited to show cause why the said proceedings should not be stayed pending the determination of this suit, and in the meantime a restraining order issued. The rule to show cause came on for trial in due course, and it then developed that both suits in the state court were filed on February 24, 1913, and that the orders to issue executory process were signed and demands for payment were served on John Wells on the same day; that a petition for involuntary bankruptcy was filed against Woulfe on February 25, 1913, one day later. He was not adjudicated a bankrupt in the said proceedings, but on his own voluntary petition, on February 27, 1913, in proceedings filed that day.

[1, 2] On the facts as alleged by the bill, the restraining order properly issued, as the state court would have no jurisdiction to foreclose a mortgage after bankruptcy had intervened, without leave of this court and making the trustee a party, and it is well settled that, in matters pertaining to bankruptcy, the federal courts have the right and power to enjoin not only the officers of the state courts but to stay the proceedings of the courts themselves when necessary to enforce their jurisdiction to administer bankrupt estates. Bankruptcy Act of 1898, §§ 2 and 11; section 265, Judicial Code; In re Hicox, 164 Fed. 823, 90 C. C. A. 627; Hooks v. Aldridge, 145 Fed. 865, 76 C. C. A. 409; In re Watts, 190 U. S. 30, 23 Sup. Ct. 718, 47 L. Ed. 933.

[3] The state courts, however, have concurrent jurisdiction to sell the property of a bankrupt for the purpose of foreclosing a mortgage. See In re Zehner (D. C.) 193 Fed. 789. And, where their jurisdiction has attached prior to bankruptcy, it should not be disturbed.

[4] It is contended by the trustee that the civil district court did not obtain jurisdiction over the property until the seizures were actually made. With this I cannot agree. In Freedman's Savings & Trust Co. v. Earle, 110 U. S. 717, 4 Sup. Ct. 226, 28 L. Ed. 301, the Supreme Court said: "The filing of the bill, in cases of equitable execution, is the beginning of executing it." This so fairly states the law that it is unnecessary to cite other authority, of which there is an abundance. Executory process is an action in rem to enforce a pre-existing lien. It is in the nature of an equitable levy, and in my opinion the state

court obtained jurisdiction of the real estate when the petition was filed and the order for executory process was granted.

[5] With regard to the bill filed by the trustee, the state courts have concurrent jurisdiction under the express provisions of paragraph 70, subd. "e," of the bankruptcy act, and, in view of the fact that the state court had properly obtained the custody of the res before the intervention of bankruptcy, comity and a due regard for the orderly administration of justice require that that court should retain jurisdiction and that all questions pertaining to the said property be submitted to it for final determination. I am not unmindful of the fact that the trustee intervened in the executory proceedings, and his prayer was denied, but in a plenary suit filed in the same court, setting forth clearly the various facts upon which he bases his cause of action, I have no doubt the state court will give due consideration to his contentions, affording him any ancillary protection, by injunction or stay of proceedings, to which he may be entitled, and will ultimately decide all questions properly according to the law and evidence of the case.

The order herein issued is recalled, and the bill is dismissed, without prejudice to the rights of the trustee, and with special leave to renew his suit on the same, or any other, cause of action in the state court.

In re BARNETT.

(District Court, N. D. Georgia. February 16, 1914.)

No. 478.

BANKRUPTCY (§ 273*)—ADMINISTRATION OF ESTATE—DEPOSITS OF FUNDS OF ESTATE—EXEMPTIONS—WAIVER.

Where a trustee in bankruptcy, depositing the bankrupt's money to his own account or his firm's account, paid to the bankrupt the amount set apart as exempt under Civ. Code Ga. 1910, § 3413, as soon as set apart by the referee, creditors of the bankrupt, holding waivers ineffectual as waivers of the right to an exemption, could not require the trustee to deposit all moneys received as trustee in a bankruptcy depository, and not to disburse any money except on checks approved by the referee, and thereby require the trustee to redeposit the money paid out in good faith, though, where an exemption is set apart and money is ordered paid, it ought to remain long enough in the hands of the trustee to allow claimants an opportunity to be heard.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 347; Dec. Dig. § 273.*]

In Bankruptcy. In the matter of the bankruptcy of G. O. Barnett, bankrupt. Petition of J. C. Garlington and another against W. H. Coker, trustee. Action of referee approved and confirmed.

Harris & Harris, of Rome, Ga., for petitioners.

Lipscomb & Willingham, of Rome, Ga., for trustee.

NEWMAN, District Judge. This is a peculiar case, and yet I do not see how the referee could have done otherwise than he did, or how he could have made any other order on this petition. Mr. Coker, the trustee, had the bankrupt's money deposited to his own account or his

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

firm's account, but the money seems to have been kept and properly accounted for—the mistake being depositing it in the way indicated instead of in a regularly designated bankruptcy depository in his name as trustee.

The exemption allowed the bankrupt was evidently intended to be under section 3413 of the Code of Georgia, which provides that a debtor may have an exemption, in addition to wearing apparel, of $300 worth of household and kitchen furniture and provisions. This exemption was for household and kitchen furniture, $25, one cow, $20, and one hog, $5, and cash, $250. In an exemption such as provided in the section referred to, the debtor cannot waive or renounce his right to the same. That is to say, any waiver of it would be ineffectual to accomplish that purpose. Whether a debtor could have a part of it in cash, either before the ordinary or in the bankruptcy court, it is probably unnecessary now to determine.

The exemption was set apart to the bankrupt on May 19, 1913, and the $250 was immediately paid over, on the same day (19th), to the bankrupt's attorney. The record I have shows that the referee did not approve it until the 20th. Why it was done in this way, the record does not disclose. The record shows that the exemption of $300 was by consent of the trustee and the bankrupt.

The petition of the two creditors holding waivers, J. C. Garlington and J. C. Everett, is that W. H. Coker, as trustee of G. O. Barnett, bankrupt, be required to deposit all moneys he may have received as trustee of said G. O. Barnett since the date of his appointment and qualification, and that he be ordered not to disburse any of the money except upon checks approved by the referee. The record shows the purpose of the petition of Garlington and Everett is that he shall be required to repay and deposit in a bankruptcy depository the $250 which he has already paid to the bankrupt. I do not very well see how he could be required to do this. Of course his depositing the money with his firm's account was irregular and improper, but he paid the money to the bankrupt on the order of the referee, and the referee determined about it, and it seems to me correctly, that he ought not to be required to lose the $250 by depositing it in a bankruptcy depository, in fact paying it back again on the ground that he had paid it out improperly.

The referee's brief opinion on the matter is as follows:

"The above matter having come on for a hearing before the referee on the 12th day of August, 1913, all parties at interest on both sides being present. After hearing evidence and argument in said matter, it is the opinion of the referee that the plaintiffs in this petition, not having proved claims or become parties to the case, could not file objections to the homestead, and could not proceed against the trustee in the court in any manner in regard to said homestead. The referee further holds that, although at the time the trustee paid the $250 to G. O. Barnett on his homestead, he had not deposited the funds of the estate in his name as trustee in a bankruptcy depository; that said payment at the time was legal, so far as the bankrupt was concerned; and that the trustee is not required to redeposit said money so paid in a depository as trustee. Under instructions of the referee, the trustee has since deposited all the funds in his hands in the Cherokee National Bank of Rome, Ga., in the name of W. H. Coker, trustee. Therefore the referee declines to grant a rule nisi calling upon the trustee to so deposit said funds as trustee."

It will be seen that one of the grounds given by the referee for determining the matter as he did was that Garlington and Everett had not proven their claims in the bankruptcy court. Whether this was correct or not, he further finds that the trustee ought not to be required to redeposit the money paid out to the bankrupt under the referee's order.

The difficulty about the whole matter was that, after the order for the exemption was passed, no time was allowed for any one to take steps to enforce any rights they may have had or claimed to have against the fund. I have frequently said that where a homestead exemption is set apart to the bankrupt, and especially where it was in money, it ought to remain long enough in the hands of the trustee to allow anyone having a claim against it to have an opportunity to enforce the same.

It appears from the record which I have in this case that an effort was made in the state court to reach this fund; that a receiver was appointed by the judge of the superior court; and that, Mr. Coker having failed to pay over the $250 to him, a rule was instituted against him to show cause why he should not be attached for contempt, and that Coker answered the same, setting up the fact that he had paid out the $250 on an order from the referee in bankruptcy, made on the 19th day of May, 1913, said order directing Coker, as trustee in said case, to pay to the bankrupt the sum of $250 in cash. Thereupon, after argument had and upon consideration of the matter, the rule against Coker was discharged by the judge of the superior court. So that the whole matter was apparently heard by the state court and determined against Garlington and Everett, the petitioners.

Whether Messrs. Garlington and Everett have any rights here that can be enforced in any other way it is not necessary to determine. I am clear, however, that the referee was right in not requiring Mr. Coker to redeposit the money paid out, as stated. The referee must necessarily have found that the whole matter was in good faith and without any wrongful intent on the part of Mr. W. H. Coker, the trustee. He says he had Mr. Coker, after this transaction, to deposit the bankrupt funds he had in the Cherokee National Bank, a designated depository, and he had done so.

It might not be improper to remark here that referees in bankruptcy should take the utmost care to see that receivers and trustees comply with the law in reference to the depositing of funds, and that they deposit all funds received by them in a regularly designated depository for bankruptcy funds. There are such depositories in all sections of this district that are always available to receivers and trustees, and deposits should be made in no instance elsewhere than in such designated depositories.

The action of the referee must be approved and confirmed; and it is so ordered.

THE BRAND.

THE E. STARR JONES.

(District Court, E. D. Pennsylvania. May 25, 1914.)

Nos. 53, 54.

COLLISION (§ 93*)—STEAMER AND SCHOONER CROSSING—SCREENING OF LIGHT BY SAILS.

A collision in Delaware Bay at night between a steamship and a schooner on crossing courses *held*, on the evidence, due solely to the fault of the schooner in permitting her green light to be screened by her sails so that it could not be seen from the steamship. Both vessels *held* not in fault for changes of course immediately before collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 194, 195; Dec. Dig. § 93.*]

In Admiralty. Suit for collision by H. L. Heyliger, master of the schooner E. Starr Jones, against the steamship Brand, with cross-suit by Edward Ballestad, master of the Brand, against the schooner. Decree for cross-libelant.

Howard M. Long, of Philadelphia, Pa., for the E. Starr Jones.
Henry R. Edmunds, of Philadelphia, Pa., for the Brand.

BUFFINGTON, Circuit Judge. These cross-libels concern a cross-course collision between the steamship Brand and the schooner E. Starr Jones. While considerable testimony was taken, the case narrows to the question whether the schooner's green light was screened by her sails, or could be seen from the Brand. If the green light was visible on the Brand, it was her duty as a steamer to yield to the schooner's right of way. If, on the other hand, the schooner by her sails screened the light from the Brand, the schooner was at fault. The Brand is a steel steamship of 1,500 tons register, 208 feet in length, and 37 feet beam. On the morning of October 13, 1912, the Brand, with a heavy cargo aboard, entered Delaware Bay on her way to Chester, Pa., a port on the Delaware river. Near Overfall's lightship she stopped and took on board a licensed pilot at 4:15, and, with lights properly set and burning, proceeded to Chester. A competent seaman was on the lookout bridge, and the licensed pilot, the captain, first officer, and a competent wheelsman were on the main bridge. The steamer's course was north by west, and her speed about eight knots. The E. Starr Jones was a four-masted sailing vessel, 185 feet long, 38 feet beam, with a carrying capacity of 1,300 tons. She was bound from Philadelphia to Porto Rico with a cargo of coal. About 3:30 the same morning she cast off her tug, and under sail was putting out to sea at five to six knots. Her course was southeast with the wind about north. Her lights were burning and her lookout and crew in place. While the vessels were thus converging toward the place of collision, the lookouts of each saw and reported the lights of a tug, with barges, going up the bay. This tug the schooner says passed up on her starboard. Thereafter the schooner saw the Brand's lights, and, relying on the Brand likewise seeing hers, she held her course until the vessels ap-

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

proached so close to each other that they eventually collided. The testimony of the Brand's lookout is that no light was visible on the Jones, and the first thing he saw of her was when the sails showed up, and that she was then about 150 feet away; that the green light was not visible until after he saw the Jones' sails. The licensed pilot, the captain, and the first officer each corroborate the lookout, and say that, although all of them were watching for lights, the first seen of the Jones were her sails, and thereafter her green light.

We have carefully considered the testimony and have reached the conclusion, and so find the fact, that the schooner's green light was screened by her sails from the view of the Brand's lookout. The proofs show the green light of the schooner was of standard size, and could have been seen for two miles. There is nothing but conjecture to suggest that the Brand's people were remiss in their duty, while the circumstances were such as to warrant a belief that they were vigilant and attentive. They were all fresh on the watch; the pilot had just come aboard and set his course; they were entering an inland highway of commerce where they would expect other vessels; the captain was on the bridge; the first officer—whose watch it was—had given over the charge of the ship to the pilot, and he had nothing to do but watch. Altogether, the situation was one that would naturally require and suggest vigilance, and the testimony of these four men whose training, duty, and safety were calculated to inspire vigilance that each of them saw no light, is, in our judgment, strong proof that the light of the Jones was not visible. Moreover, the screening of a sailing vessel's light by her tackle under certain conditions of approach being a not unrecognized incident of navigation—see The General (D. C.) 82 Fed. 830; The Daylight, 73 Fed. 878, 20 C. C. A. 81—the positive testimony of these men is to our mind strong proof that the Jones' green light was hidden from view. Their testimony bears the marks of certainty, reasonableness, and truth. The fact that the tug which passed to the Jones' starboard just before the collision was seen, reported by the lookout, and independently seen on the bridge, show that the location from whence the Jones was coming was being scanned by these men. Moreover, the testimony of the wheelsman, as far as his duties at the wheel permitted him to observe, strengthens that of these other men. We also think the fact of the schooner changing her course just before the collision must not be overlooked, for this change would gradually tend to bring her green light into range.

By the testimony and the arguments, several other matters were raised. The schooner charges the Brand was at fault in hard-aporting just before the collision, and in not passing under the schooner's stern. On the other hand, the Brand asserts that if the schooner had not hard-astarboarded, but had kept on her course, or better yet, had hard-aported, the vessels would have cleared. In that regard we are of opinion, and so find, that neither vessel was, in view of the imminence of collision, in fault in the steps they severally took to avert it. The situation called for instant action, and neither took a course which misled or influenced the other vessel. We are also of opinion the contention of the schooner that the Brand failed in the statutory duty of standing to

after the accident is not justified. There was well-founded reason for the Brand, with her heavy cargo, taking no step until the hole in her side was stopped. Meanwhile, she signaled a pilot boat and sent her to the schooner. The word brought back showed, as the outcome proved, that the schooner had no need of the Brand's assistance.

In the view we take of this case, namely, that the Jones' green light actually was screened by her sails from the Brand, we have not felt called upon to pass on the contention of the Brand that the height, etc., of the Jones' light was improper.

In accordance with these views, let decrees be drawn sustaining the Brand's, and dismissing the Jones', libel.

KENDRICK v. ROBERTS.

(District Court, N. D. Georgia. February 17, 1914.)

APPEAL AND ERROR (§ 482*)—ORDERS OF TRIAL COURT AFTER PERFECTING APPEAL.

The District Court, approving a supersedeas bond made a part of the record in the case, which has been filed in the Circuit Court of Appeals on writ of error, has no jurisdiction to vacate the supersedeas.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2259–2263; Dec. Dig. § 482.*]

At Law. Action by A. F. Kendrick against Columbus Roberts. There was a verdict for plaintiff, and defendant appealed and executed a supersedeas bond, which was approved. Motion to vacate order of supersedeas denied.

Anderson & Rountree, of Atlanta, Ga., for plaintiff.

Little, Powell, Hooper & Goldstein, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. In this case there was a verdict for the plaintiff for $5,500. There was a motion for a new trial heard and overruled. Writ of error was obtained within the six months allowed by statute from the time the motion for new trial was overruled, and the case finally ended in this court. At the same time a supersedeas bond was presented in the sum of $7,000, which counsel for defendant stated to the court was satisfactory to plaintiff's attorney, and that he was authorized to so state to the court. Counsel for the plaintiff now states that this is correct, and counsel for defendant was authorized to state that to the court. He says, however, that what he referred to was the amount of the bond, which he agreed would be satisfactory, inasmuch as the defendant was giving a surety company bond and it was useless to require him to pay more premium than was necessary to cover the judgment, interest, and costs. More than 60 days had elapsed when the supersedeas bond was presented and approved by the court. I have no recollection of what was in my mind about it, whether I knew that more than 60 days had elapsed, or, knowing this, I thought that counsel were agreeing about the matter, and that it was satisfactory to plaintiff to have a good supersedeas bond, instead of trying to

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

enforce his judgment before the case was determined in the Circuit Court of Appeals. All I remember about it is that the message referred to above was brought to me from plaintiff's counsel, and that I approved the bond as a supersedeas bond.

The present matter is a motion by counsel for the plaintiff, which, after reciting the facts above stated, that the bond was given and approved more than 60 days after the final ending of the case in this court, makes this prayer:

"And now, during the term at which said order was made, comes A. F. Kendrick, the plaintiff in said case, and moves the court to vacate the following portion of said order, to wit: 'And upon the giving of said bond in said sum, when it is approved by the court, the judgment herein rendered in favor of the plaintiff against the defendant shall be suspended, and supersedeas will be granted until the determination of said writ of error by the United States Circuit Court of Appeals for the Fifth Circuit.'"

As a matter of fact the motion was not made during the same term in which the supersedeas was granted, but was made on January 14, 1914, during a later term of the court than that at which the supersedeas was granted. In my judgment the court here has no right to make any order in the premises. The supersedeas bond was approved by the court and made a part of the record in the case, which has been filed in the Circuit Court of Appeals and the case entirely transferred to that court. I do not think, in this situation, the court here has any right to interfere with the case. This is thoroughly laid down in the decisions of the Supreme Court, as I understand them. Slaughter-House Cases, 10 Wall. 273, 19 L. Ed. 915; Draper v. Davis, 102 U. S. 370, 26 L. Ed. 121; Keyser v. Farr, 105 U. S. 265, 26 L. Ed. 1025. In this last case the language of the first headnote is as follows:

"Where, after the allowance of an appeal, the required supersedeas bond was duly approved and the cause entered here, the court below had no longer any control over the decree, and its subsequent order vacating that allowance is void." Ensminger v. Powers, 108 U. S. 292, 2 Sup. Ct. 643, 27 L. Ed. 732.

In Clarke v. Eureka County Bank (C. C.) 131 Fed. 145, the third headnote is as follows:

"Where a supersedeas bond has been accepted, writ of error allowed, and the citation issued, a motion to increase the bond is within the exclusive jurisdiction of the appellate court."

It seems to me, therefore, that I would be violating the proprieties and the correct rule of practice on the subject. Besides that, the jurisdiction of the appellate court over the case now is complete; it having been transferred to that court, and therefore removed entirely from the jurisdiction of this court.

The motion to grant the order prayed for is therefore denied, without prejudice in any way, of course, to the right of the plaintiff in this court, and the defendant in error in the appellate court, to make the same motion in the appellate court, if he so desires.

In re HUGHES.

(District Court, N. D. Georgia. March 18, 1914.)

No. 507.

CHATTEL MORTGAGES (§ 87*)—RECORDING—PLACE OF RECORDING.

Under Code Ga. § 3259, requiring chattel mortgages on property located in some other county than that of the mortgagor's residence to be recorded in such county in addition to the record thereof in the county of the mortgagor's residence, and section 3262, providing that a mortgage recorded in an improper office, or so defectively recorded as not to give notice to a prudent inquirer, shall not be held notice to subsequent bona fide purchasers or younger liens, but that a mere formal mistake in the record shall not vitiate it, where a resident of C. county purchased a mule in B. county, and gave a note and chattel mortgage, which was also signed by a resident of B. county because the seller was unwilling to sell to the buyer on credit, the recording of the mortgage in B. county was a substantial compliance with the statute, and was sufficient to give notice to a prudent purchaser.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 162–165; Dec. Dig. § 87.*]

In Bankruptcy. In the matter of M. A. Hughes, bankrupt. On petition to review an order of the referee relative to a chattel mortgage. Order disapproved, and mortgage held entitled to proof as such.

Jas. F. Kelly and Harris & Harris, all of Rome, Ga., for petitioning creditors.

John C. Davis, of Rome, Ga., for trustee.

NEWMAN, District Judge. The question to be determined by the court in the matter brought here by petition to review develops the following facts: Joe Landrum had a mule that he wished to sell, and M. A. Hughes, the bankrupt, wished to buy the mule. Landrum was unwilling to sell to Hughes on credit. Hughes went to W. A. Lackey and got him to help him buy the mule. Lackey signed the note with Hughes, though Hughes was the real party who wished to buy the mule. The sale took place at Cartersville, in Bartow county. Hughes at that time lived in Cherokee county, and Lackey, who signed the note and mortgage with Hughes, lived in Bartow county. Landrum sold and transferred the mortgage to the Bank of Cartersville, and the Bank of Cartersville caused same to be recorded in Bartow county. It was not recorded elsewhere. On the offer to prove the mortgage in the bankruptcy proceeding against Hughes the referee held that the mortgage was not properly recorded, as it should have been, in Floyd county, where Hughes lived. The facts seem to be, as stated, that Hughes, at the time the mortgage was made, lived in Cherokee county, and subsequently moved to Floyd county, where he seems to have gone into bankruptcy.

The law on the subject is contained in section 3259 of the Code of Georgia, and to some extent in sections 3260 and 3262. It provides that:

"All chattel mortgages of stocks of goods, wares, and merchandise, or other personal property, shall be recorded, in case the same is upon property or

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

goods located in some other county than that of the mortgagor's residence, in the county where said goods or personal property is located at the time of the execution of said mortgage, in addition to the record of said mortgage in the county of the mortgagor's residence."

I am not aware of any decisions by the Supreme Court of Georgia on this subject, and the referee and counsel seem to have failed to find any. While I differ with some reluctance with the referee, for the matter is not at all clear, I am inclined to think that the record of the mortgage in the county where the mule was when the mortgage was executed, and where the sale took place, and where one of the mortgagors resided, would be sufficient. The record seems to me to be in substantial compliance with the statute.

Section 3262 of the Code provides:

"A mortgage recorded in an improper office, or without due attestation or probate, or so defectively recorded as not to give notice to a prudent inquirer, shall not be held notice to subsequent bona fide purchasers or younger liens. A mere formal mistake in the record shall not vitiate it."

I think the record of this mortgage was sufficient to give notice to a prudent purchaser, and that the lien of the trustee should not take precedence over it.

The action of the referee is disapproved, and the mortgage held to be entitled to proof as such.

THE ORLANDO V. WOOTEN.

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

SHIPPING (§ 24*)—SALE OF VESSEL—REQUISITES AND VALIDITY.

A bill of sale or other writing is not necessary to transfer title to a vessel; but when the parties to the sale contemplate an immediate transfer of title, which is followed by possession by the buyer, such transfer takes place without payment of the purchase price.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 50, 81–83, 88, 89, 92; Dec. Dig. § 24.*]

In Admiralty. Suit by the Smith Shipping Company against the schooner Orlando V. Wooten and J. M. Eskridge, Daniel F. Gilmartin, and Raymond P. Trundy. On exception to libel. Overruled.

MacFarland, Taylor & Costello, of New York City, for libelant.

Carpenter & Park, of New York City, for respondents.

RELLSTAB, District Judge. The libel alleges, inter alia, that the libelant is the absolute owner of $^{35}/_{64}$ of the schooner Orlando V. Wooten, and that it had the possession and the employment thereof and was the managing owner of it until deprived of such possession by respondents on a pretended sale. It also sets forth that such interest was purchased from J. M. Eskridge, who, at the time of such sale, was in possession of the schooner and was its managing owner; that libelant formally took possession of the schooner on October 21, 1913; that on October 25th respondents ousted libelant's master from possession and took possession themselves; and that they refuse to redeliver

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

possession to libelant. It further sets forth that with the authority of the vendor libelant assumed the payment of certain bills for work then being done on the vessel, and with his consent "agreed to assume the charter party of said vessel"; that respondents were fully informed of libelant's rights in said schooner; and that libelant stands ready to pay the balance of the consideration upon receipt by it "of the ship's papers and proper bill of sale."

Libelant prays that, in addition to process against the schooner and the respondents, "the possession of said vessel, her tackle, apparel and furniture may be delivered to libelant as managing owner, and that the said respondents may be condemned to pay to the libelant its damages and costs in the premises and to deliver to libelant proper bills of sale for thirty-five sixty-fourths (35/64) of said schooner and that it may have such other and further relief in the premises as in law and justice it may be entitled to receive."

The exception interposed by the respondents is as follows:

"That it appears from the libel that the controversy arises over an alleged contract of sale of a part of said schooner and a prayer for specific performance of said alleged contract, and that the alleged cause of action so set forth is not an admiralty and maritime cause of action and is not within the jurisdiction of this honorable court."

Respondents' contention that the libel discloses only an equitable title in the schooner is without merit. The libel distinctly asserts absolute ownership of the majority interest in the vessel, and that constitutes an allegation of a legal, and not merely an equitable title.

A bill of sale or other writing is not necessary to transfer title to a vessel. The Amelie, 73 U. S. (6 Wall.) 18, 18 L. Ed. 806; The Marion S. Harris, 85 Fed. 798, 29 C. C. A. 428. Where the minds of the parties contemplate an immediate transfer of title which is followed by possession, such transfer takes place without the payment of the purchase price. Williamson v. Berry, 49 U. S. (8 How.) 495, 12 L. Ed. 1170; Leonard v. Davis, 66 U. S. (1 Black.) 476, 17 L. Ed. 222. See, also, 35 Cyc. 322.

The truth of the libel's allegation as to ownership cannot be put in issue by an exception; and, as libelant prays to be put in possession of such schooner, a relief to which it will be entitled upon proof of the asserted ownership, it is immaterial whether or not in other respects it asks for relief not grantable in admiralty. The exception is overruled.

COLLIER v. IMP FILMS CO.

(District Court, S. D. New York. January 28, 1913.)

COPYRIGHTS (§ 40*)—ABANDONMENT—CHANGE OF TITLE.

An author, who copyrighted a play under one title and thereafter adopted another title, under which it was produced, did not thereby forfeit her copyright as against an infringer with full knowledge of all the facts.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 35; Dec. Dig. § 40.*]

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

In Equity. Suit by Lizzie Hudson Collier against the Imp Films Company. On demurrer to the bill. Demurrer overruled.

Nathan Burkan, of New York City, for plaintiff.
Waldo G. Morse and John L. Lotsch, both of New York City, for defendant.

NOYES, Circuit Judge. The substantial ground of the demurrer is that the complainant is not entitled to restrain the infringement of the copyright of the dramatic composition entitled "A White Slave's Love," because the author after taking out such copyright adopted a new title, "The Undertow," and thereafter assigned the work to the complainant, who produced it under the latter name.

There would be force in this contention, if it appeared that the defendant had acted without notice. I am not satisfied that an author can copyright a play under one title, produce it under another, and hold as an infringer a person who has been misled by his action. But I am not called upon to determine that question, as it does not arise upon these pleadings. The bill avers that the defendant produced the complainant's work with full knowledge of all the facts. As to such a person I think it clear that an author or his assignee does not forfeit a copyright by a change of the title of the work. I also think that the use of the work by the defendant is sufficiently averred.

The demurrer to the bill is overruled, with costs, and the defendant is assigned to answer at the next rule day.

RAIL & RIVER COAL CO. v. YAPLE et al.

(District Court, N. D. Ohio, E. D. May 20, 1914.)

No. 233.

1. COURTS (§§ 282, 314*)—FEDERAL COURT—JURISDICTION—DIVERSITY OF CITIZENSHIP—FEDERAL QUESTION.

The district court has jurisdiction, by reason of diversity of citizenship and the presence of federal questions, of a suit by a West Virginia corporation against the Ohio Industrial Commission, to restrain the commission from enforcing Act Ohio Feb. 5, 1914 (104 Ohio Laws, p. 181), regulating the weighing of coal at the mines, on the ground of its unconstitutionality as violation of the federal Constitution.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820–824, 860; Dec. Dig. §§ 282, 314.*]

2. CONSTITUTIONAL LAW (§ 48*)—STATUTES—VALIDITY.

A state statute must be sustained as constitutional, unless it is clearly shown to be in conflict with some constitutional provision.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

3. CONSTITUTIONAL LAW (§ 81*)—MINES AND MINERALS (§ 86*)—POLICE POWER.

The police power extends to the making of regulations promotive of domestic order, morals, health, and safety, to the removal of causes giving rise to disputes between capital and labor, to provision for the safety

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

and health of miners, and to the regulation of mines and mining and the conservation of minerals.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81;* Mines and Minerals, Cent. Dig. §§ 216–221; Dec. Dig. § 86.*]

4. CONSTITUTIONAL LAW (§ 45*)—STATUTES—PUBLIC POLICY.

The courts may declare the public policy when the lawmaking power has remained silent, but when the people, acting within constitutional powers, have, by amendment to their fundamental law, enumerated the subjects of legislative action, the constitutional provisions and statutes enacted in harmony therewith must be enforced and not nullified by the courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 42; Dec. Dig. § 45.*]

5. CONSTITUTIONAL LAW (§ 45*)—DETERMINATION OF VALIDITY OF STATUTES—QUESTIONS CONSIDERED.

The court, in determining the constitutionality of Act Ohio Feb. 5, 1914 (104 Ohio Laws, p. 181), regulating the weighing of coal at the mines, enacted pursuant to Const. Ohio as amended by adding section 34 to article 2, authorizing laws for the comfort, health, and general welfare of employés, may not adjudge that the act does not provide for the health, safety, and general welfare of employés by supplying an incentive for more effectually removing coal dust, thereby minimizing the danger from its continued presence in mines.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 42; Dec. Dig. § 45.*]

6. CONSTITUTIONAL LAW (§ 45*)—DETERMINATION OF VALIDITY OF STATUTES—JUDICIAL AUTHORITY.

The court in determining the constitutionality of Act Ohio Feb. 5, 1914 (104 Ohio Laws, p. 181), regulating the weighing of coal at the mines, adopted pursuant to Constitution as amended by adding section 36 to article 2, authorizing laws for the regulation of methods of weighing coal and other minerals, may not adjudge that the business of mining coal is not so far affected with a public interest as to justify appropriate regulation of the manner of paying employés, when paid according to the quantity produced, where such regulations will operate to allay discord and conserve the coal supply, for the constitutional provision is designed to limit, by appropriate legislation, the freedom of contract as regards the methods of mining, weighing, and measuring coal.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 42; Dec. Dig. § 45.*]

7. CONSTITUTIONAL LAW (§ 89*)—IMPAIRING RIGHT TO CONTRACT—REGULATION OF MINES.

Act Ohio Feb. 5, 1914 (104 Ohio Laws, p. 181), regulating the weighing of coal at the mines in cases where miners are paid according to the quantity of coal produced, and empowering the Industrial Commission to fix the standard for compensation in case of disputes between operators and miners, does not restrict the right of contract for the labor of miners by the day, week, month, or year, or in any other manner, except as to quantity, that operators may deem proper, but the right of contract is only curtailed, where miners are paid according to quantity, to the extent that they shall be paid according to the total weight of the coal in the mine car, the contents of the car to include no greater percentage of impurities of slate, sulphur, rock, dirt, than is unavoidable as determined by the Industrial Commission, and the act is not invalid as impairing the freedom of contract.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 157; Dec. Dig. § 89.*]

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

8. CONSTITUTIONAL LAW (§ 46*)—STATUTES—OBJECTIONS—TIME TO MAKE.
The objection to the provision of Act Ohio Feb. 5, 1914 (104 Ohio Laws, p. 181), requiring the weighing of coal at the mines, which makes a violation of the act a misdemeanor punishable by fine for each distinct offense in the sum of not less than $300 nor more than $600, is premature when raised by a mining corporation seeking to enjoin the Industrial Commission from enforcing the act, if it be assumed that the penalties are a separate part of the act.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43–45; Dec. Dig. § 46.*]

9. CONSTITUTIONAL LAW (§ 46*)—STATUTES—EXCESSIVE PUNISHMENT.
The provision of Act Ohio Feb. 5, 1914 (104 Ohio Laws, p. 181), regulating the weighing of coal at the mines, which makes a violation of the act a misdemeanor punishable by fine for each distinct offense in the sum of not less than $300, nor more than $600, does not impose such excessive punishment as will preclude a resort to the courts by a mining corporation to test the validity of the act.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43–45; Dec. Dig. § 46.*]

10. CONSTITUTIONAL LAW (§ 62*)—DELEGATION OF LEGISLATIVE POWER.
Act Ohio Feb. 5, 1914 (104 Ohio Laws, p. 181), regulating the weighing of coal at the mines, and empowering the Industrial Commission, in case of disputes between operators and miners, to determine the amount of impurities to ascertain the amount of compensation based on the quantity of coal produced, is not violative of Const. Ohio, art. 2, § 1, as delegating legislative power to the Industrial Commission.

[Ed. Note:—For other cases, see Constitutional Law, Cent. Dig. §§ 94–102; Dec. Dig. § 62.*]

11. STATUTES (§ 107*)—TITLE—SUFFICIENCY.
Act Ohio Feb. 5, 1914 (104 Ohio Laws, p. 181), entitled "An act to regulate the weighing of coal at the mines," is not violative of Const. Ohio, art. 2, § 16, providing that no bill shall contain more than one subject, which shall be expressed in the title, since only one subject is embraced in the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121–134; Dec. Dig. § 107.*]

12. COURTS (§ 366*)—FEDERAL COURTS—DECISIONS OF STATE COURTS.
The district court, in determining the validity of a statute of Ohio attacked on the ground that it violates Const. Ohio, art. 2, § 16, providing that no bill shall contain more than one subject, which shall be expressed in the title, will follow the decisions of the state court, holding that the constitutional provision is merely directory.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954–957, 960–968; Dec. Dig. § 366.*]

13. MASTER AND SERVANT (§ 11*)—REGULATIONS AS TO COAL MINING—STATUTES—VALIDITY.
Act Ohio Feb. 5, 1914 (104 Ohio Laws, p. 181), regulating the weighing of coal at the mines, and empowering the Industrial Commission, in case of disputes between miners and operators to determine the amount of impurities in coal, to ascertain the amount of compensation based on the quantity of coal produced, enacted pursuant to Constitution as amended by sections 34, 36, added to article 2, authorizing laws establishing a minimum wage, and providing for the comfort, health, and welfare of employés, and for the regulation of methods of mining, weighing, and measuring coal and other minerals, is not repugnant to any constitutional provision, state or federal.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 11.*]

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

14. INJUNCTION (§ 157*)—DENIAL OF INTERLOCUTORY INJUNCTION—SUSPENSION OF OPERATION OF DENIAL FOR APPEAL.

The district court, denying an interlocutory injunction to restrain the enforcement of Act Ohio Feb. 5, 1914 (104 Ohio Laws, p. 181), regulating the weighing of coal at the mines, will suspend the operation of the denial to enable complainant to appeal directly to the Supreme Court under Judicial Code, § 266 (Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]), and apply to that court for orders of suspension or supersedeas.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 340, 342; Dec. Dig. § 157.*]

In Equity. Suit by the Rail & River Coal Company against Wallace D. Yaple and others, as members of and constituting the Industrial Commission of Ohio. On application for an interlocutory injunction. Denied.

Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio (A. C. Dustin, of Cleveland, Ohio, of counsel, and Tracy, Chapman & Welles, of Toledo, Ohio, on the brief), for plaintiff.

Timothy S. Hogan, Atty. Gen., of Columbus, Ohio (James I. Boulger, of Chillicothe, Ohio, Robt. M. Morgan, of Cleveland, Ohio, and Clarence D. Laylin, of Columbus, Ohio, of counsel), for defendants.

Before WARRINGTON, Circuit Judge, and SATER and KILLITS, District Judges.

PER CURIAM. The plaintiff, a West Virginia corporation, a large producer of coal and employer of mine laborers, of whom there are more than 45,000 in Ohio, assails the constitutionality of the Ohio law of February 5, 1914 (104 Ohio Laws, p. 181), entitled "An act to regulate the weighing of coal at the mines," and asks for an interlocutory injunction against the defendants, who constitute the Industrial Commission of Ohio, to prevent them from enforcing and attempting to enforce any of the provisions of such act. The act, in so far as it need be considered, is set forth in the margin.[1]

[1] "Section 1. Every miner and every loader of coal in any mine in this state who under the terms of his employment is to be paid for mining or loading such coal on the basis of the ton or other weight shall be paid for such mining or loading according to the total weight of all such coal contained within the car (hereinafter referred to as mine car) in which the same shall have been removed out of the mine; provided, the contents of such car when so removed shall contain no greater percentage of slate, sulphur, rock, dirt, or other impurity than that ascertained and determined by the Industrial Commission of Ohio as hereinafter enacted.

"Sec. 2. Said Industrial Commission shall ascertain and determine the percentage of slate, sulphur, rock, dirt, or other impurity unavoidable in the proper mining or loading of the contents of mine cars of coal in the several operating mines within this state.

"Sec. 3. It shall be the duty of such miner or loader of coal and his employer to agree upon and fix, for stipulated periods, the percentage of fine coal commonly known as nut, pea, dust and slack allowable in the output of the mine wherein such miner or loader is employed. At any time when there shall not be in effect such agreed and fixed percentage of fine coal allowable

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

[1] Diversity of citizenship and the presence of federal questions confer jurisdiction. Siler v. Louisville & Nashville R. R. Co., 213 U. S. 175, 191, 29 Sup. Ct. 451, 53 L. Ed. 753; Michigan Central R. R. Co. v. Vreeland, 227 U. S. 59, 63, 64, 33 Sup. Ct. 192, 57 L. Ed. 417; Louisville & Nashville R. R. Co. v. Siler (C. C.) 186 Fed. 176, 179; Ohio River & W. Ry. Co. v. Dittey (D. C.) 203 Fed. 537, 589; Mutual Film Co. v. Industrial Commission of Ohio, 215 Fed. 138, decided in this district April 2, 1914.

The Ohio Coal Commission, appointed by virtue of a joint resolution of the General Assembly (103 Ohio L. p. 981) "to investigate and report an equitable method of weighing coal at the mines, when the employés are to be paid for their labor on the basis of weight, measure, or quantity, and that will at the same time be to the best interest of the consumers and protect the coal measures of the state," submitted a report in December, 1913, in which, following a review of the evidence and arguments of both operators and miners, it recommended for passage a bill which finally assumed the form of the present act. The information thus brought to the attention of the General Assembly, and to which counsel in the present hearing freely alluded, in so far

in the output of any mine said Industrial Commission shall forthwith upon request of such miner or loader or his employer, fix such allowable percentage of fine coal, which percentage so fixed by said Industrial Commission shall continue in force until otherwise agreed and fixed by such miner or loader and his employer. Whenever said Industrial Commission shall find that the total output of such fine coal at any mine for a period of one month during which such mine shall have been operating while the percentage of fine coal so fixed by said Industrial Commission has been in force, exceeds the percentage so fixed by it, said Industrial Commission shall at once make, enter and cause to be enforced such order or orders relative to the production of coal at such mine, as will result in reducing the percentage of such fine coal, to the amount so fixed by said Industrial Commission.

"Sec. 4. * * *

"Sec. 5. Said Industrial Commission shall have full power from time to time, to change, upon investigation, any percentage by it ascertained and determined, or fixed, as provided in the preceding sections hereof.

"Sec. 6. It shall be unlawful for the employer of a miner or loader of the contents of any car of coal to pass any part of such contents over a screen or other device, for the purpose of ascertaining or calculating the amount to be paid such miner or loader for mining or loading such contents, whereby the total weight of such contents shall be reduced or diminished. Any person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction, shall be fined for each separate offense not less than three hundred dollars nor more than six hundred dollars.

"Sec. 7. A miner or loader of the contents of a mine car, containing a greater percentage of slate, sulphur, rock, dirt or other impurity, than that ascertained and determined by said Industrial Commission, as hereinabove provided, shall be guilty of a misdemeanor and upon conviction shall be punished as follows: For the first offense within a period of three days he shall be fined fifty cents; for a second offense within such period of three days he shall be fined one dollar; and for the third offense within such period of three days he shall be fined not less than two dollars nor more than four dollars. Provided, that nothing contained in this section shall affect the right of a miner or loader and his employer to agree upon deductions by the system known as docking, on account of such slate, sulphur, rock, dirt or other impurity."

as deemed material, is summarized in the next succeeding paragraph, and is as follows:

All mine employés are required to belong to the United Mine Workers—the strongest labor organization in the country. They have had no difficulty in the past in securing fair wages. The system of paying miners long in vogue in nearly all Ohio mines originated when only lump coal was marketable, and is based on the amount of coal mined and passed over a 1¼-inch screen, which amount is assumed to be 28 per cent. The insistence of the miners that they are paid for but a part of the product of their labor began when the finer grades of coal became salable. Their persistent grievance, although it will not bear analysis, engendered disputes and bitter feeling between them and their employers. A statute (section 956, Page & A. General Code of Ohio), whose purpose is the avoidance of danger, especially in gaseous mines, wisely requires the removal of fine coal and coal dust from the mines, for the violation of which (section 976, Page & A. G. C.) the offender may be punished by fine or imprisonment, or both; but the miners, believing their grievance to be just, have not always removed such coal and dust, and thereby neither obviate such danger nor conserve the coal supply. Generally stated, from 20 per cent. to 50 per cent. of the coal under the heretofore prevailing systems of mining has been left in pillars, ribs, and stumps. The coal so left deteriorates from exposure, becomes somewhat crushed by the overlying strata, and yields a more than ordinary percentage of fine coal, in consequence of which the miners either wholly refuse to draw such supports, or decline to do so unless paid a sum additional to the regular contract price. In many instances, on account of such unwillingness, those portions of mines which yield an unusual amount of fine coal have been abandoned, and the fuel so indispensable to industrial progress is lost. On account of dissimilarities in the character of coal, the quantity of fine coal produced varies in different mines and even in different portions of the same mine; the variations in some instances being quite marked. The result is a variation in the wages of miners of equal skill and ability, and an advantage to operators obtaining an excess of fine coal as against the miners, and also as against other operators in districts in which an effort is made to secure as large a percentage of lump coal as is possible. The increased openings between screen bars, resulting from the wear incident to use, diminish the quantity of lump coal passing over such bars, to the loss of the miner. The failure to substitute new screens is due in part to the negligence of the check weighman, authorized by statute (section 970, Page & A. G. C.) and selected and paid by the miners to call attention to the defective character of the screens, and in part to the carelessness of the operators in failing to maintain screens conforming to their contract. Each, however, charges the other with the responsibility of such failure, and instances have occurred in which the miners have struck and closed down mines on account of disputes and delays regarding the furnishing of new screens. Neither the charge that the operators so dump mine cars as to break the coal (by an excessive drop from such cars to the screens, for instance), nor the countercharge that the miners will not

permit such dumping as will eliminate the fine from the lump coal, is proved; but the cupidity and the carelessness of each are deemed factors worthy of consideration. If coal be shot from the solid, payment on the mine-run basis will result in an increased quantity of fine coal. Whether such increase will occur if the coal is undercut before it is shot down, as was done with about 95 per cent. of the coal mined at the time the report was filed, is, in view of the experience in other states having kindred statutes and the difference in the Ohio coal from that of other fields, problematical. If an increase occurs, it will operate quite prejudicially to the sale of Ohio coal. The adoption of the mine-run system will also cause, to the prejudice of the operators, a considerable increase in the amount of impurities brought to the surface, unless some way be found to protect the operator from the carelessness and indifference of the miner, and will require the inauguration of some method of cleaning. It will also necessitate some increased expenditure in the readjustment of tipples. The commission, in view of its findings so summarized as above, concluded that the present system of mining is inequitable, unjust, and productive of discontent. To obviate existing conditions, and to conserve the coal by supplying an incentive to employés to remove pillars, ribs, and stumps and the portion of mines yielding more fine coal than is usual, and to load and send from the mine the fine coal which is now left underground, the commission recommended that shooting from the solid be prohibited; and that the mine-run system of payment be adopted, but so safeguarded as to apply to clean coal only, i. e., coal so cleaned as to be marketable.

The plaintiff charges that the act, in lodging in the industrial commission the duty of determining the percentage of impurities unavoidable in the proper mining or loading of coal, and of fixing, in case of disagreement between the mine operator and his employés and until they subsequently agree, the percentage of fine coal allowable in the output of the mine, unreasonably, unnecessarily, and arbitrarily deprives the operator, whose business, it is alleged, is strictly private and unaffected by any public interest, from contracting with his employés for the production of coal containing more impurities or having a greater degree of purity than that which the Commission has fixed, and denies him the right to reject, and requires him to accept and to make payment for the total contents of each mine car, without deduction or diminution, so long as the percentage of impurities fixed by the Commission is not exceeded. It avers that the act is not designed to protect the morals, health, or safety of the public or of mine employés, and has no real or substantial relation as between the purposes attributed to it and the means devised for attaining such purposes, but has for its object the regulation of the relations between masters and such of their servants as are paid by weight for coal mined or loaded, and that it is therefore unconstitutional, in that it deprives the plaintiff of liberty and property without due process of law, and of the equal protection of the law as guaranteed by the fourteenth amendment and the Ohio Bill of Rights.

[2, 3] The act must be sustained, unless it can be clearly shown to be

in conflict with some constitutional provision. Board of Health v. Greenville, 86 Ohio St. 1, 20, 98 N. E. 1019, Ann. Cas. 1913D, 52; Schmidinger v. Chicago, 226 U. S. 578, 587, 588, 33 Sup. Ct. 182, 57 L. Ed. 364; Mutual Film Co. v. Industrial Commission of Ohio, supra. It came into existence through a claimed exercise of the police power, a power which extends to the making of regulations "promotive of domestic order, morals, health, and safety." Railroad Co. v. Husen, 95 U. S. 465, 471, 24 L. Ed. 527. Laws enacted in its appropriate exercise have been sustained whose purpose has been to remove causes which give rise to disputes and bickerings prejudicial to the good order of society (Camfield v. U. S., 167 U. S. 518, 524, 17 Sup. Ct. 864, 42 L. Ed. 260), to promote harmonious relations between capital and labor (McLean v. Arkansas, 211 U. S. 539, 549, 550, 29 Sup. Ct. 206, 53 L. Ed. 315), to avert strikes, violence, and bloodshed (State v. Peel Splint Coal Co., 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385; Knoxville Iron Co. v. Harbison, 183 U. S. 13, 21, 22 Sup. Ct. 1, 46 L. Ed. 55), to provide for the safety and health of miners (Freund, Police Power, § 115; Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 34 Sup. Ct. 359, 58 L. Ed. ——), and to regulate mines and mining, and to conserve and avoid the waste of fuel, minerals, and other natural resources (Barrett v. Indiana, 229 U. S. 26, 29, 33 Sup. Ct. 692, 57 L. Ed. 1050; State v. Ohio Oil Co., 150 Ind. 21, 49 N. E. 809, 47 L. R. A. 627; Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 Sup. Ct. 576, 44 L. Ed. 729; Hudson Water Co. v. McCarter, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560; Wilmington Star Mining Co. v. Fulton, 205 U. S. 60, 27 Sup. Ct. 412, 51 L. Ed. 708).

[4] The rule announced in McLean v. Arkansas, supra, which involved a statute akin to that here under consideration, has subsequently been so often approved by the Supreme Court as to be controlling in the present instance, if the Ohio act is not materially different from that of Arkansas and is free from the constitutional infirmities which resulted in the overthrow of the earlier statute for the weighing of coal before screening. 93 Ohio L. p. 33; In re Preston, 63 Ohio St. 428, 59 N. E. 101, 52 L. R. A. 523, 81 Am. St. Rep. 642. It is contended that the McLean Case is not an authority, on account (among other things) of the powers conferred on the Industrial Commission, the alleged absence of a provision granting to operators the right, under proper circumstances, to reject coal brought to the surface, the possibly heavy penalties that may be imposed on offending operators, and the alleged obscurity and uncertainty of the penalties to which transgressing employés will be subjected. It is further urged that the act must be held to be in excess of the state's police power, and contrary to its declared policy, in view of the Preston Case, which pronounced invalid a law less vulnerable, it is claimed, to constitutional objection. None of the state courts has passed upon the present statute. The courts may declare the public policy when the lawmaking power is silent, but when the people, acting within constitutional powers, have, by amendment to their fundamental law, enumerated the subjects of legislative action, such constitutional provision and statutes enacted in harmony therewith must be enforced and not nullified by the courts. Probasco v. Raine, 50 Ohio St. 378, 391, 34 N. E. 536.

[5] Subsequent to the decision of the Preston Case, the state Constitution was amended by adding to article 2 the following sections:

"Sec. 34. Laws may be passed fixing and regulating hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employés; and no other provision of the Constitution shall impair or limit this power."

"Sec. 36. Laws may be passed * * * to provide for the regulation of methods of mining, weighing, measuring and marketing coal, oil, gas and other minerals."

[6] Without determining the soundness of the argument that the act, indirectly at least, establishes a minimum wage, in that it insures the miner full pay for all coal mined in accordance with the prescribed regulation, it may not be said that, in supplying an incentive for more effectually securing the removal of fine coal and coal dust to the surface, and thereby minimizing or dissipating the danger arising from their continued presence in the mines, the act does not provide for the health, safety, and general welfare of employés. Furthermore, section 36 was designed to limit, by appropriate legislation, the freedom of contract as regards the methods of mining, weighing, and measuring coal. We are not prepared to hold that the Legislature, acting within the scope of that section, may not say that the business of mining coal is so far affected with a public interest as to justify appropriate regulation of the manner of paying employés when they are to be paid according to the quantity produced, and when such regulatory statute will operate to allay discord and strife and conserve the coal supply.

[7] The Ohio act does not restrict the right of contracting for the labor of miners by the day, week, month, or year, or in any other manner (except as to quantity) that the operator may deem proper. If the miner or loader by the terms of his employment is to be paid by the ton or other weight, the right of contract is then curtailed to the extent that he shall be paid according to the total weight of the coal contained in the mine car, such contents to include, however, no greater percentage of slate, sulphur, rock, dirt, or other impurities than is unavoidable, as determined by the Industrial Commission. If the employé should send to the surface an excess of such impurities, or of any of them, the operator is not required to accept the car or pay for its contents as delivered, but is at liberty to agree with him as to the deductions to be made on account of impurities. If no agreement is made, the offending employé may be prosecuted for his violation of the Commission's order as for a misdemeanor. If he be unable or unwilling to pay the fine imposed, he may be imprisoned in the county jail until his fine and costs are paid, or secured to be paid, or he is otherwise legally discharged, provided he be given credit upon his fine and costs at the rate of 60 cents per day for each day's imprisonment. Section 13,717, Page & A. G. C. He is thus subjected to penalties which are neither obscure nor uncertain. The act does not require the operator to mingle the contents of such a car with the other coal produced, or prevent his removing, by screening or otherwise, the excess of any impurities. It must be presumed that the Industrial Commission will perform its official duty and fix a standard which will exclude all slate, sulphur, rock, dirt, or other impurities, except such as is unavoidable.

The operator, if given the unrestricted right of contract, could do no more. If dissatisfied with the Commission's order, which by statute is made prima facie reasonable and lawful, he may petition for and obtain a hearing before the Commission as to those features, and may thereafter have a speedy review of its action by the Supreme Court of the state. Act February 27, 1913 (103 Ohio L. p. 95) §§ 25, 27, 38–42; article 4, § 2, Ohio Constitution. The Commission may of its own motion upon investigation modify or rescind any of its prior orders. The law permits the employer and employé to stipulate as between themselves what percentage of coal commonly known as nut, pea, dust, and slack shall be allowable in the output of the employer's mine. It is only in case of their disagreement that the Commission may designate such percentage, and its orders in that behalf must possess the same characteristics as those above mentioned, and are likewise subject to rehearing and review. If at any time for a period of one month during the operation of the mine the percentage so fixed is exceeded, the Commission is required to enforce its order against the offender, whoever he may be. The act prescribes no penalty for disobedience to such an order, but if, as claimed by defendants, section 43 of the act of February 27, 1913, applies, which we do not determine, an offending party may be fined not less than $50, nor more than $1,000 for his first offense, and not less than $100 nor more than $5,000 for each subsequent offense. In either event the attitude of the employer is no worse than that of the employé. The danger of an increase in the quantity of fine coal caused by shooting from the solid may, under the act of February 5, 1914 (104 Ohio L. 161), be wholly obviated, if the operator so elects, in that shooting of that character may not be done and is made a misdemeanor, unless the operator and a majority of his miners obtain from the Commission, upon application, an order permitting it.

[8, 9] A violation of the provisions of section 6 is made a misdemeanor punishable by fine for each distinct offense in a sum not less than $300 nor more than $600. If the penalties are a separable part of the act, which we need not now determine, the objection to it on account of them is premature. Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312. If they are not separable, they are not so excessive as to preclude a resort to the courts for the purpose of testing its validity. It is not to be presumed that a prudent employer, wishing to test the law, will risk the possibilities of repeated violations of the Commission's orders.

[10] Every argument advanced to sustain the contention that the act delegates legislative power to the Industrial Commission in violation of section 1, art. 2, of the state Constitution was urged against the act, providing a board to censor motion picture films, approved May 13, 1913, in the case brought by the Mutual Film Co. v. Industrial Commission of Ohio, supra. To state our reasons for holding the present contention unsound, as we do, would be to repeat, in substance, what was said to the same point in that case. We are content to abide by the conclusion there reached.

[11, 12] The claim that the act is in violation of section 16 of arti-

cle 2 of the Ohio Constitution, which provides that "no bill shall contain more than one subject, which shall be clearly expressed in its title," is unavailing. But one subject is embraced in the act. Were it otherwise, we should follow the decisions of the state court, and hold that the provision of the Constitution above quoted is directory and not mandatory. State ex rel. v. Covington, 29 Ohio St. 102, 116.

[13] In view of the above quoted amendments to the Ohio Constitution, the present act's want of similarity to that considered in the Preston Case and its general resemblance in its principal features to that of Arkansas, the instant case is ruled by McLean v. Arkansas, and is well within German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. ——, decided April 20, 1914. It is not repugnant to any constitutional provision, state or federal.

[14] The prayer for an interlocutory injunction is therefore denied. In order, however, to enable complainant to take an appeal directly to the Supreme Court of the United States, pursuant to section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]), and to apply to that court for an order of suspension or supersedeas, if it so desires, we have concluded to suspend the operation of the order of denial herein for a period of 15 days from the date of its entry.

UNITED STATES v. ROGDE et al.

(District Court, D. South Dakota, S. D. April 22, 1914.)

1. PLEADING (§ 217*)—DEMURRER—NATURE AND OFFICE.
   Under the South Dakota practice a demurrer searches the whole record and relates back to the first defective pleading.
   [Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 537, 540–548; Dec. Dig. § 217.*]

2. POST OFFICE (§ 7*)—POSTMASTERS—STATUS.
   In conducting the Post Office Department the United States is engaged in discharging a governmental function, and all persons or corporations engaged in the carriage or delivery of the mail by authority of the United States, conferred by contract or general laws, are public agents or instruments used by it in the discharge of such function.
   [Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 7–14; Dec. Dig. § 7.*]

3. OFFICERS (§ 118*)—LIABILITY OF PUBLIC OFFICERS—RESPONSIBILITY FOR DEPUTIES OR ASSISTANTS.
   A public officer or agent, provided he has exercised ordinary care to select competent subordinates, is not responsible for the misfeasance or positive wrongs, or for the nonfeasance or negligence or omissions of duty of his subagents or servants, or other persons properly employed by him in the discharge of his official duty.
   [Ed. Note.—For other cases, see Officers, Cent. Dig. § 195; Dec. Dig. § 118.*]

4. POST OFFICE (§ 7*)—POSTMASTERS—LIABILITY ON BONDS—LOSS OF REGISTERED MATTER.
   By Postal Regulations 1902, § 864, a postmaster is made liable "for the wrong delivery, depredation upon, or loss of any registered letter or par-

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

cel while in his custody, if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations"; but neither under the statutes nor regulations is he made an absolute insurer of mail while in his custody, and a postmaster is not responsible for the loss of a registered package, which in the usual course came into the possession of a sworn clerk in his office, not appointed by him, but in the classified civil service, without his knowledge, and which was lost or stolen therefrom without his negligence or wrongdoing, or disregard of the regulations.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 7–14; Dec. Dig. § 7.*]

At Law. Action by the United States against Peter J. Rogde, H. W. Kittredge and Fanny Pearson, as heirs and devisees of Alfred B. Kittredge, deceased, Thomas McKeon, Peter F. Thompson, William L. Baker, Herman C. Freese, George W. Abbott, Francis Hyde, and Porter P. Peck. On demurrers to answers. Demurrers overruled, and judgment for defendants.

Robert P. Stewart, U. S. Dist. Atty., of Deadwood, S. D., and Edmund W. Fiske, Asst. U. S. Dist. Atty., of Sioux Falls, S. D., for plaintiff.

Aikens & Judge, R. D. Kittredge, and E. R. Winans, all of Sioux Falls, S. D., for defendants.

ELLIOTT, District Judge. Plaintiff brings this action in this court against the defendant Rogde, as principal, and his codefendants, as sureties, upon his official bond, for the purpose of recovering $10,000 and interest by reason of the facts set forth in the complaint herein as follows:

"The United States of America, plaintiff herein, appearing by its duly authorized attorney, Robert P. Stewart, complains and alleges:

"I. That this action is brought and instituted by and under the direction of the Attorney General of the United States.

"II. That the defendants Peter J. Rogde, Thomas McKeon, Peter F. Thompson, William L. Baker, Herman C. Freese, George W. Abbott, Francis Hyde, and Porter P. Peck are residents of Minnehaha county, South Dakota, and the said defendants are residents, citizens, and inhabitants of the Southern division of the said district of South Dakota.

"III. That the defendants H. W. Kittredge and Fannie Pearson are nonresidents of the said district of South Dakota.

"IV. That on the 21st day of June, A. D. 1910, the above named Peter J. Rogde was duly appointed postmaster of the United States post office at Sioux Falls, South Dakota, and thereafter did duly execute the prescribed oath of said office and did duly qualify as such postmaster, and was duly commissioned as such by the proper authorities of the United States on the 29th day of June, A. D. 1910, and thereupon entered upon the discharge of his duties as said postmaster, and then became, and was at all times mentioned in this complaint, and now is, such postmaster.

"V. That on the 25th day of June, A. D. 1910, the defendants Peter J. Rogde, Thomas McKeon, Peter F. Thompson, William L. Baker, Herman C. Freese, George W. Abbott, Francis Hyde, and Porter P. Peck, together with Alfred B. Kittredge, now deceased, did execute and deliver to the plaintiff a certain bond, as required by section 3834, Revised Statutes [U. S. Comp. St. 1901, p. 2610], which said bond so executed by said defendants and said Alfred B. Kittredge, deceased, was in the following words, figures, characters, and letters, to wit:

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

"'Bond.

"'Know all men by these presents that we, Peter J. Rogde, of Sioux Falls, in the county of Minnehaha, state of South Dakota, as principal, and Alfred B. Kittredge, Sioux Falls, South Dakota, Thomas McKeon, Sioux Falls, South Dakota, Peter F. Thompson, Sioux Falls, South Dakota, William L. Baker, Sioux Falls, South Dakota, Herman C. Freese, Sioux Falls, South Dakota, George W. Abbott, Sioux Falls, South Dakota, Francis Hyde, Sioux Falls, South Dakota, and Porter P. Peck, Sioux Falls, South Dakota, as sureties, do hereby bind ourselves, our heirs, executors, and administrators, jointly and severally to pay to the United States of America the sum of fifty thousand dollars ($50,000).

"'In witness whereof we have hereunto subscribed our names and affixed our seals this twenty-fifth day of June in the year one thousand nine hundred and ten.

"'Whereas, the above-bound Peter J. Rogde was on June 21, 1910, appointed postmaster at Sioux Falls aforesaid, and has duly executed and subscribed the prescribed oath of office:

"'Now the condition of this obligation is that if the said Peter J. Rogde shall faithfully discharge all the duties and trusts imposed on him either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the government imposed on him by law or by regulation of the Treasury Department made in conformity with law, then this obligation shall be void; otherwise, of force.

"'Peter J. Rogde.	[Seal.]
"'Alfred B. Kittredge.	[Seal.]
"'Thomas McKeon.	[Seal.]
"'Peter F. Thompson.	[Seal.]
"'William L. Baker.	[Seal.]
"'Herman C. Freese.	[Seal.]
"'George W. Abbott.	[Seal.]
"'Francis Hyde.	[Seal.]
"'Porter P. Peck.	[Seal.]

"'Signed and sealed in the presence of:

"'Harry R. Barton, Sioux Falls, S. D.

"'Edna Dixon, Sioux Falls, S. D.'

"That the said sureties did duly justify, which justification was indorsed on said bond, and thereafter, and on the 29th day of June, 1910, and prior to the issuance of the commission of the said Peter J. Rogde as postmaster aforesaid, said bond was accepted by the postal authorities of the United States.

"VI. That among other covenants said bond was conditioned 'that if the said Peter J. Rogde shall faithfully discharge all the duties and trusts imposed on him, either by law or by the regulations of the Post Office Department, and shall perform all duties as fiscal agent of the government imposed on him by law or by regulation of the Treasury Department made in conformity with law, then this obligation shall be void; otherwise, of force.' That under the provisions of section 810 of the Postal Laws and Regulations of 1902 the Post Office Department of the United States imposed upon all postmasters the following duty and trust with respect to registered mail matter: 'The postmaster will be held accountable for all registered matter coming into his post office, and he must take such precautions as may be necessary to safeguard it.'

"VII. That the said defendant Peter J. Rogde was such postmaster of the United States at Sioux Falls, in the state of South Dakota, and in charge of said post office and engaged in the performance of his said duties, on the 19th day of September, A. D. 1911, at 7 o'clock a. m. That there was received at said time by the said defendant Peter J. Rogde, as such postmaster, at the said United States post office at Sioux Falls, in the state of South Dakota, a certain United States registered parcel numbered ninety-three thousand

five hundred and three (93,503), which had been duly registered by the United States post office establishment at the United States post office, at Minneapolis, Minnesota, and had been mailed in said United States post office at Minneapolis, Minnesota, with the postage and registry charges prepaid thereon, on the 18th day of September, A. D. 1911, by the Northwestern National Bank, a corporation duly established and doing a banking business at Minneapolis, Minnesota, addressed to the Sioux Falls Savings Bank, Sioux Falls, South Dakota. That said registered parcel had been transported and carried from Minneapolis, Minnesota, to said Sioux Falls, South Dakota, by means of the United States post office establishment. That said registered parcel then and there contained currency and bank notes of sundry and divers denominations, lawful money of the United States, to the amount and of the value of ten thousand ($10,000.00) dollars. That said registered parcel of the amount and value aforesaid was then and there received by said defendant Peter J. Rogde, and came into the possession and custody of him, the said Peter J. Rogde, in his official capacity as such postmaster of the United States at Sioux Falls in the state of South Dakota.

"VIII. That the said plaintiff, for assigning a breach of said bond, alleges that the said defendant Peter J. Rogde failed, neglected, and did not faithfully discharge and perform all the duties and obligations imposed upon him and required of him by the laws of the United States and by the rules and regulations of said United States Post Office Department and the condition of said bond, in that the said postmaster, the defendant Peter J. Rogde, unlawfully failed and refused, and still unlawfully fails and refuses, to account and respond for said registered parcel so received by him as aforesaid, of the value aforesaid, to the United States, when requested heretofore so to do by the proper officers of the United States, and has unlawfully failed and refused, and still unlawfully fails and refuses, to deliver said registered parcel to the said addressee, Sioux Falls Savings Bank, Sioux Falls, South Dakota, or to any one for the said addressee, although the said addressee has heretofore demanded said registered parcel from the said defendant Rogde. That said addressee has never received said registered parcel, nor any part of the sum contained therein, nor has any one received the same for said addressee.

"IX. That on the 17th day of February, 1912, demand was made by the plaintiff upon said defendant Peter J. Rogde for the sum of ten thousand ($10,000.00) dollars, which was, and is, the value of said registered parcel, and demand was heretofore made, on the 17th day of February, 1912, by the plaintiff upon the defendants Thomas McKeon, Peter F. Thompson, William L. Baker, Herman C. Freese, George W. Abbott, Francis Hyde, and Porter P. Peck for the payment of the sum of ten thousand ($10,000.00) dollars, and said defendants and each of said defendants has refused and still refuses to make payment of said amount to plaintiff.

"X. That one of the sureties on said bond, Alfred B. Kittredge, after the execution thereof died, and his estate has been duly probated in the county court of Minnehaha county, South Dakota, and, by the terms of the will and the decree of distribution entered in said probate court, property of a value exceeding $25,000.00 belonging to the estate of said Alfred B. Kittredge was vested in the defendants H. W. Kittredge and Fannie Pearson, and each of them.

"XI. That the said two last named defendants are now in possession of said property belonging to said estate. That the said estate has been fully closed in said probate court and the executors thereof discharged.

"XII. That by reason of the foregoing facts and premises there is due and owing to the plaintiff from the defendants above named, and each of them, the sum of ten thousand dollars ($10,000.00), with interest thereon from February 17, A. D. 1912, at the rate of 7 per cent. per annum, no part of which has been paid.

"Wherefore plaintiff demands judgment that it have and recover of and from the defendants, and each of them, the sum of ten thousand dollars ($10,000.00), with interest thereon at the rate of 7 per cent. per annum from February 17, A. D. 1912, besides its costs and disbursements herein incurred."

To this complaint the defendant Rogde answered as follows:

"The above-named defendant, Peter J. Rogde, for his answer to the complaint in the above-entitled action alleges:

"I. Denies each and every allegation, statement, and charge therein contained not hereinafter specifically admitted.

"I½. Admits paragraphs I, II, III, IV, V, and so much of paragraph VI as refers to the conditions of the bond, and that section 810 of the Postal Laws and Regulations of 1902 contains the words quoted in said paragraph as forming a part thereof, and so much of paragraph VII as reads: 'That the said defendant Peter J. Rogde was such postmaster of the United States at Sioux Falls in the state of South Dakota and in charge of said post office and engaged in the performance of his said duties on the 19th day of September, A. D. 1911;' also so much of paragraph IX as reads: 'That on the 17th day of February, A. D. 1912, demand was made by the plaintiff upon said defendant Peter J. Rogde, for the sum of ten thousand ($10,000) dollars,' and that he 'refused and still refuses to make payment of said amount to plaintiff'; also paragraphs X and XI thereof.

"II. Specifically denies that he personally received the registered parcel referred to in paragraph VII as No. 93,503, but alleges that a parcel so numbered and addressed to the Sioux Falls Savings Bank, Sioux Falls, South Dakota, was, according to the records of the said post office at Sioux Falls, received at said office from train No. 83, running from Worthington, Minnesota, to Mitchell, South Dakota, on the Chicago, St. Paul, Minneapolis & Omaha Railway, at about the hour alleged in the complaint, and that said registered parcel was sent from Minneapolis, Minnesota, on the 18th day of September, 1911, which said record was made by a government postal employé in the classified civil service, who was at that time in charge of incoming registered mail in said post office, and who was duly sworn according to law and the rules and regulations of the Post Office Department of the United States.

"That what is contained in this paragraph is all the knowledge and information this defendant has concerning the receipt of said registered parcel No. 93,503.

"III. As to whether said registered parcel No. 93,503 contained the sum of $10,000 in currency and bank notes, as therein alleged, or any other sum, more or less, he has no knowledge or information sufficient to form a belief.

"IV. Specifically denies paragraphs VIII and XII thereof, but admits that the Sioux Falls Savings Bank, the addressee of the registered parcel No. 93,503, did on the 19th day of September, 1911, present to the clerk then having charge of the delivery of registered mail at the post office at Sioux Falls a notification card of the receipt of said registered parcel and asked for the same, but that defendant was unable to deliver the same for the reasons hereinafter stated.

"V. Further alleges that the reason why defendant did not and could not deliver to the addressee the registered parcel No. 93,503, upon request or demand as stated in paragraph IV hereof, was that the said parcel had then been either wrongly delivered or lost, or had then been stolen by some person or persons to this defendant unknown, if it had in fact been received as disclosed by the records of the post office referred to in paragraph II hereof.

"That after the wrong delivery, loss, or theft of said registered parcel No. 93,503 referred to in the complaint was discovered and reported to him, this defendant promptly notified the proper Post Office Department officials of the loss or theft of such parcel as required by post office laws and regulations then in force. That immediately thereafter post office officials charged with the duty of examining into such matters proceeded to investigate such wrong delivery, loss, or theft, in which investigation this defendant participated and rendered such service as was in his power, and if it has been determined who the responsible parties were, or if the said parcel or its contents, in whole or in part, has been recovered, this defendant has no knowledge thereof.

"VI. Further alleges that on the 19th day of September, A. D. 1911, there

was in force the following regulation of the Post Office Department of the United States, which said regulation is designated as section 864 of the Postal Laws and Regulations of July, 1902, to wit: 'Postmasters will be held personally responsible by the Post Office Department for the wrong delivery, depredation upon, or loss of any registered letter or parcel while in their custody, if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations. They are also liable on their bond for any damage resulting to the department on account of such wrong delivery, depredation, or loss.'

"That said section 864 is a part and parcel of subtitle VI of Title Five, having reference to the 'Registry System,' and is classified under the subtitle of 'Delivery of Registered Matter,' whereas section 810 of said Postal Laws and Regulations (a portion of which is copied into paragraph VI of the complaint herein) is contained in subdivision II of said Title Five, 'Registry System,' under the subtitle of 'Preparation and Dispatch of Registered Matter,' and contains in addition to the language quoted in said paragraph VI of the complaint, and preceding the same, the following: 'All registered matter must be kept separate from ordinary matter, and properly protected from accident or theft. No unauthorized person should be permitted to have access to the place where registered matter is kept; and all persons employed in a post office who handle registered matter must be duly sworn.'

"VII. Further alleges that he did not either wrongly deliver, take, or appropriate, or convert to his own use, lose, or commit any depredation upon said registered parcel No. 93,503 or any of its contents, and that he was not, with respect to said registered parcel or its contents, either in its receipt, protection, or delivery, nondelivery, depredation, or loss, guilty either of negligence or disregard of the regulations of the Post Office Department of the United States, but that he was free from negligence and in all respects regarded the regulations aforesaid.

"VIII. Further alleges that the post office at Sioux Falls in the state of South Dakota was at all the times mentioned in the complaint an office of the first class, and that the employés therein, who were in charge of said registered parcel No. 93,503 and all other registered mail, as well as all other employés therein except the assistant postmaster, were in the classified civil service, and were all duly sworn as such employés, and under personal bond to the government of the United States as such employés, as required by law and the rules and regulations of the Post Office Department. That the said employés who were in charge of said registered parcel No. 93,503 and other registered mail had been in the classified civil service as aforesaid, and employed in said post office as clerks for many years prior to September 19, 1911, and prior to the appointment of this defendant as such postmaster; that they were familiar with the laws, rules, and regulations of the Post Office Department for the treatment and handling and care of registered mail. And this defendant had no reason to doubt their familiarity with or knowledge of such laws, rules, and regulations, nor their competency, reliability, fidelity, honesty, or integrity, but, on the contrary, he believed them competent, reliable, honest, and trustworthy.

"IX. Further alleges that plaintiff is not the real party in interest in the subject-matter of this action, that plaintiff has not been damaged on account of any of the facts set forth in the complaint herein, and further in this regard alleges upon information and belief, and charges the truth to be:

"(a) That the sender of the registered parcel No. 93,503 has suffered no damage on account of the facts set forth in the complaint herein, for the reason that said sender was protected by a policy of insurance, issued to it by the Marine Insurance Company, or some other insurance company, without the knowledge, acquiescence, or consent of this defendant, in consideration of an agreed premium or compensation, duly paid to it for its safe delivery, to the full extent of the value of the contents of said registered parcel, and has been fully reimbursed by such insurance company for the failure of delivery of the same to the addressee thereof.

"(b) That he is informed and believes, and charges the truth to be, that the addressee of the registered parcel No. 93,503, referred to in the complaint,

has, because of the facts in subdivision 'a' of this paragraph alleged, suffered no damage on account of the facts set forth in the complaint herein.

"(c) Further alleges that neither the sender nor the addressee of said registered parcel No. 93,503, referred to in the complaint, has ever made any claim or demand against defendant on account of the nondelivery to said addressee of said parcel.

"(d) Further alleges upon information and belief, and charges the truth to be, that the sender of said registered parcel No. 93,503, referred to in the complaint, would not have transmitted through the United States mail said parcel, had it not been for the security afforded them by the insurance hereinbefore referred to and the inducement of a less cost for such insurance and transmission than it would have been obliged to pay to a common carrier.

"Wherefore defendant demands judgment: (1) For the dismissal of the complaint on its merits; (2) for his costs and disbursements herein."

The rest of the defendants also filed an answer in no respect substantially differing from that of the defendant Rogde.

The plaintiff thereupon filed demurrers to the separate answers of the defendant Rogde, and his codefendants, upon the ground that said answers do not state facts sufficient to constitute a defense.

[1] The plaintiff, by filing a demurrer to the answer, admits all facts stated in the answer that are well pleaded, and in the light of the position of counsel for the plaintiff, as well as for the defendant, the determination of the real issue involves also a determination of whether or not the complaint in this action against these defendants states facts sufficient to constitute a cause of action. Under the practice recognized in this state a demurrer searches the whole record and relates back to the first defective pleading. Clay County v. Simonsen, 1 Dak. 403, 46 N. W. 592; Tribune Printing & Binding Co. v. Barnes, 7 N. D. 591, 75 N. W. 905.

It was conceded by counsel for plaintiff upon the oral argument that it was the intent and purpose of the plaintiff, in its complaint, to charge the defendant with responsibility for the loss of the registered package described in the complaint, eliminating any and all allegations of negligence on the part of the defendant Rogde, as postmaster.

It is further claimed by the plaintiff that the various elements entering into the affirmative allegations of defendants' answers herein constitute no defense, and that the postmaster is in effect an absolute insurer of all mail, whether registered or otherwise, and that he is absolutely liable upon his bond for a failure to deliver mail to the addressee upon demand, and that such liability is absolute, saving only the act of God and the public enemy; that the execution of the bond set forth in the complaint herein superimposes upon the implied contract of bailment an express contract, which carries with it a greater liability, and that greater liability, in so far as material here, is the absolute duty to deliver all mail coming into his possession, to the addressee upon demand.

The defendant contends: (1) That it being admitted by plaintiff's demurrer that defendant is not a wrongdoer, and it being further shown that there is no allegation of his wrongdoing in the complaint, that therefore the possession of the mail in the Post Office Department at the post office in Sioux Falls, S. D., was not disturbed by him,

nor is it claimed that he either destroyed or converted the registered letter. (2) That this action is brought in behalf of the insurance company, who has neither a legal nor moral right to recover damages against the defendants or either of them. (3) That a fair interpretation of the obligations of the defendant Rogde as postmaster of the city of Sioux Falls, S. D., gathered from the statutes of the United States, the postal laws, or rules and regulations promulgated pursuant to law, and the bond set forth in the complaint herein, does not evidence an intent on the part of the Post Office Department to impose any such liability upon the defendant Rogde, or his bondsmen, either by law or by contract.

This case, therefore, depends upon the answer to the one question of whether or not this defendant Rogde, as postmaster, under the provisions of his bond, the laws of the United States, and the regulations of the Post Office Department, became an absolute insurer of all mail matter that came into his hands, whether registered or ordinary mail matter, because it is conceded that there is no difference in the liability of the postmaster as to the different classes of mail, unless it be to the amount that the government is liable upon a registered package, and that has been eliminated in this case as the defendant, rather than contest that feature, offered to pay to the government $50, the maximum amount the government insures to the sender of registered packages.

There is a dearth of decisions upon the question presented here, and barring the case of Griswold v. United States, which will be hereafter referred to, there is no decision directly in point. There are well-settled principles of law which I believe must determine the rights of the parties to this litigation, upon the facts admitted in the pleadings.

The defendant Rogde was a public agent of the United States in relation to the delivery of the mail, for the reason that the Constitution of the United States conferred upon it the power to establish post offices and post roads, and this power was granted by the people as one of the sovereign powers to be exercised by the general government exclusively. By virtue of this grant of power the United States has always, through its Post Office Department, assumed exclusive charge of the carriage and delivery of the mail for the benefit of all the people. In doing so the United States is beyond question engaged in the discharge of a governmental function. All persons or corporations who are engaged in the carriage or delivery of mail by the authority of the United States, conferred by contract or general laws, are but the instruments used by it to discharge this function. Bankers' Mutual Casualty Co. v. Minn., St. P. & S. S. M. Ry. Co., 117 Fed. 434, 439, 54 C. C. A. 608, 65 L. R. A. 397.

[2] What are the liabilities of public agents? To this question, under the authorities, there can be but one answer. A public officer or agent, provided he has exercised ordinary care to select competent subordinates, is not responsible for the misfeasances or positive wrongs, or for the nonfeasances or negligences or omissions of duty, of his subagents or servants, or other persons properly employed by or under him in the discharge of his official duties. It seems to me that the

foregoing is directly applicable to the situation pleaded by the defendants and admitted by the demurrer of the plaintiff.

[3] It is conceded by all parties that it is the intent to charge no negligence of any kind or character, no wrongdoing upon the part of Postmaster Rogde, and, considering the facts as pleaded by the answers, the package came into the post office at Sioux Falls, was registered, never was seen by Postmaster Rogde, he has no knowledge that it ever came, except that the record kept in the regular way showed such a package had been received, and the fact further appears that it was stolen or lost, and whether it was lost or stolen by or through the acts of some one employed in the post office or by trespassers is not known. It is only conceded that the defendant postmaster was not guilty of any negligence or wrongdoing in connection therewith, unless he be a wrongdoer under the provisions of his bond, by simply failing to deliver such package to the addressee upon demand, though it is admitted that he in no way, directly or indirectly, in any manner contributed to the larceny of the package.

The answer to the above question as to the liability of the defendants herein involves two propositions, as follows:

1. There is no common-law liability on the part of the defendant postmaster for property lost or taken from him without negligence or wrongdoing upon his part.

2. If there is responsibility on the part of this defendant Rogde for the loss of the registered package referred to in the complaint herein, then it must be (a) by reason of the statutes of the United States; (b) by the rules and regulations of the Post Office Department promulgated pursuant to law; (c) by contract, which in this case is dependent upon the provisions of the bond in connection with the law and rules and regulations.

It is conceded that there is no statutory provision directly fixing the liability on the part of the defendant Rogde as postmaster, for the loss of this package. It is claimed, however, by the plaintiff, that section 810 of the Postal Regulations of A. D. 1902 makes the postmaster liable as an insurer on his bond, and the plaintiff cites, and with justification, the case of United States v. Griswold, 8 Ariz. 453, 76 Pac. 596; Id., 9 Ariz. 304, 80 Pac. 317.

Apparently the case above cited was considered in every material aspect that is raised in the instant case. I am of the opinion, however, that the conclusion of the court reached in this case was not justified by a fair interpretation of the rules and regulations as they existed at that time; it being evident that an important regulation was entirely overlooked, or at least was not considered, in construing the duty of the postmaster with reference to the mail, and especially registered mail, and therefore the determination of whether or not the loss of the registered package without negligence of the postmaster amounts to a breach of the bond given by such postmaster, under section 3834, Revised Statutes of the United States. The decision of the court at page 318 of 80 Pac., at page 307 of 9 Ariz., states:

"These rules and regulations place upon the postmaster the following duty and trust with respect to registered matter: All registered matter must be

kept separate from ordinary mail matter, and so as to be secure from accident or theft. * * * The postmaster will be held accountable for all registered matter coming into his postoffice. Section 1051, Postal Laws and Regulations."

The court then goes on to discuss the necessity for the construction they place upon this section, closing their conclusion with the following language:

"Packages intrusted to them under the registry system be thus insured, as designed by the post office regulations, the receipt of their special care and watchfulness."

It will be noted that the judgment in this case is based upon this section 1051 of the Postal Laws and Regulations of A. D. 1893, while as a matter of fact at the time of this decision there had been another compilation of the laws and regulations of the postal department, and section 1051, above quoted from the said opinion, was carried forward in the compilation of 1902 of the Postal Laws and Regulations promulgated by the United States Post Office Department as section 810, which changes the phraseology slightly, but not the substance, and reads as follows:

"Sec. 810. All registered matter must be kept separate from ordinary matter and properly protected from accident or theft. No unauthorized person should be permitted to have access to the place where registered matter is kept, and all persons employed in a post office who handle registered mail must be duly sworn. The postmaster will be held accountable for all registered mail coming into his post office, and he must take such precautions as may be necessary to safeguard it."

In this compilation, following section 810, the following notice appears:

"*See Sec. 278 as to responsibility of postmasters for negligence.*"

Turning, then, to section 278, referred to in the note by the Post Office Department, we find the following:

"Sec. 278. * * * For the value of registered or ordinary mail matter lost by robbery of post offices, the postmaster will be held responsible, if upon investigation it appears that due care was not taken for the protection of the property."

Then also turning to page 402 of the said regulations, we find section 864 with reference to the liability of postmasters, which is as follows:

"Sec. 864. Postmasters will be held personally responsible by the Post Office Department for the wrong delivery, depredation upon, or loss of any registered letter or parcel while in their custody if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations. They are also liable on their bond for any damage resulting to the department on account of such wrong delivery, depredation or loss."

The Griswold Case was officially reported March 30, 1905, and therefore it will be seen that at the time of the filing of that opinion, and prior to the time the original opinion was reported in 76 Pac. 596, in 1904, the Post Office Department had promulgated its Postal Laws and Regulations of A. D. 1902, and had by section 864 specifically prescribed the liability of a postmaster for the wrong delivery, depredation upon, or loss of any registered letter or parcel while in their

custody, predicating such liability upon the condition precedent that *the loss must be due to negligence or disregard of the regulations.*

It appears from the judgment that is directed in the Griswold Case that interest is to be computed from March 21, 1900, thus indicating that the cause of action arose upon that date. It is possible that section 864 was not in existence at the time the action accrued, and therefore that the Griswold decision was necessarily based upon section 1051, and upon that alone, and that 864 had not then been promulgated at all.

There is no pretense in this case that this defendant Rogde was either negligent or disregarded the regulations, and therefore it appears clear to me that it was never the intent or purpose of the department to charge him with any liability with reference to its loss.

Plaintiff refers to the last portion of this paragraph 864, which reads as follows:

"They are also liable on their bond for any damage resulting to the department on account of such wrong delivery, depredation, or loss."

"They" in this sentence of this paragraph refers back to the word "postmasters," and it refers to liability on their bond for any damage resulting to the department on account of *such* wrong delivery, depredation, or loss; that is, on account of any wrong delivery, depredation, or loss, if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations.

It will be observed that in 1902 this section 864 was published, and that the old section 1051 was carried forward as 810. Section 864 is evidently a later regulation. I am not willing to concede that a fair interpretation of the old section 810 evidenced an intent upon the part of the Post Office Department to charge postmasters as absolute insurers of all mail that came into their possession. A fair interpretation of this language is that it was the intent and purpose that more than ordinary care should be used by the postmasters and keep it separate for its greater security, and that the greater security of registered packages was the purpose when this section was framed, rather than that there was any idea of making postmasters absolute insurers of the property.

[4] But if, perchance, my construction of section 810 is wrong, and I have found nothing except the Griswold decision that indicates it, then clearly the department, when they promulgated section 864 above quoted, and made that a part of the regulations, clearly evidenced an intent by the department to fix liability upon postmasters for loss of registered mail due to negligence or disregard of the regulations. If that was the intent and purpose when this was promulgated in 1902, it controls the issue that is presented here.

The later enactment, 864, must take precedence over old 1051, even though 1051 is carried forward into the compilation of 1902 as section 810; 864 being the later enactment and being specifically placed under the title, in the arrangement of the postal laws, "Responsibility of Postmasters for Registered Matter," and under the chapter title of "Delivery of Registered Matter." This being true, in my judgment it must control the duty of the postmaster under the terms of his bond

to deliver the mail to the addressee upon demand, and that this duty to deliver is performed by the postmaster when he cares for the registered mail in the manner provided by the postal laws and regulations and protects it in the manner directed, and he is relieved by the specific provisions of the postal laws and regulations from any liability for wrong delivery, depredation upon, or loss of any registered letter or parcel while in his custody, if the same is not due to negligence or his disregard of the regulations.

The primary duty of a court in construing the provisions of this bond and these sections of the postal laws, is to ascertain and effectuate the intention of the parties. This can only be done by examining the language and looking to the relation which the parties bear to each other and to the subject-matter of the contract. U. S. v. Atlantic Coast Line (D. C.) 206 Fed. 190.

As circumstances showing the manner in which the relations existing between the postmasters and the postmaster general, and especially the manner in which liability was fixed by the postal laws and regulations, attention is called to Act Cong. March 17, 1882, c. 41, 22 Stat. 29 (U. S. Comp. St. 1901, p. 2616), which provided:

"That the Postmaster General be, and he is hereby, authorized to investigate all claims of postmasters for the loss of mail order funds, postal funds, postage stamps, stamped envelopes, newspaper wrappers, and postal cards, belonging to the United States in the hands of such postmasters, resulting from burglary, fire, or other unavoidable casualty, and if he shall determine that such loss resulted from no fault or negligence on the part of such postmasters, to pay to such postmasters, or credit them with the amount so ascertained to have been lost or destroyed."

By an act approved January 21, 1914, the indemnity above provided for was extended to include postal savings funds, postal savings cards, postal savings stamps, postal savings certificates, key deposit funds, funds deposited to cover postage on mailing, and funds deposited to cover orders for stamped envelopes. Congress by the statutes has expressly provided for the relief of postmasters from the absolute liability that is imposed upon them by statute for the property that belongs to the government of the United States. The very fact that these statutes have never been extended to cover ordinary mail matter or registered mail is persuasive at least that such extraordinary liability with respect to mail matter was never contemplated and that the interpretation given the statutes and regulations by Congress was that there existed no such liability without negligence.

My attention has been called to the further fact that the Postmaster General has promulgated an edition of the Postal Laws and Regulations dated 1913, which is the first that has been issued since 1902, and I am impressed with the fact that the regulation referred to in the Griswold Case as section 1051 of the 1893 Regulations, and which was carried forward as section 810 in the Postal Laws of 1902, has been separated and placed under different subtitles. Section 524 contains that provision prohibiting unauthorized persons being permitted to handle the mail, while section 885 provides that registered matter shall be kept separate from ordinary matter and properly protected from accident or theft. And that portion of the old regulation 1051 which

provides that "the postmaster will be held accountable for all registered matter coming into his postoffice" has been entirely eliminated, and in its place we find section 940, which is practically identical in meaning and effect with section 864 of the Regulations of 1902, which is above referred to.

It seems to me that this new compilation emphasizes the intent and purpose of the department, when it promulgated section 864, to eliminate all question as to the liability of the postmaster without negligence. This must be true if any meaning whatever is to be given to section 864. It was a useless act, and entirely meaningless, unless it was intended to and did define the responsibility of the postmasters in cases exactly like the one at bar.

It is unnecessary to consider here, because it is conceded upon all hands, that the statutes of the United States and the rules and regulations absolutely fix the responsibility of the postmaster for all property of the government, including moneys and post office property. There is no question but that he is absolutely liable for these, and the fact that there is no uncertainty with reference to this liability, but that the same has been fixed by definite, plain provisions of law, rules, and regulations, is another reason that influences my judgment in determining the intent and purpose of the department with reference to this liability of the postmaster for registered mail lost without fault upon his part.

That the government has placed an absolute responsibility upon its officers, in different departments, for the "property of the United States," but has claimed no such liability for property of the public coming into the hands of the officer in the performance of his duty, is illustrated by the case of Robertson v. Sichel, 127 U. S. 507, 8 Sup. Ct. 1289, 32 L. Ed. 203. In that case a collector of customs was held not to be liable for the value of the contents of a trunk which passed through the custom house, and which was probably stolen by one of his subordinates. But had Robertson been sued upon his bond by the United States for the loss of money of the United States, collected by him in his official capacity, he would have been absolutely liable, notwithstanding the money might have been embezzled by one of his subordinates, and without any fault or negligence on his part.

This is important only in so far as it tends to show the policy of a department of the government toward one of its officers, as well as the construction placed upon the liability of such officer by the Supreme Court of the United States, where there was no negligence upon his part.

There are a number of sections of the statutes of the United States specifically providing absolute responsibility of the postmaster for money and property of the United States, and no good purpose can be served by reference to them here. Suffice it to say that a postmaster, in the receipt and transmission of mail matter, owes it to the public to exercise great care, skill, and discretion, but when it comes to his dealing with the property of the government of the United States, his employer, he owes duties entirely different; the same being provided by certain statutes, and rules and regulations, together with the provisions of his bond with reference thereto.

My attention has been called to a number of cases by plaintiff, and they have been duly considered. In practically all of them, except the Griswold Case, property of the United States was involved, and in most cases negligence or wrongdoing on the part of the defendant was an element. These cases throw no light upon the question here.

My attention is specifically called by plaintiff to plaintiff's claim that the condition of the bond is breached by admitting the receipt of the registered parcel, and the refusal and failure of the postmaster to deliver the registered parcel, on demand of the addressee. The evident reply to this, in the light of my construction of the rules and regulations, is that they do not hold the postmaster responsible, or the postmaster and his bondsmen liable upon their bond, for the wrong delivery, depredation upon, or loss of any registered letter or parcel, while in the postmaster's custody, unless such wrong delivery, depredation, or loss is due to negligence or disregard of the regulations by such postmaster.

Being fully convinced that there is neither law, nor regulation promulgated pursuant to law, and no contract imposing upon the defendant Rodge any liability whatsoever on account of the loss of the registered mail referred to in the complaint herein, in the absence of negligence or wrongdoing on his part:

1. The demurrers to the answers of the defendants should be overruled.

2. The complaint, eliminating all claim of wrongdoing or negligence on the part of the defendant Rogde, does not state facts sufficient to constitute a cause of action against the defendants, or either of them, and judgment should be entered dismissing plaintiff's complaint herein.

Let judgment be entered accordingly.

BARTLEY v. BOROUGH DEVELOPMENT CO.

(District Court, E. D. New York. April 13, 1914.)

1. SHIPPING (§ 54*)—HIRING OF BARGE—LIABILITY FOR INJURY.
The hirer of a barge is exonerated from the duty of returning her in as good condition as when received, where her injury results from her unseaworthiness for the service for which she was let.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219–221; Dec. Dig. § 54.*]

2. SHIPPING (§ 54*)—CHARTER—SURVEY OF INJURED VESSEL.
Surveyors taking part in the survey of a vessel claimed to have been injured by a charterer should make a definite statement in their report of the damages they attribute to the specific injury which is known to them to be, or is evidently, under scrutiny.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219–221; Dec. Dig. § 54.*]

3. SHIPPING (§ 58*)—CHARTER—LIABILITY FOR INJURY TO VESSEL.
Where a boat under charter, with an express or implied warranty of seaworthiness, receives an injury of which her unseaworthiness would be a sufficient producing cause, and no other cause is shown, a presumption arises that she was not seaworthy, which must be overcome before the

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

owner can recover from the charterer for the injury. On the other hand, if the charterer is a bailee for hire, and under the duty of returning the boat in good condition, the burden rests upon him to explain his default, and the owner may rest on the burden of evidence thus thrown on the bailee; but if both parties offer testimony, not only as to the cause of injury, but as to their own compliance with their duty under the charter and under general rules of law, the finding of facts on the testimony will not only dispose of the question of the burden of proof, but will also determine responsibility for the injury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 233–244, 314, 327; Dec. Dig. § 58.*]

4. SHIPPING (§ 54*)—CHARTER—LIABILITY FOR INJURY TO VESSEL.

Where a boat has been chartered without a captain or master, the bailee in possession is in entire control and responsible for her handling, and the presence of a master furnished by the owner makes no difference, in case of an injury resulting from matters under the control of the charterer; but if the master was performing some duty, admittedly that of the owner, such as handling lines, pumping, watching, or caring for her in a manner made necessary by past experience, or limiting the load because of any peculiarity in structure or capacity of the boat, and if these are not matters which would be learned by reasonable care and observation, or the ordinary requirements which the bailee should take into account, then the act of the master would not be that of a servant of the bailee.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219–221; Dec. Dig. § 54.*]

5. SHIPPING (§ 58*)—CHARTER—LIABILITY FOR INJURY TO VESSEL.

Libelant chartered a scow with her captain to respondent, to be used in carrying earth or refuse at a stated hire per day. She was loaded at respondent's dump in the usual manner with earth dumped from carts. No negligence in loading was shown, nor was she overloaded, but the load being received faster than it could be trimmed caused the boat to list, and by reason of the listing she became strained and developed leaks so that repairs were necessary. Other boats were loaded in the same way without injury. *Held*, on such evidence, that there was a presumption and proof that the injury was due to her unseaworthiness and that her owner could not recover therefor.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 233–244, 314, 327; Dec. Dig. § 58.*]

6. SHIPPING (§ 54*)—CHARTER—LIABILITY OF CHARTERER.

If the proper use of a boat for the purpose for which she was hired developed weaknesses, which needed repair before she could be sufficiently strong to undergo such use, the mere fact that the weakness developed during the time she was in the possession of the charterer does not throw upon him the obligation to make the repairs and to turn back a sound boat.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219–221; Dec. Dig. § 54.*]

In Admiralty. Suit by William S. Bartley, as owner of the scow Bartley Brothers, against the Borough Development Company. Decree for respondent.

Foley & Martin, of New York City, for libelant.

Edward M. Grout and Paul Grout, both of New York City (Mark Ash, of New York City, of counsel), for respondent.

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

CHATFIELD, District Judge. The Bartley Brothers is a log-sided scow, 100 feet by 30, with sides 9 feet high. She was built about 1901, apparently in first-class manner, and was kept in repair. She was overhauled and caulked in the year 1909, and about the 1st day of March, 1910, was chartered with her captain to the Borough Development Company, by Mr. Bartley, whose father was the president of the company which owned the boat.

The terms of this charter are stated to have been that she was to be loaded in deep water (that is, at the Twenty-Seventh Street or Harrison Street dumps of the respondent), was to be returned in good condition, and a compensation of $6 per day was to be paid therefor.

The next day a telephone message was received, and the boat, which was then at the Long Dock, was towed to Gowanus Canal and taken to the Third Street dump of the Borough Development Company. She had been at the Long Dock for something like a week, and a new captain was placed on board of her the day that she was chartered to the Borough Development Company. She arrived at the Third Street dump upon the afternoon of March 2d, and, according to the records of this company and the testimony of its employés, was not placed under the dump until the following forenoon. They state that she was taken into a position to be loaded at half past 10, and loading continued until half past 11. A message was then sent to the office of the company that she had been taken out from the dump, because her captain reported that she was leaking. She was again placed under the dump at 2:30 and loaded until 3:30, when she was again taken leaking from the dump, and at 4:15 this condition was reported by the superintendent of the dump to the office of the Borough Development Company. A tug was sent to pump the boat out. Subsequently she was moved some 200 feet alongside the adjoining dock, and workmen 8 to 10 in number were set to work trimming the load, while 4 or 5 men removed some 8 or 10 cubic yards of material from the center of the boat to another scow. Hand pumps were procured from the vicinity, the boat was pumped out, repairs were made to the leaks by nailing cleats (strips of what was said to be fire wood or pieces of boxes then upon the boat) over the leaking seams, and the boat was left for the night. The following morning she was found to be in such condition that she could be moved or taken to the Long Dock, and from there to Yonkers, where, after a trip 9 days in length, she was unloaded, returned, and surveyed. Subsequently repairs were made and the boat put again in good condition.

The owner of the boat has sued for the amount of these repairs, alleging that the boat was improperly loaded.

It was suggested upon the trial and some of the testimony indicated that the boat had touched bottom, but the testimony as to the depth of the slip and the place of loading, as well as the testimony of the captain of the boat and those who saw her while she was in the position in which she rested while being pumped out, indicates that the boat did not rest upon the bottom in any such way as to cause the damage or the strain from which the leaks resulted.

Many disputed points appear in the testimony. The witnesses called upon each side contradict each other, and the case has developed into a difficult question of fact as to just how the damage was imparted to the boat.

The general manager of the Borough Development Company testified that he received the message that the boat was leaking before he went to lunch that day. After lunch he went down to the dock, found the boat at what is called the Pure Oil Dock (which is up the canal or to the east of the Third Street dumping board), and that he then spoke to the captain, who said the boat was "all right" and could receive more load. He then gave directions to the superintendent of the dump to finish loading the boat and went away. He did not go down to examine the hull, and estimates that she then had some 3 feet freeboard and was somewhat more than half loaded.

Later in the afternoon he received the second report that the boat was leaking, and then went to the dock, where he again found the boat near the Oil Dock. He succeeded in stepping on board, either directly from the dock or by getting upon a boat lying at the end of the Bartley Brothers. On this visit he went down into the hold. He found the boat listed, some water, sufficient to cover the keelson and at one point some 3 inches over the keelson, so that he wet his feet when stepping upon the keelson, and the captain and the superintendent or runner for Bartley Brothers were making repairs by nailing strips of board over the leaks after having placed oakum in the seams.

Mr. Bartley arrived while this witness was upon the boat and men were directed to trim the boat so as to correct the list. Also, upon Mr. Bartley's suggestion, certain of the material was removed. The boat was pumped out by hand, and during this time the tug which had been sent to do the pumping came but did not attempt, or at least succeed, in doing any pumping. This witness, Mr. Van Etten, was said to be the man with whom Mr. Bartley had made the charter for the boat, but this he denies, and Mr. De Wilde, the clerk who kept the record for the Borough Development Company, testifies that the conversation as to the chartering of the boat was with him. Mr. De Wilde testifies positively that he received a message that the boat was leaking, before noon, and that he received a further message in the afternoon that the boat had been taken out a second time from under the dump because of her leaky condition.

The superintendent at the dump testified that the captain reported to him in the forenoon that the boat was leaking; that the carts which deposited the load upon the boat drove up on the dumping board by a ramp on which but one line of carts could pass to, and but one line of carts pass off, the board. There was at times a continuous line of carts going up and coming down from the street to the board. The board itself was 77 feet long and about 30 feet wide. It was so constructed that it had an overhang of some 14 feet, and the carts were backed up, one alongside of the other, in turn. The material thus dumped over the face of the dump, from the back of the cart, would fall a little to the outside of the center of the boat.

This witness testifies that a depth of 9 feet at the inner side of the berth, increasing to a depth of 16 or 18 feet some 30 feet out, extended along the whole face of the dump, and that no dredging was done throughout this period, but that many boats as large as the Bartley Brothers came in and out, and that no one of them, in any way, found trouble through lack of depth of water, or from any obstruction while they were under the dumping board.

[1] It is admitted by the Borough Development Company that their plan was to load all the boats in deep water. No attention was paid to the provision of that nature in the charter, and they intended to return the boat in as good condition as they received her, unless she proved to be unseaworthy, a breach of warranty that would relieve them if the boat proved to be unable to properly perform the duties for which she was chartered. The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130; The Joseph W. Fordney (D. C.) 193 Fed. 520; United States Metals Refining Co. v. Jacobus, 205 Fed. 896, 124 C. C. A. 209.

The captain of the barge testified that the boat was actually placed under the dump and received some load upon the preceding afternoon at a late hour. He testifies that upon the morning of March 3d she was taken under the dump early, between 7 and 8 o'clock, and was loaded continuously until 11:30. He then, not knowing where the boat was to be unloaded and what service was to be required of her, thought that she had a sufficient load, inasmuch as the material which was placed upon her was heavy, that is, dirt rather than street sweepings or light ashes, and that he told the superintendent that he wished no more load, using the phrase, "I have enough." He actually hauled the boat out from under the dump, and remained at the point to which he hauled the boat until afternoon, when at about 2:30 he was again taken under the dump, more material was placed on board, and, he says, about 100 carts came so rapidly that he could not haul the boat back and forth so as to distribute the load, which in consequence was piled in the center of the boat, in such a way that its trim was disturbed, causing a list outboard or to port, and also causing a heap of material in the center of the boat, which he estimates at some 5 or 6 feet in height. He is corroborated to a certain extent, as to the way in which the load was piled, by the testimony of Mr. Van Etten, who says that there was a pile of dirt in the center of the boat some 5 or 6 feet in height, and that the boat had a list to port so that she had a freeboard of but 4 inches on the outside and some 2 feet on the inside.

This testimony does not differ greatly from that of Mr. Bartley, the president of the company, who arrived there between 5 and 6 in the afternoon, and who says that he found the boat with a freeboard, on the outside, of about a foot, and on the inside of from 3 to 4 feet; but his statement is that the pile of dirt in the center of the boat was much greater in extent than as stated by Mr. Van Etten. Mr. Van Etten testifies that the captain of the boat and Mr. Bartley's superintendent were placing battens or pieces of wood over the leaks inside of the boat. He generally agrees as to the location of these strips with the testimony of the other witnesses, and he estimates the total

number of these strips at 6 or 7. Mr. Bartley testifies that he told Mr. Van Etten that the boat should be trimmed and that some of the material should be taken off, and Mr. Bartley also testified that the boat was in good repair, and that when at Long Dock he examined her and knew that there were no battens or pieces nailed over any leaky places when she was taken to the dump at Third street for the purpose of use by the Borough Development Company. Mr. Bartley, however, testifies that the boat was not at the Pure Oil Dock, but was further down the Gowanus Canal, and that oakum was tamped into the seams before the pieces were nailed on. The captain of the boat testified that the tug tried to pump that afternoon, and that the next day a tug came and pumped him out. He also testified that at noon, while the boat was lying alongside the Pure Oil Dock, after he had hauled her out from under the dump, a tug came along and refused to take her away because she did not have enough load on board. This is denied by all the witnesses for the Borough Development Company, but does not seem to be conclusive, for the boat was taken back to receive more load, and it is not shown definitely that no tugboat was there, although the general statement is made that no tug to take the boat away was in the vicinity during the day.

One of the witnesses, who was called a "runner" or general man, working for Mr. Bartley, testified that he also went to the boat around 5 o'clock in the afternoon, that he found her listed over and twisted, leaking badly and with her seams open, that she had an overload of dirt, and that there was a high pile of dirt in the middle of the boat. He helped the captain caulk the seams and nail on the pieces, and also helped him pump, and remained with the boat, so as to assist with the pumping, after the others went away.

Suit was not brought upon this claim for some year and a half after the accident, and the statements of the witnesses are all made at a time so long after the occurrence that inaccuracies of recollection could easily occur, and must be considered with that in view, in so far as they contradict one another.

According to the records of the company, 350 truck loads of earth were dumped from this board on the 2d of March, while upon the 3d of March 445 truck loads of earth were dumped from this board. An accurate account of these dumpings and of the movements of the boats, and also of the time in which the boats were receiving the material, is kept and entered upon sheets which were produced in court by Mr. De Wilde; the reports being made over the telephone to him by the men at the dump.

The captain of the Bartley Brothers says that he was under the dump the greater part of the day. He received 176 out of the 445 loads of material dumped during that day, and yet 100 truck loads were dumped in the short space of time between 2:30 and 3:30 o'clock. The testimony of the employés of the company is to the effect that the Bartley Brothers was under the dump but a little over an hour in the forenoon, and for just about an hour in the afternoon, and that during this time the 176 loads of material were placed upon her. Here again there is but little contradiction between the witnesses. Such a quantity of

earth placed upon the Bartley Brothers in two hours would indicate a much higher average or rate of loading for those hours than during the rest of the day, and this in a sense would corroborate the testimony of the captain as to the way in which the load was placed upon his boat. The weight of this material is estimated at from 425 to 450 tons. It is admitted that the material was dirt, and that this runs from 2,700 pounds to 3,000 pounds per cubic yard, while the other materials dumped at this board, such as street sweepings and light refuse, average but from 1,200 to 1,500 pounds per cubic yard.

Another contradiction which must be taken into account is with respect to the survey. This was made by three men who signed the survey and who found a serious injury to the scarf upon the starboard side of the boat in the chime-log or bilge-log. It appears that there was but one scarf in this log as built, while one of the surveyors who was named by the Borough Development Company testifies that there were two scarves in this timber at the time. Other leaks were found in the scarf of the side log upon the starboard side. A number of the braces were unfastened, and of the 80 foot length of bottom to the vessel, some 62 feet, or all except about 10 feet at each end, were strained so that the seams were open and recaulking was reported necessary. All of the surveyors signed the report to the effect that they were there to estimate the damage to the boat, and that she had suffered a severe strain, such that she would have to remain upon the dry dock a sufficient time to allow the boat to resume her proper position and shape after repairs were made.

One of the surveyors has testified that the boat showed a severe strain, that the injuries apparent were those resulting from such a strain, and that the boat appeared to be in good condition except with respect to the matters which were directly attributable to this strain or injury. The surveyor for the respondent, however, testifies that he went and looked at the boat a few days before he made the survey; that he then had some conversation with Mr. Bartley and told him that he could not report to the company that Mr. Bartley should be allowed anything for the injury, as these leaks were old. He testified that the strips or battens placed over the leak showed from their color and discoloration that they had been there for a long time, and that the leaks themselves showed that they were of long standing. This conversation is contradicted by Mr. Bartley, and the surveyor showed so plainly upon the stand that he was endeavoring to justify his testimony to the effect that these were old leaks, as to make it difficult to give much weight to his testimony, especially in view of the fact that the witnesses who went down in the boat on the afternoon in question testified that battens were put on at the time of the accident, and that leaks showed themselves at that time. This surveyor also signed the statement that he was there to estimate the damage, and that the boat had suffered a severe strain.

[2] It seems to the court that comment should be made upon what is often the practice of surveyors who are sent to join in the survey for the purpose of protecting the rights of their employers, and who, instead of making a definite statement of what damages they at that

time attribute to the precise injury which is either known to them or is evidently under scrutiny, make out, agree to, and sign, a list of all repairs necessary to place the boat in first class condition, and then upon the trial testify to the effect that all of the injuries were in the nature of ordinary repairs, and that they found nothing, or substantially nothing, attributable to any cause such as that which admittedly has occurred, which has been the direct reason for the survey and which has given rise to the litigation in which they are testifying. The surveyor in question is evidently an exceedingly accurate, painstaking, and careful man. He appeared upon the trial to be desirous of telling the exact truth and at the same time of giving testimony which would help the parties who employed him and who called him, and to argue, by way of his testimony, on their side of the case while arguing against the testimony of the other side. His attitude upon the trial is not open to criticism in that respect. He was employed for that purpose, and his testimony was called by the Borough Development Company. But his employment as a surveyor, and his signature to the survey at the time, should have been based upon the expectation of giving testimony, and the survey as made by him should show nothing but matters which he is willing to testify to in court, without explanation as to why he gave a different appearance to the survey, or seemed to agree with his fellow surveyors in a report which he repudiates when upon the witness stand.

Upon the foregoing state of facts, the libelant contends that the Bartley Brothers was in the possession of the respondent under a charter which made the respondent a bailee for hire and therefore bound to return the boat in good order. Swenson v. Snare & Triest Co., 160 Fed. 459, 87 C. C. A. 443; Terry & Tench Co. v. Merritt & Chapman D. & W. Co., 168 Fed. 533, 93 C. C. A. 613.

[3] In some charters an express provision "to furnish only seaworthy boats" (U. S. Metals Refining Co. v. Jacobus, 205 Fed. 896, 124 C. C. A. 209) or the implied duty in a special charter, to furnish a boat which is seaworthy for the purpose of the charter (The J. W. Fordney, supra), controls the situation in case of accident and is analogous to but greater than that creating liability against a common carrier who is negligent in using reasonable precautions to furnish seaworthy vessels and in the conduct of those vessels upon the voyage (U. S. Metals Refining Co. v. Jacobus, supra). In case of an accident under such circumstances (as under the doctrine of res ipsa loquitur), the presumption arises (in the absence of other explanation) that her condition before the accident was not in accord with the warranty, and that the boat was unseaworthy, if unseaworthiness would be a sufficient producing cause.

Where no cause of accident has been shown, except this conclusion of unseaworthiness from the fact that the accident happened, then the presumption will make out a prima facie case, which the owner must combat and which if left unexplained will carry with it, against the owner, liability for the damages received.

As has been said in Terry & Tench Co. v. Merritt & Chapman D. & W. Co., supra, the presumption of unseaworthiness frequently arises

in insurance cases, where the party relying upon the presumption has nothing to do with the accident, and where the party furnishing the boat is necessarily bound to explain, if nothing is shown but that an accident happened.

In the case, however, of a special charter, or where by express or implied provision a seaworthy boat (in the sense of being sufficient for the purpose required) is to be furnished, the responsibility for supplying a boat of that sort is a different proposition from the responsibility resting upon the bailee to exercise proper care and management of the boat and to avoid obvious or reasonably expected injury.

The bailee, having so contracted, must return the boat or explain his default. Bouker v. Smith (D. C.) 40 Fed. 839. It follows therefore that, if a bailee is in possession of the boat and an accident occurs, the libelant (owner) may offer testimony to prove actual neglect on the part of the bailee, or (if he has no evidence beyond being able to prove the terms of the charter, the possession of the bailee, and the happening of the accident) he may rest upon the burden of evidence thus thrown on the bailee to explain.

In the Terry & Tench Case, supra, the District Court held that the bailee had explained the accident and had shown that he was free from negligence or responsibility for what happened. The District Court therefore invoked the rule placing responsibility upon the person furnishing the vessel, in the case of an accident attributable only to unseaworthiness. On appeal the Circuit Court of Appeals reversed, holding, as in the Snare & Triest Company Case, supra, that the respondent or bailee in possession had failed to show that it was not negligent. In the Terry & Tench Case, however, the court made the statement:

"If the presumption of unseaworthiness exists in the case, the libelant rebutted it by its proof concerning the condition of the vessel before and after the accident." 168 Fed. 534, 93 C. C. A. 614.

It is thus apparent that if either party relies upon presumption and puts in no testimony upon the merits as to this point, the foregoing rules can be applied in comparing the questions of liability as affected by the burden of proof. But where both parties offer testimony, not only as to the cause of the accident, but as to their own compliance with their duty under the charter and under general rules of law, the situation is that presented in the Terry & Tench Case, supra, as well as in The J. W. Fordney, supra, U. S. Metals Refining Co. v. Jacobus, supra, McAllister v. Southern Pacific Co. (D. C.) 111 Fed. 938, and other decisions of the same nature; and the finding of facts upon the testimony will not only dispose of the question of the burden of proof, but will also determine responsibility for the accident, and there is no need of falling back upon a presumption, unless the entire record shows no evidence of explanation from which the court can find the cause of the accident with respect to one party or the other. If no cause of accident can be ascertained except leaking from unseaworthiness, then the presumption and the conclusions of fact are in accord, as in The Rosalie McLoughlin (D. C.) 186 Fed. 255.

In the present case the libelant has attempted to rely upon the rule requiring the bailee in possession to satisfactorily explain the accident, but has at the same time presented evidence as to the condition of the vessel and as to the circumstances attending the accident, and has made it possible to decide the question of fact upon the entire record.

The respondent contends that it has sustained the burden thrown upon it and explained the cause of the accident, by showing that it was due to nothing unless unseaworthiness, and that, further than this, it has actually proven a condition of itself showing unseaworthiness and a breach of the implied warranty on the part of the libelant.

[4] A decision as to the cause of the accident will therefore dispose of the case, and the libelant must, under these circumstances, show that the respondent was to blame for the accident and satisfactorily meet as well the charges of unseaworthiness, and upon the whole case prove his right to a decree before he can recover.

The presence of the captain or master of the scow must also be taken into account. In cases where a boat has been transferred without a captain or master, the bailee in possession is certainly in entire control of the boat. If a master goes with the boat, his presence makes no difference in the case of an accident occurring from matters under the control of the charterer. The Bombay (D. C.) 38 Fed. 512; Terry & Tench Co., supra; Zabriskie v. City of New York (D. C.) 160 Fed. 235; North Atlantic Dredging Co. v. McAllister Steamboat Co., 202 Fed. 181, 120 C. C. A. 395.

If the master was, however, performing some duty admittedly that of the owner of the boat, such as handling lines, pumping, watching, or caring for her in a manner made necessary by past experience, or limiting the load because of any peculiarity in structure or capacity of the boat, and if these are not matters which would be learned by reasonable care and observation, or the ordinary requirements which the bailee should take into account, then the act of the master (captain) of the vessel would not be that of a servant of the bailee. Zabriskie v. City of New York, supra.

[5] In the present case the captain was on board to handle the lines and look after the boat, in the way of pumping, etc. He had to trim the load and to care for the boat while she was being placed under the dump and loaded. His acts in these respects and his manner of performing the obvious duties, as well as the giving of information about the boat, were matters as to which the bailee could call upon the captain, and in some of which the bailee made the captain his own representative in doing the work. But when the question of observing old leaks or recollecting former acts of misbehavior on the boat's part were concerned, then the captain would not be acting for the boat with respect to any matter which the bailee could know or would be expected to learn by ordinary inquiry. The master of the vessel would still bear some responsibility for the owner, and the bailee for hire might show that there was no negligence on his part or on the part of his servant, in so far as the master was acting for him.

This situation applies to the present case. The master of the vessel went with the boat and in the performance of many ordinary duties was acting for the bailee. The bailee was bound to return the boat and to be responsible for any acts of negligence on his own part or on the part of those who were acting for him at the time. On the other hand, with respect to pumping, watching for leaks, and keeping in mind the prior history of the vessel, or the previous load-carrying capacity of the vessel, the master was bound to represent the owner of the boat, or the libelant, and to give information of any hidden defect or to call attention thereto, if the situation arose, unless it were as to a matter apparent from ordinary observation or as to which the bailee should have made inquiry and did not.

The master of the Bartley Brothers had been upon the boat but one day. The testimony shows that, when the boat was but partially loaded, he began to think that she had sufficient load, and that he had her taken from under the dump. He is also said by the other witnesses to have reported that she was leaking.

Knowing nothing about the previous history of the boat, he could only judge from what he saw, and as to these matters the Borough Development Company was bound to use the same care and observation. After the boat had been taken from the dump and her trim restored, and the leaks if they existed attended to, the boat was taken back under the dump; it being evident that she had not been loaded to her capacity, and there being nothing apparent which would prevent her taking the rest of the cargo. Upon being substantially fully loaded, she again developed weakness and was certainly in a leaky condition, which was again overcome. Some days after, the boat was repaired in accordance with the survey.

It would appear from the testimony that what happened was as follows: The trucks, coming upon the dump, side by side and succeeding each other in rapid order, deposited a substantially continuous pile of cellar dirt to the outside of the center fore and aft line of the boat. One man could not trim this load immediately. The boat, according to the testimony, acquired a list. The captain says that she was forced over until her rail was substantially awash. She was able to carry the load because none of it was dumped. The captain trimmed the boat; but the strain under this listing caused leaks, which disappeared when the boat went back to an even keel and when her port rail was raised to a proper height above the water.

This is in entire accord with the captain's testimony that something like 100 carts came and dumped their loads near the middle of the boat. It is impossible to hold that all of the carts reported by both the captain and the witnesses for the respondent dumped their loads midway between bow and stern, but they evidently did dump their loads midway near the fore and aft line, and evidently the pile was higher right at the middle of the boat between bow and stern. The boat was taken back under the dump and in the afternoon received an additional load almost as great in amount and placed on the boat in exactly the same manner. She again manifested leaks under the

necessary listing before the load could be trimmed, and water began to come in.

No amount of water is shown which of itself would cause the strain reported in the survey. Upon being righted and repairs made, the boat again closed up the seams and became tight enough to make the succeeding voyage with a small amount of pumping. This would indicate that the strain was the result of the deposit of the load of earth in such a position as to cause a list, not sufficient in amount to either dump the cargo or to overload the boat. The tide was rising throughout this whole period, and the greatest listing and straining seems to have happened when the load was substantially complete or after the tide had risen to a considerable extent.

The inconsistencies and contradictions in the testimony, whether due to failure of recollection or to the viewpoint of the witnesses, substantially disappear when we consider the actual facts of the case. The Borough Development Company has apparently sustained any burden thrown upon it to show that the accident did not happen through its own fault, or through negligence on its part as bailee in possession of the boat, and the testimony also shows that the condition of the boat and its inability to sustain the rapid receipt of a load of earth from a dump, or its liability to leak and twist when listed during the process of loading, was the real cause of the accident.

The total amount of material on the boat was not more than she could properly carry. A seaworthy boat with a load placed upon the boat from a dump (in such a manner as to cause a list, insufficient to dump the load, but sufficient to require trimming and possibly to require pumping, if ordinary leaks either above or below the load line produced a sufficient quantity of water to be removed during the time the boat was listed over) should not suffer strain and should not develop weakness making repairs necessary beyond the ordinary repairs of the usual voyage. Many scows were loaded in this way at these dumps without injury.

[6] No evidence has been introduced to show that this load was placed upon the scow in any manner other than as usual or than was contemplated when the scow was chartered for this purpose. No testimony satisfactorily shows that any extra load at one particular point was the cause of the accident. No testimony shows that the Borough Development Company was negligent in loading the boat in the usual way, and if the boat were unseaworthy or unable to stand the strain of being treated in the way for which she was provided, and if that use developed weaknesses which needed repair before she could be sufficiently strong to undergo that use, then the mere fact that the weakness developed during the time when she was in the possession of the respondent under the charter does not throw upon the respondent liability to make the repairs and to turn back a sound boat instead of one insufficient for the purpose desired.

The testimony of the witnesses receiving a report at noon that the boat was leaking and then going to the boat, where one of them testifies that he took a lantern and saw some leaks which had been repaired by the captain at that time, and the general evidence as to the

occurrences of the day in question, shows the fault to have been, not that of negligence on the part of the respondent, but rather the fault of the boat.

The proof shows that she was not in a proper condition to satisfy the implied warranty under which she was chartered, and, in so far as unseaworthiness would be presumed from the conditions shown, the libelant has not been able to prove the contrary.

A decree dismissing the libel will be entered.

THE MALOLA.

(District Court, W. D. Washington, N. D. May 18, 1914.)

1. MARITIME LIENS (§ 29*)—REPAIRS—SUIT TO ENFORCE LIEN.
The owner of a fishing schooner *held* bound by the approval of an account for repairs on a gas engine by her agent, who contracted for and superintended the work, where such approval was given after the engine had been tried and broken down subsequent to the repairs and without complaint as to the work done.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 48; Dec. Dig. § 29.*]

2. MARITIME LIENS (§ 65*)—REPAIRS—AGREEMENT FOR LIEN.
Evidence considered, and *held* sufficient to establish the claim of a libelant that repairs on a vessel in her home port were made on the credit of the vessel, and that such was the understanding of both libelant and the owner.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 103; Dec. Dig. § 65.*]

3. MARITIME LIENS (§ 27*)—REPAIRS—RIGHT TO LIEN.
That part of the work connected with the installation of an engine on a vessel was done upon the engine while it was still on shore does not deprive the one doing the work of his right to a maritime lien therefor.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 41–45; Dec. Dig. § 27.*]

4. MARITIME LIENS (§ 61*)—REPAIRS—SUIT TO ENFORCE LIEN.
A general agreement by one making repairs on a vessel to wait a stated time for payment does not deprive him of the right to file a libel before that time to enforce his lien, where the vessel is about to be removed from the jurisdiction; and in any event the premature commencement of the suit, where the owner was not damaged thereby, would affect only the matter of costs.
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 99; Dec. Dig. § 61.*]

5. MARITIME LIENS (§ 29*)—REPAIRS—RIGHT TO LIEN—AUTHORITY TO BIND VESSEL.
Facts considered, and held not such as to put one making repairs on a vessel on inquiry as to the authority of the person contracting for the repairs, who was an agreed purchaser of a part interest and in possession, to bind the vessel therefor under the provisions of Act June 23, 1910, c. 373, § 3, 36 Stat. 605 (U. S. Comp. St. Supp. 1911, p. 1192).
[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 48; Dec. Dig. § 29.*]

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

In Admiralty. Suit by the Elliott Bay Yacht & Engine Company against the schooner Malola; E. E. Van Hook, claimant. Decree for libelant.

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

Libelant cites the following authorities: The Ha Ha (D. C.) 195 Fed. 1013; The Thos. W. Rodgers (D. C.) 197 Fed. 772; The City of Milford (D. C.) 199 Fed. 956; Alaska & P. S. S. Co. v. Chamberlain, 116 Fed. 600, 54 C. C. A. 56; Chouteau v. Allen, 70 Mo. 290; Bierce v. Red Bluff Hotel, 31 Cal. 165; Hayward v. Inc. Co., 52 Mo. 192, 14 Am. Rep. 400; Conger v. R. Co., 24 Wis. 158, 1 Am. Rep. 164; Wortman v. Griffith, Fed. Cas. No. 18,057; Zane v. The President, Fed. Cas. No. 18,201; The L. B. X. (D. C.) 93 Fed. 233; The Lassell (D. C.) 193 Fed. 539; The Pioneer (D. C.) 53 Fed. 279; Clark v. Lumber, 70 Fed. 1020, 17 C. C. A. 555; The Ella (D. C.) 84 Fed. 494.

Wardall, Martin & Wardall, of Seattle, Wash., for claimant.

In addition to certain authorities cited by libelant, claimant relies on: The Edna (D. C.) 185 Fed. 206; section 4, Fed. Maritime Lien Act.

CUSHMAN, District Judge. In October, 1910, a libel for $1,223.15 herein was filed for materials and labor furnished at the Port of Seattle in repairing, altering, equipping, and furnishing the respondent, Malola. The Pacific Net & Twine Company, of the same place, filed a claim as owner. Mrs. E. E. Van Hook, also of Seattle, filed a claim as owner, likewise, alleging that, though she had, in October, 1910, given a bill of sale to the Pacific Net & Twine Company, such conveyance was in effect a mortgage.

The answers of both claimants admit that libelant, at the request of the claimant Van Hook, did a small part of what is claimed in the libel, but deny the amount and value thereof. They deny that the work and material were furnished on the credit of the Malola, and allege that claimant Van Hook contracted, in 1910, for libelant to, within 30 days, repair and overhaul a gas engine in the Malola, together with machinery attached thereto, and place them in good, first-class, seaworthy condition, for $218.

They further allege: That libelant delivered the boat July 1st, instead of May 30th, as agreed; that, by this delay, said claimant lost the use of the boat for the month of June. That the repairs were not properly made, whereby the engine broke down July 4th on the way to the fishing banks, and, upon returning to Seattle, the engine was found to be in such condition that it could not be repaired. That Van Hook contracted with one Randles, July 15th, to replace the old engine with a new one. That libelant agreed with Randles to install the new engine, looking only to Randles for payment, which work it so did, except as to labor performed by it for the Troyer-Fox Company, who furnished the engine to Randles. That thereafter this agreement was modified, whereby libelant agreed to look to the Troyer-Fox Company, solely, for its pay for all work in connection with installing the new engine. That, while repairing the old engine, libelant had furnished

extras for Van Hook, in amount not exceeding $75, which have not been paid; but the answer of Van Hook offers to allow this amount in reduction of her cross-libel for damages. That $300 of the amount claimed by libelant was for labor performed upon the old engine after its removal, and upon the new engine before it entered the Malola and while such engines were upon land. That this part of the claim is not maritime and there can be no lien therefor. That libelant agreed with Randles to wait for its pay 30 days after the completion of the work, but that, in violation of such agreement, this suit was brought before the expiration of the time agreed.

Mrs. E. Van Hook has also filed a cross-libel to recover $1,330 from libelant on account of the loss of the use of the Malola in the halibut fisheries during the months of June, July, August, and September, 1910; and for the further sum of $248.18. These items are claimed as losses and damages caused by the delay and failure of libelant to perform its contract for the repair and overhauling of the old engine. The claim of $248.18 was reduced upon the trial, by cross-libelant, to $138.

Libelant, as cross-respondent, answering the cross-libel, admits that, at the time alleged, it contracted to repair the old gasoline engine and place the same in first-class condition, as far as its condition would permit; but, categorically, denies all of the other allegations of the cross-libel inconsistent with its asserted claim. It alleges that the engine broke down when the Malola had gotten 35 miles from Seattle, that it was defectively built, and that a new engine was necessary. It further alleges that the cross-libelant, for the repair of the old engine, agreed to pay the reasonable value of the work and material, which amounted to $443.15, of which $120 was paid; that the vessel was delivered to cross-libelant, who approved the bill for the work and material; that, owing to an incompetent engineer, the vessel became temporarily out of commission on the way to the fishing banks; but that she returned to Seattle under her own power, with an engineer furnished by cross-respondent; that all the further work of removing the old engine and installing the new was at the request of cross-libelant, through her agent, the reasonable value of which was $1,135.54, of which $200 has been paid and $35.54 waived; that the charges were satisfactory to, and the bill therefor approved by, cross-libelant.

[1] Sanders, the attorney and agent of claimant Van Hook, ordered the first work done, superintended it, and approved the account therefor. This admitted approval of libelant's account, after the breaking down of the old engine—rendered for $343.15 on account of repairs to the old engine and machinery, without other evidence, is sufficient to overcome claimants' contention that the contract was for a certain sum, to wit, $218.

Claimants seek to avoid the effect of this approval, and assert now that libelant was negligent in installing the engine; that libelant's accounts were irregularly kept; and that Sanders, the agent of claimant Van Hook, in getting the repairs done, did not know, at the time of approving the account, of libelant's negligence.

No items of libelant's account in this matter are shown to have been

wrongly included in the approved statement. Sanders for the owner superintended the work of installing the engine, and he accompanied the vessel upon the cruise on which the engine broke down. He paid the account in part and approved a statement thereof after the vessel's return to Seattle.

The old engine was taken out and a credit of only $200 allowed therefor. A new engine was purchased to replace it for $2,500. Libelant—who had repaired the old engine—was afterwards engaged to do the work of installing the new one. Complaint was not made of negligence until after suit was brought. No effort was made to have the old engine further repaired by libelant, or others; or the question of the advisability of such repairs taken up with it, or submitted to others engaged in such business. These facts, as well as the approval of the account and part payment, with the other testimony in the case, show that the trouble with the engine was rather on account of its age and inherent unfitness, and not because of any negligence upon libelant's part in repairing it, which caused its failure to work satisfactorily.

The evidence is conflicting concerning whether the agreement was to finish these repairs by May 30, 1910, as alleged by claimants, or not. The court finds that claimants have not sustained the burden of proving this allegation, or that, if there was delay, it was the fault of libelant. The question of damage on account of libelant's alleged delay will therefore not be considered.

[2] The Act of June 23, 1910, provides:

"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. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

"Sec. 3. That the officers and agents of a vessel specified in section two shall be taken to include such officers and agents when appointed by a charterer, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel, but nothing in this act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor." Act June 23, 1910, c. 373, 36 Stat. 604, 605; Fed. Stat. Ann. Supp. 1912, vol. 1, p. 352 (U. S. Comp. St. Supp. 1911, p. 1192).

The work of installing and repairing the old engine was done in May, June, and July, 1910, $217.10 of the amount of which was for labor and material prior to June 23d, and $106.06 for that done and furnished subsequent to June 23d.

"The supplies having been furnished to the charterer, and at the place of its residence, the presumption is that credit was given to the charterer, and not to the vessel. * * * In the Valencia it was said: 'In the absence of an agreement, express or implied, for a lien, a contract for supplies, made di-

rectly with the owner in person, is to be taken as made on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived.' The Valencia, 165 U. S. 264 [17 Sup. Ct. 323, 41 L. Ed. 710]. That presumption may be rebutted only by proof that credit was in fact given to the vessel. But in order to establish that fact it is necessary to show that such was the intention of both parties to the transaction. It is not sufficient that the vendor so understood, or that he charged the supplies to the vessel, and so entered them upon his books of account." Alaska & P. S. S. Co. v. C. W. Chamberlain & Co., 116 Fed. 600, 602, 54 C. C. A. 56.

To sustain a lien, libelant relies upon the fact that Sanders, claiming to be the owner and actually in the control and management of the vessel at her home port, ordered the work to be done on her; that he had been the attorney for libelant as late as April, 1910, and, as such attorney, had advised libelant, in the conduct of its business in working upon boats, "never to look to anybody but the boat for pay"; that Sanders approved the bill for such services and material rendered by libelant, which bill was rendered to "E. L. Sanders" and "Launch Malola."

The fact that Sanders had so recently been the attorney of libelant and, as such, advised libelant "never to look to anybody but the boat for pay," warrants the court in concluding that, at the time he ordered the work done, he knew that it was probably libelant's purpose to assert a lien. Chouteau v. Allen, 70 Mo. 290; Bierce v. Red Bluff Hotel, 31 Cal. 165; Hayward v. Inc. Co., 52 Mo. 192, 14 Am. Rep. 400; Conger v. R. Co., 24 Wis. 158, 1 Am. Rep. 164. That Sanders knew of libelant's intent, alone, would not suffice, "but in order to establish that fact (an agreement for lien) it is necessary to show that such was the intention of both parties to the transaction." A. & P. S. S. Co. v. Chamberlain, supra.

It is clear that, if Sanders—acting as agent of claimant—did nothing to manifest an intent to allow a lien, or mislead libelant concerning its allowance, the fact of such prior advice should not bind claimant. If Sanders had, likewise, in the past, advised claimant Van Hook that at any time in having her boat repaired, she should have it done on her personal credit and not on the credit of the vessel (which fact libelant's agent knew), would this change the contract? Certainly not.

The effect of this past advice, if it in any way affects a present intent, would only be to estop claimant from denying that it was libelant's intent to claim that the work was done on the credit of the vessel; but it would not, alone, be sufficient to show a like intent upon claimant's part.

The approval of the account rendered by libelant to "E. L. Sanders" and the "Launch Malola" is worded:

"The foregoing account of labor and material used in repairing Schr. Malola is correct as stated. E. L. Sanders."

As decided in Alaska & Pacific S. S. Co. v. C. W. Chamberlain & Co., 116 Fed. 600, 54 C. C. A. 56:

"It is not sufficient (to establish the fact of an agreement for lien) that the vendor so understood, or that he charged the supplies to the vessel, and so entered them upon his books of account."

Yet the approval of the account, as stated, to the "Launch Malola" by Sanders, who had authority to bind the owner, is sufficient to show the past intent and agreement for a lien upon the vessel. It follows from the foregoing that it is also sufficient to establish libelant's account for the portion accruing after June 22, 1910, since which time the presumption would be that the work was done on the credit of the vessel.

There is no contention that the work done by libelant in installing the new engine was, in any way, unsatisfactory.

The allegation by claimants of a modification of the agreement with libelant for installing the new engine, whereby it is alleged to have been understood that libelant was to look to the Troyer-Fox Company (Astoria Iron Works) for its pay, is wholly unsupported by evidence.

Randles, under an arrangement with claimant Van Hook, was to furnish the new engine. The Astoria Iron Works agreed with him to deliver such engine, in Seattle, with certain adjuncts, the exact nature of which is not clearly disclosed, but which were necessary in connecting the engine furnished with the machinery already in the boat. Later Randles represented to libelant that the Astoria Iron Works had failed to supply such adjuncts and requested libelant to do so and send the bill therefor to the Astoria Iron Works. The latter company did not pay libelant, but credited Randles, upon his account, with the portion thereof acknowledged by the Astoria Iron Works. Libelant, not being paid by the Astoria Iron Works, charged the same in its account in question in the present suit. Such course was proper.

[3] The claim that work done upon the new engine, while it was yet upon land and prior to its being put into the vessel was not of a maritime nature and that there can be no lien therefor, cannot be maintained. Wortman v. Griffith, Fed. Cas. No. 18,057; Zane v. The President, Fed. Cas. No. 18,201; 1 Cyc. 825 et seq. It is not clear that work, if any, done upon the old engine after its removal from the vessel, would be either of a maritime character or lienable; but, as the evidence fails to disclose what, if any, part of the account sued on is for such item, it is not necessary to determine such question.

[4] It is alleged by the claimant Pacific Net & Twine Company that libelant agreed to wait for its pay until 30 days after the completion of the installation of the new engine; that it failed to do so and libeled the vessel prematurely. There is a dispute in the testimony as to the terms of this agreement—whether libelant agreed, unconditionally, to wait 30 days, or agreed to wait upon an unperformed condition. It is not necessary to determine this issue, as there is no evidence that libelant agreed or understood that, in the meantime, the vessel would leave the jurisdiction. The vessel was about to proceed to Alaskan waters at the time the libel was filed. This would warrant the commencement of suit, notwithstanding an agreement for delay. The Lassell (D. C.) 193 Fed. 539.

The libeling of the boat did not substantially delay her intended voyage, as she sailed the day after she was libeled. Libeling prematurely, at least in a case such as the present one, would only affect the matter of costs. The Lassell (D. C.) 193 Fed. 539, 543; The Stroma, 53

Fed. 279, 281, 3 C. C. A. 530; Clark v. 505,000 ft. of Lbr., 70 Fed. 1020, 1021, 17 C. C. A. 555; The Ella (D. C.) 84 Fed. 471, 494; 1 Cyc. 877 (3).

Where, as in this case, the libelant's entire claim is disputed and the time alleged to have been allowed for payment has expired during the proceeding, no extra costs being incurred by reason of its being prematurely brought, the allowance of costs would in no way be affected.

Although there are attached to the libel statements of the account involved in this suit for labor and material, which statements were O. K.'d by Randles, the correctness of such statements is now denied by claimants. It is alleged by them that libelant's books of account were padded so as to largely increase the amount of these bills. A charge in the account of four hours work is shown to be incorrect. There is considerable testimony concerning the accounts as kept in libelant's books against others, not parties to this suit, which, if true, would tend to show that libelant had, in certain instances, where it had two classes of work on hand at the same time—one being work contracted to be done for a sum certain, and the other on the quantum meruit—charged the time of the men working on the first class to the second class.

If proof of libelant's cause depended upon its books of account, it would be necessary to determine to what extent their correctness was impeached by this evidence; but Randles was present during the time the work was being done, superintending it for the owners, kept his own books, and O. K.'d the statements of account rendered by libelant upon the completion of the work. Under these circumstances, in the absence of any showing as to how Randles was misled, if at all, by the alleged falsely kept books, it is not proper to determine the issue raised concerning the correctness of such books.

It is asserted by claimants that Randles did not "O. K." the bills for labor and materials as they now appear; that, after securing his "O. K." upon the final sheet of the statements for labor and material, they were tampered with so as to enlarge the amount shown. Upon this issue claimants offer the copy of the statements of account claimed to have been delivered to Randles, which differ in many particulars from those attached to the libel and offered by libelant in evidence. No satisfactory explanation of the difference in these statements is given by the witnesses, and their correctness must largely, if not entirely, be determined by their inspection and the circumstances of the case.

The statements offered by libelant are clean statements, without erasures and in one handwriting. The total amount of the material is footed on the last page, and the O. K. of Randles and his signature are placed below such footing in the ordinary manner. The same is true concerning the statement for labor performed.

The statements produced by claimants, while most of them appear to be in the same handwriting as those produced by libelant, contain numerous erasures. Where these erasures relate to particular items, the amounts are uniformly less, with one or two trifling exceptions,

than those in the other statements. Where figures showing amounts have been erased, pains have been taken to completely obliterate the original figures; but, in one or two instances, where they can be traced, they agree with the figures upon the statements of libelant. Where there have been interlineations upon the statements produced by Randles, they appear in another handwriting than that in the body of the statements. Libelant's witnesses deny any knowledge of whose handwriting this is, and it does not appear whose it is. Upon the last page of the statement for material which is produced by Randles—that is, the one corresponding with that upon which his O. K. appears in libelant's copy—there are the following footings: The footing for the last page; the total footings of former pages; the total of these two footings; an allowed credit; and the remainder, after deducting this credit—five separate numbers, all of which have been completely erased and rewritten.

In the statements produced by Randles for labor performed, the last page—being the one corresponding with that page in the copy produced by libelant upon which Randles' signature and "O. K." appear—is in a handwriting entirely different from any other in either of the statements, unless it be that in which the interlineations in the Randles statements are made. Upon the last page of the Randles statement for material appears the deduction "credit by allowance, $35.54." Upon the last page of the Randles statements for labor appear two credits, one being "by allowance, material returned, $35.54." These, together, evidently constitute a double credit.

For the foregoing reasons, it appears that the statements produced by libelant are entitled to the greater credit. Though the statements produced by Randles originally emanated from libelant, there is nothing to connect it with the particulars wherein these statements differ from those produced by libelant. As claimants do not account for the alterations in the statements offered by them, as they had long been in the possession of them, and as the changes, in the main, are to their advantage, the conclusion follows that these changes were made after the statements were delivered to Randles, and that they were originally counterparts of the statements produced by libelant, with the "O. K." of Randles thereon, and which are now found to be correctly stated as agreed.

[5] About July 10th, after the abandonment of the voyage, Sanders, for the claimant Van Hook, entered into negotiations with Randles, resulting in an understanding by which it was originally agreed that Randles should put a new engine into the boat and make changes in her—the exact nature of which is not disclosed—for a half interest therein. Pursuant to this arrangement, the boat was turned over to Randles' management and control, who took it to libelant to install the new engine. As manager and agreed purchaser in possession, Randles' employment of libelant to install the engine entitled it to a lien upon the vessel under the provisions of the Act of June 23, 1910 (supra), unless, by the exercise of reasonable diligence, it would have ascertained that, because of the terms of the agreement for sale, Randles was without authority to bind the vessel.

Logically, the question first to be determined is the one of reasonable diligence upon libelant's part. If there was not enough to put libelant on inquiry, it matters not, under the circumstances shown, what the exact terms of the agreement between Randles and Van Hook were. Morrow, the president and manager of libelant, was informed that Randles was to furnish and install an engine in the boat for a half interest therein, as first agreed between Randles and Van Hook. If that fact stood alone, it might have been sufficient to put libelant upon inquiry.

What constitutes reasonable diligence is to be determined, not in the light of a single fact, but in the light of all of the circumstances. The only credit received by libelant for this part of its work was the old engine, at an agreed price of $200. The old engine was a part of the vessel and the property of Van Hook. Such part payment on account warranted the assumption that Randles had authority to bind Van Hook and the boat.

In an agreement entered into between Randles and claimants Van Hook and the Pacific Net & Twine Company it is recited that:

"First party (Van Hook) is the owner of the schooner Malola and has agreed. * * * The cost of installation of said engine and all other expenditures upon said schooner, subsequent to July 10, 1910, to be equally divided between the first and third parties (Randles)."

Though this agreement was executed about the time of the completion of libelant's work on the vessel, as an admission of the prior terms of agreement, it is more persuasive than the recollection of interested witnesses as to general conversations, months past.

The court finds libelant entitled to a lien for this work and material also. The conclusion reached renders the consideration of the other questions urged unnecessary.

Decree will be prepared in accordance herewith.

THE DEFENDER.

(District Court, W. D. Washington, S. D. May 15, 1914.)

No. 921.

1. SHIPPING (§ 209*)—LIMITATION OF LIABILITY—SUFFICIENCY OF PETITION.
That the owner of a vessel did not petition for a limitation of liability until after the liability of the vessel has been established does not bar his right to such limitation, but in such case, when a surrender of the vessel is sought, the petition must show that the owner's interest therein is equal in value to that at the end of the voyage during which the liability was incurred, both with respect to the value of the vessel itself and to liens thereon, or the difference must be made good.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646–655, 659, 661, 662; Dec. Dig. § 209.*]

2. SHIPPING (§ 209*)—LIMITATION OF LIABILITY—SUFFICIENCY OF PETITION.
Where a petition for limitation of liability alleged merely that only one claim against the vessel had "been made," it is not subject to exception on the ground that, when suit in rem was brought on that claim, peti-

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

tioner, in a stipulation for value, had admitted the value of the vessel to be greater than the claim as afterward allowed.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646–655, 659, 661, 662; Dec. Dig. § 209.*]

In Admiralty. Suit by the Barkentine Lahaina Company, owner of the barkentine Lahaina, against the tug Defender, Pacific Transportation Company, claimant, the launch Fearless, Alma Smith, claimant, and the Quinalt Lumber Company. On exceptions to petition of Pacific Transportation Company for limitation of liability. Sustained in part.

See, also, 208 Fed. 836.

Huffer & Hayden, of Tacoma, Wash., for libelant.

Wedell Foss, of Tacoma, Wash., and Welsh, Welsh & Richardson, of South Bend, Wash., for petitioner Pacific Transp. Co.

CUSHMAN, District Judge. In June, 1911, through negligent handling of the tug Defender, her tow, the barkentine Lahaina, was injured. In October, 1913, in this cause, the Defender was found liable for such injuries in an amount which, with interest and costs, approximates $4,500.

[1] The Pacific Transportation Company, claimant, and owner of the Defender, petitions for a limitation of liability. Libelant excepts to such petition. The petition avers:

"That said stranding happened, and loss, damage, and injury occasioned thereby was incurred without the knowledge or privity of the petitioner and without any fault or negligence on its part, as found by the court in its decision herein; however, an action at law in rem against the said tug was begun in the district court of the Western district of Washington, Southern division, by Messrs. Huffer & Hayden, proctors for the Barkentine Lahaina Company, a corporation, who were the owners of said barkentine damaged in consequence of said mishap, and in which case this court has found judgment against the said tug Defender in a sum which, together with interest and costs will approximately be about $4,500 according to the proposed decree and cost bill filed by said proctors, and which, on the 1st day of April, 1914, proctors have asked this court to consider and to sign. The proctors representing the above-named libelant are Huffer & Hayden, Fidelity building, Tacoma, Wash. No other claims have been made against said tug or against this petitioner that constitute in any way a lien or claim against said tug to recover for any loss or damage whatsoever. That the amount of all claims against said tug as petitioner avers, by reason of the losses occasioned by said mishap, far exceeds the value of petitioner's interest in said vessel and her freight pending. Petitioner further avers on information and belief that there is no prior paramount lien on said vessel. and that she has made no voyage or trip since the voyage or trip on which the claim hereby sought to be limited arose, that have to any degree unreasonably decreased the value of said tug."

Petitioner offers to surrender the Defender to a trustee for the benefit of libelant and others entitled to share therein, and prays discharge from all liability. Libelant excepts because of claimant's laches and the insufficiency of the foregoing allegations. Libelant relies on the case of The Rose Culkin, 52 Fed. 328. Petitioner cites the following cases: New York & W. S. S. Co. v. Mount, 103 U. S. 239, 26 L. Ed. 351; The City of Boston (D. C.) 159 Fed. 257; In re Starin (D. C.) 124 Fed.

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

101; Dyer v. Nat. Steam Nav., Fed. Cas. No. 4,225; The Benefactor, 102 U. S. 214, 26 L. Ed. 157; Benedict on Admiralty (4th Ed.) p. 349. The exception because of claimant's laches is overruled. Benedict on Admiralty, § 522.

The allegation that the claim against the Defender, because of the mishap in which the Lahaina was injured, "far exceeds the petitioner's interest in said vessel and her freight pending," if material, should be directed, not to the value now, but at the end of the voyage. Benedict on Admiralty, §§ 545 and 546. The allegation that no voyage or trip made by the Defender since libelant's claim arose has unreasonably decreased the value of said tug is insufficient, being in the nature of a negative pregnant, and is not the equivalent of a positive averment that her value is equal to that at the end of the voyage upon which the damage occurred. The City of Norwich, 118 U. S. 468, 6 Sup. Ct. 1150, 30 L. Ed. 134; The Rose Culkin (D. C.) 52 Fed. 328; Benedict on Admiralty (4th Ed.) §§ 521 and 522.

"If, therefore, the proceeding is taken at the actual end of the voyage on which occurred the claims of loss or damage sought to be limited, the transfer to the trustee would be a simple transfer of the res in its condition at the time. But, if the transfer is made later, the court must be assured, by the affidavit supporting the motion for the order for the transfer, that there has been no diminution of the value of the ship, or, if there has been such a diminution, that the petitioner will make good the difference and will transfer to the trustee both the res and the additional amount required to bring the value of the whole surrender up to the value at the end of the voyage in question. If the owner should convey his interest to a trustee, and a claimant for damage alleges that the true interest has not been surrendered, it would be proper for the court to order an appraisement of the value of the interest of the owner in the res at the end of the voyage in question, notwithstanding the surrender, and to compel the owner, as a condition of obtaining his decree of limitations, to pay into court the difference between the appraised value and her value when surrendered to the trustee as affected by subsequent happenings or the accruing of subsequent liens." Section 522, Benedict on Admiralty.

While the text is not directly supported by the citation of authority, it is inferentially supported by all the cases cited by counsel.

The allegation that "there is no prior paramount lien on said vessel" is insufficient. It is the owner's interest in the vessel at the end of the voyage with which the court is primarily concerned. While it is proper to make allegations concerning the existence of prior and paramount liens to the end that the court may bring into the proceeding those entitled to share in the proceeds of the vessel's sale, yet an allegation is not only appropriate as to liens and claims arising subsequent to the voyage in question, for the same reason, but, when the surrender of the vessel is sought, for the further reason of advising the court whether the interest of the owner surrendered is of the value it was at the end of the voyage as well. Benedict on Admiralty, § 545.

"But as a matter of practice simply, where a surrender is desired, the existence of prior paramount liens, if such exist, must be alleged in the petition for limitation; also the existence and nature and amounts of any liens arising on any voyage since the voyage on which the claims sought to be limited arose, with the names and addresses of the lienors, so far as known, so that all such lienors may be notified of the proceeding; the petition must also allege the special facts on which the right to surrender is claimed, notwith-

standing the fact that the vessel has made a subsequent voyage, which special facts are ordinarily that petitioner, apart from the limitation proceeding, has paid or secured claims arising on such subsequent voyage, so that the vessel is surrendered with a value as of the end of the voyage on which the claims sought to be limited arose." Section 546, Benedict on Admiralty.

The manifest and adjudged effect of the act is to afford a shipowner, in those cases where the blame is not brought too nearly home to him, the opportunity of escaping further liability by giving up his ship, as at the end of the voyage, with freight earned, or the value of his interest therein at such time, or bond therefor. The act is one for the owner's advantage, and he must bring himself within its spirit to escape further responsibility.

It is neither intended that he should give less, nor his creditors take less, than the value of his interest at the end of the voyage. If there be subsequent liens, though they may be inferior to such as libelant's, and it ultimately prevail against them, it is not intended that it should sustain the burden of litigation to determine this, or that the ship's owner should have the advantage of the act and escape further liability by the surrender of a thing worth less to him than the vessel at the end of the voyage, which would be the result if there were subsequent liens thereon, or the vessel lessened in value to him for other reasons.

[2] There is an exception upon the further ground that, upon the libel being filed after the injury, the Defender was released upon stipulation and bond for value; that, in fixing the bond at $8,000, it was agreed by claimant, now the petitioner for limitation, that, at that time, $8,000 was the value of the vessel. An affidavit in support of this exception, which is undenied, recites that the claim of libelant amounts, as stated, to $4,500. As shown by the affidavit, the claimant prima facie admitted a value, at the time of the injury, of $7,000. If libelant's claim was the only one against the vessel, and she was still of equal value, claimant would not be prejudiced by a denial of the petition. But the allegation of the petition is not that there are no other claims against the Defender than libelant's, but that no others "have been made" that "constitute, in any way, a lien."

The right to take advantage of the statute for limitation of liability to the vessel and her freight pending does not depend upon whether the value exceeds or falls below the claims made or ultimately established, although the excess over such value would ordinarily be the actuating motive for invoking the statute. The object of the law was to afford certainty for uncertainty, and to establish a limitation beyond which a shipowner could not be pursued by certain creditors. The exception upon the last ground is denied.

While claimant is not deprived by laches or waiver of the right to limitation of liability, or to surrender the vessel in limitation merely because of the length of time which has elapsed since the voyage upon which the injury was caused to libelant, nor because of the subsequent voyages of the Defender, nor on account of the stipulation and bond for value given in these proceedings, nor for all these reasons (Benedict on Admiralty, § 520), yet these disclosed circumstances render more imperative the requirement that the petition for limitation fully

disclose the particulars above indicated and show that the vessel owner's interest, proposed to be surrendered, is equal to that at the end of the voyage.

UNITED STATES v. SUTHERLAND.

(District Court, W. D. Virginia. May 2, 1914.)

CRIMINAL LAW (§ 101*)—FEDERAL COURTS—DIVISIONS OF DISTRICTS—TRANSFER OF CRIMINAL CASES.

The provision of Judicial Code (Act March 3, 1911, c. 231, § 53, 36 Stat. 1101 [U. S. Comp. St. Supp. 1911, p. 150]), that "when a judicial district contains more than one division * * * all prosecutions for crimes or offenses shall be had within the division of such districts where the same were committed, unless the court or the judge thereof, upon the application of the defendant, shall order the cause to be transferred for prosecution to another division of the district," applies only to districts having statutory divisions; and in a district having no such divisions, but which, on account of there being different places fixed for holding court, the court has by rule divided into so-called divisions for convenience in drawing juries, etc., the court has discretionary power to transfer a criminal cause from one place of holding court to another without the consent of the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 199–205; Dec. Dig. § 101.*]

Criminal prosecution by the United States against one Sutherland.

Barnes Gillespie, U. S. Atty., of Tazewell, Va.

S. H. Sutherland, of Clintwood, Va., for defendant.

McDOWELL, District Judge. This was a prosecution under section 5209, Rev. Stat. (U. S. Comp. St. 1901, p. 3497), for a violation committed in Dickenson county, Va. A mistrial was had at the August term of the court at Big Stone Gap. Upon withdrawing a juror, on the motion of the government and over the objection of the defendant, the case was ordered transferred to Abingdon for trial at the succeeding October term. The reasons for making the transfer need not be stated at great length. It developed during the trial that there was at Big Stone Gap among sundry of the citizens a strong sentiment in favor of the acquittal of the defendant, which most probably aided no little in bringing about the disagreement of the jury, and it was there at that time impracticable to secure fit accommodations for keeping a jury under charge. Leaving the case at Big Stone Gap would also have resulted in delay until the following January term. The desire of the district attorney for a speedy retrial was in my opinion based on most meritorious grounds, while defendant's objection to the motion was based on grounds of the opposite character. It should be added that Abingdon was practically as convenient of access to the defendant and his witnesses as Big Stone Gap.

The defendant's counsel relied upon section 53 of the Judicial Code. That section reads in part:

"When a district contains more than one division. * * * All prosecutions for crimes or offenses shall be had within the division of such districts

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

where the same were committed, unless [transferred on motion of the defendant]."

In this district there are no divisions created by act of Congress, and there has never been any special statute applicable to this district with reference to the place of trial. The rules of this court create territorial subdivisions of the district, which are therein called divisions, and the offense was committed within the Big Stone Gap "division." While section 53 Jud. Code (see, also, section 58) may seem literally to apply to this district, I cannot perceive that it can be so construed.

In the edition of the Judicial Code prepared under direction of the Senate Judiciary Committee under resolution of February 18, 1913, there is a note appended to section 53:

"In a great many *acts creating divisions* of districts there are to be found provisions requiring, etc. * * * To avoid the necessity for repeating them in the various sections in which they otherwise would appear, and to avoid the necessity for *repeating* similar provisions *in future acts creating or changing divisions* or districts, this section has been inserted and made general. The section also contains the restriction with respect to the place of prosecution of crimes and offenses found in many acts; and the provision of the act of June 2, 1906 (34 Stats. 206, c. 2569), authorizing the transfer of certain criminal cases from one division of the Western district of Arkansas to another division, for trial etc., is also carried into the section and made general in its application. The purpose of this latter provision is to facilitate the early disposition of criminal cases, especially in minor cases, where the defendant is unable to give bail, and may, in view of the fact that in many divisions but one term of court is held each year, possibly be compelled to remain in jail nearly a year before a trial may be had or before an opportunity will present itself for him to plead guilty."

There have been many statutes creating divisions of districts. See, for instance, 4 Fed. Stats. Ann. 635, 667, 699, 702, 704, 705, 706, 711, 712, 713, 714, 725. In many of these statutes there are provisions fixing the place for certain trials. In some the provisions relate to criminal trials, for instance, Act March 2, 1887, c. 315, 24 Stat. 442, 443 (U. S. Comp. St. 1901, p. 345); Act March 3, 1891, c. 566, 26 Stat. 1110 (U. S. Comp. St. 1901, p. 338); Act Feb. 20, 1897, c. 269, 29 Stat. 592 (U. S. Comp. St. 1901, p. 322); Act May 29, 1900, c. 594, 31 Stat. 220 (U. S. Comp. St. 1901, p. 326); Act June 1, 1900, c. 601, 31 Stat. 249 (U. S. Comp. St. 1901, p. 353); Act June 2, 1906, c. 2569, 34 Stat. 207.

It is a mere accident of phraseology that there are any "divisions" eo nomine in this district, "sections" or "departments" would have answered equally well. A rule of court promulgated in 1907 reads:

"For purposes of convenience the Western District of Virginia is hereby divided into divisions, to be known as follows and to consist of the territory hereinbelow named," etc.

The purposes of the rule were to be conveniently able to specify from what counties and cities the jurors for the respective places of session were to be drawn, and to conveniently phrase the rules guiding the United States commissioners as to the places of session to which they should bail defendants and recognize witnesses. If in writing the rules of court it had been said that juries for service at Abingdon shall be drawn from Washington county and (by name) the other counties styled the "Abingdon division" in the rules, etc., and that the Unit-

ed States commissioners shall bail defendants and recognize witnesses to the then next term of this court to be held at the place of session nearest to place of the offense, it would have been difficult, if not impossible, to assert that there are "divisions" in this district. That the application to this district of this act of Congress should depend upon the fortuitous choice of words in the rules of this court seems to me highly improbable.

In districts in which there are no divisions created by act of Congress, there was, at least prior to the enactment of the Judicial Code, a common-law power to do what was done in the case at bar—to make transfers in clear furtherance of justice although objected to by one party. Such power has been exercised in this district as far back as my own knowledge takes me without question ever having been made. In removals, under section 643, Rev. Stats. (U. S. Comp. St. 1901, p. 521), from the state courts of prosecutions against federal revenue officials, the removal had to be to the place of session of the federal court where a court was "next to be holden," anywhere in this district. In removals under the Judiciary Act of 1875 (Act March 3, 1875, 18 Stat. 470, c. 137); 1887 (Act March 3, 1887, 24 Stat. 552, c. 373); 1888 (Act Aug. 13, 1888, 25 Stat. 433, c. 866 [U. S. Comp. St. 1901, p. 508]), the place of session of the federal court at which the copy of the state court record was regularly to be filed was that at which the federal court of the district was *next* to have a session anywhere in this district. In either class of removals the place of session to which a case was carried by removal was not infrequently inconvenient and unduly expensive to one party, or caused delay in trial, to the unjust detriment of one party, and to the unfair advantage of the other. Under such circumstances, without consent of both parties, the power to transfer to another place of session is assuredly a power in the furtherance of justice. That this common-law power existed, at least prior to the Judicial Code, see Barrett v. U. S., 169 U. S. 218, 221, 18 Sup. Ct. 327, 329 (42 L. Ed. 723) in which it is said:

"As to where trials shall be had in a judicial district depends entirely on the legislation upon the subject."

In Rosencrans v. U. S., 165 U. S. 257, 260, 263, 17 Sup. Ct. 302, 304 (41 L. Ed. 708) it is said:

"These statutes declare the general rule, that jurisdiction is coextensive with district. That being the general rule, no mere multiplication of places at which courts are to be held or mere creation of divisions nullifies it. Indeed, the place of trial has no necessary connection with the matter of territorial jurisdiction. * * * So far as the mere transfer of the place of trial from one division to another, it would seem, in the absence of express prohibition, to be within the competency of the court having full jurisdiction over the entire district, and certainly presents no ground of error when it is not at the time challenged, and the trial proceeds without objection."

In Terry v. Skinner (C. C.) 110 Fed. 494, 495, it is said:

"The motions under consideration are governed by the rules of court in force in this district since 1886. Rule 20 is: 'Upon the affidavit on the part of a plaintiff or defendant, showing good cause, a judge may remove a cause from one place of holding court to another.' Hence the question where a cause shall be heard is one addressed to the discretion of the judge."

A transfer from one place of session to another within the district is not a change of venue, and we need not consider the possibly debatable question of discretion in the court to order a change of venue in criminal cases on motion of the prosecution and over objection of the defendant. 12 Cyc. 242, 243. It seems clear, therefore, that there was a common-law discretionary power in the court of this district to order the transfer against the objection of the defendant. If so, and if section 53 be construed to apply to districts which have no statutory divisions, this statute is in derogation of this common-law power. In Northern Securities Co. v. U. S., 193 U. S. 197, 361, 24 Sup. Ct. 436, 466 (48 L. Ed. 679) it is said:

"Whenever a departure from common-law rules * * * is claimed, the purpose to make such departure should be *clearly* shown."

In Johnson v. Railroad Co., 117 Fed. 462, 466, 54 C. C. A. 508, 512; it is said:

"The common or general law is not further abrogated by such a statute than the clear import of its language *necessarily requires*."

See, also, 26 Am. & Eng. Ency. (2d Ed.) 662; Shaw v. R. Co., 101 U. S. 557, 565, 25 L. Ed. 892; Chauncey v. Dyke, 119 Fed. 1, 17, 55 C. C. A. 579, 595.

If the language of section 53, read in connection with other sections of the Code, can possibly be read as applying to divisions of both kinds, it must be admitted that it can also be fairly read as applying only to statutory divisions. To adopt the former construction over the latter, we destroy a common-law power, although the language used does not fairly, clearly, or necessarily require such construction. If the purpose of the provision in question was to prevent delay, it defeats that purpose in part to read it as applying to the districts having no statutory divisions. This is well illustrated by the instant case. The defendant relied upon this section, construed as applying to this district, largely for the very purpose of obtaining delay.

Section 53 applies to civil as well as to criminal cases. If confined in its application to districts in which by previous acts of Congress divisions were in effect made judicial districts, we find excellant reason for enacting this section; but if applied to this district, for instance, little but evil can result. Transfers of civil cases originally brought in this court, at the instance of one and over the objection of the other party, have been made in this district for many years—and always in order to prevent oppressive delay or considerable expense or serious inconvenience to the party moving for the transfer. An intent to cause public inconvenience is certainly not to be construed into a statute when not clearly necessary. Construing this section as applying to districts such as this does cause public inconvenience, and without any compensating benefit. I have never heard that the power of transfer has been generally or frequently abused by the federal courts which have heretofore had it.

The chief reason for the enactment of the statutes dividing districts into divisions and making the divisions practically judicial districts was the public inconvenience caused by the great territory embraced

within some districts, which was also in many cases coupled with inadequate means of travel. In some of the larger Western states there was all-sufficient reason for requiring that a single defendant in a civil suit could be sued only within the division of his residence. In this district, and in many others of not such very great area and well supplied with convenient means of travel, there is no reason for such requirement, and there are some very strong reasons against it. U. S. v. Fisher, 2 Cranch, 359, 2 L. Ed. 304.

While it seems to me that Judge Sanford's opinion in Reich v. Tenn. Co. (D. C.) 209 Fed. 880, has no bearing on this question, it should be noticed that there are statutory divisions of the Eastern district of Tennessee. 4 Fed. Stats. Ann. 725.

Another, and I think controlling, reason for holding that this statute applies only to districts having statutory divisions is this: In many of the statutes which created divisions of districts are provisions which do make, or which were construed as making, the place of trial in a division the only place at which certain trials could be held. Act Feb. 20, 1897, 29 Stat. 590, 592, relating to both districts in Arkansas, created divisions and provided:

"That all crimes or offenses committed * * * in any of the divisions of the said districts shall be cognizable within such division."

In 24 Stat. 442, it is provided:

"That all * * * criminal prosecutions must be brought in the division * * * where * * * the offense is committed."

See, for instance, also, of similar purport, 26 Stat. 1110, § 3; 31 Stat. 249, § 3. The result was that a defendant in a criminal case, unable to give bail, could not on his own motion be tried, or even be allowed to plead guilty, until a term of court for his division was held. This occasionally operated to keep defendants in jail longer before trial than they could be kept after trial, if found guilty. This wretched hardship, due entirely to slipshod legislation, was in Arkansas corrected by section 2 of the act of June 2, 1906 (34 Stat. 206, 207). And as is shown in the note appended to section 53, Jud. Code, the purpose was to correct the evil caused wholly by statutes creating divisions of districts and providing that jurisdiction to try certain cases is given to the court only when sitting within some particular division. In this district there has never been any such evil to be remedied. It has been, since long before I went on the bench, the constant practice to transfer prisoners from one division to another at their request, in order that they might plead guilty and spend the time in jail serving the sentence rather than in waiting to serve the sentence. In all reasonable probability, this practice does and always has prevailed in many, if not in all, of the districts where there are divisions created only by rule of court.

Truly Congress may have intended the statute to be general in its application to all districts having divisions created by statute, or at least to all districts having such divisions, where the division is by statute made in effect a judicial district. To construe it as applying to other districts is to wholly lose sight of the evil intended to be cured

and to create unnecessarily another evil almost equally pernicious. For if the power of transfer be taken away, except at the instance of the defendant, he is given an opportunity to delay trial that will frequently be used to defeat the ends of justice.

Almost equally persuasive is the language of section 59 of the Code:

"Wherever any *new district* or division has been or *shall be established*, or *any county* or territory has been or *shall be transferred from one district* or division *to another district* or division, prosecutions for crimes," etc.

Assuredly here it must be plain that the thought of the framers was fixed upon changes by act of Congress. The note to this section reads:

"This section is based upon provisions contained in a large number of *acts* creating new districts or divisions, or transferring counties from one district or division to another. The purpose of the section is to obviate the necessity for repeating, in similar acts in the future, provisions of this character."

If section 59 relates only to divisions created by act of Congress, I can think of no reason for asserting that section 53 relates to any other kind of divisions.

So also section 60 adds force to this belief:

"The transfer of any county * * * from one * * * division to another * * * division shall not affect or divest any lien," etc.

It seems incredible that Congress, in a statute of this character, could be solemnly legislating that a transfer of a county from a division created by order of court to another such division of a district should not divest liens. For the prototypes of this section, see Act Aug. 5, 1886, c. 928, § 6, 24 Stat. 308, 309 (U. S. Comp. St. 1901, p. 325), and Act March 2, 1901, c. 801, § 7, 31 Stat. 880, 881 (U. S. Comp. St. 1901, p. 407). By each a new judicial district was created, and in each there is a provision that liens shall not be impaired by the transfer of territory from the old to the new district.

LEONARD v. WILLIAM G. BARKER CO.

THE ABENAKI.

(District Court, D. Massachusetts. May 18, 1914.)

No. 674.

1. SHIPPING (§ 184*)—CHARTERS—TIME FOR DISCHARGING—CUSTOM OF PORT.
Evidence *held* to establish a custom at the port of Boston that Eastern lumber schooners shall await their turn in discharging and shall discharge in the order of their arrival at the wharf of discharge; also that the customary rate of discharge of such schooners is 20,000 feet per each weather working day.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 596; Dec. Dig. § 184.*]

2. SHIPPING (§ 184*)—CHARTERS—DEMURRAGE—DELAY IN DISCHARGING.
Where neither the charter nor the bill of lading of a schooner chartered for the carriage of a cargo of lumber contained any reference to demurrage or rate of dispatch in discharging, she was subject to the custom of

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

the port in that respect, but, where such custom required her to wait her turn at the wharf of the consignee, she was entitled to have vessels preceding her discharged with customary dispatch, and could not be required to await the mere convenience of the consignee; and also, on receiving a berth, she was entitled to customary dispatch in her own discharge and to demurrage for delay caused by the failure of the consignee to receive or provide space for the lumber so that she could discharge at the customary rate.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 596; Dec. Dig. § 184.*]

In Admiralty. Suit by Everett W. Leonard, master of the schooner Abenaki, against the William G. Barker Company. Decree for libelant.

Carver, Wardner, Cavanagh & Walker, of Boston, Mass., for libelant.
Barker & Wood, of Boston, Mass., for respondent.

HALE, District Judge. This is a libel for demurrage, arising from the alleged detention of the schooner Abenaki at East Cambridge in the port of Boston, while discharging a cargo of lumber. The suit is brought by the master, in behalf of the owners of the vessel. On July 2, 1912, the schooner left South Gardiner, Me., for Boston, under an oral charter to Lawrence Bros., with a cargo of 194,063 feet of spruce lumber consigned to the respondent at Boston. Neither the charter party nor the bill of lading contained any reference to demurrage or rate of dispatch. The schooner arrived in Boston on Friday, July 12th, in the afternoon, reported at once to the consignee, and was ordered to the wharf, in East Cambridge, of the Gale Lumber Company, to which company the lumber had been sold. The vessel arrived at the wharf on July 13th, in the forenoon, and found no berth ready to receive her. There were only two berths at the wharf, both of which were then occupied by lumber-laden vessels. The berth on the south, about 200 feet long, was occupied by the schooner Nellie Eaton; and that on the west, about 120 feet long, by the schooner Leo. Both these schooners had arrived earlier than the Abenaki; the Leo on July 3d, and the Eaton on July 11th. The Leo carried 83,745 feet of lumber, and the Eaton 118,293 feet of lumber.

The libelant contends that the Abenaki, on arriving at the Gale wharf, should have been discharged at the rate of 20,000 feet a day; that this was the customary rate of discharge of Eastern lumber schooners in the port of Boston; that at this rate she could have discharged in ten days, or by Thursday, July 25th; that she actually completed her discharge on July 31st; and that for this delay of six days she is entitled to demurrage.

[1] The evidence in the case makes it clear that there is a well-known custom in the port of Boston that Eastern lumber schooners shall await their turn in discharging, and shall discharge in the order of their arrival at the wharf of discharge. This custom is fully recognized by the courts. Belatty v. Curtis (D. C.) 41 Fed. 479; The Viola (D. C.) 90 Fed. 750. The respondent urges that, upon arrival at the wharf, the Abenaki was subject to this custom of the port of Boston; that, pursuant to this custom, the schooner received reasonable and cus-

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

tomary dispatch in discharging, and was not delayed by the fault of the respondent.

[2] The first question then is: Was the Abenaki delayed in discharging by the fault of the respondent, or of some one for whose misconduct the respondent is responsible?

It is not denied that the respondent is liable for any delay caused by the Gale Lumber Company. The libelant contends that the Gale Company did not use reasonable care in procuring a berth for the Abenaki, or in giving her discharge.

In considering this question, it is necessary to inquire, first, whether the Leo, the schooner preceding the Abenaki at her berth, received customary dispatch in unloading. It is contended by the libelant that the custom of awaiting turns will not, as against a vessel awaiting her turn, excuse the charterer from liability for delay caused by his failure to discharge preceding vessels with due diligence; and it is clear that, if this were not so, the custom might lend itself to a great hardship upon lumber vessels, for a lumber-laden schooner might be kept a long time awaiting a berth, while the consignee held vessels ahead of her for the mere purpose of storehouses. The custom of awaiting turn cannot be invoked for the mere convenience of the charterer or consignee in the conduct of his business. It has often been held that the custom of a port can be used as a reason for delay only when, because of such custom, a vessel is deprived of an opportunity to discharge sooner; and that it cannot be used as a reason for delay when such opportunity is afforded, and, merely for reasons of the charterer's convenience, the discharge is delayed. Lindsay v. Cusimano (D. C.) 10 Fed. 302; Id. (C. C.) 12 Fed. 503, 504.

The testimony in behalf of the libelant tends to show that, when the Abenaki arrived, the Leo was discharging not over 10,000 or 15,000 feet a day; that the Gale trucks came to take the lumber away, after it was put on the wharf, at intervals of two or three hours, sometimes only two or three coming during the day; and that sometimes only about two of Gale's men were at work loading the trucks. There is a sharp contention on this point. It is insisted on the part of the respondent that the delay in discharging the Leo was caused only by the fault of the captain and the crew of the vessel, and not by any lack of facilities for receiving the cargo on the wharf. It is urged, also, by the respondent that there was an unusual accumulation of vessels at the wharf. Upon examination of the proofs, however, I find that there is nothing to show that between July 3d, when the Leo arrived, and July 11th, when the Eaton arived, there was any other vessel than the Leo at the wharf. It appears, therefore, that the Gale Lumber Company had from July 3d to July 11th in which to take the cargo of the Leo away. The cargo consisted of 83,000 feet of lumber; and this was only about half discharged when the Abenaki arrived on July 17th.

It is clear that a vessel awaiting her berth may demand reasonable dispatch under all existing conditions; and I am satisfied that the discharge of the Leo did not meet this requirement. Empire Transportation Co. v. Philadelphia & R. Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623; Tweedie Trading Co. v. Barry (D. C.) 194 Fed. 286.

This brings me to the inquiry: Was there in 1912 any customary rate of discharge of Eastern lumber schooners at the port of Boston? And, if so, what was that rate?

There is a sharp conflict of testimony upon this subject; and the evidence is not altogether satisfactory. Some of the witnesses say that it is hard to fix an average rate for the discharge of lumber cargoes. The testimony for the respondent related largely to the time in which crews of vessels could discharge their cargoes, rather than to the time required by consignees to take the cargo. The vital question relates to opportunities furnished by the consignees for receiving cargoes at a given point, and not to find how much per day the crew of different vessels can discharge. When a charter is made, it is for the ship to inquire what facilities for discharge will be given to her at the port of discharge. The fact that the consignees cannot tell with entire accuracy when vessels are likely to arrive from Eastern ports cannot afford a reason for the failure of consignees to discharge them with due diligence when they do arrive. The time when a vessel has arrived, and has reported, is the time to which the attention of the court is directed, in order to find whether or not reasonable facilities have been afforded to give the vessel a discharge.

In the case before me the inquiry must be: What is reasonably demanded of the party who has the responsibility for the discharge of the vessel? George D. Rogers, a leading shipbroker, is shown to be a man of large experience, with cargoes of spruce and hemlock from Maine and from the provinces. He testified that, in his opinion, the discharge of a vessel of about the capacity of the Abenaki and the Chamberlain would be 20,000 feet per weather working day.

I find that such was the customary rate of discharge of Eastern lumber schooners at this port. In coming to this conclusion, I recognize the difficulty courts have often found in attempting to fix a rate of customary dispatch in a general port where the only testimony in the case is of a somewhat limited range. This difficulty was commented upon by Judge Dodge in Gilbert Transportation Co. v. Borden, 170 Fed. 706, 710, 96 C. C. A. 26; Eleven Hundred Tons of Coal (C. C.) 12 Fed. 185, 187.

The libelant contends further that the Abenaki did not receive reasonable dispatch in discharging after she had obtained her berth on July 19th. The berth was clear for her on July 23d; she discharged about 50,000 feet, and was then compelled to stop, because there was no more available space on the wharf. The testimony of Capt. Leonard of the Abenaki is to the effect that the lumber was piled upon the wharf as high as it was reasonable to pile it under all the circumstances; that it covered all the space provided for it; that, whenever the Gale Company took a truck load or more away, the crew of the schooner put out enough to fill the space; that there was no other reason for the delay in discharging except that the schooner was unable to discharge at the average rate on account of the lack of space on the wharf, and the discharge was thus delayed until July 31st.

It is urged by the respondent that there was a great accumulation of vessels at the time in question. In my opinion, the proofs fail to

sustain this contention. All the vessels whose arrival affects this question are the Leo, the Eaton, the Abenaki, and the Chamberlain. The cargo of the Leo was 83,745 feet. The cargo of the Nellie Eaton was 118,293 feet. The cargo of the Abenaki was 194,063 feet. The cargo of the Chamberlain was 234,848 feet. This made a total of about 631,000 feet of lumber. At the rate of 20,000 feet per day for each of the two schooners, namely, the Abenaki and Chamberlain, or 40,000 feet per day for both vessels, this lumber should have been discharged in 15 or 16 days. Although there is nothing to show that the Leo and the Eaton did not receive berths as soon as they arrived, and although the Leo arrived on July 3d and the Eaton on July 11th, the Abenaki on July 13th, and the Chamberlain on July 17th, the discharge of all four vessels was not completed until August 10th, a period of 38 days. Although the testimony shows that the Gale Company increased its usual force during the time in question, it does not show due diligence on the part of that company in applying its force to the discharge of the Eastern lumber schooners. The evidence before me induces the belief that the respondent was at fault in that reasonable facilities were not furnished on the discharge of the cargo, and in that due diligence was not used in the premises.

As to the value of the use of the Abenaki, the testimony is not very ample. The amount claimed in the libel is $25 a day. From the evidence before me, I think the value of the use of the Abenaki at the time in question was $21 per day.

The Abenaki arrived at Gale's wharf and reported herself ready to discharge on Saturday, July 13th, in the forenoon, with a cargo of 194,063 feet. At 20,000 feet a day for discharge, she could have completed her discharge by July 26th. She actually completed her discharge by July 31th, a delay of five days and a half. She is therefore entitled to damages at the rate of $21 a day for 5½ days, amounting to $115.50.

A decree may be entered for the libelant for $115.50, with interest from the date of the libel, with costs for the libelant.

WASSON v. STETSON, CUTLER & CO.

THE H. H. CHAMBERLAIN.

(District Court, D. Massachusetts. May 18, 1914.)

No. 687.

1. SHIPPING (§ 47*)—CHARTERS—TIME FOR DISCHARGING.

Under a provision of a charter party that lay days for loading and discharging shall be "commencing from the time the captain reports himself ready to receive or discharge, customary dispatch and usual conditions at ports of loading and discharge," the stipulation as to the time of the commencement of the lay days for discharging must be given effect; and such time cannot be postponed after the captain has reported himself ready, because of a custom of the port for vessels to await their turn

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

for a berth; but, after their commencement, the further provisions as to customary dispatch and usual conditions govern.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 182, 183; Dec. Dig. § 47.*]

2. SHIPPING (§ 47*)—CHARTERS—TIME FOR DISCHARGING.

Under a provision of a charter party for discharge of a cargo of lumber according to the customary dispatch and usual conditions at the port, the vessel has the right, after commencing, to discharge continuously at the customary rate per day, and to have wharf room for piling the lumber supplied so that she may do so.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 182, 183; Dec. Dig. § 47.*]

In Admiralty. Suit by Burtis M. Wasson, master of the schooner H. H. Chamberlain, against Stetson, Cutler & Co. Decree for libelant.

Carver, Wardner, Cavanagh & Walker, of Boston, Mass., for libelant.

Russell, Moore & Russell, of Boston, Mass., for respondent.

HALE, District Judge. This is a libel by the master of the schooner H. H. Chamberlain for demurrage, arising from the detention of the schooner at East Cambridge, within the port of Boston, for ten days in July, 1912, and for $32.50 "dead freight." The written charter to the respondent provided for two voyages from Bridgewater, Nova Scotia, to Boston with:

"Full cargoes dry, planed, or rough hemlock boards, the freight as follows: The first voyage, $3.25 per M feet delivered."

The provision for the discharge of cargo, the only other part of the charter party material for the court to consider, is as follows:

"It is agreed that the lay days for loading and discharging shall be as follows (if not sooner dispatched), commencing from the time the captain reports himself ready to receive or discharge, customary dispatch and usual conditions at ports of loading and discharge."

The Chamberlain arrived at Boston on July 17th, with a cargo of 234,848 feet of lumber, and reported to Stetson, Cutler & Co., the charterer and consignee; she was ordered to the wharf of the purchaser of the lumber, the Gale Lumber Company, in East Cambridge, within the port of Boston. She arrived at the wharf the same day about noon. There were only two berths at the wharf; both were then occupied by vessels with lumber cargoes. The wharf was blocked up with lumber. The schooner Leo was at the west berth with about half her cargo out, filling up the clear space on the wharf. She had reported at the port of Boston July 3d, and was discharging slowly. The schooner Eaton was at the south berth with her full cargo aboard, not having begun to discharge. She had reported July 11th. The schooner Abenaki lay outside the Eaton; the Chamberlain tied up to the Abenaki. Capt. Wasson, the master of the Chamberlain, requested the charterer to furnish him with a berth in which he could discharge; he was told that the lumber had been sold to the Gale Company and must be delivered at the Gale wharf. There being no chance

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

to discharge for a considerable time, the captain went home, leaving his brother in charge, authorized to take the discharge whenever he was furnished facilities. Capt. Wasson returned to Boston July 29th, and found conditions not materially changed, as he testifies, except that the Leo was gone, the Abenaki had taken her berth, and was about half discharged. The Eaton was also about half discharged and working slowly. She had got into her berth July 12th. She had not, however, begun to discharge until after the Abenaki had begun her discharge, some time after July 22d. A space about 30 feet wide had been cleared for the Eaton on the wharf; but she had filled that space up on July 29th, and was working only two or three hours a day. The Abenaki left the wharf July 31st; the Eaton did not get discharged until August 1st. The Chamberlain then took her place. The captain's testimony shows that the wharf was blocked up with the Eaton's lumber, there being no place on it where the Chamberlain could discharge; that she was forced to wait until August 2d for a space to be cleared; that the captain complained to Gale's superintendent, Mr. Sterritt, and was told by Sterritt that the more the captain bothered him the longer he would keep the vessel, and, if he bothered him too much, he would "keep the Chamberlain there for a storehouse"; that, after a clear berth was obtained on August 2d, the Chamberlain was able to land only about 20,000 feet of lumber. This filled all the available space to a height of six feet. No more space was then cleared until August 5th, when enough was cleared for the balance of the cargo to be taken care of as discharged. The discharge was completed August 10th at noon.

[1] Under the provisions of the charter that lay days for loading and discharging shall be "commencing from the time the captain reports himself ready to discharge, customary dispatch and usual conditions at ports of loading and discharge," the libelant contends that the schooner Chamberlain was not obliged to submit to any custom of the port as to awaiting turn for berth, but was entitled to have the purchaser of the cargo ready to take it away as soon as the schooner reported herself ready to discharge.

The learned proctor for the respondent urges that, notwithstanding the language of the contract in respect to lay days, the words "customary dispatch," as they are used, import the true meaning that the lay days shall commence when, in accordance with customary dispatch, a berth is given, namely, when the vessel gets her berth "in turn."

After a careful examination of the question, I am constrained to accept the libelant's view of the construction of the charter party. There is an express stipulation in the contract that the lay days, both for loading and discharging, shall commence when the captain reports himself ready. The clear meaning of the further provision is, I think, that, after the captain reports himself ready to discharge, he shall receive customary dispatch and be subject to usual conditions at the port of discharge. If the lay days are to begin to run from the time the captain reports his readiness to discharge, then the custom of awaiting turn for a berth cannot be applied before the period of discharge begins.

The interpretation of the contract urged by the respondent entirely fails to give any meaning to the stipulation that lay days for discharging shall commence from the time the captain reports himself ready to discharge.

It appears that, in the charter party, the stipulation for the beginning of lay days is printed, while the words "customary dispatch for discharging" are typewritten. Where there is a conflict between the written and the printed provisions of a charter party, there is a presumption in favor of the written provision. In the construction of the charter party before me there is no conflict between the two provisions. I give effect to the proposition that lay days are to commence from the time the captain reports himself ready to discharge. I give effect also to the provision that after the lay days have begun, namely, during the period of discharge, customary dispatch and usual conditions at the port of discharge shall prevail. In this construction there is nothing in the charter party, either written or printed, which it is necessary to reject. The familiar rule is that, so far as possible, such a construction shall be adopted as will give effect to all provisions of an instrument, and not make it necessary to reject some and give greater effect to others.

The charter party is similar to that in Crowley v. Hurd (D. C.) 172 Fed. 498, 501. In that case, the custom of the port of New York was found to require consignees to furnish a berth within 24 hours after arrival, and did not require a vessel to await her turn. If the custom in New York had required vessels to await their turn, such a custom could not have been given effect in the case before the court, on account of the express provision of the charter party, which was, as in the case at bar, that lay days for discharging should commence from the time the captain should report his vessel ready for discharge, and then should have customary dispatch while discharging. The court in that case referred to Bartlett v. Cargo of Lumber (D. C.) 41 Fed. 890, and Bellatty v. Curtis (D. C.) 41 Fed. 479, and said:

"In neither of these cases was there any charter party, and the bill of lading, in both of them, contained no provision whatever on the subject of demurrage. An agreement that the vessel should have 'customary dispatch,' inserted, as was the case here, in the charter party as the agreement of the parties in regard to lay days for discharging, must, I think, be considered as presumably intended to secure for the vessel something more than the mere right to be discharged in turn, which she could claim in any event, without any express agreement."

In Gilbert Transportation Co. v. Borden, 170 Fed. 706, 96 C. C. A. 26, the court had before it a state of facts in which the agreement for discharge with customary dispatch was not connected with the provision that the lay days should commence at a stipulated time. That case is authority for the construction which should be given in this circuit to the words "customary dispatch." The court held that the agreement for "dispatch," without qualification, may exclude awaiting turn, but the word "customary" must be given its fair meaning by way of qualification, citing Smith v. Yellow Pine Lumber (D. C.) 2 Fed. 396; Lindsay v. Cusimano (C. C.) 12 Fed. 504. In Hinckley v. Wilson Lumber Co. (D. C.) 205 Fed. 974, 979, the court, in the Maine dis-

trict, gave substantially the same interpretation to the words "customary dispatch," holding that those words meant discharge with due diligence according to the lawful, reasonable, and well-known custom of the port of discharge.

The cases cited above give a clear interpretation to the words "customary dispatch." This interpretation must be applied to the charter party in the case at bar; it affects the rights of the parties after the period of discharge begins.

In Carbon Slate Co. v. Ennis, 114 Fed. 260, 261, 52 C. C. A. 146, the charter party contained the provision that the lay days were not to commence to run until 12 o'clock noon after the vessel was entered at the customhouse and ready to load. This was construed to amount to a stipulation that the lay days were actually to commence at that time. The court held that, where such explicit statement as to the beginning of lay days was inserted in the charter, no custom of awaiting turn for berth could be given effect. The force of the opinion is that the stipulation of the time when lay days commence is to have distinct and positive effect; and that it overrides any custom as to awaiting turn.

[2] Among the "usual conditions at the port of discharge" is the condition relating to the rate of discharge at the port of Boston. In the case of the Abenaki, I have found that the customary rate in the port, and at the wharf, where the schooner was to be discharged is 20,000 feet per weather working day. It is clear, then, that, when the Chamberlain had reported ready to discharge, she was entitled to be given discharge at once, and have the discharge proceed continuously at the customary rate per day. She had the right to expect a clear space afforded her on the wharf; she had the right to assume that dockage for piling the lumber should be supplied with reasonable promptness, and that, when unloading commenced, the lumber would be discharged continuously and with customary dispatch. Williscroft v. Cargo of the Cyrenian (D. C.) 123 Fed. 169; Crowley v. Hurd (D. C.) 172 Fed. 498, 501; Smith v. Yellow Pine Lumber (D. C.) 2 Fed. 396.

The evidence induces me to believe that the Chamberlain was delayed in discharging by the fault of the respondent. It shows the respondent at fault in failing to procure a berth for the Chamberlain when the captain reported her ready for discharging, and thereafter in failing to give her customary dispatch in discharging.

I have found that, by reason of the provision of her charter party, the Chamberlain was not obliged to submit to the custom of awaiting turn for a berth, but was entitled to a clear berth and to facilities for discharging as soon as she reported herself ready to discharge. Demurrage began to run July 17th at noon, when she reported herself ready to discharge. At the average rate of 20,000 feet per day for discharge, and with a cargo of 234,848 feet, she could have been wholly discharged in 12 working days, or by July 31st at noon. She did not, in fact, complete her discharge until August 10th at noon, a delay of ten days. For this delay she is entitled to damages for demurrage.

The evidence leads me to the conclusion that the value of the use of the Chamberlain was $25 per day. She is entitled, therefore, to recover demurrage in the sum of $250.

It is further contended in behalf of the Chamberlain that, under the contract, she was to be furnished for the two voyages to which the charter relates with "full cargoes dry, planed, and rough hemlock boards." The evidence is that the capacity of the Chamberlain for dry, planed, or rough boards was 260,000 feet. The respondent tendered freight on 250,000 feet, leaving a balance of 10,000 feet on which freight has not been paid or tendered. On this amount, at the rate of $3.25 per M feet, the libelant claims demurrage in the sum of $32.50.

In reference to this claim, the respondent contends that Capt. Wasson represented the capacity of the schooner to be 250,000 feet. This the captain denies, and says that he always called the capacity of the schooner 260,000 feet. A witness for the respondent testifies that, when the charter was negotiated, Capt. Wasson gave 250,000 feet as an estimate of the capacity of the schooner. It appears that such an estimate, if made, was not a warranty as to the capacity of the schooner, but a mere estimate for a certain purpose. I cannot disregard the clear testimony that the capacity of the schooner was 260,000 feet. I therefore allow the libelant for freight on the balance of 10,000 feet at $3.25 per M feet, namely, the sum of $32.50. This allowance is spoken of by courts under the name of "dead freight." Hinckley v. Wilson Lumber Co. (D. C.) 205 Fed. 974, 979, 980.

The libelant is, then, entitled to a decree for the sum of $250 for demurrage, and for the sum of $32.50 for "dead freight." The decree will be for the libelant for the sum of $282.50, with interest from the date of the libel, and with costs for the libelant.

McCOY v. J. W. PAXSON CO. et al.

(District Court, E. D. Pennsylvania. May 27, 1914.)

No. 62 of 1913.

SEAMEN (§ 29*)—PERSONAL INJURIES—LIABILITY OF VESSEL OWNER—DEFECTIVE APPLIANCE—RELATION TO VESSEL.

Libelant was permitted by the master to ride on a scow which was being towed down the river from Philadelphia, and, while she was docking at her destination, he was injured, as alleged, by reason of a defective appliance on the vessel. The scow was without motive power, and the master was authorized to hire but one other person as a deck hand, which he had already done, and the deck hand was with him. He was also forbidden to take any other person on board, and the owners did not know that he had done so. *Held*, that libelant was not in the service of the boat, and the owners were under no obligation to look after his safety nor liable for his injury.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 186, 188–194; Dec. Dig. § 29.*]

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

In Admiralty. Suit by Patrick McCoy against the J. W. Paxson Company and others, owners of the barge Estelle. Decree for respondents.

Philip Sterling and Lewis, Adler & Laws, all of Philadelphia, Pa., for libelant.

H. Alan Dawson and Biddle, Paul & Jayne, all of Philadelphia, Pa., for respondents.

J. B. McPHERSON, Circuit Judge. This is an action in personam for bodily injuries suffered by the libelant, Patrick McCoy, on November 25, 1911, and was brought against the owners of the tug Cahill and the owners of the barge or scow Estelle. At the trial, however, the charge against the tug was abandoned, and the only question now is the fault of the scow.

Primarily the libelant's right to recover depends upon his relation to the scow. Unless he was a deck hand in the service of the vessel, he cannot sustain the action. This point was disputed, and in my opinion the two witnesses called to establish the hiring did not prove it to be a fact. On the contrary, this is what occurred:

Hutton was the so-called "master" of the scow. She was 115 feet long, 23½ feet beam, without motive power, and was used solely on short voyages to carry cargo for her owners. Her capacity was 350 tons. Hutton was no doubt the "boss," but he was an ordinary laborer and with one other man, Coogan, constituted the full crew. This was his first trip as master, and he was to receive $85 per month, out of which he was to pay Coogan $25, and to furnish provisions costing about $11.25 for each. He had no authority to hire more than one deck hand, and he was forbidden to take any other person on board; the accommodations on the vessel, indeed, being limited to himself and one hand. On November 23d, the day before the scow started on the voyage in question, McCoy came to the dock in Philadelphia where the boat was lying. He had known Hutton for about two years, and asked permission to accompany the scow on its trip to Bridgeton, N. J. He had been a fireman on vessels, but had never served as a deck hand. He had just had a difficulty with his wife growing out of his habits of drink, and one of the city magistrates had compelled him to take the pledge for a year. He had broken his promise immediately, however, and apparently his request to Hutton was due to a wish to leave the city, at least for a time. Hutton agreed that he might go down the river on the scow, and the agreement was followed by drinks ashore and by bringing a bottle of whisky on board. On November 24th the scow started for Bridgeton with about four-fifths of a full cargo of coal, and on the way down McCoy did some unimportant work. Bridgeton was reached that evening, and the accident happened the next day.

Even if it be assumed, for the purposes of this case, that under some circumstances Hutton might have had the power to hire a second deck hand, the fact is that he did not do so. The usual crew of similar scows is the "master" and one man; there was no need for another on this occasion, as Coogan was already employed and was experienced

and competent; and I am satisfied that Hutton's account of what took place at the dock is not worthy of confidence. What really happened was that, in violation of his orders, he promised as a favor to take McCoy on the scow to Bridgeton. But he made no attempt at hiring, and of course the owners of the scow did not know, and had no reason to know, that a passenger was on board, and they were therefore under no obligation to look after his safety.

But, even if this point be laid aside, we come next to observe that the libelant's case depends secondly upon the assertion that a horn of the forward starboard chock was broken, and that a hawser was thus enabled to slip out of the chock in the process of warping the barge through a drawbridge, whereby the libelant's left leg was injured so badly that amputation became necessary. Concerning this asserted defect in equipment, the evidence is conflicting, but the decided weight is against the libelant. Only Hutton testified that the chock was broken, and his testimony is no more satisfactory on this point than on the other. Other witnesses swore distinctly, and I find the fact to be, that the chock was not broken at all but was in good order, and I experience no difficulty in coming to the conclusion that the injury was in no respect due to a defective condition of the chock. Indeed, I am convinced that the principal cause of the injury was the negligence of Hutton himself. As the barge slowly moved forward, influenced by the flood tide and by the operation of warping, it was his business to see that the shore end of the hawser was cast loose as the chock approached the point where the end had been made fast; and, if he had discharged this easily performed duty, the accident could not possibly have happened. In fact, there are excellent reasons against putting the hawser into the chock at all, but to allow the shore end to remain fast was a plain mistake.

I say nothing on the subject of McCoy's contributory negligence, since either of the two matters already considered is sufficient to bar recovery. As he was not a seaman, the doctrine of The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, does not apply.

A decree may be entered dismissing the libel.

In re PENNELL.

PENNELL v. HENDRICKSON.

(Circuit Court of Appeals, Third Circuit. April 29, 1914. Rehearing Denied June 6, 1914.)

No. 1613.

1. BANKRUPTCY (§ 136*)—COMPELLING TRANSFERS BY BANKRUPT TO TRUSTEE—SUFFICIENCY OF EVIDENCE.
In a proceeding in bankruptcy in which the bankrupt was ordered by the referee to pay a specified sum to the trustee, evidence *held* to support the finding that the bankrupt had in his possession or under his control the amount so ordered paid.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

2. BANKRUPTCY (§ 467*)—REVIEW OF PROCEEDINGS—QUESTIONS OF FACT.
Where the referee in bankruptcy and the District Court are in accord upon the facts, their conclusions will not be lightly disturbed.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. § 467.*]

3. BANKRUPTCY (§ 136*)—COMPELLING TRANSFER BY BANKRUPT TO TRUSTEE.
The referee in bankruptcy, in a proceeding by the trustee to compel a bankrupt to turn over money in his possession or under his control, should in the first instance have merely found that such money was in his possession or under his control at the date of bankruptcy, leaving its subsequent disposition for inquiry under such further proceedings as might be taken.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

Petition to Review Order of the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Bankruptcy proceeding against John F. Pennell. Petition of bankrupt to review an order affirming an order of the referee requiring the bankrupt to pay a specified sum to George D. Hendrickson, trustee. Modified and affirmed.

Addison S. Pratt, of New York City, for petitioner.

Jerome C. Lewis, of New York City, for respondent.

Before BUFFINGTON and McPHERSON, Circuit Judges, and WITMER, District Judge.

J. B. McPHERSON, Circuit Judge. On April 17, 1911, the referee ordered the bankrupt to pay over to his trustee the sum of $19,132.25, "being property of the estate of said bankrupt now in his possession or under his control, within ten days after the service of a copy of this order upon him." This order was affirmed by the District Court in February, 1912, and the case is now before us for review.

[1] The facts will appear from the following opinion of Judge Rellstab:

"The referee, on July 7 (April 17?), 1911, made an order directing the bankrupt to pay over the sum of $19,132.25. He, by a previous order dated No-

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

vember 30, 1908, directed the bankrupt to pay over to the trustee $49,710.75. On December 12, 1908, he made another order denying bankrupt's application to reopen the case and permit him to introduce new testimony. Both of these orders were set aside; the court, in its memorandum of April 12, 1909, saying:

"'Under the circumstances I think the referee should have reopened the case and permitted the introduction of such additional testimony on behalf of the parties or either of them, as might be offered. Without prejudging the merits of the case, it can properly be said that the testimony is not clear and convincing, certainly it is not so clear and convincing to me as it seems to have been to the referee. The amount in controversy is large, and as it is apparent that there are many sources of information open to the parties, through and by means of which the testimony of the bankrupt can probably be either entirely corroborated or utterly disproved, therefore for the satisfaction of the court and in the interest of justice an opportunity should be afforded the parties to produce such testimony. It should be borne in mind, however, that the burden of proof in this matter rests primarily on the trustee, and his case must be sustained by clear, satisfactory and convincing proof.'

"Thereupon additional testimony was taken on behalf of the bankrupt. The sum previously found by the referee to have been withheld by the bankrupt was the amount which he, as the administrator of his brother's (Arthur R. Pennell's) estate, paid to himself as one of the residuary legatees.

"His brother died testate on March 10, 1903. By his will, he, after making some trivial bequests and devising his real estate to his wife, gave all his estate to his wife, mother, and brother John F. Pennell, the bankrupt. Both he and his wife died as the result of an automobile accident; he dying first. The bankrupt was appointed the administrator with the will annexed. The personal estate consisted almost entirely of insurance policies, and was inventoried at the sum of $220,745.06. Some of these insurance policies, however, were not collected in full. The bankrupt's affidavit filed in the administration of such estate, and made for the express purpose of having the Surrogate determine the cash value of the estate of which the deceased died seised and possessed, and the amount of tax to which it was liable under the state laws, shows that the entire personal estate was valued at $183,708.28, and that after deducting claims allowed, funeral and testamentary expenses, there was in the hands of the administrator the sum of $151,232.25 for distribution, of which bankrupt was entitled to the sum of $49,710.75, the amount which the referee, by his first order, found was the amount that the bankrupt should turn over to the trustee.

"Included in the claims presented and allowed was one to Henry W. Lamb, administrator of the estate of Carrie L. Pennell (testator's widow), deceased. At the time of the first order the bankrupt alone gave testimony concerning the disposition of these moneys, and he then testified, in substance: That none of this $49,710.75 was retained by him, but that it, with the other moneys which such affidavit disclosed was held for distribution, was used in the payment of the testator's debts. That his brother's estate was heavily involved and proved to be insufficient to pay all of his debts. That shortly after the death of his brother he found a paper in the deceased's safe giving the names of and amounts due certain creditors, and which he considered as a command of his brother to pay. These names and amounts are as follows: Sarah H. Pennell, $12,000.00; Elizabeth H. Pennell, $7,500.00; Carrie L. Pennell, $20,000.00; and Susan T. Goodwin, $141,000.00; total $180,500.00. That none of the claims of such persons were presented to him as administrator except that of Carrie L. Pennell, testator's widow. That such claims were withheld pursuant to an arrangement made between him and the representatives of such other persons, for the reason that the insurance companies were resisting the payment of the policies upon the ground that his brother's death was suicidal, a suspicion engendered by the circumstances of his death, and by his name being involved in a scandal with a woman whose husband had been mysteriously murdered but a few days prior to such accident, and that a disclosure of these claims, which would show the estate

to be insolvent, would strengthen such suspicion and make it more difficult to effect a satisfactory settlement with the insurance companies; but that they were to be paid out of the moneys to be realized, as far as they would go. The paper containing these names was not produced; the bankrupt stating that he destroyed it immediately after he got it from the safe.

"On the first day of the bankrupt's examination, he persistently refused to give the names of the creditors or the amounts said to be due them, or where he kept the money which he said he subsequently paid over to them. At a subsequent hearing, however, he gave this information. He also said that he paid the four people whose names were on that paper about $150,000; that such payments were made about the following May, about 16 months after the paper was destroyed; that he did not know the date of the payments, refusing to answer whether the payments were made at one time or within two or three days or a week or a month after he got the money. He also said that the estate of his brother's widow did not receive the one-third of his brother's estate, but only $20,000, the amount mentioned in his brother's instructions. He also said that the four persons named on this paper received only about 85 per cent. of their claims. Bankrupt here was only speaking approximately, but such a percentage of the total amount of those claims would be $153,425, about $2,000 more than the transfer tax deposition showed was in his hands for distribution. The administrator of the estate of Carrie L. Pennell, deceased, did not receive any of this $151,232.25. What he received was the $20,000 mentioned under the head of claims allowed, and which, if it had not been so allowed, would have increased the sum in the hands of the administrator for distribution, to the sum of $171,232.75. As the sum of $49,710.75 is admittedly the one-third of the estate after payment of all allowed debts and expenses, the entire amount available for the payment of the claims not presented to the administrator would be the sum of $149,132.25. As the bankrupt at the time of the making of the referee's first order did not claim that he paid more than $150,000 to the four creditors named in the paper taken from his safe, and as the estate of Carrie L. Pennell did not get the $20,000 said to be due her out of such sum, it follows, on bankrupt's own showing, that he retained in his hands the sum of $19,132.25, the amount directed to be turned over by the order now under review. In the face of the documentary evidence emanating from and sworn to by him, the burden was on him to satisfactorily show a disposition of the moneys different from that indicated by such documents, if a different disposition was made. He claimed that such was the case, but his own accounts, given their utmost effect, leave unaccounted for the last-named sum.

"Turning now to the testimony taken since the first order was set aside, the refusal to take which, when offered by the bankrupt, was the controlling reason for setting aside such order, we find that the bankrupt has not availed himself of the opportunity to take the stand and give a more explicit and satisfactory account of the disbursement of such money, but that he contented himself with the calling of witnesses with whom he dealt in administering the estate, and to some of whom he said he paid all of the money traced into his hands by such transfer tax deposition. These, however, do not support his contention that he paid out all of such moneys. On the contrary, they establish that the bankrupt retained in his possession approximately $20,000. William M. Pennell, the person who represented all the claimants named in the paper taken from the decedent's safe other than his widow, stated that he received approximately $130,000 from the bankrupt on account of such claims. He could not give the exact amount, claiming to have lost the memorandum showing the exact figures.

"In substance his testimony shows that the bankrupt paid him moneys at different times and places and in different amounts, aggregating between $145,000 and $150,000; that the first payment was approximately $20,000, which, however, was paid back to bankrupt at latter's request to meet the requirements of the surety company who was on his bond as administrator; that thereafter the money transaction was begun all over again, and that he then obtained from bankrupt in three several payments the total of $125,000 or $130,000. In this behalf he said:

" 'Q. Can you tell me whether you received all this money at one time or not?

" 'A. I did not receive it all at one time. I received it in at least three different times.

" 'Q. Do you remember the approximate dates and amounts?

" 'A. They will have to be approximate. I received early in May, 1904, my recollection is the first time was $90,000. Then subsequently I received, I think, it was practically $30,000, and then one further payment of $5,000 or $10,000, I don't remember which, but in all about $130,000. * * *

" 'Q. What did you do with this first payment of $90,000 that you received?

" 'A. I deposited the bulk of Mrs. Goodwin's part of it in two Boston banks, and turned over I think $20,000 of it to my sister.

" 'Q. What were the names of the banks you deposited it in?

" 'A. I deposited $40,000 in the New England National Bank, and I think $20,000 in the First Ward National Bank.

" 'Q. Have you got the date when you deposited that money?

" 'A. I deposited the $40,000 in the New England National Bank on the 14th of May, 1904.

" 'Q. And the $20,000?

" 'A. I think the $20,000 that same day in the First Ward National Bank.

" 'Q. What did you do with the remaining $30,000?

" 'A. I think I deposited $10,000 in Portland for Mrs. Goodwin, and the balance I think I gave to my sister to deposit in her bank in Boston. I can't remember definitely. You see I didn't charge my memory with these things. I did have a memorandum of everything I did which was in a small book in my desk at the time of the fire. * * *

" 'Q. What did you do with the second payment of $30,000?

" 'A. That I don't remember.

" 'Q. Did you deposit it in any bank?

" 'A. I can't say whether I gave it to the parties to deposit, or whether I deposited it for them.

" 'Q. By the parties you mean Mrs. Goodwin and your sister?

" 'A. I don't think my sister, because I think my sister received practically all that was coming from my mother's estate. The balance was given to Mrs. Goodwin, and I think I gave it to her personally.

" 'Q. What was the amount your sister received?

" 'A. My sister received $12,000 from my mother and $7,500 for herself. There was no deduction made from their claims. The deductions were made wholly from Mrs. Goodwin's share. She didn't receive all that was due her, but my mother and sister did receive all that was due them.

" 'Q. The last payment, what did you do with that?

" 'A. I turned it over to Mrs. Goodwin; that is all I can say.

" 'Q. You don't remember whether you deposited it first?

" 'A. I am quite sure I didn't. I think I took the money to her.'

"This testimony and that of Henry W. Lamb supports the bankrupt's general statement that he paid about $150,000 to the creditors named on that slip, but it negatives the contention that this was the $150,000 that was left in his hands for distribution upon the settlement of his brother's estate. As stated, Mr. Lamb, the administrator of Carrie L. Pennell's estate, received but $20,000, and this was in payment of a bond held by her against her husband Arthur P. Pennell's estate, and for which bankrupt, as the administrator of that estate, claimed allowance in his deposition ascertaining and fixing the amount upon which the state's transfer tax was to be paid. The payment to him, therefore, did not in any manner reduce the sum of $149,232.25 left in his hands after the payment of all presented claims and expenses upon a settlement of his brother's estate, and of this amount the utmost that the proofs show was paid over to William M. Pennell, the representative of the other claimants whose names appeared upon the paper which was taken from decedent's safe, is the sum of $130,000. William M. Pennell does not say positively that it was $130,000. From his figures it would be $125,000 or $130,000. Giving the bankrupt credit for the greater sum, the sum of $19,232.25 was still in his possession after he had made settlement with the creditors

whose claims were not presented or allowed in the administration proceedings. There is nothing in the case that permits of a different conclusion.

"The contention made by bankrupt's counsel that the $20,000 paid to William M. Pennell, and which he testified was returned to the bankrupt at his request and subsequently repaid to William M. Pennell, is unwarranted. Not only did William M. Pennell say that after such repayment the matter of the payments was begun all over again, but he distinctly said that the moneys secured by him on account of the claims he represented amounted approximately to $130,000; and his detailed explanation of the amounts received indicates that, if $130,000 was not the exact amount received, it was less. That the bankrupt expected to obtain a substantial sum from his brother's estate is shown by the contract entered into between him and E. Cooper Wills on or about July 28, 1903, more than four months after his brother's death and his appointment as administrator. Under this agreement he was to pay Wills $5,000 for a patented process in the making of steel, which was to be turned over to a corporation of which the bankrupt was to be secretary and treasurer; and in furtherance of the business to be conducted by such corporation bankrupt was to advance an additional sum of $10,000. On this contract bankrupt only paid the sum of $1,000, repudiating the remainder of his obligations. There is some conflict between the bankrupt and Wills and Swart, the latter being the person who induced bankrupt to enter into such enterprise, as to the reasons given by bankrupt, first for the delay in carrying out his obligation, and latterly for his repudiation thereof. But, irrespective of the merits of this controversy, the facts stand out prominently that the bankrupt did obligate himself for nearly the sum that the referee has found he withholds from the trustee.

"Previous to his brother's death, bankrupt was making a living as a commercial salesman on commission, earning not more than $150 a month. Considering his entering into this contract as the act of a rational being, we must conclude that he was looking to a source for the moneys to meet his obligations different from his previous occupation. This contract was made at a time when he knew of the existence of these creditors named on the slip which he had taken from his brother's safe, aggregating $180,500, the making of the agreement for their payment, that the insurance companies were resisting the payment of their policies, and that if such policies were paid in full, which was not then probable, the allowance of such claims, plus the funeral and administration expenses, would not net him as the residuary legatee of one-third of the estate, an amount sufficient to meet the obligations thus incurred.

"Full opportunity has been given bankrupt to show what disposition was made of the moneys traced into his possession. His explanation lacks frankness, is meager, and couched in the most general terms. Some of it was obtained after he had persistently refused to testify, and much more only after persistent prodding. His possession of the moneys was so recent before the time of testifying that general statements of how it was handled and disposed of lack force if not probity, and the details of such disposition given by the witnesses called by him, and through whom such disposition is said to have been made, clearly prove he did not disburse to them the sum mentioned in the order now under consideration. In such circumstances the presumption is that the bankrupt still has such moneys in his possession or under his control.

"The order of the referee of July 7, 1911, is affirmed."

[2, 3] The referee and the District Court being in accord upon the facts, their conclusions will not be lightly disturbed. Epstein v. Steinfeld (C. C. A., 3d Cir.) 210 Fed. 236, 127 C. C. A. 54. As we see no reason for disagreeing with the findings before us, we accept them as correct. It follows that the order under review should be affirmed in substance, although it needs to be modified in one particular. It will be observed that the referee's order (affirmed in all respects by the District Court) declares that the bankrupt has the sum of money

named "now (April 17, 1911) in his possession or under his control." But the inquiry has not yet reached that stage. The date involved in the referee's investigation was the date of bankruptcy, and that was June 4, 1906. The proper practice on applications for an order to pay over is stated in detail by the court of appeals in Re Epstein. It is therefore necessary to modify the order under review by striking out the word "now," and by adding after "control" the words "on the date of bankruptcy, namely, June 4, 1906." What may have become of the money since that time is a subject for inquiry under such further proceedings as may be taken.

Thus modified, the order is affirmed.

BANKERS' SURETY CO. v. ELKHORN RIVER DRAINAGE DIST.†

(Circuit Court of Appeals, Eighth Circuit. April 20, 1914.)

No. 4032.

1. PRINCIPAL AND SURETY (§ 100*)—DISCHARGE OF SURETY—CHANGE IN DUTY OF PRINCIPAL.

Changes in the specifications for work to be done by a contractor in straightening a river channel, which were minor in character, and neither added to the expense nor delayed the work, did not release the surety on the contractor's bond from liability.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 162–165; Dec. Dig. § 100.*]

2. DAMAGES (§ 78*)—STIPULATION FOR LIQUIDATED DAMAGES—VALIDITY—DELAY IN PERFORMANCE OF CONTRACT.

A drainage district contracted for the straightening of a river channel, which was an essential part of the work in the construction of a drainage system. The contract required the work to be completed by a stated time, otherwise the district might declare a forfeiture and relet or otherwise complete the work. On failure of the contractor to complete it in time, an agreement for an extension was made and a bond given conditioned that, if not completed within the extended time, the sum of $30 per day from the time of the making of the agreement until completion should be paid by the contractor as liquidated damages. The amount of the damage which would result was uncertain, depending upon weather conditions. *Held*, that such stipulation was not for a penalty but was valid and enforceable.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 157–163; Dec. Dig. § 78.*]

In Error to the District Court of the United States for the District of Nebraska; Thos. C. Munger, Judge.

Action at law by the Elkhorn River Drainage District against the Bankers' Surety Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. C. Brome, of Omaha, Neb. (Clinton Brome and A. G. Ellick, both of Omaha, Neb., on the brief), for plaintiff in error.

W. J. Courtright, of Fremont, Neb. (S. S. Sidner, of Fremont, Neb., on the brief), for defendant in error.

Before ADAMS 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

† Rehearing denied August 3, 1914.

RINER, District Judge. This was an action brought by the Elkhorn River Drainage District, defendant in error, against the Bankers' Surety Company, plaintiff in error, upon a bond given to secure the performance of a contract theretofore entered into between the Elkhorn River Drainage District and the Standard Drainage Company for the construction of certain cut-offs along the course of the Elkhorn river, in Dodge and Washington counties, Neb., for the purpose of straightening it and facilitating the passage of water down that stream. For convenience the Elkhorn River Drainage District will be hereafter designated the "district," the Bankers' Surety Company the "surety company," and the Standard Drainage Company the "drainage company."

A trial was had in the district court resulting in a judgment in favor of the district against the surety company for the sum of $14,850, and this is a writ of error to reverse that judgment.

On the 15th of December, 1909, the district awarded contracts for the construction of 65 miles of drainage work. The contracts were four in number, to as many different contractors. The contract for straightening the Elkhorn river, which was to be the trunk line or main stem of all the drainage work provided for under these four contracts, was let to the drainage company, and is the only one with which we have to do in this case. By the terms of the contract the drainage company agreed to commence the work provided for in the contract on or before the 1st day of March, 1910, and to entirely complete it on or before the 31st day of December, 1910. The contract also provided, among other things, that all work to be performed thereunder should be done and performed according to certain specifications which were attached and made a part of the contract; that the district reserved the right to change the line, grade, and endings of the work from that shown on the plans furnished; that, if the contractor failed to prosecute the work with sufficient force, in the opinion of the engineer of the district, to insure its completion within the time specified in the contract, the district should have the right to employ such additional force as the engineer might deem necessary to complete the work within that time, or the district might declare the contract forfeited and abandoned; that the contractor should be liable for damages arising from a failure to complete the work within the time specified in the contract; that in the event of delay caused by the district by reason of the failure of the engineer to stake out the work promptly, or from any other cause for which the district was responsible, the time for completion of the work should be extended for a period equal to not less that the aggregate length of time of such delay. To secure the faithful performance of this contract, the drainage company gave a bond with the Title Guaranty & Surety Company as surety. During the progress of the work in 1910, the district, as authorized by the contract, made some changes in the line of the excavation work to be performed by the drainage company.

On the 30th of December, 1910, one day before the time fixed by the contract for the completion of the work, only about one-third of

it had been finished, and to avoid a forfeiture of the contract, after some negotiations between the drainage company and the district, the bond in suit was executed and accepted as additional security; the district agreeing not to declare a forfeiture at that time. As the recitals in the bond contain a statement of the facts as they existed at the time the bond was executed, it is here set out at length:

"Know all men by these presents: That we, Standard Drainage Co., of Windom, Minnesota, as principal, first party, and the Bankers' Surety Co. of Cleveland, Ohio, as surety, are held and firmly bound unto Elkhorn Drainage District, second party, in the sum of thirty dollars per day as liquidated damages for the noncompletion of the contract hereinafter mentioned, said per diem damages to commence with the first day of January, nineteen hundred eleven, and continue for each day until the work hereinafter mentioned is fully completed, for the payment of which sum, well and truly to be made, we hereby bind ourselves, our successors and assigns.

"Dated this 30th day of December, nineteen hundred ten.

"Whereas on the 15th day of December, nineteen hundred nine, first party entered into a contract in writing with second party, a drainage district organized under chapter 153 of the Laws of Nebraska of 1907 and amendments thereto; and

"Whereas said contract provided that said first party should do certain excavating and construct certain embankments, and do certain clearing and grubbing, all with reference to the straightening of the channel of the Elkhorn river through Dodge and Washington counties, Nebraska; and

"Whereas said contract provided that all of said work should be commenced on or before the first day of March, nineteen hundred ten, and be entirely completed on or before the thirty-first day of December, nineteen hundred ten; and

"Whereas, said party entered into a bond with second party in the sum of ten thousand dollars for the faithful performance of said contract, in which bond the Title Guaranty & Surety Co., was surety; and

"Whereas, the time for the completion of said contract has nearly expired and only a small portion of said work has been done, and it is now known that the very large majority of said work cannot be completed by the expiration of the time provided therefor in said contract; and

"Whereas, said work provided in said contract to be done, contemplated an expenditure of more than thirty thousand dollars, estimated cost to be paid to said first party; and

"Whereas said work contemplated the expenditure of many thousands of dollars in addition thereto for right of way and other expenses, all of said work above mentioned relating to what is known as the 'river cut-off work'; and

"Whereas said river cut-off work constitutes the 'trunk line' of a more comprehensive drainage system now being established by said second party, the total expenditures for said drainage system being considerably in excess of two hundred thousand dollars; and

"Whereas nearly all of said drainage work has now been completed except the river cut-off work; and

"Whereas the balance of the drainage system other than the river cut-off work is dependent in part for its effectiveness upon the completion of said river cut-off work, and will not furnish adequate relief or do its full measure of service without the completion of said river cut-off work; and

"Whereas the benefits that said second party will obtain from said drainage system will be several multiples of the cost thereof, being a benefit of from six hundred thousand dollars to one million dollars; and

"Whereas said first party admits that it is impossible to finish said work by the contract time therefor; and

"Whereas said second party has the right to declare a forfeiture of said contract and has a right to take steps to arrange with some one else to do said work; and

"Whereas said first party desires to do said work and to have additional time therefor; and

"Whereas said the Title Guaranty & Surety Co. desires said second party not to declare a forfeiture of said contract and not to take steps to employ some one else to do said work, but desires that said first party be permitted to proceed to do said work and to have additional time therefor; and

"Whereas said second party will be greatly damaged by the delay in doing said work which is admitted by the parties hereto to amount to thirty dollars per day as damages, commencing on the first day of January, nineteen hundred eleven; and

"Whereas it is agreed that said contract above mentioned and said bond above mentioned are not in any way modified or changed, but shall continue in full force and effect in all the provisions thereof, said second party, however, omitting to exercise its right and privilege at the present time to declare a forfeiture of said contract and bond, and omitting to exercise its right at the present time to take steps to employ some one else to do said work or any part thereof, but reserving the right to take either or both of said steps at its election at some future date should it deem such course necessary for its protection:

"Now, therefore, the conditions of this obligation are such that if said first party shall fully perform said contract within one year from the time limit for the completion thereof as originally contracted, that is, if said first party shall complete said contract by the thirty-first day of December, nineteen hundred eleven, then this obligation to be null and void, otherwise to remain in full force and effect, the liability hereon in such case being for the payment of thirty dollars per day as agreed and liquidated damages commencing with January first, nineteen hundred eleven, and continuing until said contract is fully performed."

November 21, 1911, the drainage company quit work and notified the district that on account of financial troubles it could not proceed further. On the same day the district notified both the drainage company and the surety company, as required by the contract, that, unless the work was expedited within ten days from the date of the notice, it would proceed to employ additional force to complete the work. No effort having been made either by the drainage company or the surety company to proceed with the work, at the expiration of the ten days' notice the district leased the dredge, used in the work, from the drainage company and proceeded with the work, which was finally completed on the 10th of May, 1912. The lease of the dredge provided:

"It is agreed, and a part of the condition hereof, that if either of the surety companies involved in this contract desires to take possession of said work and complete it, that then the drainage district will assign its interest in this lease to said surety company for that purpose. It is further agreed that in the employment of men to operate said dredge reasonable consideration will be given to the views and wishes of said drainage company as to who shall be employed. It is further agreed that the party operating said dredge shall use its best judgment to maintain said dredge in repair and in the incurring of obligations in the completion of said work and that said party shall keep a careful statement of all expenditures in the completion of said work, charging all of such expenses to the drainage company as costs of completing said contract. The first party reserves the right to at all times name two of the men who shall be employed upon said dredge. This contract shall be considered as supplemental to the original contract between the parties, and on completion of the work settlement shall be made in conformity therewith."

The surety company set up in its answer by way of counterclaim that the dredge was lost by reason of the negligence of the district,

but offered no evidence tending to support this allegation of its answer.

It was said in argument that by the lease of the dredge the district appropriated the work, dredge, and appliances used in connection therewith, and precluded the contractor from the further performance of his contract, and that the district attempted both to declare the contract forfeited and to hold it in force. In other words, to treat the contract as abandoned, exclude the contractor from the work, and at the same time impose upon the surety company the liability which it had assumed. We think the language of the lease itself shows clearly that the very reverse of this contention is true. An examination of the record satisfies us that the district never, by the provisions of the lease or otherwise, attempted to declare the contract forfeited; on the contrary, it studiously avoided doing so. When notified by the drainage company that, because of financial difficulties, it was unable to go on, and realizing that some action was necessary, the district served both the drainage company and the surety company with notice, in the manner provided by the contract, that the work was not progressing satisfactorily, and, if not remedied at the expiration of ten days, it would employ additional force to complete the work. And the lease of the dredge by its very terms continued the original contract and all obligations thereunder in full force and effect. It provided that the surety company, if it so desired, could take charge of the work, and in that event the district would turn over the possession of the dredge; also that if the district continued the work it should keep a careful record of all expenditures, charging all expenses to the drainage company as cost of completing the contract; that "this contract shall be considered as supplemental to the original contract between the parties and on completion of the work settlements shall be in conformity therewith." The record shows that pursuant to the provisions of the lease weekly reports were made by the engineer of the district in charge of the work to the drainage company, showing the progress of the work and all disbursements made in connection therewith, which would have been an entirely unnecessary proceeding if the district had terminated the contract by declaring it forfeited, under the provisions of the contract which authorized that to be done, for in such event the drainage company would have had no interest in what happened thereafter. There is nothing in the record tending to show unnecessary delay in the prosecution of the work by the district after it took possession of the dredge, and we think the district court rightly concluded that there was no termination of the contract and that all of the acts of the district in prosecuting the work were conducted under the terms of, and in conformity with, its provisions.

[1] It was also argued that, because the district changed the line of the excavation in some respects, that constituted a change of the contract and relieved the surety company from liability. As we read the contract, the right to make these changes was expressly reserved to the district. Moreover, the record shows that the changes made

were minor in character and did not increase the amount of the work to be done or cause any delay whatever; and for this reason the trial court found that no substantial alterations of the contract were shown to have been made to the prejudice of the drainage company. This finding, we think, was undoubtedly right, for, under the terms of the contract, in no event could the changes made terminate the contract or release the surety; the only effect of such changes would be to extend the time for completing the work in case it took a greater number of days to do the work with the changes than would be necessary if the work was performed as shown on the plans. The evidence shows conclusively, we think, that the changes made, instead of increasing, materially decreased the amount of work to be done, thus necessarily shortening the time required to perform it, and, as the surety company was in no way injuriously affected by the changes, it was not released from liability by reason thereof. Graham v. United States, 188 Fed. 652, 110 C. C. A. 465; Atlantic Trust & Deposit Co. v. Town of Laurinburg, 163 Fed. 690, 90 C. C. A. 274.

[2] It is next contended that the indemnity contemplated by the bond must be adjudged a penalty and not liquidated damages, and in respect of this contention it was said at the argument that the bond by its terms fixed the amount of damage actually incurred at $30 per day, and then provided that on account of the loss thereby sustained the surety company should pay $10,980. This contention can, in our opinion, be sustained only by giving to the contract and bond an unnatural, strained, and unwarranted construction. There is no such provision either in the contract or the bond, and a court of law is not at liberty to make a new contract other and different from that which the parties have mutually entered into. The court has no dispensing powers, and the inquiry always is, not whether the parties have acted wisely in respect to the stipulations embodied in their contract, but rather what was the meaning and intent of the parties at the time the contract was entered into; and, when that is clearly ascertained from the language used by the parties themselves, it must be given effect. It is difficult to conceive how language could more aptly express the obligation of the surety company in case of default than the language employed in the bond now before the court. The plain provisions of both the contract and bond are that the district contracted to get, and the surety company contracted to pay, $30 per day for each day's delay in the performance of the work after December 31, 1910, provided the work was not completed by the 31st day of December, 1911. The actual damage for this year's delay to the inhabitants of the district, independent of the stipulated damages, would necessarily be wholly uncertain and incapable of ascertainment, depending very much upon weather conditions. The work contemplated by this contract was the main outlet for an extensive drainage district, and the actual damage to the inhabitants of the district to be benefited by this system of drainage work would necessarily depend very largely upon whether the year 1911 was dry or attended with an unusual amount of rainfall. That the district would suffer some damage in any event is admitted by the recitals in the bond,

which are binding upon the parties as to the physical conditions existing at the time the bond was executed, and it was because the actual damage was wholly uncertain and incapable of being ascertained that the parties agreed that upon default $30 per day from January 1, 1911, should be the measure of damage. And this amount, in view of the magnitude of the work and the possible loss to the inhabitants of the district, was, we think, entirely reasonable. The rule in cases of this kind is thus stated by the Supreme Court in Sun Printing & Publishing Ass'n v. Moore, 183 U. S. 662, 22 Sup. Ct. 248, 46 L. Ed. 366:

"The decisions of this court on the doctrine of liquidated damages and penalties lend no support to the contention that parties may not bona fide, in a case where the damages are of an uncertain nature, estimate and agree upon the measure of damages which may be sustained from the breach of an agreement. On the contrary, this court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the agreement made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or as an agreed ascertainment of damages, is to be determined by the contract, fairly construed; it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract."

See, also, Brooks v. City of Wichita, 114 Fed. 297, 52 C. C. A. 209; Turner v. City of Fremont, 170 Fed. 259, 95 C. C. A. 455; Wood v. Niagara Falls Paper Co., 121 Fed. 818, 58 C. C. A. 256; Barber Asphalt Paving Co. v. City of Wabash, 43 Ind. App. 167, 86 N. E. 1034; City of Salem v. Anson, 40 Or. 339, 67 Pac. 190, 56 L. R. A. 169, 91 Am. St. Rep. 485. The cases just cited and many others that might be referred to sustain the proposition that where the damages to be ascertained growing out of the breach of a contract are uncertain in amount, and the parties mutually agree, in language clearly expressive of such agreement, that a certain sum shall be the damages in case of a failure to perform, no sound principle or rule applicable to the construction of contracts will enable a court of law to say that the parties to the contract intended something else.

The surety company is not entitled to recover on its counterclaim for the dredge which the drainage company had pledged to it. The burden was on the surety company to prove its counterclaim, and in doing so to show by satisfactory evidence that the dredge was lost by the negligence of the district. This it wholly failed to do.

The judgment of the District Court is affirmed.

HULTBERG v. ANDERSON et al. †

SAME v. CHYTRAUS.

(Circuit Court of Appeals, Seventh Circuit. November 21, 1913.)

No. 1970.

1. CONTEMPT (§ 66*)—FINAL JUDGMENT—WRIT OF ERROR.
Punitive contempt orders are criminal in their nature arising in the exercise of the inherent power of the court to preserve its authority and punish violations thereof, either by parties to the suit or third parties within the cognizance of the court, and are therefore independent and final and subject to review in matters of law by a writ of error.
[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213–215, 223–237; Dec. Dig. § 66.*]

2. CONTEMPT (§ 66*)—ORDER—APPEAL—CIVIL PROCEEDINGS.
Where a contempt order is purely remedial as between the parties to the suit, to compel a witness to testify to matters which he claims are privileged, such order is interlocutory and not reviewable except on appeal from a final decree.
[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213–215, 223–237; Dec. Dig. § 66.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Christian C. Kohlsaat, Judge.

Action by Nels O. Hultberg against Peter H. Anderson and others. Contempt proceedings by Nels O. Hultberg against Axel Chytraus. From an order dismissing a rule to show cause why defendant Chytraus should not be punished for contempt, Hultberg appeals. Dismissed.

See, also, 203 Fed. 853, 122 C. C. A. 171.

This appeal is brought from an order of the District Court, entered in an ancillary proceeding in aid of taking testimony on behalf of the appellant before a special examiner, appointed in an equity suit pending in the District Court of the United States for the District of Kansas. The order in question denies an application to punish the appellee, as a witness before the examiner, for contempt of court in refusing to answer questions which the District Court had required him to answer, in an order theretofore made on certification of prior proceedings in the examination of such witness.

Harris F. Williams, John Barton Payne, Silas H. Strawn, and Max H. Whitney, all of Chicago, Ill., and David Ritchie, of Salina, Kan., for appellant.

E. Allen Frost and John J. Healy, both of Chicago, Ill., for appellee.

Before BAKER and SEAMAN, Circuit Judges, and LANDIS, District Judge.

SEAMAN, Circuit Judge. The appellant, Hultberg, is the complainant in a creditor's bill, filed in the District Court of the United States for the District of Kansas, against the Andersons, husband and wife, wherein that court appointed a special examiner to take testimony in the cause. Such examiner was proceeding to take testimony in Chicago, when the appellee (one of the attorneys for the Andersons) was

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

† Rehearing denied January 12, 1914.

called as a witness on behalf of the appellant. On questions propounded to the witness, in reference to the present whereabouts of the Andersons, he refused to answer, stating two grounds of objection: (a) That of privilege as their attorney, and (b) immateriality of the questions. The examiner certified the matter to the District Court of the United States for the Northern District of Illinois, and the appellant petitioned that court for ancillary relief in the premises, which was granted, after a hearing, in the entry of a rule against the witness to answer the questions certified. Recalled before the examiner, the witness persisted in his refusal, and the District Court, on petition filed by the appellant, entered a rule against the witness to show cause why he should not be punished for contempt. The hearing, however, upon the petition and an answer filed on the part of the witness, resulted in an order that the rule be "discharged at the costs of the petitioner"; and this appeal is brought by the petitioner from the order so made, with the right of appeal seemingly unquestioned.

On the hearing of the appeal in this court, the arguments of counsel, both oral and printed, were entirely directed to their respective controversies upon the merits of the proceeding, without reference to the question of appealability of the order, until attention was called to that feature by inquiries from the bench. Pursuant to direction of the court, however, briefs have been submitted thereupon, and we take up the jurisdictional inquiry, which can neither be waived by counsel nor disregarded by the court, as appears to be suggested in both briefs. Without appellate jurisdiction over the subject-matter in controversy, no ruling or intimation of opinion upon the merits involved therein is authorized.

The right of review by writ of error or appeal is prescribed by acts of Congress, and from the earliest Judiciary Acts such review by the Supreme Court has been limited to the final judgments or decrees of trial courts. In the act creating the Circuit Court of Appeals "final decisions" were named as the limitation; but its meaning is well settled to be identical with the terms final judgments or decrees above mentioned, so that, with the exception of appeals authorized therein from specified interlocutory orders for injunctions and receiverships, this fundamental requirement of finality is alike in both appellate jurisdictions, and the tests of finality as settled for review by the Supreme Court are equally applicable to this court. Loveland's App. Jur. Fed. Courts, § 39. The main difficulty, if not the only one, in the way of its ascertainment, has arisen in equity and admiralty causes, wherein decrees are commonly granted for various purposes during the progress of the cause, in advance of complete relief, and the decisions have been numerous and not entirely harmonious (McGourkey v. Toledo & O. Ry., 146 U. S. 536, 545, 13 Sup. Ct. 170, 36 L. Ed. 1079), upon the question whether various decrees so entered were in reality final, within the meaning of the limitation, or merely interlocutory and thus not appealable. All the authorities, however, concur in the elementary rule that appeals are not entertainable from such orders or decrees when they are distinguishable as merely interlocutory. We do not understand counsel for the appellant to controvert this undoubted general rule,

but that the contention is, in effect, that proceedings to punish for contempt, however interlocutory in their inception, are excepted from such rule, and that the ultimate order thereupon is recognized by the authorities as a finalty for the purposes of review. So, if it appears that both the proceedings and the order sought to be reviewed are unmistakably interlocutory, and thus not within the exceptional character of commitments for contempt, no doubt is entertainable that this appeal must be dismissed.

That the proceedings before the examiner and in the District Court were interlocutory in their entire nature is unquestionable. As aptly defined (see 2 Daniell's Chancery Pl. & Pr. c. 35):

"An interlocutory application is a request made to the court for its interference in a matter arising in the progress of a cause, * * * and may relate to any matter upon which the interference of the court or judge is required, before or in consequence of a decree or order" in the cause.

Thus the appellant's successive applications to the District Court invoked its exercise of jurisdiction, purely ancillary, for the single purpose of interlocutory relief in aid of the bill filed in the Kansas district to require the witness to answer the questions submitted. It may be conceded that inconsistency appears between the ruling upon the one branch, requiring the answers, and the other denying enforcement of the prior order, but we believe both to be alike interlocutory of the single suit; and, furthermore, were such characterization of either order deemed otherwise questionable, we understand the rule of Alexander v. United States, 201 U. S. 117, 121, 26 Sup. Ct. 356, 50 L. Ed. 686, and other references in proceedings to charge contempt, to be decisive thereof. The order appealed from not only constitutes a refusal to exercise the power to punish the witness for contempt, but has the effect of overruling the first order, on reconsideration of the application for intervention, and must be so construed, notwithstanding recitals in the order which may indicate that the presiding judge entertained some other view for his ruling.

[1, 2] The decisions upon reviewability of orders punishing for contempt are numerous—mainly arising during the past twenty years, after appellate jurisdiction was conferred over criminal cases—and all are instructive in marking their distinction from orders which are merely interlocutory, although most if not all of these contempt orders arose through interlocutory proceedings, and in several of the cases the contempt also arose in such proceedings. In the early cases of Ex parte Kearney, 7 Wheat. 39, 5 L. Ed. 391, and New Orleans v. Steamship Co., 20 Wall. 387, 22 L. Ed. 354, review of contempt orders was denied, because "contempt of court is a specific criminal offense," and no review of criminal cases was then authorized. The doctrine is now established, however, that punitive contempt orders are criminal in their nature, arising in the exercise of the inherent power of the court to preserve its authority and punish violations thereof—either by parties to the suit or third parties within cognizance of the court—and are thus independent and final, not interlocutory, and subject to review in matters of law alone, by writ of error. Bessette v. W. B. Conkey Co., 194 U. S. 324, 326, 335, 24 Sup. Ct. 665, 48 L. Ed. 997; Matter of

Christensen Eng. Co., 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072; Nelson v. United States, 201 U. S. 92, 26 Sup. Ct. 358, 50 L. Ed. 673; Alexander v. United States, 201 U. S. 117, 26 Sup. Ct. 356, 50 L. Ed. 686; Doyle v. London Guarantee Co., 204 U. S. 599, 27 Sup. Ct. 313, 51 L. Ed. 641; Webster Coal Co. v. Cassatt, 207 U. S. 181, 28 Sup. Ct. 108, 52 L. Ed. 160; Gompers v. Buck Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; Re Merchants' Stock & Grain Co., 223 U. S. 639, 32 Sup. Ct. 339, 56 L. Ed. 584; Grant v. United States, 227 U. S. 74, 33 Sup. Ct. 190, 57 L. Ed. 423. Contempt orders which are purely remedial as between the parties to the suit, remain interlocutory and are not reviewable, except under an appeal from the final decree. Bessette v. W. B. Conkey Co., supra; Re Merchants' Stock & Grain Co., supra. Thus, were the appellant's contention tenable for interpretation of the present order, no review would be authorized on his appeal, whether the application for enforcement invoked remedial or punitive action of the court; but our view of its interlocutory character requires dismissal of the appeal on that ground.

In Alexander v. United States, supra, the appeal from an order requiring the witness to answer questions was dismissed on like view of the order as purely interlocutory, under like application for the exercise of ancillary jurisdiction to that end. Definition of the proceedings was directly involved for decision, and for such definition the opinion aptly states the distinction above mentioned between interlocutory proceedings or orders and orders punishing for contempt, in substance: That prior to the exercise by the court of its power to punish for contempt, "the proceedings are interlocutory in the original suit"; but, when the power is exercised, "the matter becomes personal to the witness," giving rise to another case in which the witness becomes a party, and the order is final as to him. This distinction is observed in Nelson v. United States, supra, and in earlier cases, and reaffirmed in Webster Coal Co. v. Cassatt, 207 U. S. 181, 186, 28 Sup. Ct. 108, 52 L. Ed. 160. So, whatever may have been the ground for denial of the application to commit the appellee for contempt, it is obvious that the power of the court to that end was not exercised in the order denying such application.

On behalf of the appellant it is urged that no remedy is open without review of the present order, to obtain the information needful for prosecution of his suit. This may be true—as may be said of other interlocutory proceedings of equal or greater importance to the parties—but the remedy in such case, as said by Mr. Justice Storey, in Ex parte Kearney, supra, is for "the Legislature, and is not to be devised by courts of justice." Moreover, it may well be remarked, as to this contention, that throughout the first century of our federal system no criminal cases and only a limited class of civil cases were reviewable. The acts extending review to all final decisions were of undoubted benefit, but extensions to include all interlocutory orders would not seem either practicable or desirable.

LANDIS, District Judge (concurring). In my view of this case, it is desirable to direct attention to the statute under which the proceed-

ings were had in the District Court and to certain matters of record, in addition to the statement in the majority opinion.

The act follows:

"Sec. 868. When a commission is issued by any court of the United States for taking the testimony of a witness named therein at any place within any district or territory, the clerk of any court of the United States for such district or territory shall, on the application of either party to the suit, or of his agent, issue a subpœna for such witness, commanding him to appear and testify before the commissioner named in the commission, at a time and place stated in the subpœna; and if any witness, after being duly served with such subpœna, refuses or neglects to appear, or, after appearing, refuses to testify, not being privileged from giving testimony, and such refusal or neglect is proven to the satisfaction of any judge of the court whose clerk issues such subpœna, such judge may proceed to enforce obedience to the process, or punish the disobedience, as any court of the United States may proceed in case of disobedience to process of subpœna to testify issued by such court." U. S. Comp. St. 1901, p. 664.

The subpœna was issued and served on the respondent Chytraus. It commanded him to appear before the special examiner "to testify in behalf of the complainant" (appellant). He appeared but refused to testify. Thereupon arose the right of the complainant to an order on the respondent by "the judge of the court whose clerk had issued" the subpœna. But an order on the respondent to what end? Clearly not at that time to punish respondent's disobedience, for he had not then been ordered by the judge to answer. The refusal had occurred before the examiner, and that officer was without authority even to pass on the question of the admissibility of the evidence. Accordingly, complainant applied to the judge for an order "requiring Chytraus to answer the questions." As a basis for this application, complainant's petition set forth the pendency of the Kansas proceedings, the issuance of the commission to the examiner, the issuance of the subpœna out of the office of the clerk of the court below, the service of the subpœna, and respondent's refusal to answer before the examiner.

On the hearing of this application the court ordered "that the witness Axel Chytraus answer the questions certified by the examiner." The parties then went before the examiner, and, the questions being again put, the witness persisted in his refusal.

This refusal to obey the order of the court gave to the complainant, who was seeking the testimony, the right to apply to the judge for an order authorized by the statute quoted above. As will be observed, that order might be either coercive, "to enforce obedience to the process," as by confining the respondent in jail until he should answer, which would be solely for the benefit of the complainant, or it might be to "punish the disobedience," which would be exclusively for the vindication of the court's authority.

For some reason, the complainant did not ask for a coercive order to enforce the witness' obedience to the court's order and thereby bring out the evidence. On the contrary, he contented himself merely with then asking that the respondent be punished because he had refused to answer; that is, the complainant asked for a punitive order, the imposition of a punishment for past disobedience. The application was "for a rule on the said Axel Chytraus to show cause why he should not be

punished for contempt for failure to answer questions put to him." This application the judge granted, the order being that "Chytraus be and hereby is ruled to show cause, if any he has, why he should not be punished for contempt for his failure to answer questions before the examiner." It was the judge's discharge of this rule on the hearing, and his denial of complainant's application that respondent be punished, that was brought up for review; appellant's complaint here being that because of the judge's action appellant has lost the benefit of respondent's evidence.

But suppose the judge had done exactly what appellant requested, namely, punished the respondent for his disobedience by fine or imprisonment for a specified time, that would not have given appellant what he complains here he lost when the judge discharged the rule.

We can have no authority to hear an appeal which appellant had no right to bring, and it seems plain that appellant could not bring an appeal from the judge's refusal to enter a punitive order solely in vindication of his authority.

BAKER, Circuit Judge. If the record is to be read as showing that Hultberg was only a complaining witness in a criminal proceeding in the court below, I should agree with Judge LANDIS on the reason for dismissing Hultberg's appeal. But, as I view the record, Judge SEAMAN has stated the proper ground of the dismissal.

This appeal from the order of the District Court is therefore dismissed.

ECONOMIC MACHINERY CO. v. BERRY et al.

(Circuit Court of Appeals, First Circuit. April 24, 1914.)

No. 1018.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—BOTTLE-LABELING MACHINE.

The Gaynor patent, No. 705,832, for a labeling machine for affixing labels to bottles and similar articles, claim 1, while broad in its terms, must be limited to avoid anticipation in the prior art to the specific features pointed out in the specification; as so construed, *held* not infringed by a machine constructed in accordance with the Ermold patents, Nos. 923,501 and 950,259.

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—BOTTLE-LABELING MACHINE.

The Woodland patents, No. 937,403 and No. 941,178, for labeling machines for affixing labels to bottles and similar articles, so far as relate to the claims which disclose patentable invention, are very narrow and limited, covering only specific improvements in an advanced and highly developed art; as so construed, *held* not infringed by machines constructed in accordance with the Ermold patents, Nos. 923,501 and 950,259.

Appeal from the District Court of the United States for the District of Massachusetts; Le Baron B. Colt, Judge.

Suit in equity by the Economic Machinery Company against Casper Berry and others. Decree for defendants, and complainant appeals. Affirmed.

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

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

This suit is brought for infringement of three patents for labeling machines for affixing labels to bottles and similar articles: The Gaynor patent, No. 705,832, dated July 29, 1902; the Woodland patent, No. 937,403, dated October 19, 1909; the Woodland patent, No. 941,178, dated November 23, 1909. The application for the first Woodland patent was filed April 24, 1903, and for the second Woodland patent March 10, 1904.

The claims in issue are as follows: Claim 1 of the Gaynor patent; claims 4, 6, 12, 36, 52, 53, 56, 59, of the first Woodland patent; claims 6, 10, 11, 27, 30, 31, 42, 43, 44, 45, 46, 58, 59, 60, 67, 71, of the second Woodland patent.

The defendants' machine is shown and described in two patents granted to Edward Ermold and numbered, respectively, 923,501 and 950,259. The application for the first of these Ermold patents was filed July 23, 1908, and the patent granted June 1, 1909; and the application for the second Ermold patent was filed August 7, 1909, and the patent granted February 22, 1910.

The complainant called a single expert witness, and also Mr. Woodland, who testified as to the building of one machine in accordance with the first Woodland patent, and the date of its construction.

The defendants called a single expert witness, and also introduced in evidence 36 patents illustrating the prior art. Of these patents some 24 relate to labeling machines for affixing labels to bottles and similar articles.

With respect to this testimony it may be here noted that, in a case involving the construction of 25 claims in 3 patents in a highly developed art, the evidence is substantially confined to the contradictory views of two experts, and that no practical witnesses familiar with the art have been called to testify as to the relative utility, efficiency, and commercial value of the machines of the patent in suit as compared with the machines of the prior art. The evidence also fails to disclose, except as to some details, any satisfactory examination and analysis of the mechanism embodied in the defendants' machine.

A labeling machine for attaching labels to bottles and similar articles may be said to consist, as a general rule, of six groups of instrumentalities:

(1) The label box for holding the labels, and, if the box is movable, mechanism for actuating it.

(2) Picker devices for taking the labels one by one from the box and bringing them to the bottle, and mechanism for actuating these devices.

(3) Pasting rolls for applying paste to the pickers in order to enable the pickers to attach themselves to a label and remove it from the box, and mechanism for actuating these devices.

(4) A grip finger or clamping device for holding the label to the bottle while it is being detached from the pickers, and mechanism for actuating this device.

(5) Wipers for wiping the label over the bottle after it has been detached from the pickers, and mechanism for actuating these devices.

(6) The bottle rest against which the bottle lies while receiving its label.

These instrumentalities are brought into operation in the machine in the following order:

First. The pickers receive their coating of paste.

Second. The pickers are brought into contact with a label in the label box.

Third. The label is brought to the bottle.

Fourth. The grip finger holds the label to the bottle while the pickers detach themselves from the label.

Fifth. The wipers wipe the label upon the bottle.

A machine which embodies these instrumentalities and this cycle of operations necessarily comprises many parts, and these parts must be so constructed and arranged as not to interfere with each other in the operation of the machine.

Speaking generally, these machines may be divided into three types: The horizontal type, where the parts are arranged in horizontal alignment; the vertical type, where the parts are arranged in vertical alignment; and the mixed type, where the parts are arranged partly in horizontal and partly in

vertical alignment—and each of these types presents a different problem with respect to the construction and adjustment of these several parts and the mechanism adapted to actuate these parts.

Again, within each of these types there is still left a wide field for diversity in the arrangement of the several parts, in the mechanism employed to actuate these parts, and in the specific mechanism for each separate part.

The Gaynor patent in suit, No. 705,832, is for a machine of the vertical type and designed to affix two labels to a bottle. It is for improvements upon a prior patented machine of the same type by the same inventor. The patent says:

"The object of this invention is to provide a simple and easily-operated machine for affixing labels to bottles, cans, and the like, and especially a plurality of labels simultaneously to the neck and body of the bottle; and the new features thereof consist of improvements upon the machine shown and described in the patent for a 'labeling-machine' granted to me on the 10th day of December, 1901.

"One important feature of novelty in the machine herein shown and described is a label-holder; that is, means for holding the label centrally lengthwise of the bottle against the under side of the bottle while the label-carrying plates are moving away from the label and the label is being affixed to the bottle. Such means is so moved and controlled that it moves from the side into a position between the label-support and the label-carrying plates and bottle above and follows the same upward until the bottle is stopped, when it engages the labels centrally on the under side of the bottle and holds them while being affixed."

Figures 1 and 8 of the patent show the Gaynor machine and the "label-holder" or grip finger:

Fig. 1.

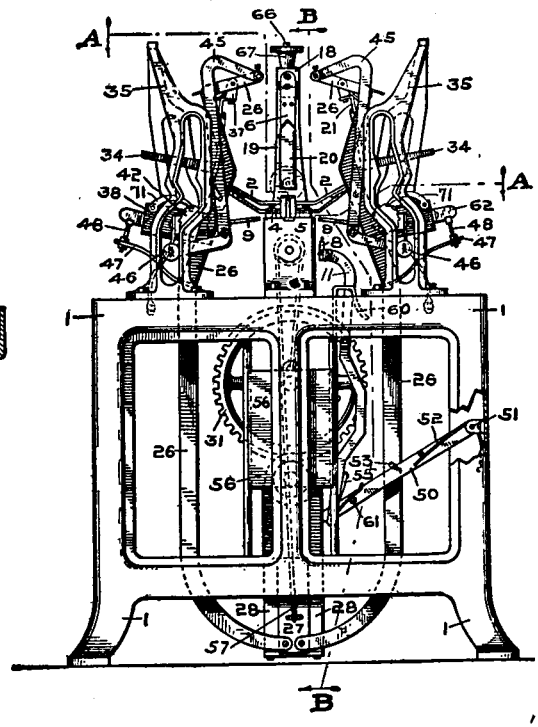
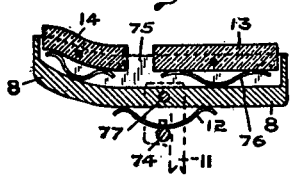


Fig. 8.



The "label-holder" or grip finger, which Gaynor here says is the important feature of novelty, and which is shown in Figure 8, is described in the patent as follows:

"The preferable form and construction of the label-holder is shown in Figs. 8 and 9. The label-holder *8* is made to conform substantially to the form of the bottle lengthwise. It is pivotally mounted near its center on the upper end of the bar *11* by the pin 77, so it can rock, and thereby conform to variations in the shapes of bottles. Its rocking movement is limited by the spring *12*, mounted on the projection *74* from the upper end of the bar *11*. To cause said label-holder to be more accurate in its accommodation to bottles of various sizes and shapes and to hold more positively the labels in its grasp when it moves upward and presses the labels against the bottle, the label-holder *8* is longitudinally and centrally provided with a channel *75*, and in said channel two blocks *13* and *14*, made of rubber or other cushionlike material, are centrally pivoted to the label-holder *8*, so as to rock and extend above the edges thereof to engage the labels. One of these, *14*, is curved to conform to the shape of the neck of the bottle and the other, *13*, is straight for engaging the body of the bottle. Their rocking movements are limited by the springs *76*, placed in the channel *75*."

The claim in issue reads as follows:

"(1) In a labeling-machine, oppositely-placed pairs of label-carrying plates that bring the labels into position against the neck and body of the bottle or the like for being affixed, and a label-holder that conforms to the neck and body of the bottle and which enters between said plates and holds the labels centrally lengthwise against the neck and body of the bottle while being affixed."

This is a broad claim for any grip finger that conforms to the neck and body of the bottle and which enters between oppositely-placed pairs of label-carrying plates and holds the labels centrally lengthwise against the neck and body of the bottle while being affixed.

Viewing this claim in the light of the prior art, we find that its main features, broadly speaking, were old. For example, the prior art, as illustrated in the Tyrrell patent, No. 115,789, shows a grip finger which enters between the pickers and holds the label against a box or like article.

Again the prior art, as illustrated in the Pettee patents, Nos. 597,858 and 675,013, shows grip fingers in a machine which affixes two labels to a bottle by means of two pairs of picker devices.

Further, there was nothing new at the date of the Gaynor invention in the general idea of conforming the grip finger to the article to be labeled. The specification of the Tyrrell patent says:

"This clamping arm has a finger, a^1, pivoted to the end for adjusting to the surface of the box at the time it acts on the label so as to bear alike all the way across it; and the finger is provided with a cushion of elastic substance, c^1, to prevent striking a hard blow and macerating or cutting the paper."

What Gaynor invented and all he invented in view of the prior art, was a special form of grip finger which conforms to the bottle and was adapted to operate in his machine as organized. This special form of grip finger is shown in Figure 8 and described in the specification as above cited.

Under these circumstances, I am of the opinion that claim 1 of the Gaynor patent must be limited substantially to the means described in the specification and shown in Figure 8 for *conforming* the grip finger to the neck and body of the bottle. In other words, that the claim, by reason of the prior art, should not be construed to cover any grip finger which conforms in any way to the neck and body of a bottle, in a machine which is organized to attach both a body label and a neck label to a bottle.

The defendants' machine, which is radically different in its general organization, does not use a grip finger containing the special features of conformity described in the Gaynor patent and shown in Figure 8. In the first place, it is not made to conform substantially to the bottle lengthwise as described in the Gaynor patent and shown in Figure 8. In substance it resembles more

an extension of the Tyrrell grip finger. In the second place, it is not pivotally mounted near its center to conform to variations in the shape of the bottle, as described in the Gaynor patent and shown in Figure 8. On the contrary, it is pivoted at one end as found in the prior art. In the third place, it has not the spring *12* which limits the rocking movement, nor the two centrally pivoted channel blocks *13* and *14* which secure a more accurate accommodation to bottles of various sizes and shapes, as described in the Gaynor patent and shown in Figure 8.

The defendants' grip finger is shown in Figure 4 of Ermold patent, No. 923,501, and, without entering into a further description of this device, it is clear to my mind that it does not infringe claim 1 of the Gaynor patent when properly construed and limited in view of the prior state of the art.

The main argument of the complainant in regard to the Gaynor grip finger seems to be that there was a broad invention in the idea of a single grip finger which holds two labels in two different planes; in other words, of a grip finger having a structural form which accommodates itself to the neck and body of a bottle. I do not concur in this view. On the contrary, it seems to me that this broad idea of conformity would suggest itself to any skilled mechanic; and further it appears that this general idea of conformity was old in the art. What I consider to be the real essence of this feature of the Gaynor invention lies in the specific means he devised for conforming the grip finger to the bottle, and in the specific means he devised for incorporating this grip finger in his machine.

The first Woodland patent, No. 937,403, is a machine of the vertical alignment type, the same as the Gaynor machine. It attaches one label to a bottle, and it does not employ any grip finger; the wipers performing the double function of grip finger and wipers. The Gaynor machine attaches labels to the under side of the bottle, and consequently the label box is below the bottle, and the pickers move upwards with the labels; in other words, the operating parts, generally, are arranged below the bottle.

The Woodland machine differs from this organization in two respects: First, it attaches the label to the upper side of the bottle, and consequently the label box, pickers, and operating parts generally are arranged in vertical alignment above the bottle, and operate from above; and, second, there is a movable label box, instead of a stationary label box (that is, the label box delivers the label to the pickers located directly over the bottle support, instead of the pickers taking the labels from a stationary label box and delivering them directly over the bottle support). In a word, the two characteristic features of this Woodland machine are the location of the parts in vertical alignment above the bottle and a movable label box.

In describing the invention covered by this Woodland patent, the specification says:

"The object of my present invention is to provide a practical and efficient mechanism for affixing labels to bottles and articles to which labels can be applied in similar manner, and to render said mechanism convenient for attendance and capable of rapid action, while affording ample time for the attendant to remove and replace the bottles while the machine is in operation.

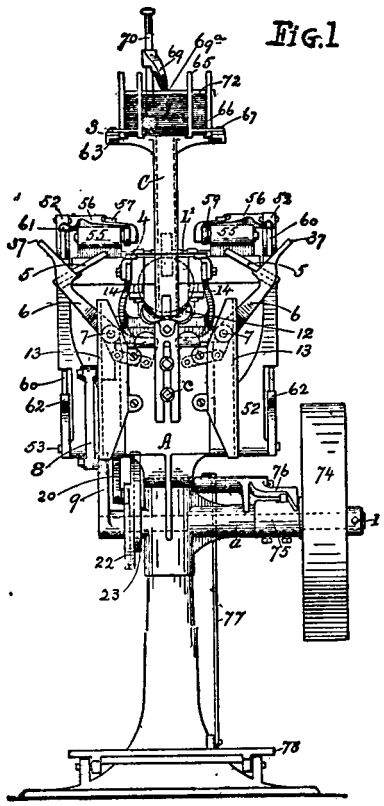
"Another object is to provide, in a machine for the purpose specified, label-feeding mechanism that will obviate liability of occasionally dropping, skipping, or displacing of labels, and to render the machine sure and accurate in its presentation and affixment of the labels.

"My invention in its embodiment comprises a stationary supporter for the bottle or article to be labeled, an upwardly and downwardly movable label-holder, from the bottom of which the labels are delivered directly over said bottle supporter, a pair of laterally movable pickers or paste applying members, upon which the label-holder descends and which receive the labels singly therefrom, a pair of wiping-on devices that have upward and downward motion and lateral or outward swinging action, and which also serve for primarily advancing and gripping the label to the bottle surface, a paste-box or reservoir with delivering rolls, a reciprocatory frame or oscillator carrying

rollers for transferring a suitable film of paste or adhesive from the delivering roll to the paste applying pickers, a suitable supporting frame and means for imparting to the several above-mentioned parts power and motion for performing their various functions in their proper time.

"My invention also comprises features of novelty in the construction of the mechanism in various parts, and in the combination and mode of operation thereof, as will be more fully explained; the peculiar features of my invention being hereinafter specified in detail, and the particular subject-matter claimed expressly defined in the summary."

This Woodland machine is illustrated in Figure 1 of the patent:



We will first consider what the complainant has classified as the broad claims of this patent, namely, claims 4, 6, 52, 53, 56. Of these claims it is sufficient to cite the first two:

"(4) In a labeling machine, the combination, of a stationary bottle-supporting device, a pair of paste-applying label-picker devices for adhesively engaging the respective ends of a label, a pair of downwardly-acting laterally-separable wipers, and an overhead label-supply holder that delivers labels to said paste-applying label-picker devices in a direct line with said bottle-supporting device; the parts being arranged for operating in common axial alignment with each other perpendicular to the planes of the picker-devices and bottle-supporting device, substantially as set forth."

"(6) In a labeling machine, the combination, of an open-bottomed label-holder, pickers adapted for singly disposing the labels, wiping-on devices, and means for bringing the label-holder into conjunction with the pickers for delivering a label from the open-bottom onto said pickers by a movement perpendicular to the plane of the picker faces."

In defining in his specification, as appears above, the "embodiment" of his invention, Woodland says that the organization comprises "an upwardly and downwardly movable label-holder, from the bottom of which the labels are delivered directly over said bottle supporter"; and it is clear that this movable "label-holder" or label box is a necessary and important feature in this machine—a feature requiring a different organization from a machine having a fixed label box.

In my opinion, all the above claims are limited to an organization which contains this feature, and, since the defendants' machine does not contain this feature, it does not infringe these claims. The defendants' machine, as appears from the Ermold patents, has a stationary label box and an organization which is different in many ways.

In saying that claim 4 is limited to this feature of a downwardly moving label box, I interpret the words of the claim, "an overhead label-supply holder that delivers labels to said paste-applying label-picker devices in a direct line

with said bottle-supporting device," as referring to the "upwardly and downwardly movable label-holder," described in the "embodiment" of the invention in the specification; and I give the same construction to the language in the other broad claims relied upon in which reference is made to the label-holder or carrier.

With respect to the vertical alignment feature of these claims, which the complainant regards as most important, it surely cannot be said that Woodland is entitled to a broad patent covering all bottle-labeling machines, however constructed and organized, which have their parts arranged vertically above the bottle and attach the label to the upper side of the bottle. If evidence had been introduced to the effect that all prior labeling machines had been a failure and that Woodland was the first to solve the problem by organizing the parts in vertical alignment above the bottle, it might afford some basis for the broad construction of these claims contended for by the complainant. There is, however, no evidence to support any such proposition.

The next claim in issue is claim 12, which reads as follows:

"(12) In a labeling machine, the combination with a bottle-supporting rest, of movable wipers, a reciprocating wiper-carrying mechanism, and means whereby said wipers are moved inward to act closed together when passing the bottle rest in one direction, and means whereby said wipers are opened or separated, and kept clear from contact therewith when passing said rest in the opposite direction."

As already mentioned, the wipers in this machine perform the double function of wipers and grip finger. When, therefore, this claim says, "And means whereby said wipers are moved inward to act closed together when passing the bottle rest in one direction," it clearly refers, when read in connection with the specification, to wipers which, when "closed together," act as grippers to hold the label upon the bottle. This is the natural construction of the claim, and, when so construed, it is not infringed, since the Ermold machine employs a grip finger and the wipers are not "closed together," either in fact or for the purpose of the Woodland machine. Further, with regard to the last element in this claim, it cannot be said, in view of the prior art, that Woodland is entitled to all "means whereby said wipers are opened or separated, and kept clear from contact therewith when passing said rest in the opposite direction," although he might fairly be entitled to a patent for such specific means as he employs for accomplishing the result and what might fairly be considered the equivalent thereof. Upon this last point there is no evidence that the Ermold machine uses the same or what should be regarded as equivalent means.

The next claim in issue is claim 36, which reads as follows:

"(36) In a labeling machine, an open-bottomed label-holder comprising means for guiding the edges of a pile of labels, and inward projections at the foot thereof that support the labels; in combination with pasting picker-devices adapted to take or receive a label therefrom, and a follower for retaining the pile of labels in opposition to the contact of said picker-devices; said follower provided with means for affording a slight yielding or elastic action succeeded by rigid resistance to the pressure of said pasting picker-devices, when taking a label from the label-holder."

The important element in this claim is "a follower for retaining the pile of labels in opposition to the contact of said picker-devices; said follower provided with means for affording a slight yielding or elastic action succeeded by rigid resistance to the pressure of said pasting picker-devices, when taking a label from the label-holder."

This feature is illustrated in the following drawing from the patent:

With respect to this feature, the specification says:

"As a means for keeping the labels in a firm pile upon the label-holder, there is employed a follower device adapted for automatic free movement in one direction and for self-locking to positively resist movement in the opposite direction, so that a constant pressure is maintained upon the decreasing pile of labels and the pile held secure against lifting when brought into contact with the pasting pickers. This follower is preferably constructed as a simple finger *69* (see Figs. 4 and 8) arranged upon an upright standard *70* fixed in the top of the carrier slide *C*, or label-holder support. Said standard is formed rectangular, or of other suitable cross-section; and the opening *71* in the head of the follower-finger is formed to approximately fit the standard at the sides, and at the front upper part of the opening, or off-set, while it is larger below at the front edge, so that while the fingers can freely slide down the standard, it will immediately lock or cramp upon the standard and resist upward movement or pressure exerted at the outer end of the finger which rests centrally upon a plate *72* laid upon the top of the pile of labels. By this means the labels are held flat and firmly sustained to meet the pressure of the pickers when the label-holder with the pile of labels descends thereon. The finger automatically follows down the standard as the labels are fed off the bottom of the pile."

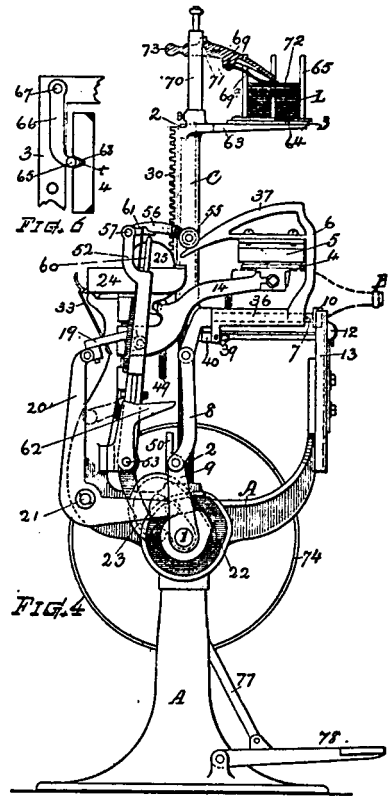


FIG. 4

Again the specification says:

"The label-follower finger is, when so desired, made to give an elastic pressure upon the pile of labels or follower-plate resting thereon. For this purpose the finger is provided with a spring *69a* secured upon the finger *69* (see Fig. 4) and adjusted so as to permit a slight yield of the spring before the finger gives a rigid resistance, as the bottom of the pile of labels is, by downward movement of the label-holder, pressed upon the pickers. This slight elasticity avoids the liability of the underlying labels becoming so firmly compressed upon the projection *t* at the bottom delivery, as to cause tearing of the bottom label when drawn therefrom by the paste-applying pickers."

Upon reading the Woodland specification in connection with the drawings, it is apparent that Woodland was addressing himself to the problem of de-

vising means for securing "a slight or elastic yielding action succeeded by a rigid resistance" in a machine in which the label box moved downward to the pickers.

On the other hand, it will be found upon an examination of the Ermold patent, No. 950,259, that Ermold was addressing himself to the solution of another problem caused mainly by the different organizations of the two machines. The specification of the Ermold patent says:

"This invention relates to improvements in bottle-labeling machines by which a regular and uniform supply of labels to the pickers is secured, and more especially to an improved label-supply mechanism for the bottle-labeling machine for which letters patent No. 923,501 were granted to me on June 1, 1909. In the patent referred to a horizontal presser-bar was used for pressing on the tops of both piles of the labels in two label-receptacles, one for the body-labels and the other for the neck-labels. This supply mechanism worked very satisfactorily when the piles of labels in the receptacles were of equal height, but when in working the bottle-labeling machine one pile or the other in said receptacles gradually became of different height, then an unequal pressure on the piles of labels resulted, so that sometimes more than one label was delivered to the pickers at the lower end of one or the other receptacle.

"The object of this invention is to overcome this objectionable feature and to improve the label-supply mechanism in such a manner that each receptacle delivers its labels to its corresponding pickers independently of the delivery of the labels by the other receptacle, whether the piles of labels in the label receptacles are of uniform height or not; and for this purpose the invention consists of a label-supply mechanism in which an upright presser-bar is arranged for each pile of labels in the label-receptacles, which presser-bars are guided independently of each other in separate holders guided on a stationary horizontal slotted guide-bar, said holders being provided with pivoted and weighted pawls that engage ratchet-teeth of the upright presser-bars, the presser-bar for the body-labels being provided with recesses at its upper and lower end for guiding an auxiliary presser-bar provided with guide-studs at its upper and lower ends and connected with the presser-bar by an equalizing spring, so that each pile of labels receives an independent pressure from its respective presser-bar, regardless of the quantity of labels in the respective receptacles. * * *

"Alongside of the upright presser-bar d for the pile of body-labels is guided an auxiliary presser-bar d^2 by means of headed guide-pins d^3 at its upper and lower ends that are guided in recesses d^4 at the upper and lower ends of the presser-bar d. The upper guide-pin d^3 is connected by a helical spring d^5 with a stud-pin d^6 on the presser-bar d. The lower end of the auxiliary presser-bar d^2 rests on the top of the pile of body-labels and takes up the vibrations and shocks to which the body-label receptacle is exposed when the pickers arrive below the same. The larger body-labels are subjected to a greater degree of vibrations and shocks than the smaller neck-labels. These vibrations are neutralized by the spring-connection of the auxiliary presser-bar with the main presser-bar, so that a regular feed of the body-labels independently of the neck-labels is securely established."

The following cuts from the patent illustrate the Ermold follower:

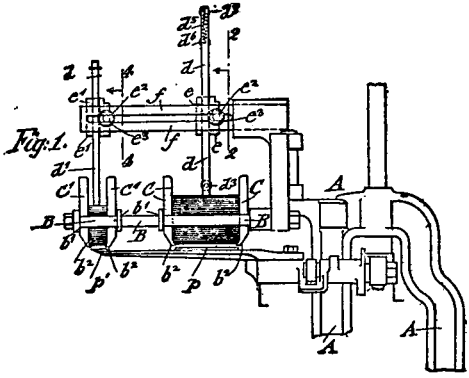


Fig. 1.

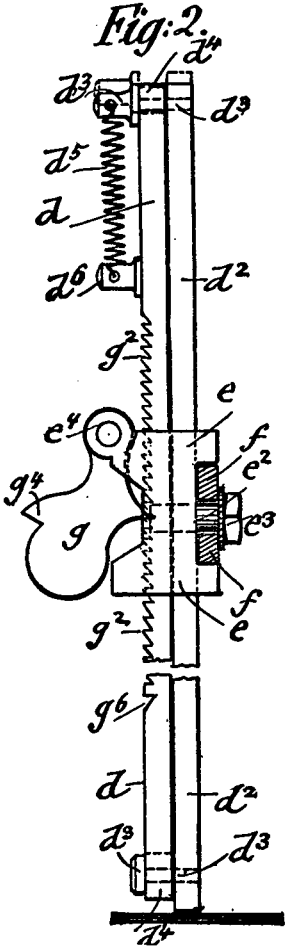


Fig. 2.

An examination and comparison of the specifications and drawings of the Woodland and Ermold patents show, in my opinion, that the Ermold follower was designed for a different purpose from that of the Woodland follower, and that it differs from the Woodland follower both in construction and mode of operation.

The next claim in issue is claim 59, which reads as follows:

"(59) In a labeling machine, the combination, of an open-topped, bottom delivery label-holder, comprising guides for the sides of a pack of labels and guides for the ends of said pack of labels, said guides arranged to afford a continued through-feed passage for the labels, means disposed outside the line of said passage for adjusting said label-holder guides to accommodate different sizes of labels, without changing the relative position of the central plane of the pack in respect to the attaching mechanisms, paste-applying pickers that coact with the bottom end of said guides for releasing and downwardly removing the single labels from said pack, and downwardly acting wipers for affixing said label to a bottle, or like article, underneath said label-holder."

With respect to this claim, the complainant's brief says:

"Claim 59 has special reference to the combination with the pickers and wipers of a label receptacle having movable side walls or guides which may be adjusted laterally in such manner as to accommodate labels of different size without changing the relative position of the central plane of the label pile with respect to the label-attaching mechanism, thus maintaining the vertical alignment of the labels and the co-operating parts located beneath them."

I am of the opinion that, in view of the prior art, there was no patentable novelty in this adjustable feature of the label box to accommodate itself to different sizes of label, and hence that Ermold was at liberty to use the specific form of adjustable label box device which is described in his first patent.

We come now to the second Woodland patent, No. 941,178. The distinguishing features of this machine as compared with the machine of the first Woodland patent are, first, the label box is stationary instead of movable; second, it has a grip finger which was absent from the first Woodland machine; and, third, it attaches two labels instead of one, as in the first Woodland machine.

In describing the invention, its objects, and in what it consists, the specification of this patent says:

"Be it known that I, Frank O. Woodland, a citizen of the United States, residing at Worcester, in the county of Worcester and state of Massachusetts, have invented a new and useful labeling-machine, of which the following, together with the accompanying drawings, is a specification sufficiently full, clear, and exact to enable persons skilled in the art to which this invention appertains to make and use the same.

"The prime object of my present invention is to provide a more desirable, convenient, and practically efficient mechanism for the purpose named, and to render the various parts and combinations peculiarly suited for performing their respective functions for the affixment of labels in a sure, expeditious and satisfactory manner.

"Another object is to provide a machine of the character described, having facilities for the delivery and affixment of a plurality of separate labels simultaneously at one operation of the machine.

"Minor objects and features of the invention are set forth and explained in the following detailed description.

"My invention consists in mechanism organized for operation substantially as set forth, and in the parts and novel combinations of parts as explained and illustrated; the particular subject-matter claimed being hereinafter definitely specified.

"In the accompanying seven sheets of drawings, Figure 1 represents a front view of a labeling machine embodying my invention, the supporting base and standard being omitted."

This figure is illustrated in the following cut:

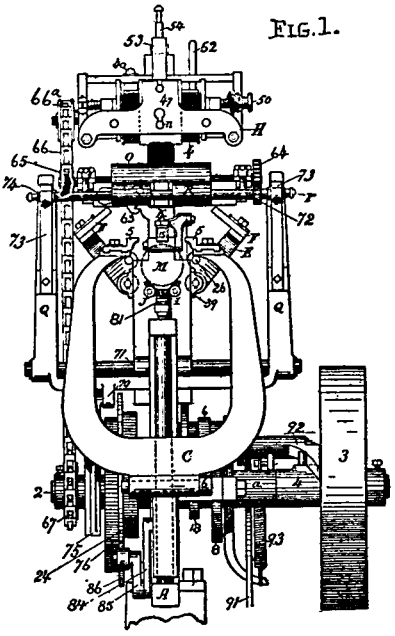


FIG. 1.

The three broad claims in issue are as follows:

"(6) In a labeling machine, in combination, a bottom-delivering label-holder comprising means for supporting labels at their edges and adapted for the downward extraction of single labels therefrom, a stationary bottle rest, an intermediately acting means for gripping a label against the top surface of a bottle laid upon said rest, a reciprocating picker-carrier, picker devices mounted upon said carrier and movable directly to and from the bottom delivery of the label-holder, said pickers provided with glue-applying faces that receive the label, means for retracting the gripping devices out of the path of the label-feed, and means for supplying glue to the picker-faces while they approach the label-holder."

"(10) In a labeling machine, in combination, a stationary underlying bottle-rest, vertically reciprocating pickers, a wiper mechanism, an overhead top-chargeable bottom-delivering label-holder, a movable grip-finger disposed above the bottle-rest and beneath the label-holder, and having its end pivoted to the frame in rear of the bottle-receiving space, to swing down upon the bottle and upward and backward beneath the label-holder, and means for operating said grip-finger.

"(11) In a bottle-labeling machine, in combination, an upright supporting-frame having a forward projecting top member, an underlying bottle-rest supported upon a lower front portion of said frame, a top-chargeable, bottom-delivering label-holder removably supported upon said top member of the frame and projecting forward over said bottle-rest, a vertically reciprocating picker-carrier having horizontally-projecting glue-applying pickers secured thereon, guiding means that directs said picker-carrier to carry the pickers perpendicular to the plane of the labels, to and from the label-holder, a label-gripping means disposed between the label-holder and bottle-rest and hingingly connected with the frame adjacent to the rear of the bottle-receiving space to swing down upon the presented label and up to an approximately upright position beneath the label-holder, actuating connections for operating said gripping means and said picker-carrier, and a wiper-carrier having opposite arms carrying means for wiping down the ends of the labels at either side of the bottle."

The difficulty with these claims is their breadth; in other words, in their failure to claim the mechanism which Woodland describes in his specification and which constitutes his real invention.

When Woodland says in his specification that "my invention consists in mechanism organized for operation substantially as set forth, and in the parts and novel combinations of parts as explained and illustrated," it is clear that what he invented was the mechanism of the machine shown in the drawings and described in the specification; and it follows that all he is entitled to

claim as his invention is this mechanism, or what may be fairly considered the equivalent thereof.

If we assume that these claims are not void by reason of the general terms in which they are expressed, but are valid when limited to the means by which their several elements are operated and adjusted, or the equivalent thereof, then the evidence fails to show infringement, since it fails to point out that the mechanism of the Ermold machine is the same as that of the Woodland machine, or the equivalent thereof. In view, therefore, of the broad language of these claims, coupled with the lack of evidence before the court, we must hold that the complainant has not made out a case of infringement.

Claims 42, 43, 44, 45, 46, and 67 comprise the next group relied upon. Of these claims it is sufficient to cite the first two:

"(42) In a labeling machine, a reciprocating picker-carrier with glue-applying pickers thereon, a label-holder for supplying labels to said pickers and means for shifting the label-holder out of reach of said pickers.

"(43) In a labeling machine, the combination, of a bottom-delivery label-holder, a reciprocating picker-carrier with glue-applying pickers thereon that move into conjunction with said label-holder for receiving the label, and means for temporarily shifting the label-holder beyond the reach of said pickers, for the purpose set forth."

The important feature in this group of claims is "means for shifting the label-holder beyond the reach of said pickers."

With respect to these claims, it is sufficient to observe that I am unable to find any patentable novelty or invention either in the idea of lifting the label-holder out of reach of the pickers, which is no more than the shifting of one part of a machine out of engagement with the other parts, or in the specific means described by Woodland for accomplishing this result.

We come now to what the complainant calls the "slanting bottle rest claims," namely, claims 27, 28, 59, 60, and 71. Of these claims we will only cite the first named:

"(27) In a labeling machine for affixing labels to bottles, a means for supporting a plurality of packs of labels; in combination, with a rearwardly and downwardly inclined rest for the bottle, and means for clamping a plurality of labels on the bottle, opposite to said rest."

In my opinion, there is nothing which rises to the dignity of an invention in these claims; in other words, it was within the skill of an ordinary mechanic to construct a bottle rest which is "rearwardly and downwardly inclined," or at such an inclination that the bottle would be better presented for affixing the label thereto.

The remaining claims, 30 and 31, relate to a minor feature of the patent having special reference to the label box and the positioning of the compartments in their relation to each other. Claim 30 reads as follows:

"(30) In a labeling machine, a duplex bottom-delivery label-holder provided with a compartment having its front and rear label-guiding members carried by supports that are slidable on guides or side-bars parallel with the plane of the labels toward and from its other compartment, for adjusting the position of the label-holding compartments in relation to each other, and means for securing the same at adjusted positions."

With respect to these claims, I find no invention by reason of the prior art.

In conclusion, it may be observed that I do not agree with the complainant's main contention with respect to the first Woodland patent, namely, that the broad "vertical organization" claims of that patent should be "held to cover any machine which they aptly describe, though specifically different from the machine of the patent." Such a broad construction would only be justified, in my opinion, upon some satisfactory proof that Woodland was the first to invent a successful machine for attaching labels to bottles and that this was accomplished by his vertical organization and arrangement of the several parts.

It is a familiar rule that the range of equivalents depends upon the breadth and importance of the invention. Now there is no substantial evidence in the record that the first Woodland patent covered a broad and useful invention,

or that this invention represented a marked advance in the art, or that the machine embodying this invention was materially better than prior machines. Only one machine was constructed after this patent, and this machine can hardly be said to have made a favorable impression upon the art.

Nor can I accept as sound the complainant's proposition that the "vertical organization" claims of the first Woodland patent are generic, and that the "vertical organization" claims of the second Woodland patent are specific, in the sense that the second Woodland patent is for a specific form of a broad generic invention covered by the first Woodland patent. An inspection and analysis of the second Woodland patent shows, to my mind, that it covers, and was intended to cover, many specific improvements in bottling machines in an advanced and highly developed art. While it may be said that in both these patents the parts are arranged in vertical alignment above the bottle rest, still the two machines, as already pointed out, are quite different in the organization of their several parts and in the results accomplished.

I have reached the foregoing conclusions upon the best consideration that I have been able to give to this case upon the evidence which is presented in this record; and it follows that a decree must be entered dismissing the bill, with costs.

Oliver Mitchell, of Boston, Mass., for appellant.

Leo J. Matty, of New York City (Brown, Raegener, Moody & Matty, of New York City, on the brief), for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. This is a suit for the infringement of claim 1 of a patent issued to John J. Gaynor, No. 705,832, July 29, 1902, and of numerous claims in two patents issued to Frank O. Woodland, Nos. 937,403 and 941,178, respectively, October 19, 1909, and November 23, 1909. The bill was dismissed on its merits, and thereupon the complainant appealed to us.

The facts are stated so fully in the opinion of the learned judge in the District Court that we need not state them here, only so far as may be necessary to elucidate our positions. As the parties are still arranged in the same order, we describe the complainant in the District Court as still complainant.

[1] The first claim of the Gaynor patent is as follows:

"(1) In a labeling-machine, oppositely-placed pairs of label-carrying plate that bring the labels into position against the neck and body of the bottle or the like for being affixed, and a label-holder that conforms to the neck and body of the bottle and which enters between said plates and holds the labels centrally lengthwise against the neck and body of the bottle while being affixed."

The District Court held that on its face this is a broad claim for any label-holder which conforms to the neck and body of the bottle, and which enters between the plates as stated in the claim; that in the light of the prior art the main features, broadly speaking, were old; that therefore it was necessary to limit the claim to the particular features pointed out in the specification; and that, so limiting it, the claim was not infringed.

The propositions of the parties fail to enlighten the case as made by the District Court, and they consist in nothing of consequence beyond extracts from the opinion filed therein. The complainant now maintains that the District Court erred in holding that the claim was

to be limited to the specific embodiment shown in the specification. This, however, is not important, because, whether the claim is broad or whether it should be limited to the specific embodiment shown in the specification, our conclusion is that, in either event, the decree on that claim must be for the respondents. The learned judge of the District Court held that, if the claim was broadly construed, the main features were old; and limiting the claim in the way he did it was not infringed. Consequently, so far as that claim was concerned, in either event, he held for the respondents; and we agree with him. Therefore the result, in either view of the construction of the claim, must be that the bill be dismissed so far as it is concerned.

[2] With reference to the two patents to Woodland, and the very numerous claims which each of them contains, and the very considerable proportion of those claims which have been brought to our attention, the District Court carefully examined them, and made detailed statements and decisions in reference to each thereof. With the views we have reached, it would be useless labor, and of no advantage to the profession or any one else, to go again over the details of what can never become a precedent. As stated by the opinion in the District Court, the Woodland machines in litigation here relate to an "advanced and highly developed art." A large portion of the claims evidently contain nothing in the nature of patentable invention. All of them cover very narrow and limited subject-matters, as to which the range of equivalents is necessarily very small, so that infringement is not sustained as to any which involve patentability, for the reasons stated in the opinion appealed from.

The decree of the District Court is affirmed; and the case is remanded to that court, with directions to dismiss the bill, with costs for the respondents in both courts.

STEAD LENS CO. v. KRYPTOK CO.

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

No. 4052.

1. PATENTS (§ 81*)—PRIOR USE—EVIDENCE TO ESTABLISH.

Oral testimony of prior use cannot prevail over the legal presumption of validity which attaches to a patent unless it is clear and convincing.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 104; Dec. Dig. § 81.*

Priority and continuance of public use of invention as affecting patentability, see Eastman v. City of New York, 69 C. C. A. 646.]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—EYEGLASSES.

The Borsch patent, No. 637,444, for bifocal lenses for eyeglasses in which the lens is made of two pieces of glass of different indices of refraction, the smaller being mounted in a recess in the larger and exposed on one face thereof, and the Borsch, Jr., patent, No. 876,933, for similar lenses, with the added improvement that the two parts are united by fusing, were neither of them anticipated and both disclose patentable invention. The devices also *held* capable of conjoint use, and both patents infringed.

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

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Suit in equity by the Kryptok Company against the Stead Lens Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 207 Fed. 85.

D. W. Cooper, of New York City, and H. P. Denison, of Syracuse, N. Y. (Theoph. L. Carns, of Kansas City, Mo., and Eugene A. Thompson, of Syracuse, N. Y., on the brief), for appellant.

William M. Stockbridge, of New York City, and John H. Atwood, of Kansas City, Mo., for appellee.

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

RINER, District Judge. This was a bill in equity brought by the Kryptok Company, praying an injunction and accounting for an alleged infringement by the Stead Lens Company of two patents, one numbered 637,444, issued to John L. Borsch November 21, 1899, and the second numbered 876,933, issued to John L. Borsch, Jr., January 21, 1908. Both patents are for new and useful improvements in bifocal lenses to be used in spectacles and eyeglasses of the special character known as bifocal.

It is averred in the bill that the Kryptok Company is a corporation organized and existing under the laws of the state of New York and is the owner of these two patents; that the two patents are capable of conjoint use in one and the same lens; that the Stead Lens Company has made and sold bifocal lenses in infringement of both of these patents; and that the lenses so made and sold by the Stead Lens Company "each constitutes a conjoint use of the inventions or improvements of both of said letters patent in one and the same bifocal lens."

The Stead Lens Company filed an answer and, by leave of court, a supplemental answer, denying in detail the averments of the bill, setting up certain facts, and referring to prior patents and publications for the purpose of showing anticipation and consequent invalidity of the patents in suit. It is expressly denied in the answers that the patents are capable of conjoint use; that the patents, in view of the state of the art at the time they were issued, did not disclose any new or patentable invention, but that the alleged invention involved, if anything, simply mechanical skill and judgment, and that the Stead Lens Company has not infringed either of the patents. It is further averred in the answers that the Kryptok Company is not a bona fide corporation; that its promoters and organizers were its present nominal stockholders; that it had previously been engaged in an unlawful combination in restraint of trade; and that they organized this corporation as a nominal corporation in furtherance of said unlawful purpose of restraining trade and are still, in the name of the company, keeping up and carrying out said unlawful combination in restraint of trade.

A replication was filed, testimony taken, and at the hearing the district court entered an interlocutory decree granting the injunction pray-

ed for in the bill and directed an accounting. This is an appeal from that decree.

The patent issued to John L. Borsch contained but a single claim, as follows:

"A bifocal lens formed of two pieces of glass of dissimilar index and size placed and secured face to face, the smaller of said lenses being mounted in a recess in the larger of said lenses, and exposed upon one face of the latter, substantially as set forth."

In the patent issued to John L. Borsch, Jr., claims 1, 2, 3, 7, and 8 are the only ones in suit. But one of these claims, claim 3, was selected by counsel for submission to the court as typical of the group of claims in this patent. It is as follows:

"A spectacle, eyeglass, or other optical lens consisting of the body portion having a selected index of refraction, and one or more portions of glass embedded in the surface of said body portion and integral therewith, the said embedded portion or portions having an index or indices, of refraction different from that of the main or body portion."

If these patents are valid and susceptible of conjoint use, there can be no doubt, we think, but that the defendant's device constitutes an infringement. It only requires an inspection and comparison of the lenses manufactured by the Stead Company with those manufactured by the Kryptok Company to show that the two lenses are, for all practical purposes, identical. And indeed upon this question there is but little, if any, real conflict in the testimony.

The defense of unlawful combination in restraint of trade, set up in the answers, may well be passed with the remark that the record discloses no substantial showing of monopoly except such monopoly as inheres in the nature and theory of the patent law. Neither do we think that the evidence offered for the purpose of showing prior use of the fused bifocal lenses sufficient to defeat the patent issued to John L. Borsch, Jr. We have carefully examined the testimony and find it uncertain and indefinite as to time and detail, and, as suggested by the trial court:

"In itself as well as in its attempted corroboration it is unsatisfactory and unconvincing."

[1] Oral testimony of prior use cannot prevail over the legal presumption of validity which attaches to a patent unless it is at least clear and convincing. National Hollow Brake-Beam Co. et al. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 694–703, 45 C. C. A. 544; Parker v. Stebler et al., 177 Fed. 210, 101 C. C. A. 380; Albright v. Langfeld (C. C.) 131 Fed. 473; Continental Rubber Works v. Single Tube Automobile & Bicycle Tire Co., 178 Fed. 452, 101 C. C. A. 436; Laas v. Scott (C. C.) 161 Fed. 122–126.

[2] It was also urged at the argument that the claimed inventions and discoveries of the patents in suit are all anticipated in the prior art, and that both patents are void for want of patentable invention. Upon these questions we here quote at length from the opinion of Judge Van Valkenburgh, annexed to the record, as fairly expressing the views entertained by this court after an attentive and critical examination of the record:

"The first patent in suit, No. 637,444, recited that:

" 'Heretofore bifocal lenses have been frequently formed by matching and uniting edge to edge two pieces of lens glass, each constituting but part of a complete lens, and respectively suitably ground, the one for distant and the other for near vision, and various forms have by different constructors been given to the respective elements or sections of the lens; the only fixed requirement as to such sections being that they should, when united, present as to their combined outer edges the usual oval outline of a lens.'

" 'In whatever forms the respective independent sections or elements of a bifocal lens of this character have been made, however, they have been united by bringing the respective edges of said sections or elements into contact and cementing the abutting edges by any suitable balsam or uniting medium, or maintaining them in their assembled position by an enclosing lens frame.'

"The aim of the proposed patent is thus stated:

" 'This construction has been objectionable, however, by reason of the fact that, however carefully the sections are assembled and cemented, a minute cement-filled space exists between the abutting edges, and the cement which is present, of course, on both surfaces of the lens in time becomes slightly worn away under the action of heat and the attrition to which it is subjected in the cleaning of the lens, with the result that the permanence of the union between the elements or sections is impaired; furthermore, the line of connection between the two sections of a bifocal lens as heretofore constructed as described is always visible, and not only detracts from the appearance of the lens but is an annoyance to the wearer.'

" 'Broadly stated, it is the object of my invention to produce a bifocal lens of an attractive, efficient, and durable character, in which the objections hereinbefore stated to the existing forms of such lenses shall be obviated.'

"As described in the patent this is done by taking a lens of crown glass suitable for far vision purposes producing in one face thereof a recess of such form as to be adapted to receive and accommodate a smaller near vision lens of flint glass, having an index of refraction different from that of the larger lens, and securing this smaller lens within the recess of the larger by means of balsam or other suitable material, the result being a compound bifocal lens uniform in curvature and integral in structure from edge to edge, the minor lens not being visible to others than the wearer except on very close inspection; a crevice or joint between the elements, with its accompanying disadvantages, being entirely absent.

"The claim declared was as follows: 'A bifocal lens formed of two pieces of glass of dissimilar index and size placed and secured face to face, the smaller of said lenses being mounted in a recess in the larger of said lenses, and exposed upon one face of the latter, substantially as set forth.'

"The essential novelty and invention claimed for this patent is that it for the first time discloses the use of glass of different indices of refraction in such combination as to permit a completed integral bifocal structure of the same thickness and uniformity of surface as a lens composed of but one kind of glass and having a single focal point. In this way the unsightliness, instability, and other infirmities pointed out as existing in former structures were either entirely removed or reduced to a more desirable minimum. If this device presents novelty and invention, its utility and desirability can hardly be disputed; but defendant contends that it presents neither the one nor the other.

"In support of the defense of anticipation something like 27 patents are cited as references. A number of these exhibit the development of the bifocal eyeglass or spectacle from its crude origin up to the application of the first patent in suit; others have to do with globes, lamp chimneys, photographic camera lenses, reflectors, and other articles of remote analogy. Others deal with achromatic lenses intended for the elimination of chromatic aberration caused by the dispersion of rays of light into their component colors. We are, however, relieved of any extended consideration of the greater number of these cited references, because it was conceded at the hearing that the defendant relied for substantial anticipation of the first patent in suit upon the British patent issued to Henry Edward Newton in 1866 for improvements in optical instruments; that to Nathan Lazarus in 1881 for improvements

in the manufacture of achromatic lenses, and letters patent No. 392,053 issued to August Morck, Jr., in 1888, for improvements in spectacles or eyeglasses. With respect to the first two, it is sufficient to state that they concededly recognize the use of two kinds of glass, crown and flint, in the manufacture of lenses; as their titles indicate, they concern eyeglasses either incidentally or remotely, and bifocals not at all. It is upon the Morck patent that defendant mainly relies for its defense of anticipation of the first patent in suit; and, if the claimed invention of the latter is not disclosed by the Morck patent, then it is not anticipated by any of the other references cited.

"The Morck patent, No. 392,053, dealt specifically with eyeglasses employed for combined near and far range purposes. Its invention 'consists in securing upon the lower surface of the selected far-vision lens a spherically-ground lens of about one-fourth to one-third of the surface of the larger lens, and which is selected with a view to near-vision purposes, and when combined with the larger lens in the manner stated produces a glass adapted for use for both close and distant range. When the two lenses are united, as stated, the larger or far-vision lens extends to the lower rim of the inclosing frame on both sides of the near-vision lens. * * * 'It will be seen that the near-vision lens 8, while having its edge bounded by a curved line of which every part is equally distant from a center, which is preferably just outside of the rim at the lower side of the frame, is made to taper to a feather-edge along the segmental line, and therefore the lens 8 has its thickest part along the lower edge. This construction obliterates the surface-line 9 to the sight, while giving a perfectly defined area of near vision. It avoids the objection of a horizontal straight projecting ledge, which forms a shelf for the collection of dirt and dust when such near-vision lens is formed thickest at such straight line; and it makes the change from a far-vision to a near-vision lens gradual as the eye crosses the segmental line at its highest point on the surface of the far-seeing lens.'

"When the first patent in suit was originally presented to the patent office it was rejected by the examiner in the following language: 'The claims of the above-entitled application are rejected in view of patent to Morck, Jr., No. 392,053, October 30, 1888, optics, eyeglasses.'

"Thereupon the applicant made the following amendments: He erased the word 'preferably,' as used in the specification describing the minor lens, making it described as 'formed of flint glass' and of 'glass of different index,' instead of as 'preferably formed of flint glass,' and 'preferably glass of different index.' He also erased claims 2 and 3; there being three claims in the patent as originally filed. Original claim 1 was left without a numeral as the sole claim of the patent. Defendant contends that the use of the word 'preferably' in the original specification indicated that Borsch did not then have in mind the use of glass of different index imbedded in a recess as the central idea of his invention. I think, however, that the specification as a whole clearly indicates that he had such structure in mind, and that the word 'preferably' was erased in order that there might be no doubt respecting it; also to exclude any claimed interference with the Morck patent which might be predicated upon the use of projecting glass of the same index. No point is or can be made of the fact that claim 2 was canceled, because it obviously did not cover the full invention claimed; but defendant insists that the cancellation of claim 3 in response to this objection limited and narrowed original claim 1, now the contested claim of the first patent in suit. Claim 3 reads as follows: 'A bifocal lens consisting of a major lens embodying a recess in one face and a minor lens conformed to said recess and mounted and secured in place therein, said lenses being of glass of different index, substantially as set forth.'

"A comparison of this claim with the remaining claim of the first patent in suit, heretofore quoted, will disclose that in all particulars substantial to this controversy they are the same. This being true, the cancellation of the superfluous third claim, substantially identical with the first, would not affect the latter. Bullock Electric Mfg. Co. v. Crocker-Wheeler Co. (C. C.) 141 Fed. 101–110. It has not been, nor to my mind can it be, pointed out in what possible way the cancellation of claim 3 was materially responsive to the ex-

aminer's objection, nor in what way the erasure of that claim could narrow or restrict the claim which was left unchanged.

"With no other changes than those specified, Borsch again submitted his application with the nature of his claims thus specifically emphasized:

" 'The fact that Morck constructs both elements of glass of the same index, while applicant constructs his two elements of glass of dissimilar index, constitutes a distinction between Morck's structure and applicant's structure, which is fundamental and vital.'

" 'By the use of glass of different index, applicant is enabled to provide a construction of bifocal lens in which both faces are, so to speak, smooth; that is to say, a construction in which the small minor lens does not project beyond the plane of the surface of the major lens.'

" 'This construction, which is a very desirable and valuable one in the optician's art, would not be possible were both pieces of glass of the same index, as in such construction the result would be the same as though the whole lens were formed of one integral piece of glass throughout and there would not be two distinct focal points.'

"To this the examiner replied as follows:

" 'The present claim has been considered in connection with applicant's argument. It appears that the terms of the claim cover all of the views shown, but it is believed that the only construction illustrated which would be operative for use in a bifocal spectacle lens is that shown in figures 1 and 2, inasmuch as the difference in refractive power between glass of the lowest refractive power known and glass, or quartz, of the highest power known would not be sufficient to make a practical bifocal lens wherein the difference in magnifying power were dependent wholly upon the different indices of refraction of the glass. Therefore it is believed that applicant would be compelled to depend upon the difference of curvature of the major and minor lenses for all practical effect. Furthermore, it is not considered invention merely to make a bifocal lens wherein the major lens is of a different kind of glass from the minor lens, in view of the fact that the difference in power secured thereby would be inappreciable.'

" 'It is believed that applicant might be entitled to a patent if he were the first to insert in the concavity of a major lens a small or minor lens, and thereby obtain greater security in the junction of the two lenses so that they would be less likely to be displaced by the friction of the spectacle wipers or of accidental contact with surrounding objects. But the Morck patent, cited, shows a small lens inserted in a concavity in a larger lens, the two combined forming a bifocal lens, and having, so far as the firmness of union is concerned, exactly the same advantages as are obtained by the construction of applicant. To make the two parts of different kinds of glass, having different refractive powers, is believed not to be invention in view of the common knowledge among opticians of the uses of the different kinds of glass, and particularly inasmuch as it is believed that in a spectacle the difference in refractive power would be practically insufficient to produce any appreciable difference of focus. It is thought therefore that the claim should be rejected.'

"There is no hint in this that the examiner thought that Morck was using glass of dissimilar index. There is every indication that he thought just the opposite, in so far as the essentials of the invention are concerned, because he doubts the effectiveness of the combination when the minor lens is reduced so much in size. He does think that the Morck patent discloses a small lens inserted in a concavity in a larger lens. He thinks that important only from the standpoint of firmness of union, and decides that Borsch could not claim any invention by reason of that alone. He believes, in view of the common knowledge among opticians of the uses of different kinds of glass, that it is not invention to make the two parts of different kinds of glass having different refractive power; he bases this upon the assumption that in a spectacle the difference in refractive power would be practically insufficient to produce any appreciable difference of focus. Thereupon, without change of specification or claim, in letter or in syllable, the applicant combatted the views of the examiner and made a practical demonstration of the efficiency of his invention; and the necessary inference

from the record is that the examiner receded from his position, for the patent was allowed without further objection.

"Now, from all this, counsel for defendant argue that complainant, because of this reference and the views expressed by the examiner, is estopped from claiming anything disclosed by the Morck patent, and contend that the Morck patent teaches, not only the use of a recess, but also the employment of different kinds of glass having different refractive power. It is doubtful if this contention should be sustained. The patentee firmly stood upon his specification and claim without change. The examiner receded and allowed the patent. It may well be doubted whether any of his objections can operate to narrow the import of either specification or claim. Certainly they could have no such effect upon the use of glass of different index. If such a limitation can be raised, it must be from the disclosure of the patent itself independently of anything said or done in the patent office. Defendant's experts and its counsel then attempt by elaborate and ingenious argumentation to make the Morck patent disclose not only a recess in which the minor lens is embedded, but the necessary employment of different kinds of glass of different index refraction. In my opinion, this effort fails utterly. Neither in specification nor claim is any reference made to such a use, and the inventor must necessarily have considered it of prime importance, if he had it in mind at all. The entire argument is based upon the alleged formation of figure 4 of the Morck patent; and to make their theory consistent experts and counsel are compelled to reconstruct the entire drawing. They first discover a depression where it has at least doubtful existence; and then, to make this depression pertinent, they are compelled to pare away an obvious excrescence upon the face of the same figure of the drawing. Thus they argue that the minor lens, according to this reconstructed drawing, is wholly imbedded in a recess in the major lens, and as it would then be inoperative, unless made of glass of different index from that of the major lens, why, of necessity, they say, glass of different index must have been used. This is not only in defiance of the drawing itself, but of the spirit of the specification as well. The latter specifically seeks to get rid of the sharp horizontal line of separation existing in prior structures. It therefore describes the minor lens as segmental instead of horizontal in outline, and makes it taper to a so-called feather edge at its upper point of contact; its thicker portion being at the lower edge of the glass. If the entire minor lens was to be imbedded, why emphasize the thinner portion at a point of contact, and confess the objectionable thickness at the lower portion? Obviously, if the glass were imbedded, there would be no appreciable edge upon the surface of the major lens, nor would the lens, as a whole, vary in thickness because of the junction of the two lenses. Throughout the entire specification and its accompanying claims, the language aptly describes a minor lens placed upon, and not within, the major lens. No mention whatever is made of any recess or of glass of different index, nor is any function or utility ascribed to either. Clearly neither the drawing nor the body of the Morck patent discloses either recess or the use of different kinds of glass. The drawings are crude, and the examiner appears to have thought that he detected a recess. He suggested this as an objection, and, because of an implied acquiescence in this suggestion, it may be that Borsch and his assigns are estopped to deny that there was a recess of some kind disclosed in this drawing. This consideration, and this only, could have the effect of narrowing the Borsch claim in any degree. Glasses purporting to be made in accordance with the teachings of the Morck patent have been submitted. In them the edge of the minor lens projects distinctly beyond the surface of the major lens, presenting in smaller degree the very defect which Morck was seeking to minimize. If he had in contemplation a recess at all, it is impossible to explain why he did not bury the minor lens completely, and thus fully attain the desired end. The conclusion is irresistible that his invention did not embrace the conception of a recess with a minor lens of different index imbedded therein; but, on the contrary, that his vision stopped with grinding the minor lens at its point of contact to what he terms a feather edge, which should stand out from the surface of the major lens in the smallest practicable degree.

"The disclosure of a recess in figure 4 of the drawings of the Morck patent, if it be a disclosure at all, was purely accidental. It was certainly not appreciated by the inventor. It is well settled that it is no anticipation that by a mistaken showing in the figure of a preceding patent, by the error of the draftsman, the structure of the patent appears contrary to the conception of the inventors and the reading of the patent. Edison Electric L. Co. v. Novelty Incandescent Lamp Co., 167 Fed. 977, 93 C. C. A. 387; Gray Telephone Pay Station Co. v. Baird Mfg. Co., 174 Fed. 417, 98 C. C. A. 353; Beckwith v. Malleable Iron Range Co. (C. C.) 174 Fed. 1001; Brill v. Third Ave. R. Co. (C. C.) 103 Fed. 289.

"'When it is sought to ascertain the state of the art by means of prior patents, nothing can be used except what is disclosed on the face of those patents. They cannot be reconstructed in the light of the invention in suit, and then used as a part of the prior art.' Naylor et al. v. Alsop Process Co., 168 Fed. 911–920, 94 C. C. A. 315.

"'A prior publication, referred to as an anticipation, must be given effect in accordance with what it actually communicates to the public, and expert testimony cannot be received for the purpose of showing that statements therein made were erroneous, and to give it the effect it would have if reconstructed so as to disclose matters which it might or should have stated, but which it in fact did not.' Badische Anilin & Soda Fabrik v. Kalle & Co. et al., 104 Fed. 802, 44 C. C. A. 201; American Thermos Bottle Co. v. Vacuum Specialty Co., 178 Fed. 552, 101 C. C. A. 232.

"The disclosures of the Morck patent, as interpreted by defendant, are at least vague and uncertain, and skilled experts differ radically as to their import. Anticipation must be proved by evidence so cogent as to leave no reasonable doubt in the mind of the court. The defendant has failed to carry the burden imposed upon it. Underwood Typewriter Co. v. Elliott-Fisher Co. (C. C.) 165 Fed. 927; Underfeed Stoker Co. v. American Ship Windlass Co. (C. C.) 165 Fed. 65; Beckwith v. Malleable Iron Range Co. (C. C.) 174 Fed. 1001; Victor Talking Machine Co. v. Duplex Phonograph Co. (C. C.) 177 Fed. 248; Hillard v. Fisher Book Typewriter Co., 159 Fed. 439–441, 86 C. C. A. 469; Mueller Mfg. Co. v. Glauber, 184 Fed. 609–620, 106 C. C. A. 613; Cimiotti Unhairing Co. et al. v. Comstock Unhairing Co. (C. C.) 115 Fed. 524.

"But conceding that because of the suggestion made by the examiner, and the asserted acquiescence of the applicant, complainant is precluded from claiming the recess as a substantive part of the Borsch invention, nevertheless it is not estopped from claiming everything Borsch, Sr., actually did invent, nor from denying the pertinency of the Morck patent as an anticipation, with this exception: That it cannot maintain that the claim of the first patent, in that particular, covers the construction of the Morck patent. National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693–714, 45 C. C. A. 544; Owens Co. v. Twin City Separator Co., 168 Fed. 259, 93 C. C. A. 561; Wayne Mfg. Co. v. Benbow-Brammer Mfg. Co., 168 Fed. 271–279, 93 C. C. A. 573; Vrooman et al. v. Penhollow et al., 179 Fed. 296, 102 C. C. A. 484; Bossert Elec. Const. Co. v. Pratt Chuck Co., 179 Fed. 385, 103 C. C. A. 45; U. S. Peg-Wood, Shank & Leather Board Co. v. Sturtevant Co., 125 Fed. 382, 60 C. C. A. 248; Albright v. Langfeld (C. C.) 131 Fed. 473; Keystone Mfg. Co. v. Adams, 151 U. S. 139–144, 14 Sup. Ct. 295, 38 L. Ed. 103.

"The presumption of validity of the first patent in suit is strengthened by reason of its original rejection on the Morck patent. American Stove Co. v. Cleveland Foundry Co., 158 Fed. 978–983, 86 C. C. A. 182; United States Fastener Co. v. Bradley (C. C.) 143 Fed. 523–529; Hale & Kilburn Mfg. Co. v. Oneonta, C. & R. S. Ry. Co. (C. C.) 129 Fed. 598.

"Let us now consider the defense of anticipation as applied to the second patent in suit. In this discussion we may disregard all the cited references but three. The defendant avowedly relies upon the Newton and Lazarus patents heretofore referred to, and upon that issued to Leon Kokocinski July 28, 1896, for improvements in spectacle lenses. This patent had to do with welding together two sheets of glass, one colored or shaded and the other transparent, so that the upper portion of the lens might protect the eye from light. All that can be claimed for these three patents, cited against the Borsch, Jr.,

invention, is that they refer to the union of different pieces of glass by the action of heat. As we have seen, the Newton patent deals with optical instruments in general, and describes a process not at all adapted to producing the delicate result required in an eyeglass lens, and particularly in a bifocal lens. The Kokocinski patent had, of course, an entirely different object in view; and the Lazarus patent was for the manufacture of achromatic lenses, which, as we have seen, deal with dispersion, and not with refraction. However, it may be freely conceded that the welding or annealing of glass, under certain conditions, was known at the time of this alleged invention, and had been known for many years. Despite that fact no one had ever conceived of the happy expedient of applying this process to the perfection of a bifocal lense, nor, in fact, to any lens, except crudely to counteract dispersion; and the reason for this appears clearly from the testimony. Moreover, the bifocal lens is bi-axial. The two lenses of which it is composed are not concentric. Both must be preserved in their true curvature, and the highest degree of precision is necessary. The comparative minuteness of the parts, and the great delicacy of adjustment required, had created an accepted belief that such a process was impracticable even after its first suggestion by Borsch, Jr. He himself required years of experimentation before success was approximated. The old lens, even as improved by Borsch, Sr., still contained imperfections. Up to this point Canada balsam, or some other kind of cement, had been necessary to hold the lenses together. This was essentially less stable than a glass made integral by fusing. Time alone, together with the slight, but continuous, application of pressure incidental to cleaning, would cause the parts to separate. The cement itself contained imperfections and was subject to disintegration. The fusing process was a distinct advance from the standpoint of clearness of sight, stability, and appearance. By it the presence of the minor lens was rendered still more imperceptible. Therefore the combination of fusion with the prior structure of the Borsch, Sr., patent marked a distinct and important advance in the art. Here, again, I think the defense of anticipation must fail; and the support of this conclusion by the decided cases is so closely allied with the announcement of the principles establishing invention that it is deemed unnecessary to duplicate citations.

"This is a product patent. The thing produced was clearly unknown before, and it is therefore immaterial that the separate features of the invention may be found in the prior art.

" 'It constitutes no anticipation and no defense to a claim of infringement that one or more elements of a patented combination, or one or more parts of a patented improvement, may be found in one old patent or publication, and others in another, and still others in a third. It is indispensable that all of them, or their mechanical equivalents, be found in the same description or machine, where they do substantially the same work by substantially the same means.' Owens Co. v. Twin City Separator Co., 168 Fed. 259, 93 C. C. A. 561; National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693–706, 45 C. C. A. 544; Eldred v. Kirkland, 130 Fed. 342, 64 C. C. A. 588; Knickerbocker Co. v. Rogers et al. (C. C.) 61 Fed. 297; Parks v. Booth, 102 U. S. 96, 26 L. Ed. 54; Potts v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275.

"The presumption of invention is not overcome by the fact that an expert is able to build up the patented device by selecting parts taken from the prior art. Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177; McMichael & Wildman Mfg. Co. v. Ruth, 128 Fed. 706–708, 63 C. C. A. 304; Thomson-Houston Elec. Co. v. Ohio Brass Co. (C. C.) 129 Fed. 378.

"That there was invention in the Borsch, Jr., patent is evidenced and emphasized by the number of patents set up by defendant as anticipations, all of which, where pertinent at all, lack some element which the successful patent they are alleged to anticipate possessed, also by the fact that the defendant has appropriated bodily the substantial structure of the Borsch patent. Schmertz Wire Glass Co. v. Pittsburgh Plate-Glass Co. (C. C.) 168 Fed. 73; Naylor v. Alsop Process Co., 168 Fed. 911–917, 94 C. C. A. 315; Edison Electric L. Co. v. Novelty Incandescent Lamp Co., 167 Fed. 977–982, 93 C. C. A.

387. We must remember that appropriateness and obvious usefulness have an important bearing upon the question of invention; that simplicity does not detract from its merit; that while great utility and extensive use will not alone sustain a patent, nevertheless 'where the question of novelty is fairly open for consideration under the law, the fact that a patented device or combination has displaced others which had previously been used to perform its function, and has gone into immediate and general use, is pregnant and persuasive evidence that it involves invention.' National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693–707, 45 C. C. A. 544. These principles have been forcibly announced in the following cases: Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. Ed. 952; Parks v. Booth, 102 U. S. 96, 26 L. Ed. 54; Loom Co. v. Higgins, 105 U. S. 580–591, 26 L. Ed. 1177; Keystone Mfg. Co. v. Adams, 151 U. S. 139–144, 14 Sup. Ct. 295, 38 L. Ed. 103; Potts v. Creager, 155 U. S. 597–606, et seq., 15 Sup. Ct. 194, 39 L. Ed. 275; General Elec. Co. v. Wagner Elec. Mfg. Co., 130 Fed. 772–778, 66 C. C. A. 82; Perkins Elec. Switch Mfg. Co. v. Buchanan Co. (C. C.) 129 Fed. 134–137; McKay & Copeland Lasting Mach. Co. v. Dizer et al., 61 Fed. 102–104, 9 C. C. A. 382; Doig v. Morgan Mach. Co., 122 Fed. 460–463, 59 C. C. A. 616; Gould Coupler Co. v. Pratt (C. C.) 70 Fed. 622–624; Hardware Co. v. Tabor Sash Co. (C. C.) 178 Fed. 831–841; Engineering Construc. Co. v. McMullen, 160 Fed. 933–938, 88 C. C. A. 115; Albright v. Langfeld (C. C.) 131 Fed. 473–475.

"That interpretation which sustains and vitalizes the grant should be preferred to that which strikes down and paralyzes it. National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 694, 45 C. C. A. 544.

"The court cannot be oblivious to the development that has taken place in the art of bifocal spectacles and eyeglasses as is generally known. The production of a glass effective for far and near vision, compact, stable, enduring, and sightly, was the desideratum long aimed at and but gradually realized. The present high degree of success was first obtained by the complainant company through the patents in suit—a distinct and highly useful advance which has practically revolutionized the art. The acceptance and adoption of the product was immediate and widespread. While the old-fashioned cemented bifocal is still in wide use, because of its comparative cheapness, nevertheless no one who feels able to afford it will accept other than the fused bifocal. I think the conception and successful application of such valuable and elusive improvements rise to the plane of invention as distinguished from mere mechanical skill. While the dividing line between the two is not always sharply defined, nevertheless unyielding strictness should not operate harshly to withhold the reward of merit from marked scientific achievement. The defendant company has made a complete appropriation of complainant's product, and defends itself solely upon the ground of the alleged weakness of complainant's title. This casts upon it the burden of establishing its case to the entire satisfaction of the court. That it has failed to do, and whatever doubt, if any, may exist must be resolved in favor of the recognized presumption of validity.

"It remains only to consider whether these patents are capable of conjoint use, and whether the complainant can maintain its suit upon the bill tendered. Defendant contends that the two patents are inconsistent, in that the first calls for two separate pieces of glass, while this element is absent from the Borsch, Jr., patent as well as from defendant's structure. Each patent is invoked only to the extent that it discloses a distinct step of improvement; that of the first patent narrowed, as contended by complainant, and as conceded for the purposes of this argument, is the employment of glass of different indices of refraction in the combination described. The Borsch, Jr., patent adds the element of fusion as an advance over cement. The complainant owns both features, and it can avail itself of both in the same structure without inconsistency. The first Borsch patent describes a bifocal lens formed of two pieces of glass secured face to face by cement; the second Borsch patent a bifocal lens consisting of a body of glass or similar substance of any refractive power, and a portion of glass or similar substance of different refractive power secured by fusion to the said body of glass or similar substance. Here, again, two kinds of glass enter into the composition of the lens; the two being

made integral by fusion. The one patent supplements the other; the two may be and actually are used in conjunction, and so used, are infringed by defendant's structure.

"The injunction and accounting prayed will be granted."

Decree affirmed.

MEISSNER v. WESTINGHOUSE MACH. CO.

(Circuit Court of Appeals, Third Circuit. March 27, 1914. On Rehearing, May 18, 1914.)

No. 1814.

PATENTS (§ 328*)—FURNACE GRATE—CLAIM—CONSTRUCTION—INFRINGEMENT.

Meissner Patent, No. 529,286, for a furnace grate, claim 5, is: "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." *Held* that, since such claim necessarily embodies means which operate "both grates" to make it a workable combination, it could not be construed as though the swinging grates were the only elements therein, and hence was not infringed by a structure having swinging grates operating separately and independently.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by William F. Meissner, as administrator, against the Westinghouse Machine Company. From a decree in favor of defendant (213 Fed. 485), complainant appeals. Affirmed.

F. W. Winter, of Pittsburgh, Pa., for appellant.

Synnestvedt & Bradley, of Philadelphia, Pa., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the plaintiff, William F. Meissner, administrator of Julius H. Meissner, to whom was granted patent No. 529,286 of November 13, 1894, for a furnace grate, by bill in equity charged the Westinghouse Machine Company with infringing the fifth claim thereof. That court held infringement was not shown. From a decree dismissing the bill, plaintiff took this appeal. After a very full and helpful argument by counsel, and after due consideration by this court, we have reached the same conclusion as did the court below. Its opinion so well reflects our views that any present opinion by us must be but a restatement in changed form of what that court has already said in substance. We therefore restrict ourselves to briefly summarizing our conclusions.

First. The art of providing inwardly and downwardly stepped fire-beds for boilers was a well-developed one, and the field of inventive effort to which this patent pertains was limited in sphere.

Second. The use of a downward-swinging pivoted section of such

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

grates at inward and lower end of fire-beds to allow clinker removal was common.

Third. The use of an upward-swinging pivoted section of such grates at the inward and lower end of the fire-bed to hold back the fuel mass was common.

Fourth. The device of Meissner consisted in coupling both these swinging grates together so that they could be simultaneously operated, one upwardly and one downwardly, by the same mechanism.

Three of these features, viz., the upward-swinging section, the downward-swinging section, and the single means for simultaneously operating them both, are disclosed in Meissner's specification, viz.:

"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*."

These three elements were embodied in claim 5, here in controversy, 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."

In effect we are now asked to construe this claim as though the only elements therein were the swinging grates. This we cannot do, first, because the claim embodies, and to make it a workable combination must embody, means which operate "both grates"; and, secondly, because to give the claim such construction would be to make it substantially the same as claim 15, which was rejected:

"(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."

Construing the claim as we do, it follows that the defendant's structure, which has swinging grates operating separately and independently, does not infringe.

The decree below is therefore affirmed.

On Rehearing.

PER CURIAM. This case has been reargued and has been re-examined by the court. This re-examination has served to strengthen our conviction that the case was rightly decided by the court below.

GENERAL ELECTRIC CO. v. AMERICAN BRASS & COPPER CO.

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

No. 164.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—LAMP SOCKET.

The Sargent patent, No. 665,582, for a lamp socket for electric lights, is valid, but must be narrowly construed, and limited to the combination described and shown. As so construed, *held* not infringed.

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

Suit in equity by the General Electric Company against the American Brass & Copper Company. Decree for defendant, and complainant appeals. Affirmed.

See, also, 209 Fed. 237.

This is an appeal from a decree of the District Court for the Southern District of New York dismissing the bill based on letters patent No. 665,582 granted to Howard R. Sargent, January 8, 1901, for a lamp socket.

The claims in issue here (1, 11 and 15) were held valid and infringed in General Electric Co. v. Freeman in the District of New Jersey. The decision of Judge Cross was filed May 15, 1911, and is reported in 190 Fed. 34. It was affirmed by the Circuit Court of Appeals for the Third Circuit November 6, 1911, 191 Fed. 169, 111 C. C. A. 646, and has been followed in the Second Circuit, where preliminary injunctions have been granted.

On the other hand Judge Killits in the Northern District of Ohio decided June 11, 1913, General Electric Co. v. Yost Electric Mfg. Co. (D. C.) 208 Fed. 719, in an action brought by the complainant against the Yost Electric Company, who manufactured the sockets in controversy, held that the patent must be narrowly construed and that, as so interpreted, the defendant did not infringe and that the complainant was guilty of laches in failing to assert its rights. An appeal from this decision is now pending in the Sixth Circuit.

Samuel Owen Edmonds, of New York City, for appellant.

Owen, Owen & Crampton, of Toledo, Ohio (Robert H. Parkinson, of Chicago, Ill., and Wilber A. Owen, of Toledo, Ohio, of counsel), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). The patent in suit is for an improvement in lamp sockets for electric lights. The sole object of the patentee, so far as the claims in controversy are concerned, is to provide insulation for the cap of the shell. This consists of ordinary insulating fiber made to fit between the metallic cap and the upper portion of the insulating base of the socket to prevent current from flowing through the metallic cap. In this way the danger of fire and of shocks to persons handling the shell is avoided. In other words, at a point where experience has shown that danger is to be apprehended, insulating material has been interposed. This would seem to be an obvious thing to do and within the knowledge of competent electricians, viz., to insulate an exposed current. But the patentee asserts that the difficulty of securing the lining in position arises from the fact that ordinary securing means would pass through the cap and

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

lining "and would defeat the very object for which the lining is interposed." The claims in controversy are as follows:

"1. In an article of substantially the character described, the combination with a cap provided with interior retaining means, of an insulating-lining made yieldable so that it can be forced over the retaining means, which lining is held thereby in the interior of the cap."

"11. In an article of substantially the character described, the combination with a cap, of projections extending in the interior thereof, and an insulating-lining adapted to be sprung over said projections, said lining being held by said projections within the cap."

"15. In an article of substantially the character described, the combination with a cap, having a hole in its crown for the passage of the wires leading to the lamp, of projections extending in the interior of the cap, and an insulating-lining having a hole registering with the hole in the cap, said lining being held by said projections within the cap."

So far as prior decisions are concerned the situation would seem to be that these claims have been held valid by the District Court of New Jersey and by the Circuit Court of Appeals of the Third Circuit and that the identical lamps here in issue have been held not to infringe by the District Court for the Northern District of Ohio and the District Court for the Southern District of New York. The question of patentability is a close one, but in view of the presumption arising from the grant of the patent and the decisions in the Third Circuit, we think it our duty to resolve any doubt there may be upon this question in favor of the complainant. The only question remaining, therefore, is one of infringement.

It is manifest that the patent is not entitled to a broad construction. The so-called problem was not a complex one. It was simply to insulate the cap by placing a non-conducting lining therein and holding it in position within the cap. There was nothing novel in using insulation for this purpose, its use was universal where there was danger of short circuiting and diversion of the currents. The material for such insulation was well known and the only difficulty about its use was how to hold it in place. If the complainant has a particularly advantageous way of doing this it may be able to hold a monopoly in its use, but it cannot prevent others from using a different method of accomplishing the same result. The specification and drawings show clearly what Sargent's method is. He says:

"As shown in Figures 1 and 3, the arms *O* are formed integral with a yoke *Y*, which is located within the interior of the crown of the cap. As shown in Fig. 2 nozzle *Z* is provided with an interior perforation for the passage of the wires *I*, which is the opening in the cap above referred to, and on one end is a sleeve *L*, of reduced thickness which fits in the central perforation of the yoke *Y*."

It is not pretended that the defendant uses this construction. It constructs a hollow bead extending outward around the cap and springs the insulating fiber into it. This is not the patented method and no one pretends that it is. It is only when the claims are so broadened that they include equivalents that infringement is established. We are clear, in view of the state of the art and the well-known methods of guarding against live wires, that the claims must be confined to

the combination described and shown and as so construed the defendant does not infringe. It is unnecessary to consider the other defenses of lack of novelty, laches and res judicata, the latter not being pleaded.

The decree is affirmed.

G. W. J. MURPHY CO. v. METAL STAMPING CO.

(District Court, E. D. New York. May 8, 1914.)

1. TRADE-MARKS AND TRADE-NAMES (§ 58*)—INFRINGEMENT.

Where plaintiff's registered trade-mark placed on metal curtain fasteners for carriages and automobiles was merely a circle surrounding the letter "M.," and it appeared that while complainant claimed to have used the mark since 1909 it had filled certain special orders for large customers with goods marked by a circle without the "M." or with a circle and dot in its place, it was not entitled to restrain defendant's alleged infringement of the mark by the use of a circle and dot.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 66, 67; Dec. Dig. § 58.*]

2. PATENTS (§ 328*)—VALIDITY—PATENTABLE NOVELTY.

Murphy patent, No. 853,206, for curtain fasteners for carriages and automobiles, consisting of a rotatable head with two grooves separated by sharp radiating ridges formed by grooves, the other of the two parts having a convex portion adapted to engage and fit into the grooves so as to hold the head in place when turned, *held* invalid for want of patentable novelty.

3. PATENTS (§ 26*)—INVENTION—APPLICATION OF OLD DEVICE TO NEW COMBINATION.

Invention may lie in the application of an old device to a use in combination with another old device, where the result forms a complete device of itself, and where the novelty is found in the application of the two devices as parts of one producing a new result or the old result in a new way.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. § 26.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 68*)— TRADE-NAMES—UNLAWFUL COMPETITION.

Where complainant's patent for a curtain fastener for carriages and automobiles was invalid, and complainant had permitted other manufacturers to place exactly similar devices on the market without distinguishing labels and without any means of warning the public that the idea belonged to complainant, it could not maintain the suit for unlawful competition in the sale of similar fasteners in absence of proof that they were sold as and for complainant's fasteners.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 79; Dec. Dig. § 68.*]

In Equity. Suit by the G. W. J. Murphy Company against the Metal Stamping Company, for infringement of a trade-mark, a patent, and for unlawful competition. Decree for defendant.

William R. Davis, of New York City, for plaintiff.
William A. Megrath, of New York City, for defendant.

CHATFIELD, District Judge. The present action is complicated by the joinder of charges of unfair competition, brought in this court because of diversity of citizenship of the parties, with allegations of

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

infringement of a trade-mark registered November 21, 1911, and with allegations of infringement of a patent issued to George W. J. Murphy, on the 7th of May, 1907, No. 853,206, upon an application filed April 2, 1906. These letters patent have been duly assigned to the plaintiff company.

[1] The registered trade-mark is merely a circle surrounding the letter "M," and the application for registration states that it has been used since 1909. This trade-mark was taken out by this company, and has been used by them since that time upon its goods generally; but it also appears by the testimony that for certain large customers and to fill certain special orders the goods have been placed upon the market without the "M," and with a small circle or dot in its place.

[2] The articles, about the sale of which the present controversy has arisen, are curtain fasteners, and the Murphy patent states that they are "for carriage curtains and the like." The testimony shows that for at least 20 or 30 years fasteners of sheet metal or brass, with a button of ovoid or irregular shape, and capable of being turned so that the longest axis will rest across or at right angles to the long sides of the buttonhole, or opening through which the button is passed, have been used upon carriage covers, and in similar places, like baby-carriage hoods, awnings, etc. Varieties of attachment by rivet, by a single screw, by a plate attached with smaller screws or by prongs (penetrating the material if cloth or leather and bent up on the underside), are old, and are selected merely according to the place in which the button or fastener is to be used. An eyelet or buttonhole has always been provided, whether for the insertion of a round button head or for a turnable head with one axis longer than the other. The use of the ovoid or long head made possible and desirable the employment of a metal or durable eyelet instead of the flexible buttonhole for a round button. Whether or not this eyelet should have a back plate, and whether it should be fastened by prongs through the curtain, to be bent over this back plate or after insertion through holes in the back plate, or in fact whether the eyelet should be sewed or crimped to the curtain, like grommets, were details of construction involving no novelty or invention and chosen because of their convenience or applicability to the use desired.

Larger sizes and greater numbers of covers, through the use of the automobile, motor boat, etc., have increased enormously the number of curtain fasteners needed in the past few years. Another need arose from the excessive strain due to the speed of the automobile and the constant flapping or working of the curtain, with the resultant wear and strain upon the button. Also the advantage of fastening two or three curtains with one button, and resisting flapping strains from all at the same time, has been met by elongating the shank or shaft of the fastener. The difficult circumstances under which curtains were hastily applied, and the use of automobiles at night, made desirable a fastener or button which, with careless or hurried handling, would assume a fixed position, and would, if only partially turned, spring into a locked position, or else return to the point of starting, thus avoiding the liability of being placed in an insecure position when strain was

put upon the curtain by movement of the machine or by wind, thus allowing the curtain to come off from the button, or allowing the button to be forced back to the starting position.

A button that could not, without extreme care, be left at an intermediate position, would be more likely to be properly placed by one in a hurry. Some such considerations led various manufacturers, including the defendant, to place upon the market fasteners with a turn button, for use upon carriages (before the great demand from automobile manufacturers arose) under what have been put in evidence as the Reed & Packard patent, No. 43,928, August 23, 1864, the Snell patent, No. 393,592, November 27, 1888, and Curtis patent, No. 289,991, December 11, 1883, in which the stud has, upon the face against which the button presses, transverse grooves or notches into which a ridge or rib on the lower side of the turn button will be forced by a spring in the head or on the shaft of the turn button, and the Curtis patent, as early as 1883, had the metal eyelet for use in strengthening the buttonhole or slit in the curtain.

It was evident that in all such devices the pressure of the curtain or eyelet, whether constant or intermittent when flapping, is exerted against the spring which holds the button head into the notches, or against the end of the stud, and if this pressure be sufficient to lift the head out of the notch, a button head that will turn easily may, under such pressure, be worked from one position to the other by the strain upon the curtain. This difficulty could not be met by increase in the strength of the spring, nor by any intricate method of locking, because of the small size of the head of the button, which has to be turned with the fingers, and the need of making application easy. In the generally accepted form of button, therefore, two depressions or grooves are now made in the face of the eyelet into which the ends of the rib or lower side of the button head will fall or rest, when the button head is turned across the eyelet or in locked position.

It is manifest that the necessity (as well as the means) for causing the button head to assume a certain position, under all circumstances, as a guard against carelessness in operating, is distinct from the necessity or means of holding the button head in the locked position. But the strain of the curtain may produce the tendency to turn back to the unlocked position, whether the possibility of so doing arises from carelessness in placing the button or from the ability of the wind pressure to lift the button head against the spring holding it in the groove.

The use of means to always seat the button head in a proper position is protection against carelessness in setting when the wind pressure occurs. The means for locking or preventing the head from turning is a safeguard against the results of the wind pressure in its tendency to turn the button head, even though the button head may have been properly placed at the outset. The grooves or depressions in the eyelet have the effect of holding the rib or convex portion of the under surface of the button head more firmly against turning from the crosswise or locked position, in direct proportion to the increase in pressure of the curtain with the eyelet against the button head. The renewal of such pressure when a curtain is flapping produces but a succession

of similar strains, if these grooves and depressions in the eyelet are large enough so that the button head must each time the curtain flaps, find itself within the depressions of the grooves. A proper proportioning of the parts allows the same protection and accomplishes these results even when the shank or stud of the button is lengthened, and provides for two or three curtains to be held by the same fastener, whether one, two, or three of the curtains is in place.

The evidence shows that a fastener, made according to the specifications and drawings of the Murphy patent, will meet the requirements above set forth, and it was with those purposes in view that Murphy perfected the form of fastener on which he applied for a patent. His application was immediately rejected in the patent office, upon certain patents which will be considered in connection with the prior art, viz., Curtis and Snell (which have been referred to) Pomeroy, No. 335,306, February 2, 1886, and Steffey, No. 373,860, November 29, 1887.

The drawings of the Murphy application, as well as the language of his specifications, show that he intended to secure precautions against careless use in placing the button, by making it impossible, without great effort or care, to leave the button set in any position other than unlocked (so as to pass through the eyelet) or locked across the eyelet. After correspondence with the Patent Office, he amended the description of his structure by specifying grooves in the end or head of the stud, of greater diameter than the smaller dimension of the eyelet and of the stud itself, but let into the end or face of the stud only to such an extent as to cause, by the intersection of these transverse grooves, ridges or curved intersections radiating from the center of the stud to the highest point of its surface, and from these high points again immediately falling away to the intersections of the outside of the stud with the bottom of the groove. He also described a distinctly convex lower face for the turn button, and as the diameter of the grooves was greater than the thickness or small dimension of this turn button, it is evident that the turn button would come to rest only at the bottom of a groove, when not bearing upon one of the so-called ridges. Upon these, it would not ordinarily remain because of the angle of the ridge and the pressure of the spring.

Murphy also included in his original application a claim covering this form of fastener, having an eyelet with the two grooves on opposite sides of the short diameter of the opening. No discussion of that claim in particular was had, and the Patent Office finally issued the Murphy patent with five claims, of which we need here consider but claims 1 and 5, although the remaining three are exactly the same as claim 1, so far as the devices of the defendant and the questions of this case are concerned.

Claim 1. "As an article of manufacture, a curtain fastener comprising a male and a female member, said male member formed in two parts one rotatable upon the other, one of said parts provided with two grooves separated by sharp radiating ridges formed by said grooves, the other of said parts having a convex portion adapted to engage and fit said grooves."

Claim 5. "As an article of manufacture, a curtain fastener comprising a male and a female member, said male member consisting of a base provided with two grooves of substantially semicircular cross section separated by sharp radiating ridges formed by said grooves, a rotatable stud provided with

a convex portion adapted to engage said grooves, and a spring adapted to hold said stud against said base, said female member provided with an aperture adapted to receive said male member, and two diametrically opposite depressions adapted to receive two corners of said stud."

It appears from the testimony that the Murphy Company has always manufactured its output of brass, with a cast base or plate to be attached with some form of screw to the framework of the carriage, automobile, or boat. The button head has also been cast and shaped with a die, and in the year 1909, the circle with an inclosed "M" was struck upon each side of the button head, and this device filed as a trade-mark in 1911. There has been, naturally, no attempt to patent the use of any particular material, and for a number of years, according to the testimony, other manufacturers have made fasteners from stamped brass, or with partially stamped and partially struck parts, under license from the Murphy Company, and have placed these devices upon the market without the Murphy trade-mark. In addition, as has been stated, the Murphy Company have filled orders, since the registering of their trade-mark, in which the "M" has been omitted from the circle. Some of the companies (now manufacturing under licenses from the plaintiff) and the defendant company have had *brass* turn buttons or fasteners upon the market, of the old Snell or Curtis patterns, for many years. When the defendant company first produced a turn button with a brass head fastened by a rivet to the shaft, or in shaping the flat head of the old Snell and Curtis buttons to allow opportunity for easy operation with the finger tips, a certain mark from the machinery used, which furnished an additional grip for the fingers, was left upon the head. After the Murphy Company used, in the same position, the circle with the letter "M," the defendant changed its die, and for a short time used a circle with a dot in the center, very much similar to that which the Murphy Company has subsequently used in making up orders for other customers.

The Murphy Company has never taken out a design patent, and while for a time the use by the defendant of the circle with a dot caused some resemblance to the Murphy trade-mark or button, yet the discontinuance of the use of this circle, and the fact that the Murphy Company have also put goods upon the market with a circle without the "M" make it impossible to hold that there has been any actionable infringement of trade-mark, even though, while the defendant was using the circle, sufficient confusion might have been caused to require the defendant to cease.

On the question of unfair competition, the case rests upon two charges: First, that the defendant imitated the Murphy product as soon as it appeared to be successfully meeting the demand of the trade; and, second, that the defendant's goods have been actually sold to supply a call for the Murphy fasteners.

Taking up the second point first, it is shown that the trade has come to recognize the Murphy fastener, or the Murphy type of fastener, and that the Ford Automobile Company is calling for the Murphy type of fastener as a specification for the curtain fasteners for its enormous output of automobiles at the present time, while the Packard

Company, which previously had used a more expensive form of fastener, is now also using fasteners of the Murphy type.

This so-called Murphy type includes a grommet or eyelet, with the depressions or notches in the line of the shorter diameter, and a button having a convex undersurface to rest at each end in the grooves of the eyelet, with the grooves upon the top of the stud of larger diameter than in the old Climax or Perfection button, and with the two grooves forming by their intersection a more or less crescent-shaped ridge, up to the highest point or shoulder, at substantially 45 degrees between each permanent resting place.

Leaving the question of unfair competition until it is seen what features of this fastener the defendant has the right to use, it will be necessary to take up the question of the patent and consider first the matter of infringement.

The defendant's button is made entirely of stamped metal, but adapted for application to the same sort of surfaces as the solid fastener of the plaintiff. The head or turn button part of the fastener in the defendant's structure is substantially like the plaintiff's head, but with more rounded corners like the old fasteners; and when the defendant was using tools leaving a mark upon the side of this button, or was impressing a circle with a dot thereon, the resemblance of the two fasteners was even more complete.

The underside of the button heads of the two fasteners is substantially the same, and the height of the stud is shortened or lengthened according to the needs for fastening one, two, or three curtains. The only point of difference which is urged by the defendant, from the standpoint of infringement, is in the shape of the high points or ridges and the sharpness of the declivity or edge of the intersections leading thereto.

It is obvious that in making a structure of stamped brass, the bends in the material cannot be so abrupt, nor the edges of a bent-over surface left as sharp, as in a cast structure. The wear of the parts in turning decreases the sharpness of such an edge in a stamped fastener more than in the cast fastener. The defendant's buttons, because of this difference, can with less difficulty be set at some point other than in the grooves where they are intended to remain. Either from carelessness or by design the button can remain at substantially the 45 degree position until it is dislodged. But it is evident that the pressure of an automobile curtain or the flapping of the same would have the same effect as in the solid button, and that the head, when removed from immediate contact with the top of the stud, will turn to either one or the other of the groove positions, because of the greater room for exertion of the force of the spring with the large grooves than if the top of the stud were flat and the resting places broad between the two grooves.

The eyelets of both parties are substantially the same except for very slight differences in the shape of the grooves and the fact that some of the defendant's back plates are perforated. Some of the fasteners made by the plaintiff, through poor workmanship or defect in the metal, will allow the button head to stand at practically the 45 de-

gree position, when the fastener is not subjected to the pressure of the curtain. But there would seem to be no difference in actual use, and no apparent merit in the claim of noninfringement if the patent is valid.

The defendant has offered upon the question of anticipation a number of the old so-called Perfection fasteners of its own manufacture and the old Climax fasteners made under the Snell and Curtis patents. Also certain other fasteners of similar type, put upon the market by other firms prior to the date of the application by Murphy to the patent office have been shown.

In so far as the question of invalidity from lack of novelty raises precisely the same differences, we need not consider these questions of anticipation by themselves. It is evident that the use of a brass eyelet with a back plate, of an ovoid button head, with a horizontal groove or mark for the finger grip, of a stud and button (made so as to pass through the eyelet in its longest diameter, but unable to turn in the shorter diameter of the eyelet), and the adaptation of these devices to the different needs of attachment, were all old. The defenses of anticipation and lack of patentability would be sufficient if any claim of patentability were based thereon. But as to the question of patentability itself, the alleged novelty of the idea used in changing the old Climax or Perfection button into the button described in the Murphy patent, and the precise form of button which is shown by the claims of the Murphy patent, must be considered.

[3] Claim 5 of the Murphy patent differs from claims 1 to 4, as has been said, only in the use of the eyelet with grooves or depressions, in combination with a fastener such as is described in the first four claims. Sometimes invention may lie in the mere application of an old device to some use in combination with another old device, where the result forms a complete device of itself, and where the novelty is found in the application of the two devices as parts of one complete means for producing the new result or the old result in a new way.

In the earlier part of this opinion we discussed the divisibility of the device described in claim 5 of the Murphy patent, from the standpoint of provisions for bringing the head to certain positions, and to come to rest in the grooves at those positions, as distinguished from the means for holding the head in a fixed position after it had come to rest. So far as holding the head in the fixed position by means of the eyelet is concerned, when outward pressure is applied by the eyelet to the turn button head, there would be no novelty in describing a combination of the eyelet with one head, which can be turned by certain means, rather than with a different head, which can be more easily turned to the position where it is to be held, or can be brought to that position by a greater number of means. In other words, the eyelet with the grooved depressions could be used with the Climax or Perfection buttons, and if we leave out of consideration the question of turning a Climax or Perfection head into the grooves, no more invention is needed to keep the Climax head therein than to keep the Murphy head. Recognition of the fact that wind pressure upon automobile curtains makes it desirable to have a head which will stay fixed is but a recognition of an

old principle, no matter what form of button head may be used. This idea was expressed definitely, for exactly the same purpose, with exactly the same performance of function, and with the use described in exactly the same way, in the Steffey and Pomeroy patents previously mentioned. In the Pomeroy patent the interference of the groove or ring with the turning of the button, and the pressure of the eyelet or ring itself, furnishes the identical situation presented with the use of the Murphy device, when the curtain pulls against the button head. But in the Steffey patent we have the additional recognition of the locking principle furnished by the pressure of the curtain against the button or head, which holds a metallic eyelet in such position that the head cannot turn out of a groove or slot. To use the Steffey device to accomplish exactly the same purpose, and to perform precisely the same function in the same way, is but an aggregation of an old shape of eyelet, made in the precise method described by Steffey, to produce the same results covered by his patent and that of Pomeroy.

So far as claims 1 to 4 are concerned, they are not different in this respect, even assuming that they, as well as claim 5, describe the Murphy device, and we must therefore pass on to the claim of novelty, which seems to have satisfied the Patent Office and to have secured the allowance of the patent.

It has been pointed out by the defendant that the plaintiff's turn button is not forced out against the spring by the so-called ridges, but rather by the ascending crescents or intersections, and that as soon as the button reaches the ridge, it immediately passes over and starts down to rest in the other groove. The Murphy patent as finally allowed by the Patent Office speaks in all the claims of "sharp radiating ridges," and it is evident that what has been referred to as the ascending crescent intersections may be called "radiating ridges," but that the long slopes to the outside of the stud are not "radiating ridges" in any sense of the term. When the button head is being turned in one direction, the elevation is not caused by the long outside ridges or slopes, but by the intersecting crescents, which are only one side of the ridge. This variance need not be deemed material, for the purpose and description of the so-called "radiating ridges" is so plain and definite, in so far as any novelty was found by the Patent Office, as to make the meaning of the claims plain, and to make it apparent that the defendant's structure, as well as those of the manufacturers operating under licenses, make use of the principles set forth in the claims as allowed, and that the changes from the Climax and Perfection fasteners have been based upon this principle.

It is simply what has been previously described as the use of a groove of large enough diameter to insure intersection to the summit of the elevation at each corner between the sides of the grooves, and with the necessary corresponding falling away on either side of this summit, so that the spring may easily bring the button head to rest in the groove, and so that there will be no extensive support for the button head upon the top of these ridges or summits. It will be seen from this standpoint that whether the lower side of the button head shows in section a convex curve for its outer surface, or whether it

shows in section substantially a V, would make no difference. It would be convex as called for in the patent, for the purpose desired, in either form. But the use of such ridges or grooves was novel only in that it had not been found necessary to make the old form of button fastener in such an exact manner for holding carriage curtains; and, when the need for this fastener came with the automobile, the application of means to meet the need, was not the discovery of a new means, but merely the recognition that the need was the same as one which had been previously known, and which probably could be traced through many arts. But the Patent Office cited only the patents which had been granted with reference to button fasteners, and it now appears that the patent was issued without actual consideration of other patents relating to appliances for harness and carriages, not to speak of other arts in which precisely the same need of protection against the same sort of strain was met in exactly the same way. The patent described a device which any one had the right to use at the time the Murphy application was filed.

The Quickel patent No. 484,746, October 18, 1892, was for a whiffletree end, in which the stud or shaft of the fastener was made to carry the pull of the trace, and a turn button head was held in place by a spring within the fastener. This head was so arranged that the longer diameter of the turn button head would pass through the slit in the trace, and then, upon being turned across this slit, would force into contact with the stud, against the resistance of the spring in question, sharp ridges (radiating at a right angle from the center of the shaft on which the turn button was mounted). These two ridges met diametrically opposite sharp ridges upon the part of the stud carrying the spring, and thus there was no place where the turn button head could come to rest except when one of these ridges was down in the groove, which would set it in one or the other positions of rest.

This idea of Quickel is but a modification of a much older patent which, strange to say, much more nearly pictures the button head of the plaintiff and defendant in suit, and suggests exactly the so-called ridges and grooves of which advantage can be taken by the pressure of a spring inside of the head, and in which the radiation of the ridges is but a necessary result or an immaterial feature of their construction. In other words, the patent to Van Wagner, No. 96,852, November 16, 1869, avoids the inconsistencies contained in the use of the words "sharp radiating ridges" which the Patent Office insisted upon in the case of the Murphy patent, but does present precisely the same means of procuring the same result and to resist an exactly similar strain. This Van Wagner patent is, again, for a device called a whiffletree hook, for use upon a carriage or wagon, to provide a head which shall slip through the long dimension of the slit in the end of the trace, and, by turning the head to a right angle, will leave that head across the trace, to stand the whipping strain caused by the back and forth movement of the whiffletree or evener bar, and accomplishing the certainty of holding the head of the turn button in one or the other of the grooves, by making the ascents sharp and the diameter of these grooves greater than the thickness of the button head in its smaller dimension.

This is precisely the idea of the Murphy patent, and while great commercial utility, great practicability, and great advantage is evident in making the old form of carriage button in this better and more certain way, yet the necessity which required the more accurately and certainly operating device cannot furnish novelty or patentable invention to the use of well-known means for accomplishing that result, merely because of immediate recognition by the public that the means does accomplish the result.

As has been said, there are probably other arts in which exactly the same principles have been used to produce exactly the same result. The patent to Booth, No. 286,770, October 16, 1883, which was also not considered by the Patent Office, was for a collar button, and shows the same idea of inserting the button head through the buttonhole and then securing it by turning it at a right angle and by having two radiating or intersecting grooves, which necessarily would form radiating or intersecting ridges in the head of the stud, and with these grooves of sufficient diameter to allow the button head to come to rest only at the bottom of one or the other of the grooves.

These conclusions bring us to the determination that the Patent Office could not have found patentable novelty in the Murphy application, if they had been considering anything except the turn buttons which had been available for use upon carriages, and, while we must presume that the Patent Office took into account and examined everything in the prior art, we can only assume that this was done by finding that their action was erroneous if they failed to cite such patents as Van Wagner, Quickel, and Booth against the Murphy application.

It appears from the record, further, that two applications for whiffletree fasteners of similar type had been rejected and abandoned, viz., J. W. Bishop, September 8, 1864, and Lucius Jordan, October 4, 1866, which were rejected upon the spring catch button patent of Reed & Packard, No. 43,928, August 23, 1864, and which show that even earlier than Van Wagner, the ideas made use of by Murphy were known in an analogous art.

These determinations upon the question of invalidity dipose of the points raised by similarity of the devices in question, and the other points of resemblance are plainly not patentable, nor included in the Murphy claims.

[4] But to return to the question of unfair competition, it is charged that the similarity of the device is an evident attempt to copy the Murphy button, after acquiescence by the public, and after recognition thereof as a type of commercial article. In so far as the Murphy button was an adaptation of the old form of button to the use of an automobile, by embodying the precise means of accomplishing a certain bringing to rest of the button head through employment of a type of groove which would produce that result, any manufacturer would have the right to do the same, in the same manner, unless the Murphy patent were valid.

This immediately removes many of the questions of so-called imitation. A number of exhibits have been introduced in the case, about

which litigation seems to have been previously inaugurated, and most of which are now manufactured under some sort of a license.

If the Murphy patent is invalid, then the licensing of other manufacturers to place upon the market exactly similar devices, without distinguishing labels, and without any means of warning the public that the idea belongs to the plaintiff, would be like the publication of a book without the notice of copyright. To place a label upon a box containing a gross of fasteners, and to label that package with a different name than that used by the Murphy Company, with a statement merely of the date of the patent, but with no reference to the name of the patentee, would be sufficient to warn tradesmen and dealers who were handling the unbroken package that some patent existed. But button fasteners, when applied to any automobile, would given no notice either of the existence of an alleged patent nor of any particular kind of button fastener other than a brass fastener of the type placed upon the market by a number of different dealers, and generally being an adaptation of the older brass fasteners previously in use, unless each button were stamped with the patent notice.

The Murphy patent made it possible to call fasteners of this shape "Murphy" fasteners, in the same way that they could have been distinguished by being called brass fasteners, if some one could have obtained a patent for making such fasteners of brass. But unless bearing a distinctive mark like the Murphy trade-mark, or some distinctive feature which had become known to the public as the property, that is, the commercially available idea, of Murphy (such as the depressed groove would be if this had been original with him), there is nothing about the so-called Murphy type of button fastener which renders it the exclusive property of the Murphy Company, or which would entitle them to a decree on the ground of unfair competition, merely because of the resemblance of the article and apart from the rights under their alleged patent.

As to sales at the store of the defendant, it is evident that the Murphy Company did not attempt to put stamped fasteners on the market except through their licensees. It is evident that the defendant company previously purchased fasteners from the Murphy Company, and that their catalogues have since the issuance of the Murphy patent shown what they called the New Standard Curtain Fastener, which are of the so-called Murphy type. In the particular sales on the 19th and 20th of April, 1911, by a clerk of the defendant company to a representative of the plaintiff, the difference between the versions of the two men as to the statements used by the clerk becomes substantially immaterial. If the defendant had a right to sell only fasteners made by the Murphy Company, to some one who wished a genuine Murphy fastener, but did have the right to sell any fastener of the so-called Murphy type, whether made by the defendant or by other persons, to any one who was not deceived into thinking that the fastener was made by the Murphy Company, no issue remains. The representative of the plaintiff was asking for what he considered Murphy fasteners, that is, fasteners made under the Murphy patent. The defendant's representative was selling a so-called Murphy fastener or Murphy type of

fastener made by themselves. But there seems to have been no actual misrepresentation or deception, and no statement by the clerk that the fasteners were made by the Murphy Company. The case therefore does not fall in any aspect within the radius of an action for unfair competition. The claims of the patent cannot be held valid for the use of an eyelet with grooves together with a turn button fastener, nor for the use of a fastener with a turn button head of the Van Wagner type, nor would there seem to be any actionable use of anything which could be confused with the Murphy trade-mark since the registry of that trade-mark. Prior to that time the benefit of the ownership of the device (a circle with a dot inside) by the plaintiff, has been completely nullified by the testimony that goods bearing this device had been furnished to other customers for sale in the open market, and by the fact that the use, if even in imitation of the Murphy article, has been discontinued and equitable action is unnecessary.

The defendant may have a decree with costs.

TRUSSED CONCRETE STEEL CO. v. CORRUGATED BAR CO.

(District Court, W. D. New York. September 8, 1913. On Rehearing, March 10, 1914.)

1. PATENTS (§ 129*)—SUIT FOR INFRINGEMENT—ESTOPPEL TO DENY VALIDITY OF PATENT.

   Knowledge by a corporation of the ownership of a patent by an assignee of the patentee is not alone sufficient to estop it from contracting with such patentee for the use of a later improvement made by him, or for his services, or from denying the validity or narrowing the scope of the earlier patent when sued for its infringement by an article made by it under a patent to another.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 182½–186; Dec. Dig. § 129.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT.

   The Forsyth patent, No. 862,897, for a process of making expanded sheet metal and for the product is of narrow scope and as so construed, *held* not infringed.

In Equity. Suit by the Trussed Concrete Steel Company against the Corrugated Bar Company. On final hearing, and on rehearing. Decree for defendant.

Chappell & Earl, Fred L. Chappell, and Merle Smith, all of Kalamazoo, Mich., for complainant.

James A. Carr, of St. Louis, Mo., and Kenefick, Cooke, Mitchell & Bass, of Buffalo, N. Y., for defendant.

HAZEL, District Judge. Suit has been brought on patent No. 862,897, for expanded metal, granted August 13, 1907, to William D. Forsyth, assignee to the complainant, the Trussed Concrete Steel Company, and the bill alleges that the defendant, the Corrugated Bar Company, has infringed the claims for process and product which read as follows:

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

"(3) The process of forming expanded metal which consists in slitting the same along longitudinal lines so as to form parallel bands connected by tongues split through their bases, and expanding the material.

"(4) An expanded metal comprising a series of longitudinal members, and a series of ties connecting the same, each tie formed of two parts connected at a line midway between the main tension members, all the members being integral."

"(6) An expanded metal comprising longitudinal members, and a series of ties between adjacent longitudinal members, each tie formed of two parts united at their ends."

The character of the product and the process for producing the same sufficiently appear from the wording of the claims quoted. The expanded sheet metal produced by the complainant, in which the outer longitudinal rib is extended beyond the surface of the sheet, an element not claimed or described in complainant's patent, was known commercially as "Hy-Rib," and was ordinarily used as a substitute for wooden lathing in the construction of houses or partitions. The defendant company initiated negotiations with Forsyth, the patentee herein, for the development of an improvement in sheet metal designed for such uses and for reinforcing concrete, and subsequently engaged in the manufacture of such commodity giving to it the arbitrary trade-name of "Corr-Mesh."

It was alleged that the defendant company infringed complainant's copyrighted advertising catalogue previously circulated to the trade, but this feature of the bill has been withdrawn, except in so far as the evidence relating thereto is claimed to aggravate the asserted infringement of the patent which is the subject of this action.

The defendant in its answer alleges anticipation, lack of invention, noninfringement, double patenting, and that its product is produced under the invention of one Dwight G. Clark. Infringement is based mainly upon the claim that the defendant company, having knowledge of complainant's ownership of Forsyth patent, No. 862,897, conspired with the patentee to infringe such patent, particularly the claims in controversy, and that therefore it is estopped from disputing their validity.

The evidence shows that Mr. Johnson, the vice president of the defendant company, first met Forsyth in December, 1910, the interview having been arranged by one of defendant's employés formerly in the employ of the complainant, who was acquainted with the patentee. From correspondence between Forsyth and the defendant it is evident that the former contemplated making an improvement in expanded metal which the defendant designed to exploit. Negotiations were entered into which ripened into an agreement under which Forsyth, for value, bound himself to make sheets of expanded metal in accordance with certain specifications accompanying applications for patents. The material recitals in the agreement were that, if after test sheets of expanded metal were made and delivered to the defendant, the latter elected to build machinery for making such product, Forsyth was to assist in the designing and construction thereof, the actual work of construction to be performed by engineers selected by the defendant. Reference was made therein to a license agreement held in escrow,

giving the defendant company the exclusive right, under various applications for patents, to make and use machinery and to practice the process for the manufacture of expanded metal. There were other provisions relating to the payment of expenses of any litigation carried on by the defendant for infringement of the patents and giving authority to defend any infringement suits that might be brought against it and to deduct from the royalties accruing to Forsyth an amount equaling the amount paid for such defense.

It is shown that there was an interference proceeding declared in the Patent Office between Clark and Forsyth which, however, was not prosecuted by Clark, whose application for patent was of earlier date, and who had meanwhile assigned his invention to one Neeper, attorney for both the defendant and Forsyth. An agreement was made, in which the defendant joined, by which Clark was to receive certain royalties, or an amount in extinguishment of royalties, on all products manufactured under the Clark invention to be paid from the royalties which the defendant had previously agreed to pay Forsyth.

[1] It is contended that the contractual relations by which Forsyth was to receive royalties, his apparent interest in procuring the trademark Corr-Mesh on defendant's material, and the agreement by which the Clark invention was assigned are evidential circumstances showing the intention on the part of defendant to produce expanded metal of a type equivalent to that described in Forsyth patent, No. 862,897, in controversy; and that, notwithstanding that defendant's product may be the result of the Dwight G. Clark invention, the principle of estoppel is applicable. But with this contention I do not agree. Existence, alone, of knowledge by the defendant of the ownership by complainant corporation of earlier Forsyth patents would be entirely insufficient to estop the defendant from making use of an improvement by the same inventor. Forsyth did not create the defendant company, nor was he the manager or controller of its affairs. He was not a stockholder, nor was he especially interested in its business future, except in so far as the royalties to be received by him for the use of his later inventions for expanded metal were concerned. Assuming its relevancy, the exhibit correspondence indicates that he claimed to have invented a patentable improvement, a new high rib, so called, and that the defendant, placing reliance on his assertions, engaged his services at an agreed compensation to assist in designing or making a machine to produce his improved expanded metal, which he later described in his application for patent.

[2] It is well settled that the doctrine of equitable estoppel, as applied to a corporation, arises, as said in Babcock & Wilcox Co. v. Toledo Boiler Co., 170 Fed. 81, 95 C. C. A. 363, from "some corporate act or relation of privity of estate or interest under or with one who is estopped." It is not here claimed that the defendant company had any information regarding the extent of Forsyth's option agreements with the complainant company by which the latter was to become owner of his earlier patents for expanded metal and any subsequent improvements, and which agreements were the subject of litigation between him and the complainant before Judge Day of the Eastern Dis-

trict of Ohio. The evidence in its entirety indicates that the defendant believed that a patentable improvement over his earlier patents had been made by Forsyth, which he had the legal right to assign. If Forsyth, after assigning the patent in suit, made an improvement, he had the right, unless precluded by his agreement, if sued by complainant for infringement, to invoke the prior art to limit the scope of his assigned patent, to sustain his claim of noninfringement. Babcock v. Clarkson, 63 Fed. 607, 11 C. C. A. 351; Noonan v. Chester Park Athletic Club Co., 99 Fed. 90, 39 C. C. A. 426; Western Telephone Const. Co. v. Stromberg et al. (C. C.) 66 Fed. 550. While in this case there may be circumstances which perhaps are fraught with suspicion, yet they are of insufficient strength to support the claim of privity of estoppel with Forsyth, as the creation merely of an inference or intendment is not enough. Indeed, it is judicially held that the facts upon which an estoppel is predicated must be shown with particularity and precision, for fraud cannot be imputed when the acts and conduct of a defendant, against whom estoppel is invoked, are as equally consistent with innocence as with guilt.

The complainant also urges that, notwithstanding defendant's conceded production under the Clark patent, the presumption of privity between Forsyth and the defendant is sufficiently strong to estop the latter from proving the invalidity of the Forsyth patent which he had transferred to complainant, first, because of his services in assisting in the manufacture of diamond mesh machinery; and, second, because of his efforts, or the efforts of his attorney, in procuring the assignment to defendant of the Clark application. But I think this would carry the doctrine of estoppel much farther than it is carried in any reported case to which my attention is directed. In Woodward et al. v. Boston Lasting Mach. Co., 60 Fed. 283, 8 C. C. A. 622, the doctrine was invoked against a patentee, who had previously assigned his patent, and his associates. But in the case at bar, as said, the defendant does not manufacture its product under any improvement of complainant's assignor. Such was perhaps the intention, but the acquirement of the Clark invention by defendant, even though it was in consequence of efforts of Forsyth, does not deprive the defendant of the right to prove that complainant's patent is invalid or its scope so narrow as to exclude the defendant's process and product.

The defendant disclaims any rights under its escrow license agreement with Forsyth. The evidence shows that the experiments made under the Forsyth improvements were unsuccessful; Forsyth swearing that he received no royalties under the license agreement which, indeed, he considered abandoned.

It is unnecessary, in my view of this controversy, to pass upon the defense of double patenting, and I therefore proceed to consider the complainant's patent in suit, assigned to it by Forsyth, and the specification and claims as bearing upon the questions of validity and infringement.

The string-tie and diamond-mesh types of expanded metal were well understood by the skilled in the art at the date of the conception in suit, and to slit flat metal in different ways on longitudinal

and transverse lines and to expand it were not new expedients. Metal of different thicknesses had previously been variously cut or slitted for use as lathing, in reinforcing concrete, and for scroll work. In expanding or stretching sheet metal which was to be employed for lathing or in connection with other building construction, it was important to obtain a certain amount of stiffening in the mesh or lattice portions. Prior patents had been granted by the Patent Office for improvements which decreased the flexibility of the expanded metal, stiffened it, and held more firmly in place the material in which it was imbedded. The patent to C. B. White, No. 668,668, is of this character; the metal being stiffened by corrugating it and then slitting it parallel to the corrugations. In the Kahn patents in evidence, the metal, which was much heavier than sheet metal, was slit longitudinally and transversely, and the slitted portions then struck up so as to extend above the surface of the metal, but the single object of the patentee therein was to expand metal for use in reinforcing trusses for buildings, and its use as lathing was not in his mind. Though importance is attached by the defendant to the Kahn patents, I am unwilling to deny the novelty of the claims in suit upon their reference or upon references of a similar character, although, from the knowledge gained in making trusses for building construction, there no doubt originated the idea of adapting expanded sheet metal for lathing and for reinforcing concrete.

The new element introduced by the patentee in his combination was the connection of each cross-tie at its ends to longitudinal members or ribs; each tie being of two parts and having tongues folded up on their central lines until they come together. If I am correct in believing that to connect parallel rows of string ties to longitudinal ribs was a feature of the prior art, then claims 4 and 6 must be limited to the form described in the specification and drawings.

The complainant places stress upon slitting the sheet metal in a characteristic way to form longitudinal members and cross-ties or tongues slit through their bases, but in the Fugman patent, No. 634,237, dated October 3, 1899, for sheeting used in building, there are shown unslitted longitudinal members which are separated by slitted ties, the slits, it is true, extending diagonally from the longitudinal member to permit vertical expansion of the sheet; but there is very little difference between this method of expanding the cut portion and the lateral expansion of the patent in suit.

The Wylie patent, No. 533,260, responds to claims 4 and 6 in suit more nearly than any other reference. The patent is for expanded metal lath of the string-tie variety, in which series of string ties are separately connected to unslitted portions of the metal; i. e., longitudinal members. Tongues are formed in the middle of the ties which are slit through at their bases, but, as there are two tongues to each tie, complainant's expert witness adopts the view that the particular tongues of the patent in suit are not disclosed. In spite of the differences in slitting the metal or configuring the ties and tongues, the Wylie patent bears upon the scope of the claims in controversy, and the mere fact that the tongues therein are made double and the slits

crudely cut, producing a ragged appearance, does not lessen the significance of the reference.

In the German patent to Hanson, No. 167,088, which, though not for lathing, is yet an important reference, a process of slitting or bending metal and expanding it is distinctly described, and I have no doubt that such process is adaptable to the making of metal lathing with corrugations and extensions or projections to hold the plaster in place. Defendant's Exhibit No. 5 conforms quite closely to the Hanson description and definitely shows longitudinal bars which have connected thereto cross-ties with tongues slit at their bases, as specified in claims 4 and 6 in suit; but as such patent has special reference to electrical contact pieces, and as there is doubt in my mind as to whether it sufficiently indicates the means for separating the metal and joining the longitudinal members, I therefore do not consider it absolutely anticipatory, but it is clear that, by a slight modification, it would operate substantially the same as complainant's structure. The British patent to Stimson also shows a method of slitting sheet metal along longitudinal and cross lines (see Figs. 9, 10, and 11), and that such patent is not for lathing is not of material importance. The Herringbone and Trussit lath, so called, were made from the descriptions in the Hilton, Gibson, and White patents, Nos. 651,643 and 670,827, and show a form of diagonal slitting and longitudinal ribbing of metal; the method of expansion, however, being different from complainant's. The importance of these structures should not be underestimated, for they show string ties connected at their ends to ribs extending lengthwise of the metal. Whether or not a skilled mechanic could readily alter the Trussit and Herringbone structures by extending the slits to meet and so include the two-part feature of complainant's ties is perhaps questionable, but it certainly seems that such modification would not require a high degree of inventive faculty.

There are a number of other prior patents in evidence, but it would serve no useful purpose to refer to them in detail. The involved claims barely escape anticipation by the aforesaid references, and a narrow construction only is their due.

The type of sheet metal mesh used by the defendant was first described in the John F. Golding patent, No. 297,382, which was involved in litigation in the case of Expanded Metal Co. v. Board of Education, 111 Fed. 395, 49 C. C. A. 406, while a similar method of expanding metal is described in Bradford v. Expanded Metal Co., 146 Fed. 984, 77 C. C. A. 230. Moreover, a diamond mesh with bands of mesh work separated by uncut ribs, known as "Self-Sentering," was in existence at the time the patent in suit was granted. While the particular cross-slitting of the metal to separate full diamond meshes at their ends is different from anything contained in the prior art, so also is a different result accomplished by the transverse slitting feature of complainant's device from that accomplished in defendant's form of mesh. By its adaptation, the patentee was enabled to attach the string tie to the longitudinal member. Such cross-slitting, or form of cross-slitting, in this type of mesh is found in

the patents to Gibson, Wylie, Hilton, and others. That the resultant of the slitting of the diamond meshes by the defendant operates as an apparent duplication of complainant's device when the string ties or tongues are not fully expanded is entirely immaterial.

In my view of the patent under consideration and the evidence in relation thereto, the principal object of the patentee was to stiffen his expanded sheet metal, to accomplish which he formed parallel bands connected by tongues slit through their bases, and, after striking up the tongues, pulled the metal laterally far enough to fold up the tongues in the metal of the tie until they came together. Indeed, the specification, after describing the manner of forming the upstanding tongues with their bent over portions, says:

"After the sheet has been formed, the outer longitudinal ribs *6* are pulled from each other, which will cause all the tongues to open along the slots *3*, and the portions 7 of the tongue will fold up on their central lines until they approach each other, and the side portions *8* will bend at the lines *9* until the parts *8* of each rib assume the positions indicated in Fig. 7."

The resultant of this method of operation is that longitudinal members are formed which are connected by a row of ties and tongues; the latter having their outer ends bent at right angles and united to the longitudinal members. The securing of a greater transverse strength was the achievement, and the specification stating that the side portions of each rib *8* are "at right angles to the longitudinal member *6*," as shown in the drawings (Figs. 5 and 6), emphasizes this view and indicates the distinction the patentee designed to make between his earlier patent, No. 855,240, and the patent in suit.

While claims 4 and 6 should perhaps not be restricted to expanding the tie members to the extreme, yet I am reasonably clear, in view of the prior art, that claim 4 should be limited to a construction connecting the tie members at their ends to the longitudinal members, each tie having two parts "connected at a line midway between the main tension members," and, unless the broad claim 6 is limited to two-part ties united at the ends to longitudinal members, it would be anticipated by the patents to Wylie, Fugman, and Simpson which are capable of producing substantially the same result.

Claim 3 for the process must be considered in connection with the various steps in the formation of the patentee's product. That is, the sheet metal must not only be slitted, but the tongues struck up and the tips bent and then expanded. While the process claim is expressed in broad terms, it nevertheless, in view of the prior state of the art, is of limited scope. To justify holding that the defendant's process or method of operation is an infringement of complainant's, all the essential steps by which the latter produces the result must be employed either directly or by equivalency.

The essential differences between such processes may be described thus: In defendant's process the metal is slitted from a point in the metal between spaces leaving uncut portions in the sheet and is then stretched in continuous rows of open meshes, while the slitting is arranged in series with the ends of each slit alined in each row. In complainant's process, parts of the sheet metal are left unslitted to

form longitudinal members extending the full length thereof, and the ends, after being slitted, are offset sidewise from each other with respect to the line of the series. The resultant of defendant's operation is a series of reticulations similar to the product of the Golding, Hayes, and Rapp patents, and the Exhibit "Self-Sentering," save that the tops of the meshes are slitted to separate rows from adjacent rows, while, in the string-tie type of metal, the ties are arranged in succession and attached to the unslitted portions of the sheet which are the longitudinal members of complainant's patent.

In accordance with the foregoing views, I am of the opinion that the claims relied upon are not for a primary invention, but are specific improvements on the prior art, and, as the defendant's structures are materially differentiated as to process and product, the bill must be dismissed, with costs.

On Rehearing.

I have examined the record and the voluminous briefs submitted by the complainant, as well as the multitudinous metallic and paper models and comparative sketches, but I am disinclined to change or vary the views expressed in my former opinion. The rehearing was granted principally because no mention was made therein of claim 1, which complainant contends was also infringed by defendant's process. Claim 3, however, which is basic, was sufficiently discussed and held, in view of the prior art, to be of limited scope. It was stated in the former opinion that:

"To justify holding that the defendant's process or method of operation is an infringement of complainant's, all the essential steps by which the latter produces the result must be employed either directly or by equivalency."

Now claim 1 particularizes the process and emphasizes the feature of "striking up the tongues and bending the unsplit portion of the same back parallel to the main sheet." It is shown that the defendant does not form a tongue or projection in its expanded metal; certainly there is no such tongue tip as that described in complainant's specification, one that is struck up and projects into the general plane of the sheet, nor does the defendant in its process bend the unsplit portion back parallel to the main sheet, and for this reason I think that the defendant's product cannot be produced by the adaptation of the process described in claim 1.

Much is said by the complainant on the subject of estoppel, but, as heretofore stated, no such facts are thought disclosed by the record as to induce the holding that the defendant was so intimately associated with Forsyth as to justify the application of that doctrine. It is unnecessary to advert to defendant's evidence indicating its belief that Forsyth had made a patentable improvement over his prior patents owned by the complainant, and one which it believed he had the right to assign. It was concededly unknown to the defendant that Forsyth had agreed to assign to the Trussed Concrete Steel Company all his future improvements in expanded metal, and the evidence in its entirety falls short of showing that the defendant in-

duced him to break his contract. For this reason the adjudications cited on this point by the complainant are inapposite.

In answer to the argument that the oral testimony of Forsyth and other witnesses for defendant, tending to show that the machinery which was used by the defendant was in fact designed by the Bliss Company and that Forsyth's design was abandoned, is contradicted by the option agreement and escrow arrangement, it is only necessary to state that such prior arrangements were evidently subsequently modified, if not wholly abandoned, and that therefore controlling weight cannot be accorded to the documents in evidence.

The complainant further insists that, as Judge Day has heretofore decided, in an action by this complainant against Forsyth, that the latter infringed the Forsyth patent in suit in assisting to produce defendant's machine, this court should accord to such decision full faith and credit; but in answer to this contention it is enough to repeat that, unless the defendant was in privity with Forsyth or in any way induced him to break his contract with the complainant, the decision has no important bearing upon it. The burden of proof was upon the complainant to establish the privity of the defendant with Forsyth, but in this I think it has failed. It is quite true that it appears that, when Forsyth's application for a patent came into interference with the Clark application, he consented that his lawyer procure such patent by purchase for the defendant company; but, in view of defendant's belief that the Forsyth improvement and the Clark improvement were patentably different from complainant's construction, I do not think that defendant should be estopped from invoking the prior art to sustain its claim of noninfringement. This view entertained by me may be erroneous, but I am not so persuaded by anything appearing on the reargument.

It is unnecessary to dwell further upon the various matters contained in complainant's briefs or upon the wrongful acts of the Patent Office in failing to follow the decisions rendered in the case of this complainant against Forsyth, or to point out with greater particularity the differences in the products or articles under discussion. In my former opinion I endeavored to make clear that the improvements were of exceedingly narrow compass; that the art was divided into two types, the string-tie type and the diamond-mesh type of cutting and slitting metal; that the complainant's production was of the former type, while that of the defendant was of the latter; that the complainant's patent was not for such an improvement as would warrant including within its scope the process and product of the defendant. I am still of this opinion, and therefore, for the reasons stated, a decree may be entered for the defendant dismissing the bill.

PREPAYMENT CAR SALES CO. v. ORANGE COUNTY TRACTION CO.

(District Court, S. D. New York. May 26, 1913.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PASSENGER CAR.

The Rowntree patent, No. 935,929, for a passenger car of the so-called "pay as you enter" type *held* void for lack of invention as to claims 3, 4, 5, and 6, and not infringed as to claims 7 to 16, inclusive.

At Law. Action by the Prepayment Car Sales Company against the Orange County Traction Company. Trial to court. Judgment for defendant.

Judgment affirmed by Circuit Court of Appeals, 214 Fed. 576.

The following are the drawings of patent No. 935,929, referred to in the opinion:

Fig. 1.

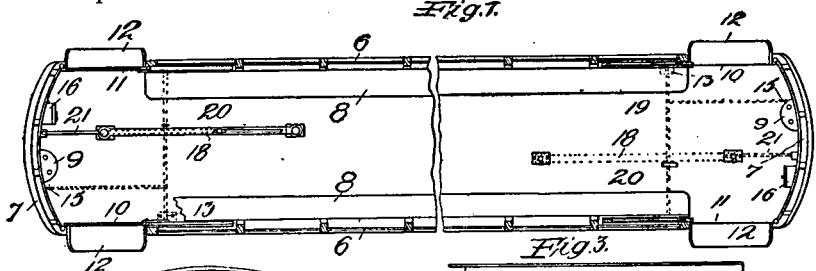


Fig. 2.

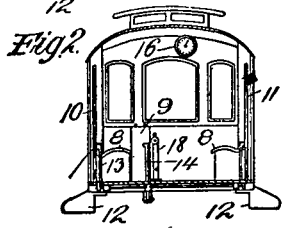


Fig. 3.

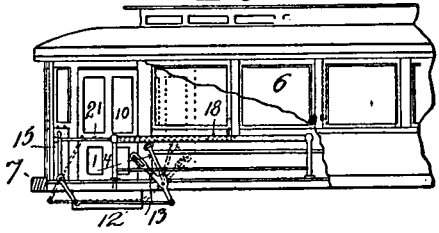


Fig. 4.

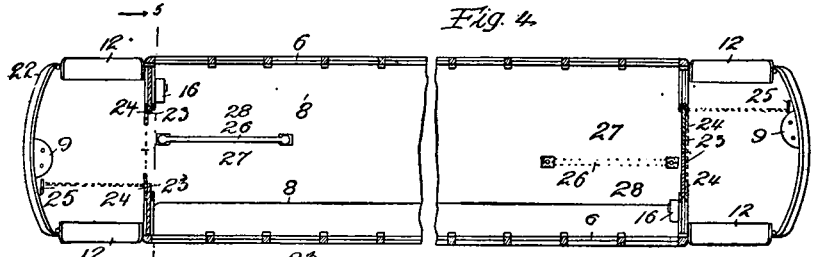
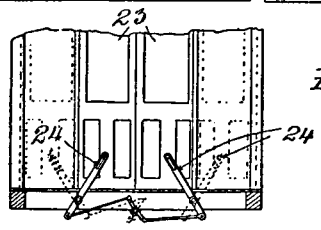


Fig. 5.



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

Samuel E. Darby and Martin W. Littleton, both of New York City, for plaintiff.

Clarence P. Byrnes, of Pittsburgh, Pa., and Israel Shrimski, of Chicago, Ill., for defendant.

VEEDER, District Judge. This is an action at law for infringement of patent No. 935,929, granted October 5, 1909, to Harold Rowntree, for a new and useful invention in passenger cars. The infringement complained of is the use by the defendant of 11 street cars at Newburgh, N. Y., which are alleged to infringe the Rowntree patent as defined in claims 3 to 16 thereof. By stipulation of the parties the action was tried before the court without a jury.

As stated in the specification of the patent Rowntree's object was to provide a passenger car for street or other railways embodying means which are simple in construction and arrangement, whereby the collection of fares as the passengers enter the car is facilitated. The invention is declared to consist substantially in the construction, combination, location, and relative arrangement of parts, as shown in the accompanying drawings and finally pointed out in the appended claims. In specification of the particular object aimed at, Rowntree refers to the difficulty experienced by street railway companies in the larger cities where the traffic is heavy in securing the full return of fares for the passengers transported, arising both from the avoidance of payment by the passenger and from the neglect or dishonesty of the conductor. Among the expedients resorted to in the endeavor to overcome this difficulty is the use of what is commonly called "pay as you enter" cars. In the construction of cars commonly employed in connection with this method a railing is placed on the platform on the end of the car so as to provide a separate entrance and exit passage, and the fare is collected as the passenger enters the car by a conductor stationed on the platform in a convenient position with reference to the entrance passage into the body of the car. Still, two disadvantages are said to have been experienced in the use of this method of operation. Inasmuch as the conductor is located on the platform outside the car body, and beyond the observation of passengers within the car, he is able to collect fares without registering them; and the location of the railing upon the platform, separating the entrance and exit passages, necessitates an increase in platform space, and consequent increase in cost of construction without any increase in carrying capacity. Rowntree states that his particular object was to secure simple and inexpensive means for the collection of fare as the passenger enters the car, whereby the conductor is always in plain view of persons inside the car, and whereby ordinary cars may be readily converted for use upon the "pay as you enter" plan.

"In carrying out my invention" he continues, "I propose to employ a railing or other suitable or convenient form of partition and which is arranged to extend into the body of the car from or adjacent the doorway or entrance, in such relation as to provide a restricted entrance passage through which the passengers pass in entering the car, and whereby the conductor can readily and easily collect the fares, from a point inside the car, from the passengers as they enter the car."

It is asserted that the invention may be carried into practical operation with various styles and types of cars, and that he is not to be restricted to the type described.

The specification then refers to and explains the accompanying drawings embodying the principles of the invention claimed, and the practical application of the various features in the attainment of the object sought. Describing specifically figures 1, 2, and 3, he says that the vestibules may be provided with doors, and the doors may be movable. Further, the doors may be operated in any suitable or convenient manner, and in the form shown, it is pointed out, means are provided whereby the door operating connections may be controlled by the conductor or the motorman.

"The parts so far described may be of the usual or any desired construction, and in the specific structure thereof form no part of my present invention."

Proceeding, then, to describe his invention as shown in figures 1, 2, and 3, he states that a railing or partition *18* is arranged to extend from the end wall of the vestibule into the body of the car, forming the entrance passageway *19*, and, if desired, an exit passageway *20* into and from the body of the car. In practice the passengers are to leave the car through the front doors, which are operated by the motorman, or otherwise. The conductor is stationed in the passage *20*.

"When passengers get on the car they enter through the door *10*, and, passing down the car through the restricted passage *19*, formed by the railing, they give their fares to the conductor, who occupies the passage *20*. If the traffic is light, the conductor occupies a position closely adjacent the door and collects the fares from that point. He has the freedom, however, of the entire length of the passage *20*, which is determined by the length of the partition or railing *18*, and hence, if the traffic is heavy, or if passengers enter the car in large numbers, then the conductor may move back and forth along the passage *20*, and so collect the fares of all the passengers as they enter the car." "It may be sometimes desired to use the same door *10*, for the entrance as well as the exit of passengers. In this event I may employ a gate *21*, in the railing *18*, when such railing is used and by means of which passengers may leave the car through the passage *20*, the gate *21*, and the door *10*, while other passengers are entering the car through the door *10*, and passageway *19*."

Finally, the patentee describes his invention as applied to the type of car shown in figures 4 and 5, having a bulkhead between the car body and the platform.

"In this type of car the railing *26* is arranged inside the car, and extends from a point adjacent the doorway lengthwise of the car a distance sufficient to form the restricted passageways *27*, *28*, of extended length into the car. The conductor is stationed in one of these passageways, as *28*, while passengers entering the car pass through the other passageway *27*, and deliver their fares to the conductor as they enter. In this case the conductor is always on the inside of the car where he may be constantly under the observation of an inspector or other passenger who might desire to watch him."

"From the foregoing description," concludes the patentee, "it will be seen that I provide an exceedingly simple and efficient 'pay as you enter' arrangement which avoids the necessity for providing an enlarged area of platform, and which can be applied with ease and economy to cars of the ordinary construction without involving any material change in the structure thereof."

It thus appears from Rowntree's disclosure in his specification that he deemed his invention to consist in placing the conductor alongside a dividing barrier inside the car body, where he is under observation ("pay within" as distinguished from "pay as you enter"), thus embodying all the advantages of the pay as you enter type of cars without requiring enlarged platform space. This is the feature common to both types of car illustrated, and the specification itself shows that all other parts are mere adjuncts, not forming part of the invention claimed. In other words, from the standpoint of the plaintiff's argument, the novelty lay in placing the means for controlling the door in the hands of the conductor at a new prepayment point. In his testimony Rowntree admitted that it was the placing of the conductor in the car body proper along the barrier that overcame the two specified disadvantages of the pay as you enter car, although he now disclaims that the invention of the claims in issue is present in figure 4 because there are neither side doors nor means associated with the railing inside the bulkhead for operating doors; and he asserts that figure 4 and its description are mere surplusage.

The claims, however, go far beyond the disclosure made in the specification. The process of enlarging the scope of the claims beyond the original specification is shown by the file contents in the Patent Office. Every one of the 20 original claims filed in the application recited that the means for forming a restricted passageway was arranged in the car or extended longitudinally into the car. This was the principal feature of the original claims; only five of the claims mentioned means for moving the door. After the first office rejection of the application as a whole on August 10, 1908, the claims were further amended by locating the barrier still more definitely inside the car. In the next office letter the examiner cited further references, showing barriers inside the car body, and stated that:

"All the claims rest for their patentability upon the question whether or not a dividing rail inside the car body is new."

When, on October 28, 1908, the examiner recommended two claims for interference, the applicant filed several additional broad claims. The interference was finally declared on claims 1 to 9 of the patent in suit. The other parties in interference, Coons and Lincoln, had filed later applications; no testimony was taken; Rowntree recovered on his record date. Thus the record stood until November 1, 1912, when the Patent Office declared an interference between claims 7, 11, 14, 15, and 16 of the Rowntree patent and the application of Harry M. Sloan, serial number 398,517, which is still pending. The defendant herein is a licensee under this Sloan application, which was filed on October 21, 1907, seven months prior to the date of Rowntree's application.

The claims are 16 in number, and all save the first two are alleged to be infringed. Claim 3 is as follows:

"A passenger car having a main car body and an end vestibule, the car body space merging unobstructedly into the vestibule space, a door and a doorway in the side of the vestibule, and means located between the car body space and the door for operating the latter."

Claim 4 differs from claim 3 in specifying that the aisle space of the body structure opens unobstructedly its full width into the vestibule space, and that the means for controlling the operation of the door are arranged in the said opening. In claim 5 the means for controlling the movement of the door are located adjacent the point of mergence of the car body space and the vestibule space. Claim 6 differs from claim 5 in specifying an inclosed end vestibule. Claim 7 specifies a car provided with wide entrance and exit ways at one end of the main car body structure where merging with a platform having movable portions, and means provided with a lever for actuating said movable portions located to define the entrance and exit ways from the platform to the main car body. Claim 8 differs from claim 7 in specifying wide entrance and exit ways at both ends of a main car body structure, directly connected with an inclosed platform, and that the lever for actuating the movable side is operatively controlled by a conductor. In claim 9 the car body structure is provided with an end opening wider than that of the aisle within the car body at the point where merging into a platform, and means in said opening to form the conductor's station, thereby dividing by the conductor's station said opening into passageways to and from the main car body. Claim 10 specifies a car body and a side door; an unobstructed passage leading from the side door into the car body, and means located within the car body to define entrance and exit ways through said passage, and to operate the door. Claim 11 differs from claim 10 in specifying a car having separate entrance and exit ways into and from the aisle space of the car body, between which the door controlling means are located. In claim 12 there is a car body into which an end platform merges unobstructedly, and means located within the car body to define entrance and exit ways through said passage and to operate the door. In claim 13 the means for operating the door are not required to define entrance and exit ways. Claim 14 specifies means arranged to divide the space inside the door into separate entrance and exit passages, and means also arranged inside the door, but removed therefrom, for controlling the operation of the door. In claim 15 the means located inside the door for operating the door serve to divide the space inside the door into separate entrance and exit passages, and a vestibule is prescribed. Claim 16 differs from claim 15 in that the means for dividing the space inside the door into separate entrance and exit passages and the means for controlling the door are specified separately, and the latter are located adjacent the former.

Summarizing these claims it appears that less than half of them (i. e., 3 to 6, 12 and 13) call expressly for a passenger car having a car body or body space (or aisle space, or end opening), a platform or vestibule space with a door in the side thereof, and the unobstructed mergence of the two spaces. Claims 10, 11, and 14 do not mention a platform or vestibule space. All the claims save 9 specify a door (side or portion); in all save claims 10, 11, and 14 the door is expressly placed in the vestibule or platform. All the claims save 9 specify means (in claims 7 and 8 a lever) for controlling the operation of the door. The location of the means thus prescribed is variously described: Simply

within the car body or space (claims 10, 12, 13), or within the car and between the entrance and exit ways (claim 11); inside the door (claim 15), but removed therefrom (claim 14), and adjacent the separate entrance and exit passages (claim 16); between the car body space (claim 3); adjacent the point of mergence (claims 5, 6); in the opening of the car body space into the vestibule or platform space (claims 4, 9); located to define the entrance and exit ways from the platform to the main car body (claims 7, 8). All the claims, save 3, 4, 5, 6, and 13, provide for separate entrance and exit ways into and from the aisle space of the car body, or means to define the entrance and exit ways from the platform to the main car body, or inside the door. The means of separation are variously located (except in claims 7 and 8); within the car body (claims 10, 12); inside the door (claims 14, 15, 16); in the opening of a car body structure provided with an end opening (claim 9). In claims 7, 8, and 15 the means for controlling the movement of the door define or provide the separate entrance and exit passages.

Upon these claims the plaintiff seeks to cover every car which has a side door controlled from a conductor's distant prepayment point, wherever located. And the advantages now claimed for the alleged invention have been correspondingly enlarged. In addition to the two objects which Rowntree states in his specification that he had in view (i. e., placing the conductor in the car under the observation of the passengers, and a method of converting ordinary cars into the pay as you enter type without enlarging the platform space) the complainant now relies upon these advantages: Protection of the conductor and passengers from the weather, better ventilation of the car, and, above all, the elimination of boarding and alighting accidents. Indeed in the presentation of its case, the latter seems to be the principal utility now relied upon. In short, the utility disclosed in the specification relates to the collection of fares, while the advantage now asserted for the claims arises out of protection of the passengers from boarding and alighting accidents.

There are really five elements to the combination claimed by the complainant: (1) A car having a car body and platform or vestibule space merging unobstructedly; (2) a movable side entrance door; (3) means for controlling the door; (4) means for separating the entrance and exit passageways; (5) the location of both these means at various points in the car with reference to the position of the side entrance door. All these elements are essential to bring about the advantages now claimed by the plaintiff, and the plaintiff relies upon them all as if all were set up in each claim. But it is to be observed that no one of the claims includes them all. Each claim must stand upon its own combination. While disclaiming the right to patent the prepayment method of operation, the plaintiff's contention drifts constantly into the assertion of the right to an idea as distinguished from a concrete construction of related parts or the particular mechanism by which the parts are actuated. But the plaintiff is not entitled to claim either the abstract idea of prepayment, on the one hand, or the mechanical appliance, on the other hand. His invention, if any, con-

sists in the "construction, combination, location and relative arrangement of parts," as specified in the patent. The form of the claims is in fact one commonly used for a particular structure rather than a combination of elements. All the claims read, "A passenger car having," etc., instead of "In a passenger car," etc.

The defendant's structure shows a car having a car body space and an end platform or vestibule, and unobstructed mergence of the two parts, movable doors in the side of the vestibule, which are operated by means located at the point where the conductor is stationed on the platform near its mergence with the car body space. These means are located midway between the sides of the car, and serve (with the addition of a rail extending from the top of the step to the center of the platform) to separate the passages for entrance and exit. Comparing this structure with the claims in issue, as analyzed above, it seems clear that it would infringe only claims 3 to 6, inclusive, of the patent in suit if valid. Claim 3, in particular, raises the issue distinctly. All the remaining claims embody elements in construction, combination, location, and relative arrangement of parts which differentiate them from the elements present in the defendant's structure. It will therefore suffice to limit the inquiry with respect to validity to those claims which if valid would be infringed. Thus limited, the inquiry is whether the plaintiff is entitled to a patent for the following combination and arrangement of parts: A passenger car having a car body and a platform or vestibule space merging unobstructedly; a movable door in the side of the platform or vestibule; means for controlling the door, located at or near the line of mergence of the car body and the platform or between that point and the door.

Passenger cars having an unobstructed mergence of the car body or aisle space and platform space, movable doors in the side of the vestibule, operated by means of a distant control on the platform, were well known in the art prior to the date of the patent in suit. Inasmuch as this is not denied by the plaintiff, it is unnecessary to review the large number of patents, publications, and uses cited by the defendant. Perhaps the best known instances in evidence are the East Boston tunnel cars, the Boston elevated cars, the Chicago West Side elevated cars, and the cars in use in the subway in this city. Upon the question of anticipation it can make no difference that these cars were not operated upon the street surface (East Boston tunnel cars do in fact operate also upon the surface), and that passenger fares were not collected upon the cars. The claims in issue cover in terms simply "a passenger car" of a particular combination and arrangement of parts, and the specification states that the object of the invention is "to provide a passenger car for street or other railways." However, both these elements are disclosed in a passenger car embodying the construction of the claims under consideration in the Ridgeway patent, No. 102,435, issued as early as 1870. It is immaterial that in this patent the direction that the doors should be provided with such appliances that the conductor could control them from his station was made in the specification, and was not set forth in the

claims. If, therefore, there be patentable invention in placing the door of a car in the side of the vestibule rather than at the end of the car body, and operating it from a distant control upon the platform, that invention was not made by Rowntree.

But the plaintiff relies upon the precise location of the door controlling means. In the tunnel, subway, and elevated cars above referred to, the lever by which the doors are operated is located at the rear end of the platform, so that a guard can operate the doors on two cars. In the Ridgeway patent it is also at the rear end of the platform. A number of patents in evidence, showing distant control of doors or gates on street, surface, and other passenger cars, indicate various locations on the platforms for the control handle. In the Appelman patent, No. 509,641, and the Libbey patent, No. 575,484, it is located just outside the doorway into the car body, where the conductor stands on the defendant's car. The Thayer patent, No. 310,921, shows, among other things, a vertically movable folding gate controlled by a lever extending upward through the platform, and operated by a conductor or other person in charge of the car, or in the alternative by a pulley rope from any part of the car. In the Minneapolis (see the Hield patent, No. 546,116), and in the Rochester & Eastern car, the operating handle is located upon the front platform for operation by the motorman. In other words, the location of the control handle depends upon who is to operate it, and this, in turn, is arrived at by considerations of convenience. So long as the conductor collected fares in the car after the passengers were seated, he would be more or less beyond reach of a control handle located upon the rear platform, and the expedient was accordingly adopted of placing it upon the front platform for operation by the motorman, whose station was fixed. It was not that it did not occur to railway managers to place the control in the hands of the conductor. The evidence shows that the relative advantages of the two locations was fully considered. Indeed, the specification of the patent in suit suggests operation by the conductor or the motorman as may be desired. I am of opinion that there is no patentable invention in the location of the door controlling means upon the platform in accordance with the convenience of the person who is to operate it. Wherever located, its function is the same, and a change in its location involves ordinary mechanical skill, not invention.

The plaintiff asserts, however, that its improvement is to be applied to cars operated upon the prepayment plan. While formally disclaiming any exclusive right to the idea of prepayment, it does claim categorically that it is entitled, under the patent in suit, to exclusive rights in passenger cars having an entrance and exit door controlled by means located at any conductor's prepayment point. The claims of the patent in suit do not refer to the collection of fares, and only one claim mentions the conductor. But the claims have been varied in such a way as to locate the door controlling means at every point where the conductor usually stands in present methods of prepayment operation. As already indicated, I am of opinion that the location of the door controlling means (at least within limits that

would involve infringement by the defendant's structure) involves no invention; nor am I persuaded that the plaintiff's claim derives any support from its professed association with the prepayment method of operation. If there were any patentable invention in locating a distant door control handle at a prepayment point, that invention is disclosed in what appears to be the first embodiment of the prepayment method of street car operation. In the Ridgeway patent, No. 102,435, already referred to, the conductor was located in a small cab or stand attached to the rear of the platform, from which he collected fares from, or supervised the deposit of fares in a box directly in front of his station by, passengers entering through doorways on either side of the platform, the doors of which were to be provided with such appliances that the conductor could open and close them from his station. This structure seems to me to anticipate every feature of the claims under examination. In this structure the prepayment point is at the end of the platform, while in the defendant's car it is at the other end of the platform, near the line of mergence with the car body. It is shown in the latter position on the Sloan car, as operated in Chicago.

I find the issue in favor of the defendant.

TREIBACHER CHEMISCHE WERKE GESELLSCHAFT MIT BESCHRÄNKTER HAFTUNG v. ROESSLER & HASSLACHER CHEMICAL CO.

(District Court, S. D. New York. February 18, 1914.)

No. 6/236.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PYROPHORIC ALLOY.
   The Welsbach patent, No. 837,017, for "a pyrophoric alloy containing cerium alloyed with iron, as and for the purposes described," describes in the specification a novel and artificial alloy possessing greater and more certain pyrophoric qualities for practical uses than any before known, the patentee being the first to disclose the fact that such quality is not inherent in pure cerium, but, as previously observed, was due to impurities therein, and the nature and percentage of the alloy in which it is the greatest, which he gives as one of cerium 70 per cent. and iron 30 per cent. The patent is a pioneer and entitled to the full benefit of the doctrine of equivalents, and, while iron is given as the preferred second metal in the alloy, others are mentioned in the specification, and the claim is not limited to such metal. *Held*, infringed by the alloy of the Huber patent, No. 967,775, which consists essentially of cerium 85 parts and magnesium 15 parts.

2. WORDS AND PHRASES—"ALLOY."
   The dictionary meaning of "alloy" is "an artificial compound of two or more metals combined while in a state of fusion."

In Equity. Suit by Treibacher Chemische Werke Gesellschaft mit Beschränkter Haftung against the Roessler & Hasslacher Chemical Company, for infringement of patent 837,017 to Welsbach, issued November 27, 1906. On final hearing. Decree for complainant.

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

James Hamilton, of New York City, for complainant.
Seabury C. Mastick, of New York City, for defendant.

HOUGH, District Judge. The only claim involved is this:

"A pyrophoric alloy, containing cerium, alloyed with iron; substantially as and for the purposes described."

The "purposes described" in the specification render plain the contest before the court.

The patentee tells the world that all preceding investigators were wrong in supposing that the so-called "rare-earth" metals, when pure, possessed pyrophoric capacity; i. e., the property when abraded of giving off particles self-igniting in the air. Admittedly these metals, and especially cerium, had long been called pyrophoric, but Welsbach deems himself the first to discover that the spark-giving quality depended upon impurities whose presence had before him been unobserved, or if noticed considered negligible. It is not pretended that this ascertainment of a natural phenomenon constitutes patentable invention.

Since, however, the cerium ordinarily obtainable had been known to give forth sparks on abrasion, Welsbach says he sought to ascertain what kind of mixture would produce sparks in greatest abundance. Iron afforded the best results, and an alloy of cerium 70 per cent. and iron 30 per cent. the maximum pyrophoric effect.

The sparks elicited are not different from those known to have been drawn from the "rare-earth" metals, as produced before Welsbach's experiments, but the flow from his alloy is said to be so copious and certain as to furnish a "prompt and reliable" means of igniting "combustible gases mixed with air."

The patentee experimented with "certain other metals," and mentions nickel and cobalt as possible ingredients in his alloy, but iron remains the favorite. On alleging as true the substance of the foregoing, the patentee sought and obtained the wide claim above quoted.

Defendant has imported and sold a substance manufactured by Kunheim & Co., of Berlin, said to be composed (in accordance with specification of Huber United States Patent 967,775, August 16, 1910), of magnesium 15 per cent. and cerium 85 per cent., treated with hydrogen at between 500° and 600° C., as long as any absorption of hydrogen can be detected.[1] The magnesium-cerium compound is pyrophoric; the alleged effect of absorbing hydrogen is to increase that quality.

The defense asserts: (1) Welsbach's invention to be void for lack of novelty; i. e., it covers only a "pre-existing inherent natural property of the alloy." (2) Kunheim's product is not an alloy at all, and therefore not an infringement. (3) The claim in suit is (in view of the prior art) too narrow to cover any alloy not containing substantially the preferred quantity of iron, or possibly nickel or cobalt.

First. This defense will not stand analysis. It is true that great

[1]Defendant's product has been analyzed and results vary slightly. Silicum, aluminium, and even iron are found present, but the theoretical statement of Huber is near enough for purposes of this case.

pyrophoric activity is, and always must have been, an inherent natural quality in an alloy of iron and cerium. It is also true that any composition of matter has inherent natural qualities, but, before such qualities can be known and used, the matter composition must be produced. Nature does not produce the alloy of Welsbach; and, if that alloy is novel and artificial, the compound is patentable as far as novelty is concerned.

[2] Second. The dictionary meaning of alloy is "an artificial compound of two or more metals combined while in a state of fusion." The important words (for this case) are "two or more metals," and all the experts examined agree that an alloy must contain that number.

Admittedly both magnesium and cerium are metals, and the best and sufficient evidence that defendant's product was once (at all events) an alloy is that Huber calls it one—and defendant insists that what Huber describes it sells.

But it is said that the hydrogen bath has created a cerium hydride, which is something so different from a mere alloy of cerium and magnesium as to be a different thing; i. e., a chemical compound, of admittedly uncertain properties and formula.

On such a point as this, I am as far as possible from hazarding any opinion other than one as to the weight of evidence. I see no reason to doubt the facts testified to by Drs. Fattinger and Olsen (i. e., that they made an amalgam of the alleged infringing substance, and liberated the hydrogen), thereby demonstrating that the hydrogen was physically, not chemically, combined with the cerium and magnesium. It seems to me that what Huber called an alloy so remained, even though saturated (so to speak) with hydrogen.

[1] Third. The substantial question in this case is that of infringement, and that depends on the range of equivalents, permissible to the patentee.

The last restatement of the requirements of a "pioneer" patent in this circuit is in Autopiano Co. v. Amphion, etc., Co., 186 Fed. at page 163, 108 C. C. A. 291.

Whether any given invention is a "wholly novel device," or one of "such novelty and importance as to mark a distinct step in the progress of the art," always and principally depends on how much men knew before they learned what the patentee taught.

Before the disclosure of Welsbach, it is I think shown that men knew nothing of the certain and reliable preparation or manufacture of a pyrophoric alloy. They thought they knew that cerium was pyrophoric, whereas they had merely observed sparks given out by an impure metal, without connecting the impurities and the sparks, as cause and effect. Before Welsbach there was and could be no art in pyrophoric substances, because the basis of all art, certain knowledge, was lacking. This patentee taught how certainly and knowingly to produce that which had been observed indeed, but not understood. Such invention is indeed pioneer.

The argument against the above conclusions rests upon several patents and the disclosures of numerous scientific publications. One good reference or publication is worth more than a volume of poor ones, and

I select the German patents to Escales, the article of Hillebrandt and Norton, and Moissan's article in Der Elektrische Ofen, as covering the whole defense. Escales speaks repeatedly of alloys of the rare-earth metals. No one doubts that such alloys were known before Welsbach, but his claim is for a particular alloy for a particular purpose, and Escales does not reveal any knowledge of such an alloy. Hillebrandt and Norton's thesis I regard as a good proof of the truth of Welsbach's specification statements. They evidently thought they were observing the behavior of pure cerium, and the still more interesting behavior of cerium and a little platinum; the important point is that they did not know nor ascertain the cause of what they observed. Moissan is much nearer the point in his opinion (meiner Ansicht) that it would be better to use (for fire-making apparatus) "an alloy of iron with uranium," but he never did it, and he did not tell any one just what to do.

Prophecy is often greater than invention, but it is not patentable. Believing, then, that this is a pioneer invention, can the doctrine of equivalents be invoked to read the claim in suit, on any alloy of cerium with any other metal, provided that such alloy be pyrophoric?

On this head the first inquiry is whether the patentee has tied his own hands, by limiting his claims. Groth v. International, etc., Co., 61 Fed. 284, 9 C. C. A. 507. Such is asserted to be the case here, for iron only is mentioned in the claim; but the inventor shows that the cerium is to be alloyed with iron or its equivalent (line 67), so that the final question is: What are the equivalents of iron in a pioneer patent, when the specification shows that the invention is far wider than the use of iron only?

As has been often said, where a valuable invention has been made, it is the duty of the court to uphold that which was really invented. What Welsbach invented was a metallic alloy having certain desirable qualities; he knew and said that iron was not the only (though it was the most desirable) component with cerium.

If a metal other than iron be used, does the resultant embody Welsbach's invention? This is the root query. Winans v. Denmead, 15 How. 330, 14 L. Ed. 717. The question is one of fact, not law, and the innumerable cases on equivalents are merely statements of how the minds of sundry judges have worked when sitting as jurymen.[2]

To me it is obvious that the usefulness of an alloy (i. e., a fusion of metals) was Welsbach's plainly disclosed invention; without knowledge thereof Huber would not have known that it was useful to make an alloy of magnesium and cerium; therefore he used and uses Welsbach's invention and is an infringer.[3]

The train of reasoning justifying this opinion is sufficiently stated by Colt, J., in Edison, etc., Co. v. Boston, etc., Co. (C. C.) 62 Fed. 397.

[2] In 1910 Mr. Wagner, of St. Louis, read a paper at the American Bar Association, on Mechanical Equivalents, to which Mr. Prindle, of New York, replied in 1911. Taken together, they present the personal equation sharply, and their citations cover most of the cases laid before me by counsel herein.

[3] I know complainant does not admit that defendant's infringement is exactly Huber's product, but for argument defendant's contention is taken.

In the technical history of this new art the opinions of the German and Austrian patent courts have been most valuable. I agree with the latter.

Decree for complainant, with costs.

TREIBACHER CHEMISCHE WERKE GESELLSCHAFT MIT BESCHRÄNKTER HAFTUNG v. WOLF SAFETY LAMP CO. OF AMERICA, Inc.

(District Court, S. D. New York. April 30, 1914.)

No. 109.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PYROPHORIC ALLOY.

The Welsbach patent, No. 837,017, for a pyrophoric alloy of cerium and iron, *held* valid on a motion for preliminary injunction and infringed by an alloy of cerium and cadmium.

In Equity. Suit by the Treibacher Chemische Werke Gesellschaft mit Beschränkter Haftung against the Wolf Safety Lamp Company of America, Incorporated. On motion for preliminary injunction. Motion granted.

See, also, 214 Fed. 410.

James Hamilton, of New York City, for complainant.
Briesen & Knauth, of New York City, for defendant.

WARD, Circuit Judge. Judge Hough has held not only that the plaintiff's patent is valid, but that it is a pioneer, entitled to the most liberal range of equivalents. Although the granting of a preliminary injunction is a matter of discretion, it is our practice in this district to follow the prior decisions of our colleagues. An alloy of cerium and magnesium was held in the adjudicated case to be an infringement, and I think the alloy of cerium and cadmium used by the defendant quite as much so. Therefore a preliminary injunction must go. As the defendant insists that this will increase the danger to life in the mines, and as the infringement consists merely of the use of a metal pin costing two or three cents in the igniting device, I will suspend its operation until the further order of the court, so far as to let the defendant supply metal pins for use in safety lamps heretofore sold, upon giving proper security to the complainant for the payment of any damages or profits that may be awarded to it. Hereafter the defendant must sell only safety lamps equipped with the paraffine friction igniter which it says in its catalogue for 1914 is safer than its metal pin igniter.

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

CALKINS et al. v. WESTERVELT.

(District Court, W. D. Michigan, S. D. July 7, 1913.)

1. CANCELLATION OF INSTRUMENTS (§ 35*)—CONVEYANCE OF PARK—PARTIES.
In a suit by purchasers of lots in a platted tract, divided into lots, streets, and parks, who bought on the faith that no obstructions would be permitted in the parks, to set aside a subsequent conveyance of a parcel located in the parks, the present owners of the unsold part of the tract and the municipality within which the parks are located should be made parties, or the purchasers should request them to become parties because they cannot represent the public.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 55–64; Dec. Dig. § 35.*]

2. INJUNCTION (§ 114*)—CONVEYANCE OF PARK—RIGHT TO SUE.
A purchaser of lots in a tract platted into lots, streets, and parks must, to obtain injunctive relief to set aside a conveyance of a part of the parks, show some special injury to his property not suffered by property owners generally, and a purchaser of a lot located at a considerable distance from a park has no appurtenant rights in and to the park, except such as are given to all property owners in that vicinity, several of whom have erected buildings between him and the park.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 202–220; Dec. Dig. § 114.*]

3. DEDICATION (§ 47*)—PARKS—RIGHTS ACQUIRED—ACTIONS—PARTIES.
A purchaser of lots adjacent to a park in a tract platted and divided by the vendor into lots, streets, and parks has rights in the park and in its preservation for park purposes, but he has no such rights in a park subsequently established, and where a subsequent purchaser of parcels in the existing and new parks has no intention of building or otherwise disturbing the land in the old park, but only intends to build in the new one, the first purchaser is not entitled to equitable relief.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 113; Dec Dig. § 47.*]

4. DEDICATION (§ 47*)—RIGHTS ACQUIRED—ACTIONS—PARTIES.
Where the owner of a tract platted into lots, streets, and parks, and purchasers of lots, constructed and maintained for several years a stairway from a street across a park to the shore of a lake until the grantee of the unsold property constructed on other land a stairway, a purchaser could not enforce in equity, as against a third person claiming to own the land on which the new stairway was constructed, any right in the new stairway, and, if the removal of the stairway caused injury either to the owner of the unsold tract or to the public generally, the injury must be prevented at the suit of the proper parties and not at the instance of the purchaser alone.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 113; Dec. Dig. § 47.*]

In Equity. Suit by William E. Calkins and another against Edmund C. Westervelt. Bill dismissed, with costs.

Diekema & Kollen, of Holland, Mich., for plaintiffs.

Bundy, Travis & Merrick, of Grand Rapids, Mich., and Stuart MacKibbin, of South Bend, Ind., for defendant.

SESSIONS, District Judge. In 1881, the Macatawa Park Association was incorporated under a statute of the state of Michigan au-

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

thorizing "the incorporation of associations for yachting, hunting, boating, fishing, rowing and other lawful sporting purposes." Neither the statute under which it was organized nor its articles of association authorized this corporation to plat or deal in real estate. Nevertheless, in June, 1888, the officers of the association executed and caused to be filed and recorded in the proper offices a plat of a tract of land owned by it and situated upon the shore of Lake Michigan in the counties of Ottawa and Allegan in this state. The plat was entitled "Plat of Macatawa Park," and containing upwards of 375 lots, and also streets, roads, trails, and certain parks, among which was "Reserve Park," of irregular shape and located along the southwesterly border of the plat.

In August, 1888, the Macatawa Park Association sold and conveyed to complainant Calkins lot 252 and a part of lot 253 of the plat of Macatawa Park, upon which he built a summer cottage. These lots are situated upon a bluff overlooking Lake Michigan and front upon "Waukazoo Trail" and "Reserve Park."

Other lots were sold to other persons, and each purchaser received a copy of the plat showing the location of Reserve Park. The selling agent of the Macatawa Park Association also stated and represented that no buildings or other obstructions to the view of Lake Michigan would be placed upon the park. Complainant Calkins relied upon these representations and was partly induced thereby to purchase the lots.

In July, 1889, the Macatawa Park Association sold and conveyed to James M. Karr lot 251 of the plat of Macatawa Park. Complainant Calkins afterwards obtained title to the south half of this lot which fronts upon Waukazoo Trail but, according to the plat, does not front directly upon Reserve Park.

In June, 1890, the Macatawa Park Association conveyed to a successor corporation, the Macatawa Park Company, the entire plat of Macatawa Park except the lots which had been sold. In October, 1890, the Macatawa Park Company platted "Lakeside Addition to Macatawa Park," containing about 140 lots, and also streets and certain parks, including "Overlook Park," which adjoins Reserve Park. Overlook Park and Reserve Park are situated almost wholly upon the slope or side of the bluff. That portion of these parks lying in front of the lots of complainant Calkins consists, for the most part, of shifting sand.

In October, 1897, the Macatawa Park Company sold and conveyed to complainant Miller lots 283 and 284 of the plat of Macatawa Park. These lots front upon Waukazoo Trail and are located about 40 rods up the trail from Reserve and Overlook Parks. Between them and the parks, several houses have been built. No part of the parks can be seen from the Miller cottage.

In 1901 the Macatawa Park Company executed and delivered to defendant a conveyance of an irregular shaped parcel of land from 50 to 78 feet wide and from 125 to 145 feet long, extending from a board walk on the beach of Lake Michigan up the side of the bluff and across Overlook and Reserve Parks to Waukazoo Trail in front of lot 253 belonging to complainant Calkins. This is the land in controversy in

this suit. Defendant's deed was not recorded until 1906. Some time prior to 1890 the Macatawa Park Association, complainant Calkins, and other purchasers of lots constructed a stairway leading down the hillside from Waukazoo Trail across Reserve Park to the shore of Lake Michigan. This stairway was maintained and kept in repair by the lot owners until about the year 1909, when the Macatawa Resort Company, which had been incorporated and had acquired all of the unsold property formerly belonging to the Macatawa Park Company, constructed a new stairway upon the land which defendant claims to own. The old stairway was north of the land claimed by defendant and nearer to the cottage of complainant Calkins. On July 13, 1909, the defendant served written notice upon the Macatawa Resort Company that he was the owner of the land upon which the new stairway was located and demanding its removal within ten days.

About one-third of the parcel of land claimed by defendant is located in Reserve Park and about two-thirds thereof in Overlook Park. That portion of the land which is in Reserve Park is upon a side hill and is not suitable for building purposes. Defendant disclaims any intention of building a cottage thereon. He does intend, however, to build upon the lower part of the land in Overlook Park. A cottage so located will not be visible from the property of complainant Miller, nor will it in any wise obstruct the view from the property of complainant Calkins.

Complainants seek a decree setting aside the conveyance from the Macatawa Park Company to the defendant, and also restraining and enjoining the defendant from interfering with or removing the present stairway and from constructing any buildings upon or exercising any acts of ownership over the land in controversy.

At the hearing and in their briefs, counsel have discussed at length several questions relating to: (1) The powers of the Macatawa Park Association and the Macatawa Park Company, under their respective charters and articles of incorporation, to plat and deal in lands for profit; (2) the regularity and validity of their acts in executing and recording the plats of Macatawa Park and Lakeside Addition; (3) the sufficiency of the dedications of the parks to the use of the public; (4) the acceptance of the parks so dedicated; and (5) the right of complainants to join in the present bill. If all of the questions were decided in favor of complainants, there would still exist, upon the present record, insuperable obstacles to their recovery.

[1] If the deed from the Macatawa Park Company to defendant be set aside, the title to the parcel of land in controversy will thereby be revested either in the municipality within whose territory it is located or in the present owner of the unsold portions of Macatawa Park, the Macatawa Resort Company. But neither the municipality nor the resort company is a party to this suit. There is no proof of any request to either of them to become a party to this litigation. Complainants do not pretend to represent either the public or the alleged owner of the land, and have no such personal interest therein as will entitle them to relief in their own behalf.

[2] To warrant injunctive relief, complainants must establish special rights in themselves not belonging to the general public, or they must show some special injury to their property not suffered by property owners generally. The lots belonging to complainant Miller are located at a considerable distance from Reserve and Overlook Parks. There are several buildings between them and the parks. Therefore he has no appurtenant rights in and to the parks and no rights of any kind except such as are common to all property owners in that vicinity.

[3] Lots 252 and 253, belonging to complainant Calkins, are adjacent to and front upon Reserve Park, and therefore it may be fairly assumed that he has corresponding rights in that park and in its preservation for park purposes. He has, however, no such rights in Overlook Park, because it was not in existence at the time he purchased his lots and built his cottage. The lesser part of the land claimed by defendant is situated in Reserve Park and, being the steep side or slope of a sand bluff, is unsuitable for building purposes. Defendant disavows any intention of building upon or otherwise disturbing that part of the land, and there is nothing in the record to indicate that he has ever had any such intention. Whatever rights the Macatawa Resort Company, the public, or others may have in Overlook Park, it is certain that complainant Calkins has none.

[4] No part of the old stairway, built and maintained by complainants and others, was upon the land in controversy, and therefore the rights of complainants in that stairway are not here involved. The construction, maintenance, and use of the new stairway, if permitted, will not be the use of the land upon which it is located for park purposes, but rather will constitute a street or passageway easement. Complainant Calkins has no right to such use either as an appurtenance to his own lots or by virtue of any grant to himself. If the removal of this stairway will cause injury either to the resort company or to the public generally, such injury must be redressed or prevented, if at all, at the suit of the proper parties and not at the instance of complainants alone.

A decree will be entered dismissing complainants' bill, with costs to the defendant to be taxed.

DIXON v. CORINNE RUNKEL STOCK CO. et al.

(District Court, E. D. North Carolina. June 1, 1914.)

No. 575.

1. ATTACHMENT (§ 4*)—RIGHT TO WRIT—CAUSE OF ACTION—NATURE—INFRINGEMENT OF COPYRIGHT—"COMMON-LAW CAUSE."

Rev. St. § 915 (U. S. Comp. St. 1901, p. 684), provides that in "common-law causes" plaintiff shall be entitled to similar remedies by attachment or other process against the property of the defendant, provided by the laws of the state in which the court is held, etc. *Held*, that since no authority exists in the United States for obtaining a copyright beyond the extent to which Congress has authorized it, a suit for infringement of a

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

copyright is not a "common-law cause" within section 915, and hence plaintiff in such action is not entitled to attachment.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 8–10; Dec. Dig. § 4.*

For other definitions, see Words and Phrases, vol. 8, p. 7607.]

2. COURTS (§ 346*)—FEDERAL COURTS—COPYRIGHTS — ATTACHMENT — VACATION.

Vacation of an unauthorized attachment in a suit in a federal court for infringement of a copyright did not oust the court of jurisdiction under Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1092 [U. S. Comp. St. Supp. 1911, p. 136]) § 24, par. 7, providing that such court shall have exclusive jurisdiction of all suits at law or in equity arising under the patent and copyright laws.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 918; Dec. Dig. § 346.*]

Action by Thomas Dixon, Jr., against the Corinne Runkel Stock Company and others to recover damages for infringement of copyright. On motion to vacate an attachment. Granted.

Harry Skinner, of Greenville, N. C., and R. O. Everett, of Durham, N. C., for plaintiff.

Murray Allen, of Raleigh, N. C., and Thos. S. Fuller, of New York City, for defendants.

CONNOR, District Judge. Plaintiff, Thomas Dixon, Jr., instituted this action on January 4, 1906, by issuing a summons, and, at the same time, upon affidavit setting out his cause of action and alleging that defendants were nonresidents and were about to remove their property from the state with intent to defraud their creditors, obtained a warrant of attachment. The summons and warrant of attachment were delivered to the marshal who, as appears by his return, indorsed thereon, "served the within summons" on defendants. No return is indorsed on the warrant of attachment, which is attached to the summons. The marshal returned, with the original summons and warrant of attachment, an undertaking signed by defendant and R. H. Wright, in which it is recited that:

"Whereas John Dockery, deputy marshal * * * pursuant to a warrant of attachment in the above-entitled action, to him directed * * * did seize and levy on property of the above-named defendant Corinne Runkel Stock Co.," etc.

The condition of the bond is as follows:

"Now, therefore, we * * * undertake in the sum of five hundred dollars that the said Corinne Runkel Stock Co. * * * if said property be delivered to them, if the plaintiff recover judgment in said action, will pay the said plaintiff all cost and damages not exceeding $500.00, that may be awarded against them in said action."

On May 30, 1906, the court made an order making the Southern Amusement Company a party plaintiff. On said day plaintiff, Thomas Dixon, Jr., and the said Southern Amusement Company filed their complaint, alleging: That said Thomas Dixon, Jr., was the author of a dramatic composition known as and entitled The Clansman, the

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

scenes and characters of which are based upon two works of fiction, of which said Thomas Dixon, Jr., is also the author, entitled, respectively, The Leopard's Spots and The Clansman, both of which said works of fiction have been copyrighted, as prescribed by the Revised Statutes, etc. That the right to dramatize the said works of fiction was reserved by the said Thomas Dixon, Jr., and has never been sold, assigned, or in any manner disposed of by him to any other person. That said Dixon obtained a copyright for "a dramatic composition in the following words: "The Clansman—an American Drama. By Thomas Dixon, Jr." That he complied with all of the provisions of section 4957 of the Revised Statutes (U. S. Comp. St. 1901, p. 3409), etc. That said copyright was in force at the time of the acts of the defendants complained of. That by said copyright the said Thomas Dixon, Jr.—

"became entitled to and acquired, and there was in him vested the sole liberty of performing, copying, executing, finishing, and vending said composition for a period of 28 years from the 27th day of October, 1905, * * * and the said Thomas Dixon, Jr., is now and has always been the sole owner thereof."

The plaintiffs further allege that:

"The composition produced by said Thomas Dixon, Jr., is of great artistic value, and that, for a valuable consideration, he assigned the sole right to produce it on the stage to the Southern Amusement Company, and that the said dramatic composition has been presented upon the stage in public performances by a company under the direction and management of the Southern Amusement Company in every city of importance in the eastern and southern parts of the United States; that the income derived from the public performance of the said dramatic composition is the sole means of support of the said Thomas Dixon, Jr., and the principal source of income to the Southern Amusement Company."

The complaint further alleged: That the defendant company, at Raleigh, N. C., and other cities, since the assignment by the said Thomas Dixon, Jr., to the Southern Amusement Company of the sole right to produce it in public, publicly performed and presented for profit a dramatic composition in all things substantially as the copyright composition of the said Thomas Dixon, Jr., and in all things, to all intents and purposes, an actual copy or reproduction thereof, or an actual copy or reproduction of a material part of said dramatic composition; that the unlawful and unauthorized composition thus produced was called In Reconstruction Days. That the acts of the defendants in producing and exhibiting the said unlawful dramatic composition was an infringement of plaintiffs' rights, and greatly to their damage.

"That, by reason of the premises and by force of the statutes in such cases made and provided, and more particularly section 4966 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3415), an action has accrued to the complainants to demand and have from the defendants, and each of them, the sum of $100, forfeited for the first public performance or representation of the said copyrighted dramatic composition, or a material part thereof, and $50 for every public performance thereof."

The plaintiffs demand judgment: First, for $400 penalties; second for $100 for the first performance, and $50 for each of the six subsequent performances; third, $500 damages resulting from the unlawful

production of the said copyrighted dramatic composition. They also demand that defendants account for the profits arising from the unauthorized performance, etc. Defendants, in their answer, denied all of the material averments of the complaint.

[1] Defendants moved the court to discharge and vacate the attachment, assigning as grounds therefor: First, that it appeared by the admissions in the complaint that Thomas Dixon, Jr., had sold to the Southern Amusement Company, for a valuable consideration, the sole right to produce the dramatic composition entitled The Clansman, and therefore had no interest in the action at the institution thereof; second, because the action is brought to enforce the collection of penalties and damages given by section 4966 of the Revised Statutes of the United States, and, not being a common-law action entitling plaintiff to the ancillary remedy of attachment as provided by section 915 of the Revised Statutes of the United States. The defendants rely upon the language of section 915, Revised Statutes, 4 Federal Statutes Annotated, 577 (U. S. Comp. St. 1901, p. 684), to sustain their contention that no attachment could issue in this case. It provides that:

"In common-law causes in the Circuit and District Courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof."

The North Carolina Revisal, § 758, provides that a warrant of attachment against the property of one or more defendants may be granted—

"* * * when the action is to recover a sum of money only, or damages for one or more of the following causes: * * * (3) Any other injury to real or personal property, in consequence of negligence, fraud or other wrongful act."

The inquiry, therefore, is whether the complaint sets forth a "common-law cause," as distinguished from a statutory cause of action. It has been held that, in the United States, no authority exists for obtaining a copyright, beyond the extent to which Congress has authorized it. A copyright cannot be sustained as a right existing at common law; but, as it exists in the United States, it depends wholly on the legislation of Congress. Wheaton v. Peters, 8 Pet. 591, 8 L. Ed. 1055. In that case a learned and exhaustive discussion of the interesting subject was written by Mr. Justice McLean for the majority, and Mr. Justice Thompson dissenting, in which the English cases were reviewed.

In the case of Donaldson v. Beckett, 4 Burr. 2408, the House of Lords resolved:

First. That at common law an author of any book, or literary composition, had the sole right of first printing and publishing the same for sale; that he was entitled to an action against any person who printed, published, and sold the same without his consent.

Second. That when he published and printed such book, or literary composition, he surrendered such right, and that any other person might afterwards reprint and sell, for his own benefit, such book or literary composition against the will of the author.

Third. That the right of action which the author had at common law was taken away by statute 8 Anne, and that by said statute he is precluded from every remedy "except on the foundation of the said statute and on the terms of the conditions prescribed thereby." Judge McLean says:

"It would appear, from the points decided, that a majority of the judges were in favor of the common-law right of authors, but that the same had been taken away by the statute, * * * and that the literary property of an author in his works can only be asserted under the statute."

After discussing the grant to the Federal Congress to legislate upon the subject and the acts passed by Congress relating to it, he says:

"Congress then, * * * instead of sanctioning an existing right, as contended for, created it. * * * From these considerations it would seem that if the right of the complainants can be sustained, it must be sustained under the acts of Congress."

Mr. Justice Thompson vigorously dissented from the conclusion reached by the court, in an interesting review of the English decisions. In Globe Newspaper Co. v. Walker, 210 U. S. 356, 28 Sup. Ct. 726, 52 L. Ed. 1096, Mr. Justice Day says that Wheaton v. Peters has been frequently followed and approved. That:

"In this country the right of an author to multiply copies of books, maps, etc., after publication, is the creation of federal statutes. These statutes did not provide for the continuation of a common-law right, but, under constitutional authority, created a new right."

He concludes that the remedies given by the statutes "are the only ones open to those seeking the benefit of the statutory right thereby created." This conclusion is based upon the principle stated in Pollard v. Bailey, 20 Wall. 520, 22 L. Ed. 376, that:

"A general liability created by statute without a remedy may be enforced by an appropriate common-law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

In the enumeration of the statutes giving a remedy for infringement of copyrights, the court includes section 4966. Saake v. Lederer, 174 Fed. 135, 98 C. C. A. 571. While, in the complaint herein, it appears that the draftsman intended to combine several causes of action to meet the complications caused by the joinder of the proprietor of the copyright, Thomas Dixon, Jr., and the Southern Amusement Company, to whom he had assigned the right to produce The Clansman, in the thirteenth paragraph, the cause of action given by section 4966 is set forth, and, as we have seen, this is the basis of the right to maintain the action. It is elementary principle that statutes, giving the ancillary remedy of attachment should be strictly construed—they should be confined to those causes of action which are clearly within the language of the statutes. This distinction between a right of action given by the common law from one dependent upon a statute is well understood in our jurisprudence. In using the term "common-law causes" in section 915, Revised Statutes (U. S. Comp. St. 1901, p. 684), it must be assumed that the Congress had this distinction in mind, and intended that it should be observed. It is not allowable to disregard it,

or by interpretation to explain it away. The motion to vacate the warrant of attachment is granted.

[2] This does not, however, oust the jurisdiction of the court, or work a dismissal of the action. Schunk v. Moline, etc., Co., 147 U. S. 500, 13 Sup. Ct. 416, 37 L. Ed. 255. Exclusive jurisdiction of "all suits at law or in equity arising under the patent and copyright laws" (Jud. Code, § 24, subsec. 7, § 256) is conferred upon the District Court of the United States.

An order may be drawn discharging and vacating the warrant of attachment.

Ex parte THAW.

(District Court of New Hampshire. April 14, 1914.)

1. EXTRADITION (§ 21*)—INTERSTATE—POWERS OF FEDERAL COURTS.

As the source of extradition power of the states is federal, and as it relates to crime only and contemplates the exercise of exceptional and arbitrary control in restraint of personal liberty, the federal Constitution and acts of Congress have reserved to the federal government, and imposed upon its courts, the very important duty of seeing that the power is exercised upon due and appropriate process, and that it shall not be extended to fields, and exercised in classes of cases, not clearly intended by the Constitution.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 26; Dec. Dig. § 21.*]

2. EXTRADITION (§ 34*)—QUESTIONS INVOLVED IN HABEAS CORPUS PROCEEDINGS—REQUISITES OF PAPERS.

Under the later decisions it may be said that, as between the states, all penal offenses, misdemeanors as well as crimes, are covered by the power of extradition delegated by the federal Constitution, and the only question for a federal court in a habeas corpus proceeding is the one of due process. Under the general question of due process are the subsidiary ones whether crime is charged and described with legal certainty against a responsible person, which is a question of law, and the question of flight which is one of fact; and, in a case where there is no evidence dehors the record upon the question of flight involved, all these questions must be determined upon the face of the papers, which must show what the Constitution contemplates—a responsible person, a charge of crime, which must be supplemented by a clear and complete description of the crime, and a fleeing from justice.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 35–38; Dec. Dig. § 34.*]

3. EXTRADITION (§ 34*)—REQUISITION PAPERS—RULE OF STRICT CONSTRUCTION.

Because extradition follows automatically and as of right, without investigation, in cases where all the contemplated elements of crime distinctly and unquestionably appear upon the face of the papers, and because extradition involves such drastic and unchallengeable power exercised at variance with common-law principles, all courts, both English and American, hold to rules of strictness in respect to the description of the crime and to rules of strict construction upon questions of intendment in respect to what is shown on the face of the papers.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 35–38; Dec. Dig. § 34.*]

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

4. EXTRADITION (§§ 28½, 39*)—INTERSTATE—SUFFICIENCY OF REQUISITION PAPERS—"PERSON."

In order to have extradition there must be a person, a crime, and a flight, and, under a reasonable and necessary construction of the constitutional provision, the person must be a responsible person; but naming the person who is charged will be supplemented by the presumption of responsibility and will be sufficient to establish the constitutional elements, unless the description of the person and the crime for which he is sought to be extradited involves something which reasonably overthrows the essential presumption of responsibility.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 31, 45, 46; Dec. Dig. §§ 28½, 39.*

For other definitions, see Words and Phrases, vol. 6, pp. 5322–5335; vol. 8, p. 7752.]

5. EXTRADITION (§ 34*)—INTERSTATE—SUFFICIENCY OF PAPERS.

When the crime alleged in the papers as the ground for extradition is a conspiracy by the person charged and others for his escape from a custody based only upon a finding of his insanity and a commitment thereon, such a finding not only overthrows the presumption of responsibility but creates the presumption that insanity continued until the escape, and this throws the question of criminal responsibility into the field of uncertainty, and the burden of proving a recovery or a lucid interval, as the case may be, rests upon the person alleging the same.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 35–38; Dec. Dig. § 34.*]

6. EXTRADITION (§ 39*)—INTERSTATE—SUFFICIENCY OF PAPERS.

Uncertainty appearing upon the face of extradition papers in respect to the material element of mental condition and criminal responsibility is as fatal to the idea of the constitutional right of extradition as would be uncertainty as to a physical fact which is a necessary element of the crime sought to be described.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 45, 46; Dec. Dig. § 39.*]

7. EXTRADITION (§ 28½*)—INTERSTATE—GROUNDS.

The constitutional power of interstate extradition does not extend to the return of a person fleeing from guardianship custody, based upon a decree or finding of insanity, idiocy, or infantile irresponsibility, or from process in the nature of civil process invoked for parental and protective purposes.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 31; Dec. Dig. § 28½.*]

8. EXTRADITION (§ 30*)—INTERSTATE—GROUNDS—SUFFICIENCY OF PAPERS.

The constitutional element of flight must have some causal relation to the specific crime alleged as the ground for invoking the power of interstate extradition, and such relation is not shown where the crime charged is a conspiracy to escape from confinement in an insane asylum under a civil process, and the flight was from such institution into another state immediately following the escape. In such case the flight was clearly not from the crime or its consequences but from the incarceration and confinement.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 32; Dec. Dig. § 30.*]

In the matter of the petition of Harry Kendall Thaw for writ of habeas corpus. Writ granted.

See, also, 209 Fed. 954.

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

Drew, Shurtleff, Morris & Oakes, of Lancaster, N. H., Martin, Howe & Donigan, of Concord, N. H., William A. Stone, of Pittsburg, Pa., and William M. Chase, of Concord, N. H., for petitioner.

William T. Jerome, of New York City, Franklin Kennedy, of Albany, N. Y., and Bernard Jacobs, of Lancaster, N. H., for respondent.

ALDRICH, District Judge. In this case the person sought to be returned to the demanding state of New York under the federal Constitution, which provides for extradition upon a charge of crime, is in fact a fugitive from a decree of custody under which, at the time of his flight, he was being held as an insane person; and the questions involved in his habeas corpus proceeding are entirely new to both English and Amercian jurisprudence.

The question here is not the general question whether the petitioner should be returned to New York custody, but the specific question whether the process under which he is sought to be returned is due process in the constitutional extradition sense.

The status of New York in respect to the situation is not that of a prosecutor for crime in the sole and ordinary extradition sense, because the relationship of guardian and ward is the foundation upon which the entire proceeding is based, and because, as claimed, extradition is sought, first, for punishment for the misdemeanor involved in the alleged plan of escape, and, second, for recommitment to guardianship custody at Matteawan.

This proceeding is in no sense whatever based upon the idea of recovering the person of Thaw for the purpose of punishing him for the offense of killing White, for which he was acquitted, because, as is axiomatic, and because, as expressly decided by the Appellate Division of the New York Supreme Court in Peabody v. Chanler, 133 App. Div. 159, 117 N. Y. Supp. 322, 325, which was one of the Thaw Cases, "there can be no punishment for him who has been acquitted."

So we have the case pure and simple, and that is all there is of it, of a person sought to be extradited under the Constitution because he has fled from guardianship custody based upon the verdict of a jury that he was insane. The person was committed on the ground of insanity, and was being held under the same commitment at the time of the alleged escape and flight.

The case is a novel one, and requires the utmost caution, as the power of extradition is exceptional and extremely arbitrary, and because it imposes itself upon personal liberty, and because heretofore neither in this country nor in England has extradition power been invoked for the return of a person fleeing from custody based upon such a finding of insanity and such an escape and flight.

Without elaborating upon particular reasonings and judicial decisions since extradition began, it may be said that, heretofore, no one has ever claimed that extradition operated otherwise than in the strict field of crime, where the crime is described with a particularity and legal certainty answering the requirements of criminal pleadings, and where, upon the face of the papers, there was no open question as to the criminal responsibility of the person sought to be extradited. The

proposition here is that the power of extradition should operate because, as was claimed in oral argument, contrary to what appears on the face of the papers, it can ultimately be shown in New York that the person sought to be extradited had sufficient mental appreciation to know that his escape was wrongful. Such is not only a novel proposition in the extradition sense, but is one fraught with dangerous possibilities, because if it is once established that you may extradite for crime a person who, as appears on the face of the papers, has escaped from guardianship custody based upon a finding against him as an insane person, upon the idea that the demanding state many ultimately prove him sufficiently sane to be a criminal, the principle is established that extradition may operate in the field of uncertainty, and as a result it would follow that you might extradite for crime an irresponsible infant who escaped from guardianship custody, or an idiot who escaped from a decree of custody based upon idiocy and indigency, as well as an insane person, upon the theory that you may subsequently, at some time and in some remote part of the country, prove that they had sufficient sense to know that the escape was unlawful and consequently that they were subject to extradition as criminals; and, failing ultimately to show criminal responsibility, it results that the person, though irresponsible, stands as a person extradited for crime under the power of the Constitution.

Thus in view of the large sense in which the proposition involved concerns the public, because of its possible application to children of tender years and idiots and other helpless and irresponsible persons, as well as the insane classes charged with crime, the question becomes one of far greater importance than the interests of the state of New York to have possession of this particular person, or the consequences which may come to this particular petitioner through a decision one way or the other.

It is because the question here is a new one and one which has a public phase, in the sense that it relates to a principle which, once established, will operate upon great classes of individuals, that it becomes a question of greater gravity than one which affects only the rights of the immediate parties concerned; and it was in this sense that Lord Justice Sir William Milbourne James, in Pooley v. Whetham, 15 Ch. D. 435, 440, said, in speaking of extradition and how it should operate, that the more important question was the public question, apart from the importance to the individuals concerned, and that, if the process of extradition was abused through using it for improper purposes, a party should be discharged independently of any extradition act or any other act in the world.

The practical exercise of the power of extradition having been delegated to the states under the federal Constitution and acts of Congress, the responsibility of the federal government is limited to the question whether, in a given case, the escape and flight constitutes a fleeing from justice in the constitutional and statutory extradition sense, and the further question whether the supposed crime is substantially and legally charged.

[1] As the source of extradition power of states is federal, and as it relates to crime only, and contemplates the exercise of exceptional and arbitrary control in restraint of personal liberty, the federal Constitution and acts of Congress have reserved to the federal government and imposed upon its courts the very important duty of seeing that the power is exercised upon due and appropriate process, and that it shall not be extended to fields and exercised in classes of cases not clearly intended by the Constitution.

The power of restraint of liberty and of personal delivery under extradition process is arbitrary and exceptional, because a person may be taken into custody in one jurisdiction and conveyed to another without a hearing before the Governor, and, as said in New York in a comparatively recent opinion by Mr. Justice Cullen in Corkran v. Hyatt, 172 N. Y. 176, 193, 64 N. E. 825, 830 (60 L. R. A. 774), approved by the Supreme Court, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657):

"Unless he may review his extradition on habeas corpus, a citizen, on the fiat of an executive officer, without a hearing, may be transported a prisoner to the utmost confines of the country."

And earlier the New York Supreme Court in People v. Donohue, 84 N. Y. 438, 441, in maintaining that suitable preliminary papers were essential in extradition proceedings, and that the right of review exists when judicial investigation and the judgment of the law are invoked, said:

"To say they are not would be to disregard the law, and make the executive an autocrat."

In exercising the power of interstate extradition, states are using a federal force, and, although there has been a world of discussion as to the scope of the revisory power reserved to itself by the federal government, it may now be accepted as unquestionably established that, in cases which reasonably present the question of the proper exercise of the constitutional power, it is not only the right, but the duty, of the United States courts to see that the right is exercised only in respect to such classes of cases as were contemplated when the power was granted, and that the crime is substantially and legally charged.

It may also be accepted as established that, as the practical administration of the arbitrary and exceptional power is at variance with the principles of the common law, and as it relates to crime, the charge of crime must be supplemented by a description answering the rules in respect to particularity and certainty.

Looking at the subject of extradition historically, it will be seen that all efforts to extend the power inconsiderately to new situations and to include new classes of cases have been stubbornly opposed both in England and in this country. Reluctance to go beyond the offenses expressly enumerated in our constitutional provision, and situations found to have been reasonably intended by the general word "crime," has been many times manifested by executives, and many times by courts charged with responsibility for the exercise of revisory control.

Without going much into the history of the contentions in respect to

limitations and extensions under judicial and executive construction, the opposition to extension of power under liberal construction is in a measure illustrated by such instances as the slave cases of Governor Seward in New York, where it was contended that no state was bound to extradite unless the crime described was recognized as such in its jurisdiction; the case of Mr. Storey, editor of the Chicago Times, sought to be extradited to Wisconsin from Chicago for libel published in the Times at Chicago, and circulated in Wisconsin, upon the theory of a constructive flight (3 Central Law Journal, 636); the case of Max Juhn, merchant of Baltimore, demanded by the state of New York for obtaining goods under false pretenses (2 Moore's Extradition, § 585); and the case of Mitchell, where New Jersey asked New York to return Mitchell, who, while in New York, instigated the burning of buildings at Jersey City, whereby life was lost, and manslaughter was charged, and where the doctrine of constructive presence was urged in order to make out a case of flight. Governor Hill denied the application, quoting from Spear (page 400) that, no matter what the consequences may be, "the Governor of a state is not to become an official kidnapper in order that the guilty may be punished." 4 N. Y. Cr. R. 601, and numerous other cases where extradition was sought to be carried to new situations.

In connection with the above case, Governor Hill promulgated a careful set of rules in respect to applications for extradition, which require, among other things, a concise definition of the crime, and that the application shall be accompanied with an affidavit that it is made in good faith and for the sole purpose of punishing the accused. 4 N. Y. Cr. R. 604.

[2] In the early stages of interstate extradition, as is well understood, it was strenuously maintained by judges, executives, and publicists that the word "crime" in the Constitution only included offenses of the higher grades; but it is assumed, for the purposes of this case, that it may now be said with tolerable exactness that, as between the states, all penal offenses, misdemeanors as well as crimes, are covered by the power delegated by the federal Constitution, and that the only question for a federal court in a habeas corpus proceeding like this is the one of due process; and that under the general question of due process are the subsidiary ones whether crime is charged and described with legal certainty against a responsible person, which is a question of law, and the question of flight, which is a question of fact, and that, in a case where there is no evidence dehors the record upon the question of flight involved, all these questions must be determined upon the face of the papers. The papers, therefore, must show what the Constitution contemplates—a responsible person, a charge of crime, which under the decisions must be supplemented by a clear and complete description of the crime, and a fleeing from justice.

It is also thought to be perfectly justifiable, for the purposes of the question now under consideration, to assume that if, upon the face of the papers, a person, without suggestion of criminal irresponsibility, is named and charged with a crime which, being described, can be seen to be a crime under the laws of the demanding state, and the descrip-

tion of the person and the crime being supplemented by a charge of flight, that extradition follows automatically, so to speak, under executive authority; in other words, that the constitutional provision, upon such papers, operates ex proprio vigore.

[3] The wisely efficient potentiality of the constitutional power of extradition results because extradition follows automatically and as of right, without investigation, in cases where all the contemplated elements of crime distinctly and unquestionably appear upon the face of the papers; and it is because of such automatic and arbitrary power exercised at variance with common-law principles (Piggott on Extradition, p. 5; Biron & Chalmers on Extradition, 1–14) that the constitutional force should not be extended to indifferent and uncertain situations in respect to which the executive is not in a position to investigate the merits.

It is because extradition involves such a drastic and unchallengeable power that all the text-books, both English and American, and all the cases, hold to rules of strictness in respect to the description of the crime, and to rules of strict construction upon questions of intendment in respect to what is shown upon the face of the papers.

[4] In order to have extradition, there must be a person, a crime, and a flight. The constitutional word "charged" must be supplemented by a description of the crime charged, and the description must be certain and complete. There must be a person, and, under a reasonable and necessary construction of the Constitution, the person must be a responsible person; and there must be a flight, and the flight must, according to Bouvier, be one to avoid punishment for the crime committed.

It must be borne in mind that all of the elements necessary to extradition must appear upon the face of the papers; but naming a person who is charged would of course be supplemented by the presumption of responsibility, and would be sufficient to establish the constitutional elements, unless the description of the person and the crime for which he is sought to be extradited involves something which reasonably overthrows the essential presumption of responsibility.

[5] In setting out its case for extradition, the state of New York describes a person escaping from a custody based solely upon the finding of a jury that he was guiltless of crime by reason of insanity, and the crime alleged as the ground for extradition is a conspiracy to escape from a custody based only upon the finding of insanity and commitment thereon. According to English and American authorities, such a finding not only overthrows the presumption of responsibility, but continues the presumption of insanity until it is proved to have ceased; and the burden of proving recovery or a lucid interval, as the case may be, lies on the person alleging the same. 19 Halsbury's Laws of England, 407, and note "k," and Langdon v. People, 133 Ill. 382, 24 N. E. 874; 27 Cent. Dig. (§ 6) 2461; Id. (§ 36) 2502–2507.

It is of course true that requisition papers, fair upon their face, even though containing nothing in the charge of crime or in the description of the person suggesting criminal responsibility, embrace the constitutional elements, and are operative because every person is presumed to

be sane and responsible until the contrary appears (27 Cent. Dig. 2458, and authorities cited), but papers which, in the description of the person and of an alleged crime involved in an escape from control because of a finding of insanity and criminal irresponsibility, do not embrace the constitutional elements, and are not operative because insanity and criminal irresponsibility being proved are presumed to continue until the contrary appears (Id. 2462).

The constitutional force is thus inoperative because it was never intended that it should be used against a person by a demanding state whose papers show upon their face that the person sought is presumptively irresponsible. It is anomalous to say that it was ever intended that the constitutional provision should operate upon persons described by a demanding state in extradition requisition papers either as idiots, insane persons, or as irresponsible infants; and this is because mental condition and criminal responsibility in such situations are always and necessarily in the field of uncertainty and doubt; and therefore it results that a crime is neither legally nor substantially charged within the meaning of the Constitution.

It is apparent that the English authorities hold rigidly to the rule of strict construction in respect to intercolonial extradition and to extradition between the different parts of the British dominions, or, as it is called there, "return of fugitive offenders," and to the idea, as shown in Pooley v. Whetham, 15 Ch. D. 435, and other cases, that extradition or forcible return was only intended to operate in clean-cut cases of crime, and, if used for ulterior purposes, that it was an abusive use.

So cautious was England, in respect to her laws in restraint of personal liberty, that her Parliament, in the various Fugitive Offenders Acts, fashioned closely after our system of constitutional interstate extradition, limited them in operation strictly to the field of crime; expressly provided that return should not operate until the alleged offender had had 15 days in which to test his liberty rights on habeas corpus; and that proceedings might be dismissed for bad faith or because of an offense being trivial. See, among the English statutes, 6 & 7 Vic. c. 34, p. 194; 33 & 34 Vic. c. 52, p. 288; 44 & 45 Vic. c. 69, p. 392. See, also, Biron and Chalmers on Extradition, pp. 90–132; Clarke on Extradition, p. 42; Act of 1870, § 26; Halsbury's Laws of England, vol. 14, pp. 403, 405, 413, and note "n."

So far removed was England from the idea of using extradition for the return of escaped lunatics upon a charge of crime, that it never used the power in such a situation or for such a purpose, but wisely provided other and different means which presented opportunities for judicial investigation and for safeguarding the rights and interests of all; as, for instance, see the Lunacy Act of 1890, 53 Vic. c. 5, §§ 86, 89. See, also, the Laws of England, by the Earl of Halsbury, vol. 19, p. 525, and notes. Moreover, and even after the Fugitive Offenders Act of 1843, which was manifestly intended to operate only upon responsible parties, remedy under habeas corpus, or through an application to commissioners, was suggested as the appropriate remedy for the restoration of an insane person escaping from guardianship asylum. See Norris v. Seed, 3 Exch. Rep. 782, 790, 792.

New York's right of custody, if the right exists, was based solely upon the idea of insanity; and, from the very nature of the case, in describing the supposed extradition crime the demanding state itself, upon the face of the papers, necessarily throws the question of criminal responsibility into the field of uncertainty, and thus it at once presents a question new to extradition law.

Careful research finds no case in this country or in England where the extradition power has been sought to return a person whose flight was from custody of such a character. The fact that among nations flights from insane hospitals, idiot asylums, and institutions for the care of indigent children of tender years have never been suggested as subjects proper to be covered by international treaties is a fact which at least historically establishes the proposition that they have never been deemed proper subjects of extradition. The fact that the return of fugitives from such custody has never been sought in this country, through the instrumentality of constitutional interstate extradition based upon alleged crime involved in escape, is strong evidence in favor of an interpretation that the constitutional provision was never intended to operate in such a field of uncertainty. The very fact of custody on the ground of infancy, idiocy, or insanity suggests irresponsibility; and it is probably perfectly correct to say that no one having to do with the creation of the constitutional provision ever dreamed of its operating upon infants, idiots, and insane persons. Are the exigencies of a case like this such as to justify extending its operation into fields into which it was never intended to enter?

Looking, as we must, in respect to the question of crime, to the face of the papers only, in a situation where the presumption of responsibility is absent, do the papers show prima facie a case of criminal responsibility, or do they show prima facie insanity or criminal irresponsibility? Do not the requisition papers and the indictment in referring to the escape and the process of custody under which the person was held, including the description of the status of the person, affirmatively introduce on the face of the papers a fact or a personal status which shifts the presumption of responsibility to one of irresponsibility, or at least a status which creates or suggests the element of uncertainty in respect to the presumption of criminal responsibility? Is the charge, which must be one of perspicuity and of particular recital of facts (Spear 250), under the description taken as a whole, left as a substantial charge with legal certainty in the extradition sense? Do not the necessary recitals of the demanding state necessarily leave the charge of crime incomplete? It is because executive extradition involves the forcible seizure of a person and without a trial carrying him from one jurisdiction to another, and perhaps a remote one, and upon a proceeding in which he is not entitled to be heard, that the rule of strict particularity, certainty, and completeness in describing the crime has been thoroughly and completely established by abundant judicial authority as a reasonable and necessary rule of protection of personal liberty. And with this goes the other rule now unquestioned, that unless the crime is substantially charged, and unless the description sets forth with strict legal exactness and completeness a crime known to the

laws of the demanding state, there is no constitutional authority to extradite.

Substantially charged means legally charged, and these rules have reference, not to the general charge of crime alone, but to the description which must supplement the charge, and include, of course, both a description of the person and the crime. Thus it follows in this case in a very substantial sense, both in respect to the constitutional word "person" and the constitutional word "crime," that the real question is whether, in the legal and substantial sense, the papers upon their face, under reasonable interpretation, show prima facie crime and criminal responsibility; or whether they show prima facie legal uncertainty, in respect to the necessary element of criminal responsibility.

The statement of Judge Hough in the Kopel Case (D. C.) 148 Fed. 505, 506, quoting Judge Cullen in the Corkran v. Hyatt Case, 172 N. Y. 176, 182, 64 N. E. 825, 826 (60 L. R. A. 774), that "no person can or should be extradited from one state to another unless the case falls within the constitutional provision, and that the power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by the states," is a good statement of the legal character of the interstate power and of the interstate relations, and is one which is abundantly supported by the legal literature on the subject. See, also, Hyatt v. Corkran, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657. In the same line is the reasoning of Lord Alverstone in respect to the English Fugitive Offenders Act (Ex parte Percival, 21 Cox, Cr. Cas. 387):

"I think that every person who comes and asks for a fugitive offender to be delivered up under that statute must be prepared with evidence to show that that condition of the statute has been fulfilled. I think that is a very important matter, having regard to the fact that we are dealing with the criminal law, and that we must apply the general principles of the criminal law and require that the prosecutor must make out his case. We are dealing with the liberty of the subject, and with a branch of the criminal law which affects the liberty of the subject, and I therefore think that that condition should under ordinary circumstances be clearly fulfilled."

It was early discovered that oppressions would result if a simple charge of crime was recognized as the only thing necessary to put the constitutional function of extradition into operation; and it followed that the Supreme Court declared in Roberts v. Reilly, 116 U. S. 80, 95, 6 Sup. Ct. 291, 29 L. Ed. 544, that, before the Governor of a state can lawfully comply with the demand for the surrender of a person, it must appear that the person demanded is substantially charged with a crime against the laws of the demanding state, and that the person demanded was a fugitive from the justice of the demanding state. The fundamental idea thus expressed by the Supreme Court has been recognized as meaning legally charged, and legally charged has been interpreted by numerous judicial decisions and text-book writers as meaning such particularity, perspicuity, and completeness of recital as will enable the executive, upon whom the demand is made, to see that the facts constitute with reasonable certainty a crime against the laws of the demanding state.

[6] It must be perfectly correct to say that uncertainty appearing

upon the face of the papers in respect to the material element of mental condition and criminal responsibility would be as fatal to the idea of the constitutional right of extradition as would uncertainty as to a physical fact which was a necessary element of the crime sought to be described.

The right of a state to have possession of a person through extradition, not for the sole purpose of punishing him for crime, but ultimately to protect a community from which he has fled, is not an inherent or fundamental right, nor is it one which would be classed with the essential or substantial rights of a state. The right of a state to exercise guardianship control rests in the parens patriæ doctrine, and in its brief the state of New York recognizes the relationship of guardianship and wardship.

[7] A very careful examination of the numerous American textbooks on international and interstate extradition, and of the very numerous decisions by American courts, and of the many writings of publicists, and of the works of the English text-writers, and of the English decisions in respect to international extradition, and the return of fugitives under the various English Fugitive Offenders Acts, discloses no suggestion of the return of a person fleeing from guardianship custody based upon a decree or finding of insanity, idiocy, or infantile irresponsibility, or from process in the nature of civil process invoked for parental and protective purposes, upon the theory that the escape involved an extraditable crime, save the single case of Amelia Leonard, an insane person, who was being held by New York in order that proceedings might be instituted for extradition upon requisition from the executive of Massachusetts, and where habeas corpus was sustained by Judge Seabury and the petitioner discharged as not an extraditable person.

So the question here for the first time is whether extradition shall enter broadly into a new field, with whatever consequences may follow from its arbitrary and exceptional character, and assert itself in behalf of a demanding state where the flight of which it complains is from a control under the doctrine of parens patriæ and from a control which, as shown by the requisition papers, was based upon mental incapacity and personal irresponsibility. Surely courts will be reluctant to blindly or inconsiderately so extend an arbitrary and exceptional body of law, unless under pressure of extreme necessity and the absence of some mode of return more consonant with the idea of reasonable opportunities for looking to the merits and of protecting personal liberty. All personal restraint and custody exercised under the doctrine of parens patriæ, or of state guardianship, is of course based upon the idea of mental incapacity, as contradistinguished from physical incapacity. It is the existence of mental incapacity that justifies the control, and it is quite correct to say that all decrees and commitments effectuating such right of control, whether based upon insanity, idiocy, or infancy, recite mental incapacity, without undertaking to define its degree; and as the function of the federal court in extradition is only to see that there is due process and a flight, and as apparently the executive of a state has no suitable power or machinery in an ex-

tradition proceeding for hearing the parties and, upon a proper hearing, to ascertain the degree of mental capacity or incapacity, it would result, though incapacity appears on the face of the papers presented by the demanding state, that upon a technical and ex parte charge and description of a crime that extradition power would operate perfunctorily alike upon all degrees of insanity, idiocy, and infancy.

No one would contend that if the degree of idiocy or insanity was in fact such that the escaped person did not know east from west, and merely wandering from hospital control in New Hampshire landed in Maine, he ought, upon a charge and description of crime, to be extradited as a criminal; yet, if it be true that the constitutional power of extradition operates automatically and arbitrarily under papers affirmatively showing the incapacity upon which the control of idiots, infants, and insane persons was based, he must be returned as a criminal, because there is no recognized machinery in the interstate extradition system for ascertaining the degree of mental responsibility.

The possibility that the constitutional right or power might be so anomalously exercised in cases involving personal liberty, and upon lines so entirely inconsistent with and so at variance with the principles of the common law (Piggott, p. 5), suggests some of the considerations of public policy which enter into the question whether extradition shall be extended to the field of guardianship and ward, and to escapes from custody under process in the nature of civil process, like the decrees under which insane persons, idiots, and infants are held in control.

Thinking simply of situations involving the custody of infant children in divorce cases under civil decrees, and escapes, and controversies between parents as to control, it is impossible to foresee the oppressions and confusions which might result if the constitutional provision as to extradition is to be accepted as a power to operate upon such abstract, drastic, and absolute lines as are urged here on behalf of New York.

The absolutism of extradition power involves neither a feasible nor a rational process for forcible return of persons escaping from idiocy, infancy, or insanity guardianship custody. It is because there have been so many attempts to use extradition power in connection with personal control and custody of weak-minded persons for property purposes, and because what has been attempted in the past will doubtless be attempted in the future in respect to such classes, that, if the constitutional provision is given such an interpretation and such a scope, it will surely sometimes be made to operate blindly, arbitrarily, and unjustly in fields of uncertainty. It is because the extradition power, in a large sense, exercises itself blindly and automatically that it should not inconsiderately enter into the field of uncertainty. Courts would be reluctant to force such a situation under rules of liberal construction, at the expense of perversion and an unreasonable extension of a carefully guarded constitutional power.

It must be borne in mind that the person here sought to be extradited is not interposing insanity against extradition as an original and independent fact dehors the record, as was done in the Charlton Case,

229 U. S. 447, 33 Sup. Ct. 945, 57 L. Ed. 1274, 46 L. R. A. (N. S.) 397, where the extradition record was fair and complete upon its face, with no suggestion of mental incapacity, and that this case is not like that, because here the demanding state must from the very nature of the situation, and does, in describing its alleged offense, introduce upon the face of the extradition record the fact that the custody under which the petitioner was held and from which he escaped was based upon a finding of insanity, and such a finding only.

If Charlton had been tried in Italy for homicide at Lake Como, and had been acquitted on the ground of insanity, and had been committed to an insane hospital under the force of such an acquittal and of such a finding, and had escaped to this country, and Italy in its papers had sought international extradition describing such a situation, his case would have been something like the one under consideration here, and a very different one from that which was decided by the Supreme Court.

In this sense, viewing the situation more as one involving a general question of public policy of vastly more importance even than one of personal right in a particular case, the facts of record are destructive of the idea that the case is one within the intended constitutional area of extradition; in other words, such papers upon their face affirmatively put a negative upon the idea that the power of extradition is operating as was intended in the field of strict crime.

The leading case on the question of the necessity of particularity of description is that of People v. Brady, 56 N. Y. 182, where it was held in effect that a vague and unsatisfactory charge of crime was not sufficient, and that a full and explicit description of the crime by the demanding state was a condition precedent to the obligation to surrender. This case is discussed at considerable length by Moore in his work on extradition, where other authorities are cited (including Ex parte Stanley, 25 Tex. App. 372, 8 S. W. 645, 8 Am. St. Rep. 440; State v. O'Connor, 38 Minn. 243, 36 N. W. 462), with explanations of the reasons for the rule. See Moore on Extradition, § 634, to and including section 640. And the doctrine of particularity was recognized in New York in the later case of Corkran v. Hyatt, 172 N. Y. 176, 191, 193, 64 N. E. 825, 60 L. R. A. 774, sustaining habeas corpus and the idea of the right and duty of the court to review the acts of the executive in respect to the questions involved in the description of the crime and the allegation of flight. And this decision was sustained by the Supreme Court in 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657.

The rule requiring that a crime shall be legally charged and described with particularity and certainty is several times stated by Spear in his book on Extradition, which was characterized by Mr. Justice Miller in United States v. Rauscher, 119 U. S. 407, 417, 7 Sup. Ct. 234, 30 L. Ed. 425, as a very learned and careful work. See pages 289, 361, 365, 369. The reason for the rule is apparent, and has been so generally recognized by the courts as to render discussion and citation of authorities unnecessary, and it will not be pursued further than to say that the rule does not mean that the crime shall be described with such technical precision as would stand the test of all questions which

might be raised against an indictment, but that it does mean that the facts shall be so fully and particularly recited in the requisition papers that the state upon which demand is made can see that it presents such material facts as will include the elements of crime contemplated by the constitutional provision, which means, of course, a description of the crime and a description of a responsible person.

As, for instance, to use an extreme illustration, if it were Mary Jones who were charged with an extraditable crime, and the description of the person rested with her name and place, it would, of course, aided by the usual presumption of responsibility, be quite sufficient; but if in describing the crime it was said that Mary Jones was a child four years of age, who was guilty of the crime of conspiracy in escaping from guardianship custody decreed in a divorce case, the description would render the charge incomplete and put the case outside of the field of extradition.

It is strongly urged by counsel for the petitioner in this case that the real and substantial purpose of the extradition sought is not to punish for the supposed misdemeanor involved in the escape, but to secure a return of the petitioner under extradition power upon a charge of crime, for the ultimate purpose of reconfinement at the Matteawan Hospital as an insane or dangerous person.

I think the reasonable interpretation of the entire proceeding, including the statement of counsel (Record, p. 154):

> "We expect to take this man back; we expect to try him and punish him for his crime; and, when he has taken his punishment for his crime, we expect to put him where he belongs and where he will not be a menace to the public"

—is at least that the sole purpose is not to punish for the supposed crime of conspiracy to escape from guardianship custody.

Although the general theory of the extradition law is that it operates only in the strict field of crime, and that extradition process is only to be used for the return of persons for the sole and genuine purpose of punishment for crime, and though recommitment at Matteawan would not be punishment for crime, but detention under guardianship relations and civil process, and though there are very many cases and publications which broadly discuss, with strong expressions, the question of bad faith and the question of the misuse of extradition process for ulterior purposes, I am not inclined to base my decision upon that phase of the controversy between the petitioner and the state of New York, or to discuss it further than to cite In re Cannon, 47 Mich. 481, 11 N. W. 280, and the various opinions in the English case of Pooley v. Whetham, 15 Ch. D. 435.

The petitioner in this case was tried before a jury in New York City in 1908 under an indictment for an alleged homicide, and was acquitted by the jury on the ground of insanity. It was thereupon ordered that he be detained in safe custody and be sent to the Matteawan State Hospital, there to be kept until discharged by due course of law. The hospital was one established by the laws of New York to be used for the purpose of holding in custody and caring for such insane persons as might be committed thereto. In August, 1913, the petitioner es-

caped from such custody, and, being found in New Hampshire, was taken into custody under state process, and while in the custody of the New Hampshire authorities, under requisition papers from New York, he petitioned for habeas corpus upon alleged constitutional grounds.

New York in its brief expressly disclaims that its extradition proceeding is in any sense based upon the idea that the escape from the state asylum in Matteawan is a crime under the laws of the state of New York, or that the indictment is for an escape, or for a conspiracy to commit the crime of escape. And it is true that, while the New York statutes do provide that it shall be a crime or misdemeanor to escape from custody under a sentence for crime or misdemeanor, and for recapture of persons escaping from such custody under a sentence of imprisonment for crime (Birdseye, Cumming and Gilbert's Consolidated Laws of New York, p. 4023 [Penal Laws (Consol. Laws, c. 40) §§ 1693, 1694]), it has not been made to appear that there is in fact any New York statute making it a crime to escape from hospital custody under process like that in question here.

New York in its brief bases its case upon the idea that that state was the legally appointed guardian of Thaw while insane, and upon the allegation of a conspiracy to pervert and obstruct justice and the due administration of the law, which, they say, is a misdemeanor under the laws of the state. Therefore all thought that the custody of Thaw is sought as a matter of punishment for a homicide must be dismissed as having nothing to do with the legal or constitutional questions involved.

The indictment, without even alleging the then existence of insanity as a necessary basis of a continuing right of control, recites the nature of the alleged conspiracy, and refers to the custody under which the petitioner was held. It is conceded that an overt act, though not a necessary element at common law, is a necessary element of conspiracy under the statutes of New York. It is contended, however, that, though the act of escape was not a criminal act, the act of walking out, or, in other words, of escaping without violence, should be accepted as an overt act under the New York statutory criminal law of conspiracy. The act of walking out, however, is not relied upon as the sole overt act, because it is argued that entering the automobile which was to take him away, and perhaps other things incidental to the flight, should be accepted as overt acts in furtherance of the conspiracy for a flight, whereby justice and the due administration of the law were to be perverted.

The petitioner was in confinement under civil process at Matteawan Hospital in Dutchess county, and the indictment was presented in the city and county of New York. Neither the place of the alleged conspiracy nor the means or manner of developing the escape, or of the knowledge or intention of obstructing justice and the due administration of the law, are with particularity, if at all, set out in the indictment, except it is said that certain of the alleged conspirators drove an automobile to Matteawan, where it awaited the petitioner, and where

the petitioner entered the car, from whence he was carried out of Dutchess county and out of the state of New York.

As to requirements in respect to a particular description of the means, where the overt act is not a crime, see Pettibone v. United States, 148 U. S. 197, 203, 206, 13 Sup. Ct. 542, 37 L. Ed. 419; State v. Burnham, 15 N. H. 396, 402; State v. Parker, 43 N. H. 83; State v. Potter, 28 Iowa 554; State v. Stevens, 30 Iowa, 391; State v. Jones, 13 Iowa, 269; State v. Roberts, 34 Me. 320; Commonwealth v. Shedd, 7 Cush. (Mass.) 514; Commonwealth v. Hunt, 4 Metc. (Mass.) 112, 125, 38 Am. Dec. 346; Lambert v. People, 9 Cow. (N. Y.) 578.

The sufficiency of an indictment involved in an extradition proceeding is open to inquiry (In re Terrell [C. C.] 51 Fed. 213), and the sum of the contention in respect to the indictment here is that even though the act of walking out and walking away from the hospital and out of the state would not be a crime, that the act though lawful, when associated with a plan to have a carriage or an automobile there to carry the escaping person away, the escape would become a crime. Such a position involves a considerable measure of refinement in order to bring the case within the Constitution, and, while there is apparently serious doubt whether the indictment sets out a situation which clearly discloses a crime or misdemeanor under the laws of New York, it is not deemed that the exigencies here demand a careful analysis of the question with a view to its definite technical determination, because it would at least require that rules of liberal construction should be invoked in order to reach such a conclusion, and rules of liberal construction are not permissible where the exercise of peremptory force against personal liberty is involved. I prefer, rather than to make the technical analysis of the question of crime in such a situation, to put my decision on the ground that the papers reasonably negative the idea of criminal responsibility, and that for that reason the charge of crime in the constitutional sense is unsubstantial and incomplete.

Knowledge or appreciation of wrongdoing is always an essential of crime, and it is only a statement of a natural truth that every person who is held in restraint upon the ground that he is mentally impaired feels that he is wrongfully restrained. A man who is in fact sane and level knows that his restraint under such circumstances is wrongful; and, as a rule, the man who is insane or mentally impaired believes that he is sane and that his detention is wrongful; and, as a general rule, the insane person actually believes that it is his custodians, or those who put him in custody, rather than himself, that are insane.

The history of the world is full of attempts of persons to regain liberty, involving escapes from political restraints and punishments, military confinements, and confinements upon the ground of insanity, idiocy, and imbecility; and it is rare that such attempts have been viewed as offenses in the strict criminal sense. Therefore, if the indictment, under liberal analysis, describes a technical misdemeanor, it is not deemed to be a description of a crime so substantial as to answer the constitutional substantive requirement of a charge of crime, and to become the foundation for carrying a great body of law into fields which it has never before entered.

Among other things which the case of Roberts v. Reilly, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544, decided are the propositions that a person sought to be extradited is entitled to invoke the judgment of the judicial tribunals by writ of habeas corpus upon the question of the wrongfulness of his arrest and imprisonment, and upon the question whether he is a fugitive from justice in the sense of constitutional extradition, and that both of these questions are subject to judicial review. It is true that the question whether a given person is a fugitive from justice is a question of fact to be determined upon the face of the papers, unless attacked by proofs, and it is a principle of law that, where there is no controversy about the facts as stated, the question of fact is to be determined upon reasonable construction and under reasonable processes of deduction.

[8] Now is it probable, or even possible, to reach the conclusion, through an examination of the history of this case as presented by the requisition papers of New York, that the petitioner was fleeing from his escape or that he ever thought that he was fleeing from the misdemeanor involved in his escape? Of course he was not. It is the purest fiction to say that the man was fleeing from the escape. His flight was in every substantial sense a flight, not from the crime which he was committing in walking out of Matteawan, but from incarceration and guardianship environment. Nothing could be more axiomatic than the proposition that a man who was restrained of his liberty, a restraint to which he was objecting as unwarrantable, who escapes without force, is fleeing from the objectionable control rather than from the possible crime involved in his escape. Under reasonable inference, upon the face of the papers from New York's description of the escape, in every sense save an extremely fictional one the flight was from Matteawan environment, not from the crime of escaping and fleeing from environment.

Flight is a fundamental, substantial, and necessary element of the constitutional power of extradition. It must be established in order that the powers shall operate. Though it has been said in some of the cases that presence in a state at the time of the alleged crime, and presence in another state at the time extradition is sought, is sufficient to create the contemplated constitutional flight, such utterances were not in cases where it was proposed to extend the body of extradition law to classes of cases upon which it had never before operated. It is where the effect of the extension of arbitrary and exceptional power is to make it operate upon new classes, and in restraint of liberty, under principles operating in derogation of the common law, that courts hesitate to take the step except upon substantial grounds and for substantial and necessary reasons of justice.

In a case like this, where the elements must be substantially established, the constitutional element of flight must have some causal relation to the specific crime alleged as the ground for invoking the constitutional power of extradition. It is entirely technical, unsubstantial, and the merest fiction to say, and it would be a bold man who would maintain, that one confined for insanity, and escaping, was fleeing from the escape rather than from the confinement of which he

was complaining. It is for these reasons, under the circumstances of this case, that I think the flight should not be accepted as the kind of a flight contemplated by the framers of the Constitution when they created the right of extradition for crime.

In the rescript handed down in this case December 17th, something was said about the question of the constitutionality of the New York statute, under which the petitioner was held at Matteawan, and that such a question under the circumstances would not ordinarily be entered upon by a judge of first instance. I still hold to that view, although counsel on both sides, under commendable research, have fully argued in respect to its validity.

Contrary to conditions in England, where a commitment is made upon a verdict of "guilty, but insane," under the New York statute the commitment was upon a verdict of acquittal because of insanity, and thus there is presented a question perhaps essentially different from questions raised in criminal procedure in England. The point here is that, upon the facts being certified that he was acquitted upon the ground of insanity, he was incarcerated at Matteawan without any evidence of his mental condition at the time of the committal other than that which was addressed to the jury and had reference to his mental condition at the time of the alleged homicide, while the statute only authorizes confinement upon mental condition existing at the time of commitment, and that the commitment was until he was discharged by due course of law, while the statute which authorizes the commitment only presupposed confinement until the person committed became sane, and that the statute, which assumes to authorize restraint until sane, operates wrongfully, because a person might, though insane, be altogether helpless and harmless, and because the statute furnishes no adequate remedies for release from the kind of custody created by virtue of the statute in question and upon the proceedings subsequent to the acquittal.

A question arising in the Supreme Court from the state of Washington, in the case of Urquhart v. Brown, 205 U. S. 179, 183, 27 Sup. Ct. 459, 51 L. Ed. 760, upon a statute similar to this, though the case was decided upon the ground that the question should have been raised directly from the decision of the pending case in the state of Washington rather than collaterally upon habeas corpus, the question involved in the attack upon the constitutionality of the statute was expressly left as an open question. It is because a constitutional question like this has been before the Supreme Court and left undecided, and because it would not be useful for me to enter upon a discussion of the constitutional question, and because I think it need not be entered upon in this case for the reason that the papers do not present an extraditable offense that I leave the question of the validity of the New York statute, under which the petitioner was held, without discussion.

It is sometimes contended in support of a proposition which is being urged that there ought to be a remedy to compel certain results, and that, if the one urged fails, the situation is remediless. It does not seem to me that that argument obtains here. Although the question is not directly involved, and although it is quite unnecessary for me to

make any suggestions about it, I should suppose, though guardianship has no positive force extraterritorially except under rules of comity, that, under the tendency of modern statutes and decisions to defer to the law of the domicile and to support the authority of the guardian, under our interstate relations, as well as in England under the common law and by statute, a guardian, whether a natural guardian, a guardian created by the court for the protection of infants, idiots, or insane persons, or whether it is a state exercising the right of guardianship control under the doctrine of parens patriæ, for the purpose of protecting the unfortunate person and the community, might, in case of escape, take the evidence of its authority and of the escape, and take the ward into custody wherever he was found, and that the right of guardianship control could be exercised against him, not because he was a criminal, but because he was a ward subject to guardianship control. Such supposed right of custody being asserted, if the ward objected to return and restraint, he could have his orderly proceeding in the courts; and if the guardian's right of control was interfered with, either by the ward or by members of the public, he could resort to the courts for suitable process to protect and effectuate his right; and habeas corpus would be a plain, orderly, appropriate, and adequate remedy in the hands of the guardian if obstructions are thrown in his way, and in the hands of the person sought to be restrained if he sees fit to oppose the return. Under such a proceeding, with the parties present, the scope of the inquiry would permit considerations of comity and discretion and of the mental and physical well-being of the ward whose restraint was sought.

If it were an infant escaping from guardianship custody created in a divorce case, and the controversies about the custody of children in such situations are numerous, and getting more so, a leading consideration would be its physical and mental well-being. If it were an idiot of irresponsibility and in ill health, the same, with doubtless other considerations, would be within the scope of judicial inquiry. If it were a person who had escaped from custody based upon insanity or dangerous mental conditions at the time of the commitment, and if, at the time his recovery is sought, his mental condition was an open one under the decisions of the state creating the guardianship, and the right of control being based solely upon mental condition, that question, and others quite likely, would be a proper subject of inquiry in a proper proceeding raising the question of the right of the guardian to continue his control. And, in all situations with respect to idiots, infants, and the insane, the question of physical and mental well-being would become an important, and perhaps a leading, consideration.

Though there may not be any case where a state, in its capacity as guardian under the parens patriæ doctrine, has exercised this right, the principle is quite within hundreds of cases that have been decided with respect to guardianship control, but I only cite the opinion of Judge Walker in Hanrahan v. Sears, 72 N. H. 71, 54 Atl. 702, 3 Blackstone's Commentaries, pp. 132, 133, and note, Peck, Domestic Relations, § 143, and cases cited in notes, as sufficiently suggesting the principle and the line of authorities.

My conclusion is that the constitutional right of extradition for crime does not reasonably apply itself to such a situation as this, where the right of control by the demanding state resides in a decree of custody based upon insanity, and where its papers upon their face negative the idea of personal criminal responsibility. It is further thought that it would involve forced and fictional reasoning to make a flight of the character of the one in question the kind of a flight contemplated by the Constitution as a basis for extradition.

It results that an order will be made sustaining the writ, and that the petitioner be discharged from the extradition process under which he was held at the time his petition for habeas corpus was brought upon constitutional grounds.

It has been understood from the beginning that, whichever way this case might be decided by me, it would be taken to the Supreme Court. Therefore no formal order will be made either sustaining the writ or discharging the petitioner until the aggrieved party has had an opportunity to perfect its appeal. When there is such readiness, and when convenient to counsel to have the operation of the appeal put into effect, the orders will be made and the discharge suspended by some appropriate order pending the appeal.

My reasoning about this case involves no criticism upon the act of Governor Felker in ordering extradition. His action was based upon the idea that the scope of a Governor's right to investigate and deal with judicial and constitutional questions was limited, and that, except in clear cases of failure to charge a crime, that extradition should go as of course under the perfunctory mandate of the Constitution; yet he expressly and wisely, under the discretionary power which he possessed, guarded the humane idea, expressed in the English statutes, that the warrant should not operate until the petitioner had had an opportunity, under a writ of habeas corpus, to test his rights in the courts, which were supposed to be possessed of power and machinery, as to the legal and constitutional questions, which the executive did not possess; the Governor expressly saying that "such procedure affords Mr. Thaw an ample remedy before a tribunal having jurisdiction of such extraordinary remedies, with the power to issue final process for carrying its judgments into effect."

Now as to bail. This question, differently from the questions arising upon the face of the requisition papers, requires consideration of the actual fact of present mental condition because, under the constitutional power, the exercise of the right of extradition depends alone upon what appears upon the face of the papers, while under the motion for bail there arises on the public phase a question of present mental condition as a matter of fact.

On the 6th day of December, 1913, the petitioner moved for bail, basing his motion upon the ground that under the laws of New York, as he was indicted for misdemeanor only, he was entitled to bail as of right, asserting that his alleged co-conspirators had all been admitted to bail. The motion was discussed orally upon the assumption on the part of New York, as well as others, that the petitioner was entitled

to bail unless it would be dangerous to the community to set him at large.

A rescript was handed down December 17th in which the right of bail was somewhat discussed, with the conclusion that the petitioner was entitled to it unless his liberty would be a menace to the community. Both parties expressed a desire to be heard upon that question and to produce witnesses and records. It appeared in argument that the last hearing on Thaw's mental condition before Judge Mills in New York occupied something like 7 weeks, and that 77 witnesses were examined orally, and that the record contained the testimony of 49 other witnesses; both classes including a large number of experts who were called on the two sides. Counsel were informed that the question of bail was, aside from the right of Thaw, a question with a public phase, and that it was not proposed to enter upon an extended adversary hearing as to his mental condition, and that it was thought that public exigencies, if any, could be answered by a nonpartisan commission to make investigations and to answer the question in respect to public danger without an adversary hearing.

Acting upon the theory of the New York cases relating to the petitioner's mental condition (Peabody v. Baker, 59 Misc. Rep. 359, 110 N. Y. Supp. 848; Peabody v. Chanler, 133 App. Div. 159, 117 N. Y. Supp. 322; People v. Lamb [Sup.] 118 N. Y. Supp. 389), the substance of which is that Thaw was held in New York, not for punishment, because he had been acquitted, but only as a temporary expedient, and that there was no pretense of holding him a moment after his restoration to a nondangerous condition, and that the question of mental condition was open and was not one within the res judicata rule in the sense that its determination as of to-day was to control the future, and of my own motion, and without suggestion from either party as to personnel, a commission was created charged with the duty of making such examinations as it should see fit, under certain limitations.

The purpose was, not only to have a commission in whose judgment I should repose more confidence than in my own, based upon an adversary hearing, but one which would command the confidence of the community. Therefore the commission was made to consist of one of the most prominent lawyers in New England and three expert alienists of high standing. The work of the commission was undertaken with the idea that it should be entirely nonpartisan, and in aid of justice, and even without any assurance that it was certain that any compensation could be made for the labor performed. Indeed, the work in fact was entered upon quite in the sense of a discharge of public duty, at the request of the court, in aid of justice.

The reasons for appointing the commission appear in the rescript of December 17th, and the findings in respect to nondanger appear from the report which is a part of the record. After the report was filed, the petitioner moved for leave to introduce witnesses, consisting of alienists who had seen and examined him since his escape, and by whom the petitioner's counsel expressed a wish to supplement the report of the commission as to present mental condition. This motion

is denied on the ground that the purpose of appointing the commission was to avoid a public adversary trial as a thing unnecessary under the circumstances.

On January 13, 1914, the petitioner moved for a hearing on the question of bail, and that the report be accepted and adopted. After hearing the parties, the report of the commission is accepted and approved as sufficiently showing the mental condition of Thaw, so far as it is involved in the question of bail.

Since the rescript of December 17th an examination of authorities has raised a query in my mind whether the various statutes and Constitutions creating the absolute right of bail in misdemeanor cases, which ordinarily operate as an imperative mandate upon courts, are to be accepted in cases arising in habeas corpus proceedings in respect to interstate extradition. The English case of Queen v. Spilsbury, L. R. (1898) 2 Q. B. D. 615, and Wright v. Henkel, 190 U. S. 40, 23 Sup. Ct. 781, 47 L. Ed. 948, Moore on Extradition, vol, 2, pp. 973, 974, Piggott on Extradition, p. 94, Ex parte Erwin, 7 Tex. App. 288, and Ex parte Gaynor & Greene, 9 Can. Cr. Cas. 255, are among the authorities which discuss the question of the right of bail in habeas corpus proceedings interposed upon extradition process.

I have no doubt of the right of the court to grant bail under the circumstances of this case; but as the question is an interlocutory one, of which the petitioner has the right to avail himself at any time and at any stage of the proceedings, and as the case is about to go out of the control of this court and into the Supreme Court, and as Supreme Court rule 34 (32 Sup. Ct. xiii) has an important and perhaps a controlling bearing upon the question, I am disposed to leave the motion for bail undetermined, without prejudice.

I am not influenced at all upon this question by any fear that the community would be in danger by giving the petitioner liberty under bail, because I accept the report of the commission, based as it was upon nonadversary investigations and examinations, and upon proofs of absence of indications of personal violence since commitment to Matteawan, supplemented by my own observations of the man at the several hearings, as sufficiently establishing nondangerous mental condition, so far as it is involved in the question of bail, and that any supposed danger to the community through liberty under bail is so remote as not to warrant his being deprived of liberty of bail upon that ground. If the broad provisions of rule 34 are to be interpreted as covering questions of bail in habeas corpus, where the person is taken from extradition custody, they are entirely conclusive of the question here in favor of bail, because in general terms they cover all habeas corpus cases. That that rule is something more appropriate for interpretation by the Supreme Court than by this court is the reason for leaving the question of bail undecided. I am not at all certain that I am not denying a plain right, and doing the petitioner injustice, by leaving this question undecided. If such is the case, an opportunity is open for him to seek redress from the higher court before whom this case will soon be pending.

PENNSYLVANIA CO. v. UNITED STATES (INTERSTATE COMMERCE COMMISSION et al., Interveners).

(District Court, W. D. Pennsylvania. May Term, 1914.)

No. 36.

CARRIERS (§ 33*)—INTERSTATE CARRIERS—SWITCHING FACILITIES—DISCRIMINATION.

Complainant, an interstate carrier, had terminal facilities within the switching district of N., owning depots, freight stations, yards, team tracks, and tracks connecting with and running into numerous separate industries located along or connected with its facilities and other railroads. Within such district there was also physical connection between complainant's tracks and those of the B. & O. R. Co. over the tracks of which the B., R. & P. R. Co. operated trains into N. from B. Complainant company had been in the habit of receiving cars tendered to it by the B. & O. and other railroads at junction points within the switching limits of N. and transporting them to industries on its lines within the city for the uniform charge of $2 per car and would transport cars from industries on its lines in N. to junction points with the carriers other than the B., R. & P. Co. for a similar charge. *Held*, that the right of the B., R. & P. Co. to a similar service over complainant's lines did not involve the use of complainant's tracks and terminal facilities by the B., R. & P. Co., but was a right to equal facilities without discrimination to which the company was entitled under Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3155]), requiring every carrier to afford reasonable and equal facilities for the interchange of traffic between their respective lines, etc.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 86–90; Dec. Dig. § 33.*]

Buffington, Circuit Judge, dissenting.

In Equity. Suit by the Pennsylvania Company against the United States, in which the Interstate Commerce Commission and the Buffalo, Rochester & Pittsburgh Railway Company intervene. On motion for preliminary injunction. Denied.

Upon motion for interlocutory injunction. The Pennsylvania Company asks the court for an order to restrain the United States from undertaking to enforce an order made by the Interstate Commerce Commission in a proceeding between the Buffalo, Rochester & Pittsburgh Railway Company and the Pennsylvania Company, which requires the Pennsylvania Company to cease from continuing certain acts found by the Commission to be unduly and unreasonably prejudicial as against the Buffalo, Rochester & Pittsburgh Railway Company. The United States and the Interstate Commerce Commission resist the application; so does the intervening carrier.

The Pennsylvania Company is engaged in the transportation of property by railroad between points in Pennsylvania and New York. The Buffalo, Rochester & Pittsburgh Company extends from Rochester, N. Y., and from Buffalo, N. Y., into Pennsylvania to a place known as Butler, about 40 miles from New Castle, Pa., and the Buffalo, Rochester & Pittsburgh Company transports freight from a further line of railroad from Butler to New Castle under a trackage agreement with the Baltimore & Ohio Railroad Company, and operates its line in competition with the Pennsylvania line.

New Castle is a city of 40,000 people, situated about 50 miles north of Pittsburgh. The Pennsylvania Company has terminal facilities within the switching district of New Castle, and owns depots, freight stations, yards, team tracks, and tracks connecting with and running into numerous separate in-

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

dustries located along or connected with the Pennsylvania's facilities. Much traffic is handled by the Pennsylvania Company within the switching district.

New Castle is reached and served by the Pennsylvania, Pittsburgh & Lake Erie, the Erie, and the Baltimore & Ohio railroads. The Buffalo, Rochester & Pittsburgh Company, jointly with the Baltimore & Ohio, operates certain lines of track between Butler and New Castle, and since 1899 has operated its freight trains into New Castle. The terminal facilities of the Pennsylvania in New Castle consist of depots, freight stations, tracks, spurs, and side tracks aggregating about 24 miles, with switching limits at New Castle extending in the direction of their greatest length for a distance of about four miles, within which there are more than 100 industries served by the Pennsylvania Company, or by the Buffalo, Rochester & Pittsburgh Company, or by other carriers. Near the center of the city at Moravia street, and at one other point a mile and a quarter from Moravia street, a physical contract and connection occurs between the tracks of the Pennsylvania Company and those used by the Buffalo, Rochester & Pittsburgh Company; at the latter point there are ample facilities for the interchange of car load freight, and at the former the Pennsylvania Company has interchange yards with a capacity for 250 cars. The Pennsylvania Company receives cars tendered to it by the Pittsburgh & Lake Erie, the Erie, and the Baltimore & Ohio, at junction points within the switching limits of New Castle, and transports them to industries on its lines within the city for a uniform charge of $2 per car, and will transport cars from industries on its line in New Castle to junction points with the three carriers just named for a similar charge. Industries on the tracks of the Pennsylvania Company within the switching limits, which receive car load freight transported by the Buffalo, Rochester & Pittsburgh, or which desire to ship over its lines to points beyond New Castle, must dray their traffic from or to that company's yards to great disadvantage to themselves. The Pennsylvania Company refuses to transport cars within the switching limits tendered by the Buffalo, Rochester & Pittsburgh Company to it at either junction point in New Castle, or to transport cars from industries on its line within the switching limits to the junction points on the lines of the Buffalo, Rochester & Pittsburgh for transportation by it beyond. It avers that the average distance from one of the points of physical connection to all of the industrial tracks operated or served by the Pennsylvania Company therefrom is less than a mile, and from the other point of physical connection the average distances of the various industrial tracks are slightly greater. The tariffs of the Pennsylvania Company name 128 industries within the switching limits and the immediate vicinity of New Castle from and to which car load shipments are transported by the Pennsylvania Company and certain other carriers at switching charges named therein.

The Interstate Commerce Commission found that the Baltimore & Ohio renders less service for the Pennsylvania Company than that company performs for it, and that it appeared that, at several points in the Shenango and Mahoning Valleys of Pennsylvania and Ohio, reciprocal switching arrangements are in effect, and that the total amount of switching secured by the Pennsylvania Company was greater than that performed by it for the valleys, including New Castle, and for New Castle proper. The Commission also considered the contention of the Pennsylvania Company that the three carriers hereinbefore named, other than the Buffalo, Rochester, & Pittsburgh Company, were in a position, either at New Castle or elsewhere, to offer reciprocal advantages to the Pennsylvania Company for the switching done for it in New Castle, while the Buffalo, Rochester & Pittsburgh was not in a position to offer similar advantages by way of compensation at New Castle or elsewhere. The Commission, however, found that car load shipments transported to New Castle by the Baltimore & Ohio or by the Buffalo, Rochester & Pittsburgh arrive at New Castle from Butler and beyond under similar circumstances and conditions; the Commission saying that, if the cars are hauled to New Castle by a Baltimore & Ohio engine and tendered to the Pennsylvania Company, they will be transported by the Pennsylvania Company to any point within the switching limits for a charge of $2 per car, but that, if similar cars are transported over the same line and to the same point by the Buffalo, Rochester & Pittsburgh, the Pennsylvania refuses to transport them

to any point within the switching limits. The Pennsylvania Company in its bill avers that at one of the points of connection in New Castle all through interstate commerce received from points on the Buffalo, Rochester & Pittsburgh road outside of the switching limits of New Castle and destined to points on the lines of the Pennsylvania Company outside of such switching limits is interchanged, and that it also receives from points on the lines of the Pennsylvania Company, outside of such switching limits, traffic destined to points on the line of the Buffalo, Rochester & Pittsburgh outside of such limits, and affords reasonable and equal facilities, without discrimination in rates or charges, and that the interchange required by the order of the Commission amounts merely to terminal service and delivery, and that, if enforced, will involve the use by the Buffalo, Rochester & Pittsburgh Company of the tracks and terminal facilities of the Pennsylvania Company without its consent.

The Commission held that the practice of the Pennsylvania Company constituted undue and unreasonable discrimination, and made an order to the effect that the Pennsylvania Company should desist from the undue and unreasonable prejudice.

The United States filed an answer, admitting the facts as to the situation, conditions, and methods of operation adopted at New Castle, and found by the Interstate Commerce Commission in its report, but denies that the order of the Commission exceeded authority conferred upon that body.

F. D. McKenney, of Washington, D. C., and Gordon Fisher, A. P. Burgwin, and Dalzell, Fisher & Hawkins, all of Pittsburgh, Pa., for Pennsylvania Co.

E. Lowry Humes, U. S. Atty., of Meadville, Pa., and Blackburn Esterline, Sp. Asst. Atty. Gen., of Washington, D. C., for the United States.

Joseph W. Folk, of St. Louis, Mo., and Charles W. Needham, of Washington, D. C., for Interstate Commerce Commission.

William A. Glasgow, Jr., of Philadelphia, Pa., for intervening carrier, Buffalo, Rochester & Pittsburgh Co.

Before BUFFINGTON and HUNT, Circuit Judges, and ORR, District Judge.

HUNT, Circuit Judge (after stating the facts as above). The motion for a restraining order was asked upon the premise that, if that portion of section 3 of the act to regulate commerce, which requires that every carrier subject to the provisions of the act shall, according to its respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines for receiving, forwarding, and delivering property to and from the several lines and those connected therewith without discriminating in their rates and charges between such connecting lines, stood alone, the Pennsylvania Company would be obliged to perform the service which the Buffalo, Rochester & Pittsburgh Company wishes it to perform, and which the order of the Interstate Commerce Commission says it shall perform. The question, therefore, is whether the additional clause in section 3, forbidding a construction of the language just referred to, which will require any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business, can under the facts avail the Pennsylvania Company.

We hold that it is not a use of the tracks or terminal facilities of the Pennsylvania Company that the Buffalo, Rochester & Pittsburgh

Company seeks for itself, but a service of transportation in receiving and forwarding freight tendered by it to the Pennsylvania Company, a service to be performed upon the payment of a reasonable compensation to the Pennsylvania Company; such compensation to be fixed, of course, in the first instance by that company. The use of the tracks and terminal facilities under the service asked for will be no greater than that which the Pennsylvania Company extends to other carriers which may desire traffic carried. No physical occupancy by running trains or locomotives of the Buffalo Rochester and Pittsburgh Company is asked; there being, as we look at it, only tender of freight at a point of interchange already established by the Pennsylvania Company, and where it receives the cars of every other road except the Buffalo, Rochester & Pittsburgh Company and hauls after delivery. The facts, therefore, take the case from within the scope of the rule of Louisville & N. R. Co. v. Central Stock Yards Co., 212 U. S. 132, 29 Sup. Ct. 246, 53 L. Ed. 441, where the Stock Yards Company demanded that the cars should be received by the Louisville & Nashville at a point which was an arbitrary one, near its terminus.

We have given careful consideration to the argument of counsel for the Pennsylvania Company in their effort to withdraw the case from the rule laid down in Grand Trunk Railway Co. v. Michigan Railroad Commission, 231 U. S. 457, 34 Sup. Ct. 152, 58 L. Ed. 310, but we believe the doctrine of that case controls this. The statute of the state of Michigan which was there examined by the court, in so far as it required interchange of traffic, was quite similar to the provisions of the act to regulate commerce pertinent to this case, for the language of the Michigan law, which required the forwarding and delivering of property, contained a proviso to the effect that nothing in the statute should be construed as requiring any railroad to give the use of its tracks or terminal facilities to another railroad engaged in like business. The extent of the city of Detroit was considered, and necessarily the court was called upon to distinguish the facts in order to demonstrate the inapplicability of its previous ruling in Louisville & Nashville Railroad v. Stock Yards Co., supra, upon which reliance was placed by the railroad company in its effort to prevent the enforcement of the order of the State Commission. The court, however, regarded the effect of the order made by the state Railroad Commission as merely requiring the railroad companies to accept freight at the designated points for shipment to other designated points, and said that, "except in an extreme sense," such an acceptance of freight was not a use of tracks and terminals other than in the sense of being only a proper use for which the roads were constituted to afford. So, upon the principle that the order made was a regulation of the business of a carrier and not an appropriation of terminal facilities for the use and benefit of other roads, it was sustained.

The underlying principle is that a common carrier may be required to accept a car for transportation whenever such a car is offered at a place where the common carrier has established a point of interchange, provided always a reasonable compensation is fixed for the service. Here, the place where the cars are offered not being an arbitrary one,

the carrier Pennsylvania Company may not inquire into the ownership of the car, nor into the route over which it has been moved to reach its rails merely to decide whether or not it will transport the car so offered. To hold otherwise would greatly diminish the regulating power of the Interstate Commerce Commission to treat all carriers as within the letter of the act to regulate commerce with respect to their duties to transport. It follows that, where compensation is offered, a practice of hauling the cars of several connecting carriers and absolutely refusing to haul the cars of another carrier is a discrimination which, in the interests of the public, may be removed as properly within the power of just and reasonable regulation by the Interstate Commerce Commission. Interstate Commerce Commission v. Delaware, L. & W. R. Co., 220 U. S. 235, 31 Sup. Ct. 392, 55 L. Ed. 448.

The question of reasonable compensation is in no way involved, and no opinion is passed thereon.

Restraining order must be denied.

BUFFINGTON, Circuit Judge (dissenting). The right of the Interstate Commerce Commission to make the order here involved is statutory. If, therefore, there is no statute thereto enabling, this order should be enjoined as unlawful. Because I regard this order, not only as without enabling legal warrant, but as in violation of that provision of the Constitution (art. 5) which provides that "no person shall * * * be deprived of * * * property, without due process of law, nor shall private property be taken for public use, without just compensation," I am constrained to record this dissent.

Warrant, if any, for this order must be found in section 3 of the act of February 4, 1887, hereafter quoted, and the question here involved is: Does this order require the Pennsylvania Lines to give the use of its terminal facilities to another carrier engaged in like business? If it does, it is unlawful. That this dispute involves terminal facilities is established by the findings of the Commission, 29 Interst. Com. Com'n R. 114, to the effect that "the terminal facilities of the defendant in New Castle consist of depots, freight stations, yards, team tracks, and side tracks, together with spur tracks reaching 26 industries within the switching limits." That terminal facilities were excluded from the operation of this statute has, in the past, been the heretofore recognized usage of the Commission. In Morris v. Baltimore & Ohio R. R. Co., 26 Interst. Com. Com'n R. 240, it is said:

"The purpose of these complainants is simply to obtain access by a purely switching movement from their industries located upon the terminals of the Frederick Railroad to and from the Baltimore & Ohio and the Pennsylvania Company. * * * To order these defendants to receive and switch cars which have been transported to Frederick over the lines of their rivals would apparently be to require them, within the meaning of the act, to open up their terminals to their competitors, *and this is forbidden.* We are therefore obliged to hold in the present case that we have no authority to grant this reasonable request of the complainants. * * * All that we now decide is that these railroads cannot be required to open their terminals * * * to traffic brought to and carried from that locality by their competitors."

And this position was taken for sound practical reasons, for as stated by that body in Cardiff v. C. M. Co., 13 Interst. Com. Com'n R. 460, where, referring to "that part of section 3 of the act which provides that no carrier shall be required to give the use of its tracks and terminal facilities to another carrier engaged in like business," it was said:

"Without some such provision in the law, or some such general understanding of the essential injustice involved, adventurous capital would not be slow in paralleling the great trunk lines and in demanding a connection that would give them the use of trunk line terminals."

We turn now to the facts of this case, and see whether they are such as call for the application of the recognized usage of the Commission. The facts of the present case are these:

The city of New Castle, Pa., is the center of the great iron, steel, and ore section known as the "Mahoning and Shenango Valleys." Four large railroad systems serve the industries in this section. New Castle alone has 128 of these manufacturing plants, and to 26 of these plants the Pennsylvania has access through its spur tracks from its terminal switching yards. The value of the switching terminal yards of the Pennsylvania is shown by the fact that the property on which they are located is worth from $3,000,000 to $5,000,000, the freight received therefrom per year is 450,000 tons, and the revenue from such terminal service and the transportation flowing therefrom is $2,500,000. The other three systems have correspondingly valuable terminal connections and facilities in New Castle and the rest of the Valley. For many years these four great systems, by mutual agreement, have had an interchange of terminal switching, whereby a car transported, or to be transported, on any one of the systems, was switched to or from any such system to a plant located on the switching terminals of the other line. The working of this agreement was such that any plant in the Valley district could consign or receive on its own siding cars of freight transported by any one of these carriers. The extent and value of this great switching interchange to the railroads in preventing duplication and superadding switching terminal facilities is seen by the fact that for the years 1909 to 1911, inclusive, the Erie Road switched for the Pennsylvania 41,029 cars in exchange for 14,891 switched by the latter. The Pittsburgh & Lake Erie switched for the Pennsylvania 49,176 cars in exchange for 39,327 switched by the latter for it. The Baltimore & Ohio switched for the Pennsylvania 22,756 in exchange for 49,493 switched by the latter for it. It will be observed that these figures only show the switching services rendered to and by the Pennsylvania alone, and do not include the cars switched by each of the three other systems for each other. This switching service was rendered by express agreement and in consideration of the possession and interchange of switching terminal service and facilities allowed by each system to the other. An arbitrary rate of $2 per car was contracted for, not as a measure of value for the service rendered, but as an arbitrary clearing house basis of accounting. The real value of the service was the reciprocal switching service rendered by these roads to one another.

As a pertinent example of the working of this system and of its service to the public, we may cite an example: The city of Rochester, N. Y., was connected with New Castle by the Pittsburgh & Lake Erie (New York Central) and the Pennsylvania (Northern Central). A consignor at Rochester could therefore route his car over the Pittsburgh & Lake Erie and have it delivered to a manufacturing plant on the switch terminals of any of the contracting railroads at New Castle or the Valley, or he could route it from Rochester over the Pennsylvania and have it delivered the same way. In addition to using these two systems which directly connected Rochester and New Castle, he would also route his car from Rochester over the Pittsburgh, Rochester & Buffalo road (the vitally interested party in this dispute), which will hereafter be called the Rochester Company. At Butler, Pa., a few miles from New Castle, that road connected with the Baltimore & Ohio, from whence the car could be hauled by the Baltimore & Ohio over its line from Butler to New Castle, where, under this terminal switching arrangement, the car thus transported by the Rochester Company could be delivered at any plant reached by the terminal tracks of the four contracting roads. What we have thus illustrated to show access from Rochester to a terminal siding plant at New Castle, of course, applies where a consignor desired to ship from his plant to Rochester or to any point on the Buffalo, Rochester & Pittsburgh Railroad. Such have been and such are now the terminal and routing facilities enjoyed by the 128 plants in New Castle alone, and by all others in the Shenango and Mahoning Valleys by virtue of this contract between these companies. The service thus rendered by these four contracting companies has been such that we are informed no complaint has been made to the Commission. That agreement is based on the ability of each of the companies to afford corresponding switching service to each of the others through the ownership of great terminal yards and facilities.

To draw from this requited, reciprocal, licensed use by these roads of their terminals the inference that they thereby dedicated their terminals to the use of all other roads is not only to lose sight of the actual facts, but it tends to undermine, discourage, and stop the broad-minded policy of encouraging railroads possessing terminal facilities to contract for such reciprocal interchange as benefit communities, shippers, and carriers alike. To call this arrangement virtually a general dedication, and to liken it to the situation in Grand Trunk v. Michigan, 231 U. S. 473, 34 Sup. Ct. 152, 58 L. Ed. 310, is to lose sight of the real situation here, which is one of a licensed use under contract. The motive which leads railroads to make such contracts is clearly stated by an able railroad executive,[1] who testified:

"The theory back of a reciprocal switching arrangement is this: There are certain railroads which have like terminals in the same general switching district; and that they may be reasonably accommodated they switch for each other. In other words, we permit these railroads to solicit freight over our tracks and have it switched by us to their lines, based on the theory that there is an offset to us elsewhere. * * * It simply comes to what you can afford to do in letting another railroad into your terminals to take your

[1] Henry W. Thornton, then division superintendent, and since made general manager, of the London & Great Eastern Railway Company.

business. There isn't any philanthropy about it, and we might as well come out and say it is a business proposition."

And the right to contract for reciprocal switching service has been recognized by the federal courts. In Kentucky v. Louisville (C. C.) 37 Fed. 573, 2 L. R. A. 289, Circuit Judge Jackson, afterwards Justice of the Supreme Court, said:

"Now, under this last limitation upon or qualification of the duty of affording all reasonable, proper, and equal facilities for the interchange, or for the receiving, forwarding and delivering of traffic to and from and between connecting lines, it is clearly left open to any common carrier to contract or enter into arrangements for the use of its tracks and terminal facilities with one or more connecting lines, without subjecting itself to the charge of giving an undue or unreasonable preference or advantage to such lines, or of discriminating against other carriers who are not parties to, or included in, such arrangements. No common carrier can therefore justly complain of another that it is not allowed the use of that other's tracks and terminal facilities upon * * * like terms and conditions which, under private contract or arrangement, are conceded to other lines."

In Little Rock v. St. Louis, 63 Fed. 775, 11 C. C. A. 417, 26 L. R. A. 192, the Circuit Court of Appeals of the Eighth Circuit said:

"A railroad having equal facilities at a given point for forming a physical connection with a number of connecting carriers might find it exceedingly beneficial to enter into an arrangement with one of them, having a long line and important connections, for through billing and rating, and for the use of each other's cars and terminal facilities, while it would find it exceedingly undesirable and unprofitable to enter into a similar arrangement with a shorter road, which could offer nothing in return."

In Petition of Philadelphia, etc., Co., 203 Pa. 354, 53 Atl. 191, the Supreme Court of that state clearly points out the quasi private nature of terminal property, saying:

"The only effect of this act is to transfer the property of one private corporation to a new one, for the same public use, both being transporters of passengers for profit. The transaction is not, in substance, different from the transfer of one farmer's land to his neighbor, under an assumed right of eminent domain, which has not the shadow of warrant in the Constitution. To illustrate, let us suppose another case, which, if this claim be sustained, might easily become a real one: The Pennsylvania, Philadelphia & Reading, and Baltimore & Ohio are all steam railroads for passenger and freight traffic entering the city of Philadelphia, with terminal stations near its center. For five miles and more each has, at immense expense, through years of enterprise, built up a very large and probably remunerative traffic on the few miles of road next their terminal stations. Suppose another road or roads organized, as they may and can easily be, under the general railroad law of 1868, with an eastern terminal at Philadelphia; they can approach to within a few miles of the city without serious difficulty, but the cost of entering, by reason of the very great value of property, would necessarily be very large. Would the Legislature, under the assumed right of eminent domain, pass an amendment to the act of 1868 authorizing the new company to take possession jointly with the old company of five miles of the older company's tracks, that it might for the benefit of the public secure an entrance into the city? Of course, there would have to be some proceeding adopted for assessing and paying the damage to the older company; but how estimate the damage? * * * It is obvious that such an amendment would not be founded on any necessity of, or even convenience to, the general public, but on the desire of and the temptation to the new company, from a business point of view, to take possession of the franchise and property of the old one, a desire which could only be obtained by the assumed exercise of the power of eminent domain in

favor of the new corporation by the state. It would be perversion of, or a tyrannical exercise of, the power of eminent domain by the sovereign, not for a public use, but for the private and corporate gain of the new organization."

In Louisville v. Central Stockyards Co., 212 U. S. 132, 29 Sup. Ct. 246, 53 L. Ed. 441, the Supreme Court, using in that connection, the words "arbitrary point near its terminus" to distinguish such point from a terminal station, said:

"There remains for consideration only the third division of the judgment, which requires the plaintiff in error to receive at the connecting point, and to switch, transport, and deliver, all live stock consigned from the Central Stockyard to any one at the Bourbon Stockyards. This also is based upon the sections of the Constitution that have been quoted. If the principle is sound, every road into Louisville, by making a physical connection with the Louisville & Nashville, can get the use of its costly terminals and make it do the switching necessary to that end, upon simply paying for the service of carriage. The duty of a carrier to accept goods tendered at its station does not extend to the acceptance of cars offered to it at an arbitrary point near its terminus by a competing road, for the purpose of reaching and using its terminal station. To require such an acceptance from a railroad is to take its property in a very effective sense, and cannot be justified, unless the railroad holds that property subject to greater liabilities than those incident to its calling alone."

These decisions recognize that there is such a thing as the quasi private property of a railroad, which a covetous competing road is bound to respect. Indeed, the common sense of the subject is aptly summed up in a public address made by one of the best versed railway thinkers[2] of the country, where, in an extract printed in defendant's brief, he says:

"The terminal problem overshadows almost every problem. Terminals are of as much importance to a railroad as hands and feet are to an individual. Each railroad must build and use its own terminals. If railroad terminals were pooled, all developments would be at a standstill. No one would build terminals. To open all railroad terminals to common use would be running a railroad like a hotel. The proposition on its face is impossible, and would lead to dire consequences."

And the distinctive character of such terminal facilities was recognized by Congress in the act here involved. In that statute (section 3, Act of Feb. 4, 1887), while it was enacted that:

"It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic in any respect whatever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatever. Every common carrier subject to the provisions of this act shall, according to their respective powers afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines"

[2] James J. Hill.

—Congress added:

"But this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

By this proviso it is clear that courts were forbidden to construe this act so as to require carriers to do two things: One was "to give the use of its tracks * * * to another carrier engaged in like business." The second was "to give the use of its * * * terminal facilities to another carrier engaged in like business." And this brings us face to face with the narrow question of fact on which this case turns, and that is: Is the Interstate Commerce Commission by its order in this case "requiring any common carrier" (to wit, the Pennsylvania lines) "to give the use of its * * * terminal facilities" (to wit, its terminal switching facilities at New Castle) "to another carrier" (to wit, the Buffalo, Rochester & Pittsburgh Railroad) "engaged in like business"? That the two railroads are engaged in like business goes without saying; that the subject-matter of this order is the terminal facilities of the Pennsylvania at New Castle, worth several millions of dollars, was, as we have seen, found by the Commission. Such being the case, it is clear that such order is in violation of the statute unless the word "use"—"the use of its terminal facilities"—is not given by this order to the Rochester Company. This great statute, beneficial alike in the powers created under one clause and the powers excluded under the other, is not to be subjected to word whittling. It was conferring broad traffic exchange between lines on one hand, and conserving great terminal facilities on the other. Congress was well aware that executive encroachment or judicial construction might give an effect to the law that the legislative branch never meant. Accordingly it left no room for construction in this clause. In clear and simple words, of common English speech, it said that this statute "shall not be construed as requiring any such common carrier to give the use * * * of its terminal facilities to another carrier." Can there be any doubt what these words meant? Without analyzing what the Rochester Company gets under this order, will any one say that the Pennsylvania is enjoying the same use of its terminal facilities at New Castle that it did before the order was made? By virtue of this order, in effect and substance, the Pennsylvania lines must, on a demand by the Rochester Company, as a right, now take its locomotive to the point of physical connection with the Rochester Company, and haul its car over its terminal switching tracks to a manufacturing plant siding, and switch such car back, and return such car to its competitor loaded with freight naturally and equitably tributary to its own line. To say that this is not "requiring any such common carrier to give the use of its * * * terminal facilities to another carrier" can only be met by the maxim, "Res ipsa loquitur."

Passing by the question whether the order is justified, the fact—the physical fact—is clear, that the servitude imposed by it is, to the extent the servitude is exercised, not only a use of the property but a taking and appropriation. "To require such an acceptance from a railroad," says the Supreme Court in 212 U. S. 132, 29 Sup. Ct. 246, 53 L. Ed.

441, supra, "is to take its property in a very effective sense." And again in Pumpelly v. Green Bay, 13 Wall. 166, 20 L. Ed. 557, that court said:

"It is not necessary that property should be absolutely taken, in the narrowest sense of the word, to bring the case within the * * * constitutional prohibition; but there may be such serious interruption to the common and necessary use of property as will be equivalent to taking, within the meaning of the" amendment.

But to our judgment, not only has this terminal property been illegally taken, but it will be further noted that the effort of the Rochester Company to secure the use of these terminals is not to answer any public need, but simply to make private gain. As we have seen, any shipper to or from any siding connected with the New Castle terminals of the Pennsylvania can now, and for ten years past could, route cars over the Baltimore & Ohio to Butler to or from any point on the Rochester Company lines. So that due service has been afforded the public on the line of the Rochester Company through the Baltimore & Ohio. By an operative contract the Baltimore & Ohio now permits the Rochester Company to run its engines, cars, and trains over the Baltimore & Ohio tracks from Butler to New Castle. In the ten years this license has been used the Rochester Company has only gotten but three industries tributary to its terminal property in New Castle. It has no reciprocal terminal switching facilities or freight-producing manufacturing advantages, either in New Castle or the Valleys to offer the Pennsylvania in exchange for the use of the latter's terminals. The order it has obtained will be of great strategic and financial gain to the Rochester Company, but it will not give the shipper on the Rochester line access to any point he does not already have under existing tariffs. I think the case is one that calls for plain speaking. Bared to nakedness, the facts show that the Rochester Company simply coveted and desired its neighbor's property, and to make this covetous purpose effective it seeks to violate, not only the act of Congress, which says, "But this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business," but that constitutional provision which in effect but restates another of the decalogue when it provides, "Nor shall private property be taken for public use without just compensation." In this effort to seek private gain under the guise of public good, this railroad has, I take it, invoked the aid of the Interstate Commerce Commission contrary to its heretofore expressed practice.

Holding, then, that the Commission has failed to comply with the requirement of the act in question, in that its order requires one common carrier to give the use of its terminal facilities to another carrier engaged in like business, its order is, in my judgment, invalid, as being without statutory warrant and violative of constitutionally guaranteed rights. I am therefore constrained to record this my dissent.

UNITED STATES v. HOM LIM et al.

(District Court, E. D. New York. May 22, 1914.)

1. ALIENS (§ 32*)—CHINESE—DEPORTATION—STATUTORY PROVISIONS.
A Chinese person may not be arrested without a warrant or on a warrant unless based on circumstances showing him to be unlawfully within the United States, within Act Cong. Sept. 13, 1888, c. 1015, § 13, 25 Stat. 479 (U. S. Comp. St. 1901, p. 1317), but a Chinese person who has been lawfully arrested must be adjudged to be unlawfully within the United States, unless he furnishes affirmative proof of his right to remain.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92–95; Dec. Dig. § 32.*]

2. ALIENS (§ 32*)—DEPORTATION OF CHINESE—EVIDENCE.
The proof furnished by a Chinese person, on being questioned before his arrest or before he has been subjected to duress by a Chinese inspector or any other person as to his status, may be used against him in deportation proceedings in requiring from him affirmative proof of his right to remain in the United States, to prevent his deportation.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92–95; Dec. Dig. § 32.*]

3. ALIENS (§ 32*)—DEPORTATION OF CHINESE—PROCEEDINGS.
Where a Chinese person is unlawfully within the United States and subject to arrest, any citizen, including a Chinese inspector, may secure the evidence necessary to cause an arrest, or may at his own risk prevent the Chinese person from escaping by restraining him, but such restraint is not the arrest which will throw on the Chinese person the burden of proof of showing his right to remain in the United States, until some facts appear, and a warrant is issued, or until evidence is disclosed on a hearing indicating that his presence is unlawful.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92–95; Dec. Dig. § 32.*]

4. CONSTITUTIONAL LAW (§ 252*)—DUE PROCESS OF LAW—DEPORTATION OF CHINESE.
A Chinese person arrested in deportation proceedings is entitled to the protection given by Const. U. S. Amend. 5, and he cannot be deprived of his liberty without due process of law.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 728–731; Dec. Dig. § 252.*]

5. CITIZENS (§ 3*)—WHO ARE—PERSONS BORN WITHIN THE JURISDICTION.
A Chinese born in the United States is, by virtue of the fourteenth amendment, a citizen of the United States, and he is lawfully within the United States and cannot be arrested without a warrant or on a warrant unless based on a complaint showing a statement of fact by some responsible person from which the charge of unlawful presence in the country may be deduced.
[Ed. Note.—For other cases, see Citizens, Cent. Dig. §§ 2, 13; Dec. Dig. § 3.*]

6. ALIENS (§ 32*)—DEPORTATION OF CHINESE—PROCEEDINGS.
A Chinese person, whose arrest in deportation proceedings is not based on any facts making the arrest presumptively lawful, cannot be forced into the position of proving his right to remain in the United States, but the entire case must fall for want of right to deport.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92–95; Dec. Dig. § 32.*]

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

7. ALIENS (§ 32*)—DEPORTATION OF CHINESE—PROCEEDINGS.
Where, in proceedings to deport a Chinese person, the arrest was made before the issuance of a warrant and on no facts indicating unlawful presence in the United States, and the hearing before the commissioner developed the fact that the Chinese person was apparently a citizen, he should be discharged.

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

8. ALIENS (§ 32*)—DEPORTATION OF CHINESE—PROCEEDINGS.
Where a Chinese person entered the United States in the exempt class because entering with his father engaging in the mercantile business in the United States, and also engaged by himself in the mercantile trade, he could not be deported merely because he became a laborer and was a laborer at the time of his arrest.

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

9. ALIENS (§ 23*)—DEPORTATION OF CHINESE—BURDEN OF PROOF.
Where a Chinese person entered the United States in the exempt class, he could not be deported merely because a doubt was cast on his real status when entering, for the decision of his right to enter was presumptively correct, and the United States must, to obtain his deportation, show persuasively the contrary, unless his entry was fraudulently obtained.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 76–90; Dec. Dig. § 23.*]

10. ALIENS (§ 23*)—DEPORTATION OF CHINESE—RIGHT TO REMAIN.
A Chinese person, admitted into the United States as a student, may remain after ceasing to be a student, and he may earn his living in any lawful manner without subjecting himself to deportation.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 76–90; Dec. Dig. § 23.*]

11. ALIENS (§ 23*)—DEPORTATION.
Where a Chinese person, born in China, came to the United States when five or six years old with a merchant, and was too young, when the Registration Act was passed, to have any knowledge of the requirement with respect thereto, and he apparently at that time was a merchant, in so far as his status was that of the person with whom he lived and with whom he came to this country, and he later engaged in the laundry business, he could not be deported merely because he was a laborer at the time of his arrest in deportation proceedings.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 76–90; Dec. Dig. § 23.*]

12. ALIENS (§ 32*)—DEPORTATION.
Where a Chinese person claimed that he had been born in the United States and had been readmitted to the United States four years before his arrest in deportation proceedings, he could not be deported, in the absence of anything in the papers readmitting him to the United States, contradicting his claim that he was born in the United States, and the mere fact that he could not explain the absence of the readmission papers, which might have been destroyed by fire, did not justify a finding against him; the record of admission being available to the government.

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

Deportation proceedings by the United States against Hom Lim, against Quan Wah, against Lou Chu, against Lee Chee, and against Wong Bit Hing. From orders of deportation, defendants appeal. Reversed, and defendants ordered discharged.

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

William J. Youngs, U. S. Atty., of Brooklyn, N. Y. (Reuben Wilson, of Brooklyn, N. Y., of counsel), for the United States.

Max J. Kohler, of New York City, for defendant Hom Lim.

James A. Donegan, of New York City, for defendants Quan Wah and Lou Chu.

William Austin Moore, of Brooklyn, N. Y., for defendant Lee Chee.

Amy Wren, of Brooklyn, N. Y., for defendant Wong Bit Hing.

CHATFIELD, District Judge. The law of Congress of May 6, 1882 (22 Stat. 58, c. 126), amended and added to by the act of July 5, 1884 (23 Stat. 115, c. 220 [U. S. Comp. St. 1901, p. 1305]), provides that for ten years thereafter "the coming of Chinese laborers to the United States be suspended," and provides that "it shall not be lawful for any Chinese laborer to come from any foreign port or place, or having so come to remain within the United States."

By section 3 of this act, Chinese laborers in the United States upon November 17, 1880, or coming within 90 days after May 6, 1882, and, by section 6, every Chinese person, other than a laborer, coming to the United States, shall obtain the permission and be identified by the Chinese or other foreign government of which the Chinese person shall be a subject.

Certain provisions regulate the landing of Chinese passengers and the reporting of such passengers by the masters of vessels, and the bringing in of a person not lawfully entitled to enter is made a misdemeanor.

By section 12, the coming of a Chinese person by land is prohibited, except upon the production of such certificate as would be required if landing from a vessel. Any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, after having been brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled, etc. All peace officers of the several states and territories of the United States are hereby invested with the same authority as a marshal or United States marshal in reference to carrying out the provisions of this act.

By section 15, the provisions of the act are made to apply to all subjects of China and Chinese, whether subjects of China or "any other foreign power"; and the words "Chinese laborers" shall be construed to mean both skilled and unskilled laborers.

This law was passed under authority of a treaty made November 17, 1880 (22 Stat. 826), by which the coming of Chinese laborers to the United States, or their residence therein, may be regulated, limited, or suspended, but not absolutely prohibited. The suspension of immigration is to apply only to Chinese who "may go to the United States as laborers."

By article 2, Chinese subjects, such as teachers, students, merchants, or travelers, and Chinese laborers who were already in the United States, are to be allowed to go and come, with the same rights and privileges which are accorded to the citizens and subjects of the most favored nation.

By the act of September 13, 1888 (25 Stat. 476, c. 1015 [U. S. Comp. St. 1901, p. 1312]), re-enacted by the act of April 27, 1904 (33 Stat. 428, c. 1630 [U. S. Comp. St. Supp. 1911, p. 524]), a Chinese laborer who left the United States could not return except under certain conditions, and after presenting a certificate which he had to obtain upon leaving.

By section 13 of this law, "any Chinese person or person of Chinese descent, found unlawfully in the United States, or its territories, may be arrested" upon a complaint, under oath, of any party, upon a warrant issued by a justice, judge, or commissioner of the United States court, and returnable before such officer or court, and, upon conviction, deportation is to be had to the country from whence the Chinese person came; i. e., "China." But see, as to a case under the Immigration Law, United States ex rel. Moore v. Sisson, 206 Fed. 450, 124 C. C. A. 356.

By the act of May 5, 1892 (27 Stat. 25, c. 60 [U. S. Comp. St. 1901, p. 1319]), the laws previously in force were continued for ten years, and it was expressly provided that deportation should be to China, unless the person deported was a citizen or subject of some other country, in which case he should be removed to that country.

By section 3, any Chinese person or person of Chinese descent, arrested under the provisions of these laws, is to be adjudged to be unlawfully within the United States, unless such person shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States.

By section 6, all Chinese laborers then within the United States were required to register within the period of one year, and any Chinese person other than a laborer, having the right to such certificate, could obtain one under this law.

By the act of November 3, 1893 (28 Stat. 7, c. 14 [U. S. Comp. St. 1901, p. 1321]), the time for obtaining certificate was extended six months thereafter, or if unavoidably prevented from so doing, and if having been a resident of the United States on May 5, 1892, a certificate might subsequently be granted.

By section 7 of the act of 1892, the Secretary of the Treasury is given authority to make such rules and regulations as may be necessary for the efficient execution of the particular law.

By the act of November 3, 1893 (28 Stat. 7), the terms "laborer" and "merchant" were defined, and it was provided that a Chinaman applying to re-enter the United States, on the ground that he had previously been in this country, as a merchant, must establish that fact by the testimony of two credible witnesses other than Chinese.

By the act of March 3, 1901 (31 Stat. 1093, c. 845 [U. S. Comp. St. 1901, p. 1327]), the United States commissioner, before whom the case should be heard, is to be designated by the United States attorney, and it is provided that no warrant of arrest for violation of the Chinese exclusion laws shall be issued by United States commissioners, excepting upon the sworn complaint of the district attorney, collector, deputy collector, immigration inspector, United States marshal, or Chinese

inspector, etc., unless the issuing of such warrant shall first be approved or requested in writing by the United States attorney.

By the act of April 29, 1902 (32 Stat. 176, c. 641 [U. S. Comp. St. Supp. 1911, p. 524]), as amended by section 5 of the act of April 27, 1904 (33 Stat. 428), the preceding laws and, among others, certain sections of the act of 1892 were re-enacted, extended, and continued, without modification, limitation, or condition. The Secretary of Labor was directed to make such rules and regulations as were necessary to carry out the act, and the laws were extended to apply to the island territory under the jurisdiction of the United States. But this law, in sections 1 and 4, added the words, after "Chinese laborers," which had not been included in any of the previous statutes, "not citizens of the United States."

The Immigration Law of February 20, 1887 (34 Stat. 898, c. 1134), and the subsequent amendments thereto have been held applicable to the exclusion of Chinese.

[1] With the foregoing statement, we will take up in order the several cases now pending in which analogous questions are involved. In each case a United States commissioner has issued a warrant, upon a complaint of a Chinese inspector, to the effect that the person whose arrest was sought was "a Chinese person and not entitled to be and remain in the United States without certificate of residence as required by law." In each case it appears that, before the issuance of the warrant, the Chinese person had been taken into custody by an inspector, without a warrant, upon questions and answers taken down by a stenographer, and obtained while the inspector was inquiring as to the possession of certificates.

It must be observed that no Chinese person or person of Chinese descent may be arrested, even upon a warrant, unless based upon circumstances showing him to be unlawfully within the United States. Section 13, Acts of 1888. A person who has been lawfully "arrested" shall be adjudged to be unlawfully within the United States unless he furnishes affirmative proof of his right to remain. It would render the law unconstitutional if it should be held to allow the arrest and deportation of a person, even where a warrant had been issued, unless the record showed some proof, at least in the way of allegations of fact, that the person arrested was a Chinese person or person of Chinese descent, and that this person was "unlawfully" in the country and had been arrested because of some state of facts prohibited by and within the language of the law.

A Chinese person, then too young to register, or born since May 5, 1892, or in the United States before May 3, 1894 (but not a laborer), who might be found in the United States after the last date, without a certificate, could have come here lawfully in three ways, even though he be a laborer at the time his status was investigated: First, he might have been born in the United States; second, he might have entered the United States under such circumstances as to be exempt from the provisions of the deportation statute; or, third, he could have been in the United States, and not required to register, up to May 3, 1894. Any other Chinese person found in the United States without the cer-

tificate must have come here either before the time of registration or contrary to law, if he arrived after that day.

[2] Upon being questioned by a Chinese inspector or any other person as to his status, before having been arrested or subjected to duress, the proof furnished by himself of his own statements could be used against him, if need be, in requiring from him affirmative proof of his right to remain, in order to prevent his deportation. Bak Kun and Ting Fong v. United States, 195 Fed. 53, 115 C. C. A. 55; United States v. Hung Chang, 134 Fed. 19, 67 C. C. A. 93; Ark Foo v. United States, 128 Fed. 697, 63 C. C. A. 249. Inconsistent statements can be the basis of a finding of fact as to unlawful presence, even though "citizenship" be claimed. Lee Ah Yin v. United States, 116 Fed. 614, 54 C. C. A. 70; Bak Kun and Ting Fong v. United States, supra; United States v. Too Toy (D. C.) 185 Fed. 840; Chin Bak Kan v. United States, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121.

[3] By the earlier law, any peace officer had the same authority as the United States marshal or his deputy, but by the later statute (1892) an arrest can be made only by a Collector of Internal Revenue or his deputies, a customs official, a United States marshal or his deputy. If a person is unlawfully within the United States and subject to arrest, any citizen, including a Chinese inspector, could secure the evidence necessary to cause an arrest, or might, at his own risk, prevent the person from escape. For one not protected by the law and subject to arrest upon properly issued warrant has no more rights than a person having committed a misdemeanor and subject to physical arrest by any citizen until a warrant be obtained. Such restraint could not, however, be the "arrest" which would throw upon the Chinese person the burden of proof until some facts appear and a warrant is issued, or until evidence is disclosed upon the hearing indicating that the presence of the Chinese person is unlawful rather than lawful.

[4] But the fact that the person taken into custody is a Chinese person gives, under the Constitution of the United States, that person no less rights than are given to any other person, not to be deprived of life, liberty, or property, without due process of law. Amendment 5, Constitution of the United States.

United States v. Hom Lim.

[5] In this case the record shows that, from the time of first questioning by the Chinese inspector, Hom Lim stated, upon being approached and questioned as a Chinese person, that he was born in the United States. By amendment 14 of the Constitution of the United States, all such persons are citizens. United States v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890. If that statement was true, he was not unlawfully within the United States; he could not be arrested without a warrant, or with a warrant unless that warrant was based upon a complaint showing a statement of fact by some responsible party, from which the charge of unlawful presence could be deduced. Moy Suey v. United States, 147 Fed. 697, 78 C. C. A. 85.

[6] Unless the record shows that an order of arrest could lawfully be made, then the entire case must fall for lack of right to deport.

A person cannot be physically "arrested" without some basis of fact showing unlawful presence, and then be forced into the position of proving his right to remain, when the "arrest" is not based upon any facts making the arrest presumptively lawful. The statement of the Chinaman, or of any other person, when uncontradicted by anything in the case, and when not incredible on its face, is affirmative proof of lawful right to remain. Jung Man v. United States, 128 Fed. 699, 63 C. C. A. 249.

[7] The arrest in this case before the issuance of the warrant, and upon no facts indicating unlawful presence in the United States, was without foundation or legal right. The hearing before the commissioner developed the fact that the Chinaman was apparently a citizen, and he should have been discharged. If, upon the hearing, any basis for the arrest were developed, the defects of the complaint would have been cured. Fong Yue Ting v. United States, 149 U. S. 729, 13 Sup. Ct. 1016, 37 L. Ed. 905. But in the absence of any evidence against the Chinaman, or of any facts raising a presumption of unlawful presence, the warrant of deportation must be vacated. Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369.

United States v. Quan Wah.

[8, 9] As to the case of Quan Wah (upon a similar warrant by a Chinese inspector and the issuance of a warrant upon his verified complaint in exactly the same form as set forth in the preceding case), the testimony shows that the person, admittedly of Chinese descent and born in China, had entered the United States as a merchant, with a certificate properly viséed by the United States Consul, after examination by the immigration authorities, who accepted the certificate as satisfactorily substantiated. The testimony shows that the Chinese person's father had been a merchant in this country, and the son had pursued a mercantile trade, but at the time of arrest he was cooking a meal in a laundry where an inspection was being made of all the Chinese in the place.

The only evidence against the Chinaman, other than the burden cast upon him of proving his right to remain, was his statement to the inspector that his father had been in business (that is, a "laundry" merchant), and that the Chinaman was admittedly not engaged in a mercantile pursuit at the moment of arrest. He testified that he had been visiting a friend who was ill and had been preparing meals for the two days of his stay.

This case raises two questions, one of which has previously been decided, viz., whether, upon credible testimony that the Chinaman entered the United States in the exempt class, he is liable to deportation if he becomes a laborer thereafter; and, second, whether doubt cast upon his real status when entering is a failure on his part to show that he has a right to remain. Both these questions must be answered in favor of the Chinese person. As has been decided in the case of United States v. Lee You Wing (D. C.) 208 Fed. 166, affirmed February 17, 1914, 211 Fed. 939, 128 C. C. A. ——, the importation or the entry of Chinese laborers into the United States is the thing forbidden

by the statute. As to a Chinese then in the United States, only those who remained without proper registration at the time of the former registration law, and who were laborers at the time of the passage of that law, were subject to deportation for their subsequent status. Tom Hong v. United States, 193 U. S. 517, 24 Sup. Ct. 517, 48 L. Ed. 772.

Nor can the fact that the burden of proof to show right to be in the United States is thrown upon the Chinaman necessitate his further showing that the action of the authorities who decided he had the right to enter was correct, unless the evidence shows that his entry was fraudulently obtained. Liu Hop Fong v. United States, 209 U. S. 453, 28 Sup. Ct. 576, 52 L. Ed. 888. The decision of his right to enter was presumptively correct, and, unless the United States shows persuasively to the contrary, the mere certificate of admission is sufficient. United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040; Fok Young Yo v. United States, 185 U. S. 296, 22 Sup. Ct. 686, 46 L. Ed. 917; Lem Moon Sing v. United States, 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082.

These facts appeared upon the record before the commissioner who ordered the deportation, and the Chinese person should have been discharged. The order of deportation must therefore be set aside.

United States v. Lou Chu.

[10] This, like the last case, raises the question of the right of a person of Chinese descent to remain in the United States. The Chinese person was born in China, and was admitted to the United States as a student.

It appears that by the regulations of the Department of Labor, now in force, governing the admission of Chinese, a student who applies for admission must at the time of entry be one who, upon the conclusion of his studies, shall have departed from the United States, unless then found to be qualified to remain. Rule 8, subd. "a." By rule 8, subd. "d", "no applicant admitted as a student shall be permitted to follow in the United States any other occupation than that of studying, unless and until he shall have made application to the immigration officer in charge of the district of his residence for the privilege of changing from that to some other exempt occupation and been granted such privilege."

Inasmuch as the law provides that only persons not lawfully in the United States can be deported, the provision that a man may enter with the right to remain here, but that he shall be prevented from following any occupation except such as meets with the approval of an immigration officer, is a statement which carries with it the answer to the query raised. The regulations seeking to restrict the occupation of the person admitted as a student can be effective only in so far as they are within the law. The provisions as to the manner of departure from the United States of a person who is not yet admitted can hardly be demanded as a condition of admission, and, if admitted, a Chinese student would seem to have the right to stay.

Article 1 of the treaty gives the authority to limit or suspend the coming or residence of Chinese laborers only to those who "came to

the United States as laborers." Other Chinese subjects, including teachers, students, merchants, etc., under article 2, are allowed to come and go of their own free will, and the right to earn a living should be accorded to a student the same as to any other person, under the Constitution of the United States.

If the government desires to show that the original certificate was fraudulent, and that the Chinese person was not a student in coming to this country, such determination is within the power of the tribunal ordering deportation, but no other power exists in this respect.

In this case, again, the record before the commissioner shows the facts of lawful entry as a student, and, as a matter of law, the order of deportation was incorrect and should be set aside.

United States v. Lee Chee.

This case is similar to that of Quan Wah, just decided.

[11] The Chinese person was born in China and came to this country when five or six years old, with a merchant, and, when the registration act was passed, was too young to have knowledge of any of the requirements with respect thereto. He apparently at that time was a merchant, in so far as his status was that of the person with whom he lived and with whom he came to this country, and he was not required to register. United States v. Mrs. Gue Lim, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544. He has since been in the laundry business, and was a laborer under the definition of the statutes at the time of arrest.

The only evidence to contradict these statements was some inconsistent answer as to the Chinese person's age, which was subsequently explained, and the ambiguous answer of one of the witnesses with respect to his own return from China.

Upon the record, as a matter of law, no deportation could be ordered, and the Chinaman must be discharged.

United States v. Wong Bit Hing.

[12] This case involves certain questions generally referred to in the previous decisions. Under similar circumstances, the person of Chinese descent was arrested upon answers given through an interpreter, to the Chinese inspector, that he was 36 years old, married, had a son 10 years old and a daughter 12 years old, in China, where he himself was born; that his father was also living in China, where he had gone back 10 years before from the United States; that the father had been a laundryman when in the United States; that the Chinese person himself had been born in San Francisco; and that he had been readmitted to the United States 4 years before the date of the arrest.

A number of witnesses were called to prove the fact that this Chinese person had been seen in San Francisco as a small boy, and in New York after his return. The only suspicious circumstance about the matter is that he was unable to thoroughly explain the absence of the papers upon which he was admitted in San Francisco, and it subsequently developed that they might have been destroyed in a fire. It

also appears that the record of the admission of this Chinese person in San Francisco four years ago is available to the government, and its production would show evidently a right on the part of the Chinaman to enter the United States; if not, presumptively he would not have been admitted upon these papers. But, in the absence of anything which might be shown by these papers to contradict his claim that he was born in the United States, it is impossible to see upon what facts the arrest was made at the outset, and there is no evidence upon which, as a matter of law, an order of deportation could be based.

The order will be set aside, and the Chinaman discharged.

LOUISVILLE & N. R. CO. v. KENTUCKY RAILROAD COMMISSION et al.

(District Court, E. D. Kentucky. May 14, 1914.)

1. INJUNCTION (§ 158*)—INTERLOCUTORY INJUNCTION—DECISION—FINALITY.
A decision either way on a motion for an interlocutory injunction is an exercise of discretion and is not final, and the court may, on a subsequent application, reach a different conclusion on the same or more convincing evidence.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 341; Dec. Dig. § 158.*]

2. INJUNCTION (§ 158*)—INTERLOCUTORY INJUNCTION—SUCCESSIVE MOTIONS.
The renewal of a motion for an interlocutory injunction on grounds, or on evidence which should have been presented on the first application, will be discouraged, and an application once refused will not be at a later stage granted, save in a clear case.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 341; Dec. Dig. § 158.*]

3. INJUNCTION (§ 158*)—INTERLOCUTORY INJUNCTION—SUCCESSIVE MOTIONS.
Where a motion by a railroad company against a state railroad commission for an interlocutory injunction to restrain the enforcement of rates ordered by the commission was denied on the ground that the supporting affidavits stated only conclusions of law, a subsequent motion rested in the discretion of the court, in the absence of anything to show bad faith on the part of the company.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 341; Dec. Dig. § 158.*]

4. CARRIERS (§ 12*)—REGULATION—RATES—PRESUMPTIONS.
That a railroad company has for a considerable time voluntarily maintained a given rate is evidence of the reasonableness thereof, and supports an order of a state railroad commission fixing that rate as lawful, unless the rate so maintained was special to meet some special situation, like water competition, or other special conditions.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

5. CARRIERS (§ 12*)—REGULATION—RATES—PRESUMPTIONS.
Where a railroad company maintained low rates for grain inward bound to distillers to build up the distilling business, and thereby receive a high-class return traffic, and the company maintained the same rates for a long time after the reason for their establishment had ceased to exist, the rates were prima facie reasonable, and an order of a state railroad commission fixing the rates for all grain inward bound as lawful was sustained by evidence, for the commission was not bound to as-

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

sume that an equivalent result would not follow as to outward-bound flour from grain inbound to millers, or as to all the reverse traffic which would normally result directly or indirectly from grain moving in one direction, and the burden was on the company to prove that the rates were unreasonable, before it could complain.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7–11, 15–20; Dec. Dig. § 12.*]

6. CARRIERS (§ 18*)—REGULATION—RATES—PRESUMPTIONS.

Where a state railroad commission established as reasonable, for all grain inward bound, rates maintained by a railroad company for grain inward bound to distillers for the development of the distilling business, and thereby receive a high-class return traffic, and the company, at the hearing before the commission, declined to exercise its privilege of showing that it would suffer loss by the application of the rates, the court, on the application of the company, could not set aside the order of the commission and enjoin the enforcement of the rates on mere probability that the return traffic would not be as profitable as the products of distillers had been.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16–18, 20, 24; Dec. Dig. § 18.*]

7. COURTS (§ 366*)—CONTROLLING DECISIONS—CONSTRUCTION OF STATE STATUTES.

The construction by the highest court of a state of a state statute defining the powers of a state railroad commission is binding on a federal court in determining the powers of the commission.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954–957, 960–968; Dec. Dig. § 366.*]

8. INJUNCTION (§ 26*)—MULTIPLICITY OF ACTIONS AT LAW.

Where an order of a state railroad commission requires a railroad company to make reparation by the payment of specified sums to 19 separate shippers, and the commission and shippers intend to bring but one suit, the railroad company was not entitled to injunctive relief against the enforcement of the order of reparation.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24–49, 54–61; Dec. Dig. § 26.*]

9. CARRIERS (§ 18*)—ESTABLISHMENT OF NEW RATES—ORDERS.

Where the court restrained the enforcement of rates fixed by a state railroad commission on condition that the carrier should pay into court month by month all the freight charges which had been collected in excess of the rates fixed by the commission, and that the payments should be refunded on it being finally determined that the excess was not lawfully collected, otherwise returned to the carrier, the court would not modify the order so far as it had been executed, but it could modify it as to its future effect.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16–18, 20, 24; Dec. Dig. § 18.*]

10. CARRIERS (§ 18*)—ESTABLISHMENT OF RATES—ORDERS OF STATE RAILROAD COMMISSION—INJUNCTION.

Where a railroad company, attacking orders of a state railroad commission fixing rates, will lose but little pending an appeal to the Supreme Court, if the rates are enforced pending the appeal, the trial court will not restrain the enforcement of the order fixing the rates but will leave that matter to the Supreme Court.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16–18, 20, 24; Dec. Dig. § 18.*]

In Equity. Suit by the Louisville & Nashville Railroad Company against the Kentucky Railroad Commission and others. On motion

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

under Judicial Code (Act March 3, 1911, c. 231) § 266, 36 Stat. 1162 (U. S. Comp. St. Supp. 1911, p. 237), for interlocutory injunction. Denied.

Henry L. Stone and Edward S. Jouett, both of Louisville, Ky., for complainant.

Edwin W. Hines and J. V. Norman, both of Louisville, Ky., for defendants.

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

PER CURIAM. The general situation appears by our former opinion ([C. C.] 186 Fed. 176, sub nom. L.-N. R. R. v. Siler) and by the opinion of the Supreme Court (231 U. S. 298, 34 Sup. Ct. 48, 58 L. Ed. ——, sub nom. L.-N. R. R. v. Garrett). On the former hearing, plaintiff urged, as one ground of relief, that the order of the Railroad Commission had been made without any evidence whatever that its newly prescribed rate was reasonable, and hence that the order was invalid; and it supported this allegation by affidavits that, upon the hearing before the Commission, no evidence to this effect was offered. We held that these affidavits stated only conclusions of law, so that the allegation of lack of evidence was itself not proved; and this view was also taken by the Supreme Court. As to the desired injunction against the reparation order, it was held, both by this court and the Supreme Court, that the question could not be raised on a record to which the reparation claimants were not parties. The case having been remanded, plaintiff now files an amended bill and makes a new motion for interlocutory injunction. As to the future rate, the present motion is based upon the same proposition that the Commission had before it no evidence that the new rate was reasonable; and, upon this motion, the allegation is supported by a transcript of all the proceedings before the Commission, and it is said that, by this transcript, the lack of any evidence to support the Commission's finding sufficiently appears. As to the reparation order, it now appears that the claimants under that order have been made parties.

[1] Counsel for the Commission and the claimants first urge that the matters have been adjudicated, or that, at least, we ought not to hear, for the second time, the same motion in the same case. A decision either way upon a motion for interlocutory injunction is the exercise of discretion, and such exercise is not final. Acme Co. v. Commercial Co. (C. C. A. 6) 192 Fed. 321, 112 C. C. A. 573. It therefore must continue within the power of the court upon a later application to reach the other conclusion upon more convincing evidence, or, indeed (save for the effect of a mandate from a reviewing court), upon the same evidence. The opinion and mandate of the Supreme Court cannot be considered as controlling, since that court carefully refrained from deciding what the effect would have been if the allegation of lack of evidence had been proved or if the necessary parties had been present; and the mandate takes effect with reference to the then existing record.

[2] On the other hand, the renewal of such a motion upon grounds or upon evidence which should have been presented upon the first application is to be discouraged, and an application once refused will not, at a later stage, be granted, save in a clear case. Chancellor Vrooman, in Buckley v. Corse, 1 N. J. Eq. 504, 510.

[3] The result of such a situation as this is that the court has power to hear the renewed application on its merits; that whether it should do so is a matter of discretion; and that it would sharply refuse to do so, if it appeared that the first application had been with any purpose of experimenting with the court or of getting indirect advantages. We see no reason to think that there was any such purpose here, or to doubt that the imperfect showing upon the first hearing was the result of a good-faith mistake as to the kind of proof necessary to establish what counsel considered a really undisputed fact and as to who were necessary parties. The long delay which has operated to keep the restraining order in force resulted from the unexpected grouping of this case with other railroad cases in the Supreme Court, and can hardly be charged against plaintiff. Upon the whole, we think we ought to consider the merits of the motion.

It is next urged that, even if no evidence on the subject was put before the Commission, that fact does not justify this court in setting aside the order fixing a future rate; in other words, it is said that the cases in which the Supreme Court has, for this reason, vacated an order of the Interstate Commerce Commission do not apply where a federal court is dealing with the order of a state commission, and this for the reason that the Interstate Commerce Act expressly gives to the courts a power to review, while the Kentucky act contains no such general provision. It is an interesting question whether the power of this kind which the Supreme Court has exercised depends in any degree upon this clause of the Interstate Commerce Act (I. C. C. v. U. P. R. R., 222 U. S. 541, 547, 32 Sup. Ct. 108, 56 L. Ed. 308; I. C. C. v. L. & N. R. R., 227 U. S. 88, 92, 33 Sup. Ct. 185, 57 L. Ed. 431), or whether, since legislative power cannot be given to the courts, this exercise depends on the inherent right to forbid prejudicial action under color of an order invalid because made without jurisdiction (Procter v. U. S., 225 U. S. 282, 298, 32 Sup. Ct. 761, 56 L. Ed. 1091). However this may be, we think the question is not now controlling, and we pass it by without decision, assuming, but only for the purposes of this case, that, if in truth there was no supporting evidence, the order cannot stand.

[4] The meritorious question so developed should be approached in the light of these rules which we may take as now established: First, proof that a railroad company has for a considerable time voluntarily maintained a given rate is evidence of the reasonableness of that rate and will support an order fixing that rate as a lawful one; and, second, by way of modification or exception, if the rate so maintained was due, not to normal and ordinary causes, but was special and to meet some special situation (like water competition), its making and maintenance then cease to be any evidence that, in the absence of those spe-

cial conditions, it would be reasonable. I. C. C. v. L. & N. R. R., 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431.

[5] In the instant case, it is conceded that the new rates fixed by the Commission for all grain inward bound to all persons for all purposes were the same as the rates which the railroad had voluntarily maintained for many years for grain shipped inward bound to distillers for distilling purposes. Under the first rule just stated, this fact becomes, prima facie, an admission, and therefore evidence that the rate were reasonable for grain. The railroad seeks to bring the case within the above-stated second rule or exception, by showing that the rates upon all grain outbound and to all persons except distillers upon all grain inbound had always been much higher, and that the distillers' rate was an abnormal one induced and justified by two considerations: First, that a very low and (directly) nonremunerative rate for distillers was established for the sake of building up and encouraging an industry which otherwise could not have existed in the interior of the state at a distance from the Ohio river gateways where grain could be more cheaply obtained; second, that these grain shipments to distillers resulted in return outbound shipments of the finished product carrying a high rate and counterbalancing the unprofitable rate on the raw material. Based upon these premises, the railroad propounds a case of irreparable injury by reason of the reduction in its rates on all grain not for distillers and as to which the special conditions never have existed and do not exist. The claim that the newly ordered rate has never been voluntarily maintained, except for distillers, is conceded to be true; the two recited special conditions, encouragement of a new industry and a high-class return traffic, seem to have rested, at the hearing before the Commission, partly upon assertions of counsel rather than upon proof; but perhaps they were not disputed, and we take them as true.

The claim that the low rates amount to nothing as present evidence of what is reasonable, because they were specially made to build up an otherwise impossible industry, is fully met by the railroad's concession, made upon the argument before us and in its testimony before the Commission, that the same rates had been maintained for a long time after this reason had ceased to exist, and that its effort to discontinue these special rates was not because of the disappearance of this justification, but because the Interstate Commerce Commission had forbidden the special rate to one particular class of shippers. This concession removes all distinguishing force from this alleged unusual reason for the rate, and leaves the prima facie evidential force of that rate so far unaffected. The situation is analogous to that concerning which the Supreme Court said (I. C. C. v. L. & N. R. R. Co., supra, at page 99 of 227 U. S., at page 190 of 33 Sup. Ct. [57 L. Ed. 431]):

"When made, the increase was not because of the absence of water competition, but to make the sum of the locals correspond with the through rates. Under the circumstances, the maintenance of these low rates, after the water competition disappeared, tends to support the theory that, by an increase of business or other cause, they had become reasonable and compensatory."

We come next to the claim that the return traffic in the high-rate finished product neutralizes the evidential effect of the low inbound

rate on raw material. In this position, the railroad company may be right; we do not know. The Railroad Commission was not bound to assume, nor are we, that, if this result followed as to inbound grain and outbound whisky, an equivalent result would not follow as to outbound flour from grain inbound to millers, or as to all the reverse traffic which would normally result directly and indirectly from grain moving in one direction. This whole subject was peculiarly one for evidence; at the conclusion of the evidence, it might have been all one way, and it might have been so clear and undisputed that a finding against the railroad's contention would have been arbitrary; but the burden was on the railroad to dissipate the evidential effect of its voluntary maintenance of this rate for one purpose; and the railroad did nothing. It results that its admission against its interest remained unaffected and did form a substantial basis for the action of the Commission.

Turning now to the supposed disastrous effect of the new rate upon the general grain traffic for every purpose, the railroad company is met by a similar obstacle. It has not proved that there is any other traffic of material or substantial volume which will be injuriously affected by the new rate, although, upon the hearing before the Commission, the railroad was expressly invited to offer any proof it had that it would suffer injury in this way. Here again the railroad company asks us to take notice and insists that the Commission should have taken notice of facts which cannot be judicially known. As to many of the interior points where distilleries are located and where the Commission's order takes direct effect, or where a similar order will take direct effect, it affirmatively appears that there is no substantial traffic in grain, excepting to these distilleries. A few of the distilleries, however, are in towns or cities of considerable size, and, in the nature of things, there must be some such traffic to mills or to feed stores, etc., and some outbound shipment of locally grown grain from these points; but that this traffic, which perhaps we must presume has some existence, is large enough to be worth any attention or to merit the granting of an extraordinary remedy, or indeed to give jurisdiction to this court, does not appear and cannot be assumed.

[6] It does appear by the map that the most distant of the distillery points to be affected are about 90 miles southerly from Cincinnati, and 75 miles southeasterly from Louisville, and if proportionate reductions, on all grain to or from Cincinnati or Louisville and all points intermediate between those cities and the extreme interior distilleries, are eventually compelled under the long and short haul clause of the Kentucky law, it is clear that some additional traffic in grain will be affected; but here again we are left without any evidence, and we cannot set aside the Commission's order upon the mere surmise or even probability that there will be a considerable amount of such traffic, and the further surmise that the induced return traffic will not be as profitable as distilleries' products. Further, if it is true that the new rate is unremunerative, and that the order compelling the application of that rate to all grain at the distillery points has resulted only from the railroad's mistaken omission to prove its case, we cannot assume

that the Railroad Commission would decline to excuse the railroad from the effect of the long and short haul clause. It apparently would have full power to grant such exemption. L. & N. R. Co. v. Eubank, 184 U. S. 27, 22 Sup. Ct. 277, 46 L. Ed. 416.

It follows that there was not, upon the hearing before the Commission, an entire failure of substantial proof to support the order which the Commission made, and that the order cannot, for that cause, be set aside. The rightfulness of this result is emphasized when we consider the conduct of the railroad at the hearing before the Commission. It was given ample opportunity to produce any proof which it desired, but it deliberately elected to stand upon the supposed inefficiency of the attack on its existing rates, and declined to exert itself to show that they were reasonable or that, if the proposed new rates were put in force, it would suffer any loss of revenue to which it was reasonably entitled. Under such circumstances, the railroad has scant equity in asking relief from the result of its carefully chosen course.

[7] For the reasons which we have stated, we think proper to take up, as if for the first time, the attack upon the reparation order; all the necessary parties being now before the court. The power of the Commission to make a reparation award which should be in effect a money judgment was left untouched by our previous opinion and by the Supreme Court. Many, perhaps all, of the mooted points have been decided adversely to the railroad's position, by the Kentucky Court of Appeals, in Illinois Central R. R. Co. v. Paducah Co., 163 S. W. 239, February 10, 1914. In so far as this decision is a construction of the state statutes, it is obligatory upon us. It is not entirely clear to us how, if the award is a judicial act, it can be sustained against the provisions of the Constitution of 1891, on the theory that this Constitution preserved the existing powers of the Railroad Commission, when the supposed power was (except for one provision) equally obnoxious to the Constitution of 1850; but perhaps the Kentucky Court of Appeals would make that clear, if its attention was directed to the question. It may be, also, that its recent opinion should be considered as really holding that the award is not a judgment, but only prima facie evidence to be used in the subsequent judicial proceeding.

[8] Whatever may be the right conclusion upon this subject as well as upon others involved in the present attack upon this reparation order, we have concluded that, with the effect of the future rate removed as a basis for equitable relief, there is, in the reparation order itself, however invalid it might be, no sufficient reason for an injunction. The order directs the payment of specifically named sums to 19 separate distilleries. If there were to be 19 separate suits scattered through the various counties where the distilleries are situated for the recovery of these sums, we might think that the prosecution of such a multiplicity of suits should be enjoined. However, we are assured by the counsel for the Railroad Commission and all these claimants that they intend to bring upon this award only one suit, either a combination suit upon the joint and several award or a suit upon one claim, to be prosecuted as a test case, or a consolidated suit, according as they

may decide. There is no reason why we should not accept this assurance and base thereon our present action. If this is done, the railroad will not be harassed by many suits in many different places; it can present, in defense, every objection which it now makes, and if, by the construction which the courts of Kentucky give to the statutes of the state, the railroad is deprived of any right which it has under the laws or Constitution of the United States, it can secure that right by the aid of the Supreme Court of the United States. Under these circumstances, we are not inclined to enjoin the Railroad Commission or the parties in interest from proceeding in the Kentucky courts according to the form of the Kentucky law; and the motion for such injunction is denied.

[9] Upon the hearing of the former motion, we continued, pending review in the Supreme Court, an order restraining the enforcement of the new rate, and we did this on condition that the railroad company should pay into court, month by month, all the freight charges which it had collected in excess of the rates fixed by the Commission order in question. Our order provided:

"Such money paid into court and subsequent similar payments shall be refunded to the parties paying the excess respectively, if it shall finally be determined that such excess was not lawfully collected, otherwise to be returned to the complainant."

This order was made January 12, 1911. Under its terms while the appeal was pending in the Supreme Court, a considerable sum has accumulated. The distillers who paid the freight charges covering these excess amounts so paid into court, and who have now been made parties to this case, move for an order that this fund be distributed and returned to them. We do not see how this can be done. It might have been better if our former order had provided for repayment of these amounts if it should "finally be determined that the restraining order was improvidently issued"; but this was not the form of the order. The language which was used provided that the fund should remain in court until the question of the lawfulness of the rate "shall finally be determined." There cannot be a final determination except by final decree; and that has not come. We could set aside or modify this order as to its further effect, but we cannot change what has been done, because the railroad has paid these sums into court upon the condition specified in the order, and it is entitled to the observance of that condition. The motion for distribution is denied.

[10] We assume that the railroad company will wish to make another effort to get the Supreme Court to pass upon the question of the supposed lack of evidence before the Commission and will accordingly appeal from the order to be entered upon this opinion. This raises the question whether we should again continue the restraining order pending this second appeal. We are not inclined to do so. If the new rate goes into effect pending this appeal, the railroad company will lose some money, and the loss will be practically irreparable, but the amount will not be very large, and we think that to impose that possible loss is a less evil than to permit the railroad company to have

longer benefit of the restraining order as the result of its own mistake in presenting its case the first time. This present record can be taken to the Supreme Court in a very few days, and if that court thinks the railroad company should have an injunction under the practice which it followed in Omaha Co. v. I. C. C., 222 U. S. 582, 32 Sup. Ct. 833, 56 L. Ed. 324, it can speedily give that relief.

The existing restraining order will be continued only for the few days necessary for the railroad to notify its agents that the new rate must be applied, and will then be dissolved.

BARBRE et al. v. HOOD.

(District Court, E. D. Oklahoma. April 23, 1914.)

No. 1545.

INDIANS (§ 15*)—RIGHT TO ALIENATE LANDS—MINOR FREEDMAN ALLOTTEE—"MINOR."

Act May 27, 1908, c. 199, § 1, 35 Stat. 312, except as qualified by other sections of the act, removes all restrictions on alienation by Indian allottees of the Five Tribes who are freedmen or of less than half Indian blood; but section 6 provides that "the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the state of Oklahoma," and makes other provisions with respect to their guardianship. Section 2 defines the term "minor, as used in this act," to be a female under the age of 18 years or a male under the age of 21 years. *Held*, that the right of a minor freedman allottee to alienate his land is governed by such act and not by the law of Oklahoma, and that, under its provisions, a conveyance by such an allottee before he was 21 years old, and without authority from a probate court, is void.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37–44; Dec. Dig. § 15.*

For other definitions, see Words and Phrases, vol. 5, pp. 4527, 4528.]

In Equity. Suit by J. A. Barbre and N. M. Coons against L. E. Hood. Decree for defendant.

Tillotson & Elliott, of Nowata, Okl., and James C. Denton, of Muskogee, Okl., for the complainants.

Gilbert M. Gander, of Coffeyville, Kan., for defendant.

CAMPBELL, District Judge. This is an action by the plaintiffs against the defendant to cancel, as a cloud upon plaintiffs' title to the land in controversy, a certain warranty deed or pretended warranty deed executed to the defendant by one Willie Merrell, a duly enrolled freedman citizen of the Cherokee Tribe or Nation of Indians; he being the allottee of the land. As will appear from the agreed statement of facts hereinafter referred to, the only question for determination is the validity of the deed under which the plaintiffs claim title. If that deed shall be held to be valid, then the plaintiffs will prevail. If

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

not, the plaintiffs must fail. With regard to the trial, parties plaintiff and defendant stipulated as follows:

"Stipulation.

"Comes now Tillotson and Elliott, attorneys of record for the plaintiffs herein, and Gilbert M. Gander, attorney of record for the defendant herein, and hereby stipulate and agree as follows:

"1. (a) That this suit is a controversy concerning the legal and equitable ownership of the following described real estate, to wit: West half (W.½) of the southwest quarter (S.W.¼), section thirty-one (31), township twenty-seven (27), range sixteen (16) east, being and lying in the county of Nowata, and state of Oklahoma.

"(b) That the above-described real estate was allotted by the Commission to the Five Civilized Tribes to one Willie Merrell, a duly, regularly, and lawfully enrolled freedman citizen of the Cherokee Nation; that said land was a part of the domain of the Cherokee Nation; and that the west half (W.½) of the southeast quarter (S.E.¼) of the southwest quarter (S.W.¼), section thirty-one (31), township twenty-seven (27), range sixteen (16) east, was selected for and set apart to the said Willie Merrell as his surplus allotment; and that certificates of allotment were issued therefor by the Commission to the Five Civilized Tribes; and that lot four (4) of the northwest quarter (N.W.¼), section six (6), township twenty-six (26), range sixteen (16) east, and the northwest eight (8) acres of lot three (3) of the northwest quarter (N. W.¼) of section 6, township twenty-six (26), range sixteen (16) east, were allotted for and set apart to the said Willie Merrell as the homestead portion of his allotment, and certificates duly issued therefor by said Commission. That thereafter W. C. Rogers, principal chief of the Cherokee Nation, executed a patent, No. 26,538, conveying to and confirming in said Willie Merrell the title to the homestead portion above described, which patent was duly approved by the Secretary of the Interior and filed for record in the office of the Commissioner of the Five Civilized Tribes, on December 8, 1908. And we further stipulate that Exhibit A of the defendant's answer is a true and correct copy of said patent and may be considered by the court as admitted in evidence by both plaintiffs and the defendant.

"2. Also W. C. Rogers, principal chief of the Cherokee Nation, executed a patent to the surplus portion above described, conveying to and confirming in said Willie Merrell the title to the surplus allotment, which said patent was duly approved by the Secretary of Interior and filed for record in the office of the Commissioner to the Five Civilized Tribes, on said 8th day of December, 1908, and that Exhibit B of defendant's answer is a true and correct copy of said patent and may be considered by the court as admitted in evidence by both plaintiffs and defendant.

"3. (a) The parties to this stipulation further agree and stipulate that the title of the plaintiff to said above-described real estate is based upon a certain instrument of writing in the form of a warranty deed, executed to the plaintiff by Willie Merrell, the allottee aforesaid, on the 23d day of April, 1910, and filed for record in the office of the register of deeds in Nowata county, Okl., on June 1, 1910; that the defendant, L. E. Hood, claims title to the same said above-described real estate by reason of an instrument of writing in the form of a warranty deed made, executed, and delivered to said defendant by Willie Merrell, the allottee aforesaid, on the 3d day of September, 1910.

"(b) It is further stipulated that the instrument attached hereto as Exhibit A may be considered by the court as 'the enrollment evidence' (that is, the evidence of enrollment of Willie Merrell), and also that it may be considered in so far as it is legally competent, for the purpose of aiding the court in determining the time when said lands should become alienable by the allottee, Willie Merrell.

"(c) That Exhibit B attached hereto is the census card of Willie Merrell, as shown by the department records, and that it may be considered by the court as admitted in evidence, by both the plaintiffs and defendant, for the

purpose of aiding and assisting the court in determining the time when the lands above described should become and be alienable by the allottee aforesaid.

"(d) It is further agreed and stipulated that the title to the real estate aforesaid is determinable upon one issue and one issue only, and that the court may decide this suit on this one issue, viz., the time when said lands above described became alienable by the allottee, Willie Merrell, both plaintiffs and defendant admitting all the matters above set forth, and that, if the court should find that said lands were alienable by the allottee on the 23d day of April, 1910, the court is then authorized to render judgment in this case quieting the title in and to said lands in the plaintiffs herein, and if the court herein should find that said lands were inalienable on said 23d day of April, 1910, and were alienable on the 3d day of September, 1910, that the court may render judgment in favor of said defendant and against said plaintiffs, quieting the title in said defendant in and to said lands; that the losing parties or their executors, devisees, grantees, or assigns shall make to the successful party or his devisees, trustees, executors, administrators, grantees, or assigns their quitclaim deed therefor; and that the costs shall follow the judgment.

"In witness whereof, the above-named attorneys for plaintiffs and defendant as aforesaid have hereunto set their hands this 30th day of January, 1913."

It appears from the foregoing stipulation that the parties agreed that Exhibits A and B, attached to said stipulation, but not here set forth, constitute the enrollment record of said allottee. From this record it appears that the allottee, Willie Merrell, was 12 years of age on July 1, 1901, and hence reached the age of 21 years on July 1, 1910. Act of Congress May 27, 1908, § 3, 35 Stat. 312. It follows that at the time of the execution of the deed under which plaintiffs claim, to wit, April 23, 1901, he was still under the age of 21 years. It is clear that on September 3, 1910, the date of the deed under which defendant claims, being over the age of 21 years, the allottee could make a valid deed to his land, and that defendant's deed of that date is valid as against the plaintiffs', unless it be held that by their deed of April 23, 1910, from the allottee, the title passed to them. The question presented, therefore, is whether a duly enrolled Cherokee freedman, between 20 and 21 years of age, could make a valid deed conveying title to his allotment or any portion thereof. It is contended by the plaintiffs that the validity of the deed must be tested by the laws of the state of Oklahoma relating to the powers of minors to make contracts affecting real property. As appears from Snyder's Compiled Laws of Oklahoma of 1909, there were in force, at the time of the transactions involved here, statutory provisions prohibiting minors under the age of 18 years from making contracts relating to real property or any interest therein, providing that a minor may make any other contract in the same manner as an adult, subject to his power of disaffirmance, hereinafter referred to, and subject to the provisions of the law on marriage and on master and servant; and it was further provided that a contract made by a minor over the age of 18 (which might include a contract conveying his real property) might be disaffirmed upon his restoring the consideration to the party from whom it was received, or paying its equivalent, with interest, providing that a minor could not disaffirm a contract, otherwise valid, to pay the reasonable value of

things necessary for his support, or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them, and providing that a minor could not disaffirm an obligation, otherwise valid, entered into by him under the express authority or direction of a statute. See sections 5035 to 5039, inclusive.

Inasmuch as the allottee, Willie Merrell, while still a minor, was over the age of 18 years when the deed under which plaintiffs claim was executed by him, it follows that, if the foregoing statutes of Oklahoma measure his ability to convey, he had power to make the deed upon which plaintiffs rely, subject to disaffirmance within the time and in the manner provided by the Oklahoma law, and, as there has been no such disaffirmance, the plaintiffs have a valid deed. But the defendant insists that the power of the said allottee to convey the land is not measured by the laws of Oklahoma. He insists that as to this land he is subject to the jurisdiction of the courts of Oklahoma exercising probate jurisdiction, and that the only conveyance he was empowered to make while under the age of 21 years was such as might be made upon order of the proper county court of Oklahoma (exercising probate jurisdiction), pursuant to the state laws establishing the jurisdiction of such courts in relation to minors and their guardianship.

By reference to the act of Congress approved May 27, 1908 (35 Stat. 312), it is seen (section 1) that the restrictions upon the alienation of the land of this allottee were by that act removed, except so far as other sections of the act may be held to modify or qualify the sweeping terms of the first section. Being under the age of 21 years, he was still a minor (section 2), and in his person and property was subject to the jurisdiction of the probate courts of Oklahoma (section 6). By section 6 of said act it is provided:

"That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the state of Oklahoma. The Secretary of the Interior is hereby empowered, under rules and regulations to be prescribed by him, to appoint such local representatives within the state of Oklahoma who shall be citizens of that state or now domiciled therein as he may deem necessary to inquire into and investigate the conduct of guardians or curators having in charge the estates of such minors, and whenever such representative or representatives of the Secretary of the Interior shall be of opinion that the estate of any minor is not being properly cared for by the guardian or curator, or that the same is in any manner being dissipated or wasted or being permitted to deteriorate in value by reason of the negligence or carelessness or incompetency of the guardian or curator, said representative or representatives of the Secretary of the Interior shall have power and it shall be their duty to report said matter in full to the proper probate court and take the necessary steps to have such matter fully investigated, and go to the further extent of prosecuting any necessary remedy, either civil or criminal or both, to preserve the property and protect the interests of said minor allottees; and it shall be the further duty of such representative or representatives to make full and complete reports to the Secretary of the Interior. All such reports, either to the Secretary of the Interior or to the proper probate court, shall become public records and subject to the inspection and examination of the public, and the necessary court fees shall be allowed against the estates of said minors. The probate courts may, in their discretion, appoint any such representative of the Secretary of the Interior as guardian or curator for such minors, without fee or charge."

In the case of Jefferson v. Winkler, 26 Okl. 653, 110 Pac. 755, the Supreme Court of this state had before it the question of the validity of a deed made by a minor Creek freedman for whom a guardian had been appointed. While a minor and pending such guardianship, she had married, and shortly thereafter, and while still a minor, joined by her husband, executed a deed, purporting to convey her allotment to Winkler. Subsequently her guardian, Jefferson, applied to the proper county court for an order of sale, permitting him to sell his ward's allotment. At the hearing on the petition for the order of sale, Winkler appeared and set up his title, and objected to the court's granting the order to sell the land, but his objections were overruled, and the order was granted. Winkler then filed his petition in the state district court, praying injunction against Jefferson to restrain him from selling the land under the order of the county court. A temporary injunction was granted, and from that order Jefferson, the guardian, appealed to the state Supreme Court. The court quotes the statute of Oklahoma, which provides that:

"All male persons of the age of 21, and all females of the age of 18 years, and all persons who have legally married, of whatever age, * * * may take title to, hold, mortgage, convey, or make any contract relating to real estate or any interest therein."

This statute the court holds specifically confers upon married persons, of whatever age, power to control and dispose by contract of their real estate, or any interest therein, and that such power in a married person is inconsistent with the continuance of the power and authority of a guardian over the ward's real estate. Then the court takes up for consideration the contention of Jefferson, the guardian, that, notwithstanding the state law, its provisions do not apply to his ward, because of certain provisions of the act of Congress of May 27, 1908. After quoting the first section of this act, which in sweeping terms appears to remove restrictions theretofore existing, the court says:

"Rebecca Johnson is an allottee of the first class provided for in said section; and, after the act became effective, the restrictions upon her power to alienate her allotted lands were removed without any limitations or conditions imposed by federal act or treaty, and she held the same as other minor citizens of the United States and of this state hold their property, unless limitations were imposed thereon by subsequent sections of the act."

The court then quotes section 2 and a portion of section 6 of the act of May 27, 1908. Then, after stating the contention of the plaintiff in error to be that sections 2 and 6 constitute in effect a proviso of that part of section 1 of the act removing restrictions from minor allottees and of allottees of less than half Indian blood, and making the removal of such restrictions conditioned upon an order of some probate court of the state, for the sale of such restricted property until the minor, if a female, reaches the age of 18, and, if a male, reaches the age of 21, the court proceeds:

"It is contended by defendant in error, on the other hand, that the provisions of these two sections have no relation to, and do not affect, section 1. With this contention we cannot agree. Throughout the act of Congress, commonly known as the 'Enabling Act,' under which the Indian Territory and

the territory of Oklahoma were admitted into the Union as one state, the Indians of the Five Civilized Tribes of the Indian Territory were treated as citizens of the proposed state, and are so treated by the provisions of the Constitution; but said enabling act contains a proviso which requires 'that nothing contained in the said Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territory (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed.' Act June 16, 1906, c. 3335, 34 Stat. 267. By one of the provisions of the enabling act, the people of the state, acting through their representatives and delegates to the constitutional convention, were required to, and did, by an ordinance irrevocable, accept the terms and conditions of said act. It is unnecessary to comment upon the extent or limitation of the authority over the lands and property of such Indians that is by said provision of the enabling act reserved to the United States government, for, whatever be the extent of that authority or its limitations, we think it cannot be questioned that said authority reserved is sufficient to retain in the government of the United States jurisdiction over the restricted lands of said Indians to determine and provide how and in what manner such restrictions shall be removed, and that, until such restrictions are removed, the lands of said Indian minor allottees are not within the jurisdiction of the probate courts of the state with power in said courts to order the sale thereof for any purpose. Since the power to remove such restrictions is wholly within Congress, it may say upon what terms and conditions they will be removed, and under the supervision of what court or officer the sale of same shall be made.

"Section 2 defines a minor to be a female under the age of 18 years or a male under the age of 21 years. It is true that this definition occurs in a proviso of said section 2, and we do not forget that one of the general rules of statutory construction applicable to provisos is that a proviso is intended to restrict or qualify some preceding matter and does not apply to matter which follows, and that it should be construed with reference to the immediately preceding part or clause of the section to which it is attached; but this rule is not without its exceptions, and, where it is plainly intended that such proviso shall limit, qualify, or define other sections or provisions of the act than that of which it forms a part, the court should give it such meaning. 2 Lewis' Sutherland, Statutory Construction. If the proviso defining the term 'minor' or 'minors' had read, 'And provided further that the jurisdiction of the probate courts of the state of Oklahoma over lands of said minors and incompetents, shall be subject to the foregoing provisions and the terms minor or minors shall include males under the age of twenty-one years and all females under the age of eighteen years,' we think the foregoing general rule of construction applicable to provisos would apply, and said proviso would have application only to the provisions of section 2, but there is inserted in said proviso and immediately after the words 'minor' and 'minors' the phrase 'as used in this act,' manifesting thereby, we think, an intent to define said terms as used in the various provisions of the act. It will be noted that by section 2 the United States government consents to and confers upon the probate courts of the state jurisdiction over the restricted lands of certain minor allottees for the purpose of leasing same for a period not to exceed five years. In order that no doubt might arise as to who was intended to be included in the term 'minors,' and that there should be no conflict between the courts of the state and the federal government in the exercise, respectively, of their jurisdiction over said minors, Congress deemed it necessary to define the term. There occurs in section 6 another proviso which reads: 'And provided that no restricted lands of living minors shall be sold or incumbered, except by lease authorized by law, by order of the court or otherwise.' Here, again, a limitation is placed upon the power of the state courts over the restricted lands of minors, and it will not be presumed that Congress intended to define the term 'minors,' as used in sec-

tion 2, in order that no confusion might arise, and leave the same undefined, as used in the foregoing proviso in section 6, when the definition made in section 2 is in language making it applicable wherever the term occurs in the act. As before stated, the language of section 1, removing the restrictions upon lands of Indian allottees of less than half Indian blood, if read and construed alone, independent of the other provisions of the act, constitutes an unconditional removal of said restrictions, and renders said allotted lands subject to the control of said allottees under the law of the state, just as other citizens of the state own and control their property. That said section is not to be construed and enforced independent of other sections of the act is clearly manifest by reading sections 3, 4, and 5. Section 3 prescribes how quantum of Indian blood and the age of such allottees shall be determined, and section 4 provides that said lands shall not be subject or held liable to any form of personal claim or demand against the allottees arising or existing prior to the removal of said restrictions other than contracts theretofore expressly permitted by law, and section 5 makes void any attempted alienation or incumbrance by deed, mortgage, contract of sale, or power of attorney made before or after the approval of the act affecting the title of lands prior to the removal of restrictions therefrom. Immediately following the foregoing sections, all of which have bearing upon the lands dealt with in section 1 of the act, occurs the provision of section 6 which provides that the property of minor allottees of the Five Civilized Tribes shall be subject to the jurisdiction of probate courts of the state, except as otherwise specifically provided by law. Just as the removal of restrictions effected by section 1 upon the lands of both adult and minor allottees of certain classes are limited by the provisions of sections 4 and 5, which render said lands not liable to certain claims or demands against said allottees or subject to certain contracts, deeds, or incumbrances that may have been executed by them, so the removal of restrictions upon the lands of minors is limited by the requirement of section 6 that said property of minor allottees shall be subject to the jurisdiction of the probate courts of the state, and the term 'minor allottees,' as defined by section 2, means males under the age of 21 and females under the age of 18 years. In other words, construing all of the foregoing provisions of said act together, we think it was the legislative intent to provide that the allotted lands of freedmen and mixed blood Indians having less than half Indian blood, under the age of 18, if a female, and under the age of 21, if a male, may be sold under the supervision and jurisdiction of the probate courts of the state, and not otherwise.

"It therefore follows that since Rebecca Johnson was not 18 years of age at the time she conveyed the land in controversy to defendant in error, and the sale to him was not made under the supervision and order of any probate court of the state, he acquired no title thereby, and has not sufficient interest in the lands in controversy to entitle him to maintain this action."

I have quoted thus at length from the foregoing opinion because it is such a clear and complete analysis of the provisions of the act of Congress bearing upon the question involved in this case. In the recent case of Tirey et al. v. Darneal, 37 Okl. 606, 133 Pac. 614, Judge Robertson, of the State Supreme Court Commission, speaking for the Commission, in a case involving the question of the validity of a deed of a married Choctaw Indian under 21 years of age, whose right to sell the land involved was only questioned because of his minority, said:

"The deed was void; of that there can be no doubt. Section 6 of the act of Congress approved May 27, 1908 (35 Stat. at L. 313, c. 199), which deals with the subject of the removal of restrictions from lands of allottees of the Five Civilized Tribes, provides that the persons and property of minor allottees of said Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the control and jurisdiction of the probate courts of the state of Oklahoma. This provision of that act is in the nature

of a restriction, by Congress, on the alienation of land belonging to minor allottees, and can be removed only by a regular proceeding, provided by statute, through the instrumentality of the county court. It has long been the policy of Congress, upheld universally by the courts, that the alienation of restricted Indian allotments was not only prohibited, but all such attempted conveyances were absolutely void. As was said above, this conveyance by Darneal to Tirey, by reason of the provision of the act of Congress, supra, was not voidable but absolutely void."

The case of Truskett v. Closser, 198 Fed. 835, 117 C. C. A. 477, decided by the Circuit Court of Appeals for this circuit, involved the right of Robert F. Goodman, a Cherokee of one-eighth Indian blood, between 20 and 21 years of age, to lease his allotment. In that case it was contended that Goodman had acquired such right by virtue of a decree of the state district court removing his disabilities of minority pursuant to a state statute. After quoting section 1 of the act of Congress of May 27, 1908, the court said:

"Goodman came within the class first named in this section, having less than one-half Indian blood, and it is claimed that his allotment was freed from all restrictions. If that section stood alone, this contention might be sustained, but it must be construed with other sections contained in the same act. * * *

"When Congress included minors in section 1, it had the right, in other sections of the law, to declare who should be considered minors for the purposes of that section. This it did in the latter part of section 2, above quoted. It is said that the declaration there made, being in a proviso, is limited to the section in which it is found. Congress expressly declared that such was not its intention, for, instead of saying 'the term "minor" or "minors," as used in this section,' it said 'the term "minor" or "minors," as used in this act.' The same definition of the word 'minor' is found in section 4 of the act of July 1, 1902 (32 Stat. 716 [c. 1375]).

"The exclusive right to determine when Goodman became of age was in Congress, so far as his allotment was concerned. It declared that he should not become of age until he was 21. A law of Oklahoma, which declared that he should become of age at 20, would be in conflict with the act of Congress, and would be void. So any act of the state which authorized any of its courts to determine that Goodman became of age when he was 20, or that at such age he had the rights of an adult, would be in contravention of the same law, and would also be void. The decree of the district court of Washington county, emancipating Goodman, was based upon the provisions of sections 73, 74, and 75 of Wilson's Revised Statutes of 1903, which were adopted as the law of the state of Oklahoma. These statutes could confer no jurisdiction upon that court to remove the disabilities of infancy under which Goodman labored at the time the decree was made, so far as his allotment was concerned. That decree was therefore void, and being void, and Goodman being a minor when the lease was made to Overfield, the latter acquired nothing thereby. The construction of this act came before the Supreme Court of Oklahoma in the case of Jefferson v. Winkler, 26 Okl. 653, 110 Pac. 755. In that case an Indian girl married when she was under 18, and while under that age conveyed her allotment. It was held that, under the general law of Oklahoma, the marriage emancipated her, but that this general law could not have effect in her case, in view of the provisions of the said act of May 27, 1908, and that her conveyance was void.

"Section 6 of the act, so far as here important, is as follows: 'Sec. 6. That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the state of Oklahoma.'

"The appellants claim that the phrase 'except as otherwise specifically provided by law' refers to and includes the laws of Oklahoma. It is apparent, however, that the law therein mentioned must be federal law, and not state

law. It cannot for a moment be supposed that Congress would take the trouble to place, under the jurisdiction of a particular court, the affairs of Indian minors, and in the same section provide that the state might by its action entirely nullify that provision."

By section 6 of the act of Congress, the property of minor allottees of the Five Civilized Tribes is made subject to the jurisdiction of the probate courts, "except as otherwise specifically provided by law." This exception, however, as we have seen in Truskett v. Closser, supra, has relation to federal, and not to state, law. Then, immediately after providing that the property of these minor allottees shall be subject to the jurisdiction of the probate courts, Congress in the same section further provides for the appointment by the Secretary of the Interior of local representatives, whose duty it shall be to inquire into and investigate the conduct of guardians or curators having in charge the estates of such minors, and to report to the probate court any derelictions of duty on the part of such guardians or curators which they may discover, and to even go to the further extent of prosecuting any necessary remedy, either civil or criminal, or both, to preserve the property and protect the interests of such minor allottees, and to make full report of such matters to the Secretary of the Interior, which reports, either to the Secretary or to the court, were to become public records subject to the inspection and examination of the public; the necessary court fees to be allowed against the estates of such minors. It was further provided that the probate courts might, in their discretion, appoint such representatives as guardians or curators for such minors without fee or charge. Here was provided by Congress a plan by which all minor allottees, as to their allotted lands, were to be under the supervision and control of the probate courts of Oklahoma, and, in order to further protect their interests and assist the several probate courts in promoting their welfare, Congress provided these special representatives of the Secretary of the Interior, whose duty it was to see that the guardians and curators of these minors dealt fairly with their wards, and to report to the proper court any failures so to do. The state Supreme Court has held, in Jefferson v. Winkler, supra, that the state law, relieving married minors of the disability of minority, does not apply to these minor allottees. The Circuit Court of Appeals for this circuit, in Truskett v. Closser, supra, has held that the state law providing for the removal of disabilities of minority by the state district court does not apply to these minor allottees. For like reasons, I conclude, in view of the provisions of section 6 of the act of Congress of May 27, 1908, that the state law, permitting minors of a certain age to make contracts affecting their real estate, does not apply to minor allottees of the Five Civilized Tribes. I agree with Judge Hayes in Jefferson v. Winkler, supra, that, construing all the provisions of said act of Congress together, it was the legislative intent to provide that the allotted lands of minor freedmen and mixed blood Indians, from which restrictions were in terms removed by the provisions of section 1 of the act, might be sold under the supervision and jurisdiction of the probate courts of the state, and not otherwise, and that the deed relied upon by the plaintiffs in this case is therefore void.

Decree may accordingly enter for the defendant.

In re HARRIS & BACHERIG.

(District Court, M. D. Tennessee, Nashville Division. December 1, 1913.)

No. 3237.

1. SALES (§ 8*)—CONSTRUCTION OF CONTRACT—SALE OR BAILMENT—CONSIGNMENT FOR SALE.

Where a contract under which goods are consigned by the owner to another for sale is ambiguous or uncertain, as title to the goods was originally in the consignor, it should not be held to have passed from him unless an intention that it should so pass can be discovered either by express provision or by necessary inference from the terms of the agreement.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 18, 19; Dec. Dig. § 8.*]

2. SALES (§ 8*)—CHARACTER OF CONTRACT—BAILMENT OR SALE.

Where a contract under which goods were consigned to a bankrupt for sale expressly reserved title in the consignor with the right to take possession of any unsold goods and merely gave it an option upon a breach of the contract by the bankrupt to require him to pay for the unsold goods, which option was not exercised, the contract was one of bailment and not of conditional sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 18, 19; Dec. Dig. § 8.*]

In Bankruptcy. In the matter of Harris & Bacherig, bankrupts. On review of order of referee. Order confirmed.

Petition by the trustee in bankruptcy for the review of an order of the referee sustaining the intervening petition of William Henne & Co. for the reclamation of certain merchandise which came into the possession of the trustee that had been delivered to the bankrupt by the said petitioner under a written contract claimed by it to constitute merely a consignment or bailment for sale, and adjudging the said petitioner to be entitled to the possession of said merchandise.

Louis Leftwick, of Nashville, Tenn., for trustee.

Percy D. Maddin, of Nashville, Tenn., for Henne & Co., reclaiming merchants.

SANFORD, District Judge. [1] In the contract in question, under which the shoes were furnished by Henne & Co. to the bankrupt, the parties are termed consignors and consignees, respectively, and it is expressly provided that the title to the goods shall remain in the consignors at all times. The contract therefore cannot upon its face be held to be a conditional sale rather than a bailment for sale, unless the legal effect of its provisions is to render it in fact a sale, regardless of the declared intention of the parties that it should only constitute a consignment, with retention of title in the consignors. And if the agreement be uncertain and ambiguous, as title to the goods was originally in the consignors, it should not be held to have passed from them, unless an intention that it should so pass can be discovered, either expressly or by necessary inference, from the terms of the agreement. Schenck v. Saunders, 13 Gray (Mass.) 37, 40; In re Smith & Nixon Co. (8th Cir.) 149 Fed. 111, 112, 79 C. C. A. 53.

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

[2] The contract further specifically provided that, if proceedings in bankruptcy should be filed against the consignees, the consignors should have the right to immediately take possession of all unsold goods, and the consignees should pack and return them to the consignors' factory.

In Re Tice (D. C.) 139 Fed. 52, it was said:

"There have been so many refinements and distinctions, as well as conflicting, if not contradictory, deliverances, that it is not always easy to determine whether any given transaction is, on the one hand, a conditional sale, or, on the other, a bailment."

Without therefore attempting to analyze or distinguish the various cases cited, it is sufficient to say that I find no clause in the contract which could have the effect of converting the contract from one of bailment to one of sale, unless it should be the thirteenth, which contains the following provisions:

"If either party shall fail or refuse to perform any part of this contract, the other party shall have the right thereupon to terminate the same; and upon the termination thereof the consignors shall be entitled immediately to take possession of all goods on hand unsold. The consignor has the right to decide whether they want to take back the merchandise not paid for at that time, or whether the consignee should pay for the merchandise at once either with check of six (6) notes of equal denomination with interest at 6 per cent. per annum payable the first of each month following until the full amount is paid."

The trustee insists that the option given the consignors, on default by the consignees, to either retake the unsold goods or to require the consignees to pay for the same, necessarily had the effect of making the transaction a sale rather than a bailment.

It is to be observed, in the first place, that there was no absolute agreement on the part of the consignees to pay for the unsold goods, but merely a conditional agreement dependent upon three things: first, that the consignees should fail or refuse to perform any part of the contract; second, that the consignors should terminate the contract; and, third, that the consignors should exercise its option and require the consignees to pay for the unsold goods. In other words, as I construe the contract, it is essentially and primarily a consignment contract providing for the return of unsold goods, with an option, however, given to the consignors to turn it into a contract of sale upon the happening of certain conditions. This option, however, was never exercised by the consignors.

The question which is presented is one that would clearly be one of local law, if there were any express decision of the Tennessee Supreme Court, construing such contract. Mishawaka Co. v. Westveer (6th Cir.) 191 Fed. 465, 112 C. C. A. 109; 1 Lovel. Bankruptcy (4th Ed.) 835, and cases cited in note 8. The case of Arbuckle v. Kirkpatrick, 98 Tenn. 221, 39 S. W. 3, 36 L. R. A. 285, 60 Am. St. Rep. 854, which is relied on by the trustee, is not, however, in my opinion, in point upon the precise question now presented, since in the contract there construed there was an express agreement by which the consignee was required to pay for the goods at a fixed price within sixty days, whether the goods were sold or not, and there was no provision authorizing the consignor

to require the return of the goods. And see, in close analogy, Parlett v. Blake (8th Cir.) 188 Fed. 200, 110 C. C. A. 72, 39 L. R. A. (N. S.) 620. The case, however, in which the consignor reserves no right to demand the return of the goods, and the consignee expressly agrees to pay for goods unsold at the end of a definite period, is obviously entirely different from the case now presented, in which the consignors expressly retained title to the goods with the right to demand the return of the same, supplemented by an option on their part, in case of the consignees' breach of contract, to require, in the alternative, payment for the unsold goods. In Re Rabenau (D. C.) 118 Fed. 471, it was held that a contract closely analogous, if not entirely similar, in all essential respects to the present contract, in which the consignee agreed at a fixed time to pay for unsold goods, at the option of the consignor, constituted a conditional sale and not a bailment. On the other hand, in the later case of In re Galt (7th Cir.) 120 Fed. 64, 56 C. C. A. 470, which was followed by the referee, it was held that an essentially identical contract constituted a bailment on consignment and not a conditional sale. In this case the Circuit Court of Appeals said:

"The distinction between bailment and sale is not difficult of ascertainment, if due regard be had to the elements peculiar to each. In bailment the identical thing delivered is to be restored. In a sale there is an agreement, express or implied, to pay money or its equivalent for the thing delivered, and there is no obligation to return. Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, 37 L. Ed. 1093; Union Stockyards & Transit Co. v. Western Land & Cattle Co., 7 C. C. A. 660, 59 Fed. 49. The bailee may, however, by contract, enlarge his common-law liability without converting the bailment into a sale. The real intent of the contracting parties must be ascertained from all the provisions in the agreement which express the contract, bearing in mind always that in a bailment the bailor may require the restoration of the thing bailed, and in a sale, whether absolute or conditional, there must be an agreement, express or implied, to pay the purchase price of the thing sold. The test would seem to be: Has the sender the right to compel a return of the thing sent, or has the receiver the option to pay for the thing in money? * * * Applying to this contract the test stated, it is clear that here was a bailment, and not a conditional sale. * * * This was a del credere condition, and not a sale. The company could compel a return of the goods not sold. Galt had not the option to pay for them in money. Even with respect to the goods unsold within the 12 months, the option for their return or payment was with the company, and not with Galt; and nowhere in the agreement does the latter covenant to pay for these goods as in the case of a sale. * * * The case is like to that of Lenz v. Harrison, 148 Ill. 598, 36 N. E. 567, where an agreement similar to the one in hand was held to be a bailment, and not a sale. The clause in the contract giving an option to the company to require Galt to give his note, or to pay in cash, or to store, subject to the order of the company, the goods not sold within 12 months, is probably the strongest clause in the contract to indicate a sale; but, as suggested by the Supreme Court of Illinois in Lenz v. Harrison, supra, while it might have such force considered alone, taking it with the whole contract, it was seemingly incorporated to compel the agent promptly to sell, and report sales within the time stated. * * * Such construction accords with the decisions elsewhere upon like contracts. Williams Mower & Reaper Co. v. Raynor, 38 Wis. 119; State v. Leicham, 41 Wis. 565, 568; Manufacturing Co. v. Jones, 96 Wis. 619, 624, 72 N. W. 44; Walker v. Butterick, 105 Mass. 237."

This decision in the Galt Case finds strong support, by analogy, in the well-settled line of cases involving the distinction between bailment with an option in the bailee to purchase, in which it is held that

title does not pass until the option is determined, and a sale with an option in the purchaser to return the goods, in which it is held that the title passes at once, subject to the purchaser's right to rescind and return. Sturm v. Boker, 150 U. S. 328, 329, 14 Sup. Ct. 99, 37 L. Ed. 1093; Hunt v. Wyman, 100 Mass. 198, 200; 1 Lovel. Bank'cy. (4th Ed.) 835, and cases cited in notes 5, 6. In other words, these cases proceed upon the principle that where the title is vested, subject to defeasance by right of return in the purchaser, this is a conditional sale vesting title at once; but, where the property is merely delivered with a right in the bailee to subsequently purchase, the title is not vested until this option is exercised. So, in the present case, I am constrained to conclude that the decision in the Galt Case is based upon sounder reasoning than that in the Rabenau Case, independently of the greater weight attaching to this decision as that of a Circuit Court of Appeals, and that where, as in the present case, the consignment contract expressly reserves title in the consignor, with the right to demand the return of the unsold goods, and merely gives him an option, upon the happening of certain conditions, to change the contract into one of sale as to the unsold goods, the contract remains until this option is exercised by the consignor one of consignment merely and not of sale.

I furthermore find nothing in the course of dealing between the parties, showing a practical construction of the contract as a conditional sale rather than a bailment, or a waiver of the consignors' title and right to demand the return of the unsold goods.

An order will accordingly be entered confirming the order of the referee, and dismissing the trustee's petition to review. The costs incident to the petition to review will be paid out of the general bankruptcy estate.

MILLER PASTEURIZING MACH. CO. v. CONWAY.

(District Court, D. Pennsylvania. June 23, 1914.)

(No. 2114 June Sess. 1912.)

1. SALES (§ 455*)—CONDITIONAL SALE—CONSTRUCTION—BAILMENT.

Where a contract for the transfer of certain machinery stated the terms of sale, and then provided that the title to the machinery should remain in the seller until the purchase price had been fully paid, which title the seller might at any time assert at its option by declaring the sale off and retaking or reclaiming the machinery, the contract was one of sale and not of bailment, so that, if the seller exercised its right to retake the property, it was bound to do so before the rights of an innocent purchaser for value intervened.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1326; Dec. Dig. § 455.*]

2. REPLEVIN (§ 90*)—QUESTIONS OF LAW AND FACT—DETERMINATION.

Where, in replevin by a seller of machinery under a conditional contract of sale, plaintiff called defendant as a witness in his own behalf as a part of plaintiff's main case and proved by him that he was an innocent purchaser for value, before plaintiff had exercised its option to retake the machinery, there was no question for a jury, and the court

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

properly determined that plaintiff was not entitled to recover as a matter of law.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 352, 353; Dec. Dig. § 90.*]

At Law. Action by the Miller Pasteurizing Machine Company against Thomas Conway, Jr. On motion for a new trial. Denied.

R. H. Locke, of Philadelphia, Pa., for plaintiff.

H. Edgar Barnes, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This case is one of replevin. The trial was had before the late Judge Holland and a jury. There was a verdict for defendant under binding instructions from the trial judge. A motion was made for a new trial which was pending at the time of the decease of Judge Holland.

The facts upon which the plaintiff based its claim of title to the disputed property may be sufficiently outlined in a short statement. The property, the title to which is in dispute, belonged to the plaintiff company, and was sold by it to an ice cream manufacturer, known as the Bahls Ice Cream & Bakery Company, and the property was delivered to the purchaser at its place of business No. 2009 North street. The sale was evidenced by a paper writing dated April 11, 1911, which stated the terms of sale and provided that the title should remain in the vendor until the purchase price had been fully paid. The property purchased consisted of machines and appliances for the manufacture of ice cream, and was set up and installed by the purchaser as part of its manufacturing plant. The purchaser occupied leased premises, and agreed that these fixtures should become part of the realty and be left upon the premises and belong to the landlord. The landlord retook possession of the leased premises and of these machines, etc., and sold the real estate, including these machines, to the defendant, Thomas Conway, Jr.

Next in the chronological order of events, the company which had bought the machines of the plaintiff was adjudicated a bankrupt. In the course of the bankruptcy proceedings two events transpired which, while they have no direct bearing upon the question now before us, are perhaps necessary, or at least helpful, to a full understanding of the evidence offered at the trial.

Following the agreement of purchase, the purchaser delivered to the vendor, the plaintiff in this case, certain old machines, at an agreed valuation of $450, and paid to the plaintiff the further sum of $700 in cash, for which a credit of $1,150 on the purchase price was allowed, and gave to the plaintiff its promissory note for $2,035 for the balance of the sale price. This note was renewed at least once, and either the original or the renewal note was discounted for the plaintiff by some bank. In the course of the bankruptcy proceedings the plaintiff presented a claim against the bankrupt estate, basing its claim upon the amount of the unpaid purchase money for the replevied property represented by the note referred to. It is not entirely clear whether the claim was made by the plaintiff as the holder of this note or was

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

made by the bank which had discounted it. It would appear that the claim had been made by the plaintiff because there seems to have been a form of claim filed in which the claim was set forth to be an unsecured claim for which the plaintiff held no security as collateral or otherwise.

The other event was that Thomas Conway, Jr., the defendant, applied for what was in effect an order on the receiver or trustee in bankruptcy to turn the replevied machines and appliances, which are the subject of this replevin suit, over to him as his property acquired by him through his purchase from the landlord and as not being part of the assets of the bankrupt estate. This order was eventually made and the property was turned over to him. In this connection, it might be further stated that following this proof of claim the name of the plaintiff appeared upon the dividend sheets in the bankruptcy proceedings as a creditor entitled to a 4 per cent. dividend, amounting to something more than $80, and a check for this amount was made out and sent to the plaintiff by the trustee in payment of this dividend. This check was attempted to be returned by the plaintiff to the trustee by being sent back to him, and was in turn resent by the trustee to the plaintiff; the trustee refusing to accept of the return of it. The plaintiff subsequently brought its action in replevin, giving the usual replevin bond, and the machines and appliances referred to were delivered to it by the marshal.

The case was then put at issue upon the question of whether or not plaintiff had such right of possession to the property replevied as entitled it to recover.

The case as now presented comes before the court as if it were a case upon an appeal, and the questions presented are appellate questions.

The view which otherwise might be had of the questions, both of fact and law, involved in the trial of the case, and the appellate questions which arise out of this record, are somewhat obscured by the course of the trial and by the manner in which the plaintiff's side of the issue was presented. Instead of confining itself to its prima facie case of showing title in itself to the property replevied and of its possession by the defendant when the writ issued, the plaintiff essayed to answer an anticipated defense. Had the plaintiff confined itself to testimony and evidence, which would have supported a prima facie title in itself, the real points in the case would have been sharply defined and clearly raised.

The proofs in support of this title would have been confined to proof of plaintiff's original ownership of the machines, of the contract of bailment, and of the exercise of its right to reclaim possession of the bailed property. Had the defendant offered no evidence, the case of the plaintiff would have turned (assuming the contract of bailment) upon the sole question of whether the mere issuance of the writ of replevin was a sufficient exercise of its right to reclaim possession of the property, or whether it was necessary for the plaintiff to have made demand or given other notice of its claim of ownership.

If the trial judge had held the plaintiff to have made out a prima

facie case, the defendant would have been put to his defense. This defense might have consisted of evidence of the following facts:

(1) In denial of the exercise of the right of the plaintiff to reclaim possession of the property that the plaintiff had elected to treat its bailee as its debtor for the purchase price by filing a claim against its bankrupt estate, thereby affirming the title of its vendee.

(2) The agreement of the bailee by which it sold the replevied property to its landlord, and he, in turn, to the defendant, against whom as an innocent purchaser for value the plaintiff could not assert title in replevin.

To the first proposition of the defense the plaintiff would have replied that it had been misled into filing its proofs of claim by false representations, and that it had withdrawn its claim and had returned to its original position as an owner of the property.

The plaintiff would have met the second proposition with a denial that either the landlord or the defendant was an innocent purchaser for value. This would have left in the case: First, the proposition of law whether the agreement of April 11, 1911, was a mere sale and purchase of the machines or was one of bailment, with such title reserved by the bailor as to enable it to assert it against the bailee. If this proposition was ruled in its favor, then the case would have turned upon the two propositions of fact, whether the plaintiff had lost or exercised its optional right, and, if this were found in its favor, whether the defendant or his vendor was an innocent bona fide purchaser for value. It would have clearly been the right of the plaintiff to have had these questions of fact passed upon by a jury, unless it failed to offer sufficient evidence upon the first to support a verdict in its favor, and unless the burden was not upon the defendant to show that he was either mediately or immediately a purchaser for value.

Instead of following by its pleadings and evidence the course outlined, the plaintiff essayed the task of anticipating and meeting all of these defenses in its statement of claim and by its proofs. Restating these proofs in their logical order, and passing by the question of the title to the replevied property having originally been in the plaintiff as an admitted fact in the case, there was testimony and evidence to the following effect:

(1) The agreement of sale or bailment, whichever it is properly construed to be, was regularly in evidence.

(2) No written lease between the vendee or bailee and its landlord, if there was one, was offered, and there was no direct evidence of its existence. There was testimony, however, to the effect that the lessee had agreed that these machines should remain on the premises in consideration of the alterations made in the buildings and should become the property of the landlord. There was also testimony to the effect that the replevied property consisted of what otherwise would be trade fixtures.

(3) It does not very clearly appear from the evidence whether the claim of title of the defendant to these machines is based upon anything more than his purchase of the real estate from the landlord, and the conveyance was not put in evidence. The plaintiff, however, called

the defendant as a witness, and he swore positively to the purchase of the machines, and that he gave value for them and bought them without notice of any claim of title of the plaintiff, and there was no other testimony or evidence upon that branch of the case.

(4) There was testimony and evidence to the effect that the bailee or vendee of the plaintiff had paid $1,150 on account of the purchase price and had given its note for the balance, which note had been discounted for the plaintiff by some bank and remains unpaid, and that the maker of the note had been adjudicated a bankrupt, and a claim was filed against the bankrupt estate on this note as an unsecured claim.

(5) There was also some testimony given and evidence admitted that the plaintiff had been misled into making the agreement of April 11, 1911, by false representations of the credit standing of its vendee or bailee, and into presenting its claim against the bankrupt estate by having held out to it expectations that the bankrupt company would be reorganized and prove solvent. There was no evidence, however, that the plaintiff had exercised its option of reclaiming title to and possession of the replevied property other than by the issuance of the writ and the subsequent proceedings in the replevin case.

The general question now presented is whether the trial judge was justified in directing a verdict for the defendant. He was so justified if any of the following propositions are sound:

(1) That the agreement of April 11, 1911, was a transaction of sale and purchase and passed title to the vendee against the plaintiff.

(2) That the only right of the plaintiff under the paper of April 11, 1911, was its option to reclaim the property, and that it had offered no evidence to justify a finding that it had exercised this option.

(3) That the option thus given to the plaintiff could not be exercised as against an innocent purchaser for value, and that the evidence before the jury required them to find this fact in favor of the defendant.

A discussion of the proper construction and legal meaning of the paper of April 11, 1911, is called for in passing upon the soundness of the propositions stated. Usually papers of the general character of this one are so drawn that they are in form strictly and only contracts of bailment, whatever they may be in fact. There is no purchase price stipulated, and all payments made, or to be made, are expressly stated and declared to be made as compensation for the use of the property and not in consideration of its purchase. In form the papers are contracts of bailment and not of sale. There is never any difficulty in construing them in the sense of determining the meaning of the words contained in them. The real difficulty is over the hesitation of the courts to permit juries to find that to be a lie which the parties have expressly declared to be a fact. The letter of the contract is plain enough. It is because the courts see that the contract is one in which "the letter killeth" the real justice of the cause that they are tempted to exercise their ingenuity in making the "letter" by construction conform to what was really the transaction between the parties. No such difficulty is presented by this paper.

[1] It is by its terms a contract of sale and purchase. This con-

tract of sale was duly followed by delivery and by payment of quite a substantial part of the purchase price. There is in the contract only the added thought that the vendor, in order to have the payment of the balance of the purchase money secured and be in a position to enforce its payment, shall retain the title to the property sold, which title it may at any time assert "at its option" by declaring the sale off and retaking or reclaiming what was formerly its property. If it never exercises this option, and until it does so, the sale having been made stays made. With the title where the parties have thus placed it, it is too clear for argument that the option to be effectively exercised must be exercised before the rights of innocent third parties intervene. No citation of authorities is called for to buttress so plain a proposition. Whatever, therefore, may be the legal effect of the paper as between the parties to it in case this reserved right of the vendor is asserted, if it never exercises the option, or if it seeks to exercise it as against an innocent purchaser for value, the conclusion reached is that the paper must be construed as effective to pass the title out of the vendor.

[2] It further follows that, in order for the plaintiff in this case to maintain its action, it must have offered evidence which would justify a finding by the jury that this option had been exercised, and its successful assertion of title would even then be defeated if the property had in the meantime been purchased for a valuable consideration by one without notice of the plaintiff's rights. It may be conceded in this case that evidence of its exercise of the option reserved was before the jury, and there remains therefore only to be determined the question of fact as to whether the defendant in this case was such an innocent purchaser for value. Had the testimony and evidence upon this question been presented by the defendant as part of his defense, it must necessarily have gone to the jury and to have been determined by them and not by the court, because its credibility would have been in issue. As the plaintiff's case was presented, however, this testimony and evidence came, not from the defense, but from the plaintiff's case in chief and was made part of the case as presented by the plaintiff to the jury. It consisted in part of the testimony of the defendant himself who was called by the plaintiff, and it was expressly stated that he was so called, not as a party under cross-examination, but as a witness for the plaintiff on direct examination. Ordinarily, courts would with reluctance rule a case upon the seemingly mere formal distinction of whether a witness testified while the plaintiff's case was being presented or the defense was being heard; but, as the case was made by the plaintiff itself to take this turn, the defendant has substantial rights in the result of which he cannot be deprived without real and practical injustice to him.

We must therefore consider the case as presented in the light of its legal effects, and one of these effects is that, the plaintiff having called a witness on examination in chief as a witness for it, and his testimony being clear and uncontradicted, its credibility need not be passed upon by a jury because vouched for by the plaintiff itself, and the testimony must be taken as true and full effect given to it.

The case therefore as presented to the jury involved the proposition

of law that, as against an innocent third party purchaser for value, title had passed out of the plaintiff, and involved the fact proven by the plaintiff itself that the defendant was such innocent purchaser for value. The instruction of the trial judge therefore to the jury to find for the defendant was correct.

The motion for a new trial is discharged, and judgment is directed to be entered on the verdict in favor of the defendant and against the plaintiff, with costs.

In re HEYMAN.

(District Court, E. D. Pennsylvania. May 26, 1914.)

No. 4436.

BANKRUPTCY (§ 226*)—WITHHELD PROPERTY—EVIDENCE.

Evidence *held* to sustain a referee's finding that the bankrupt had withheld from the referee and concealed merchandise, consisting of different kinds of jewelry, amounting to $15,307.66, which she was bound to surrender.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 226.*]

In Bankruptcy. In the matter of the bankruptcy proceedings of Ruth Heyman, individually and trading as the Heyman Company. On certificate of a referee to review an order requiring the bankrupt to surrender certain concealed property. Affirmed.

The findings of Edward F. Hoffman, referee, are as follows:

To the Honorable the Judges of the District Court:

This matter was heard before me on March 21, 1914. The petitioner was represented by Alfred T. Steinmetz, Esq., and J. Howard Reber, Esq., his counsel. Joseph Singer, counsel for bankrupt, though duly notified, did not appear or file brief.

Ruth Heyman, the bankrupt, up to the time of adjudication, conducted a jewelry store at No. 33 South Eighth street. She had been engaged in this business for a number of years, originally with her husband, Mr. Heyman, at No. 18 North Eighth street and afterwards at 602 Market street, and finally 33 South Eighth street. The store at 18 North Eighth street was abandoned in May, 1910. and the store at 602 Market street in the month of February, 1912. The adjudication in bankruptcy was June 4, 1912. The scheduled liabilities are $20,110.92, and scheduled assets $7,648.74.

Mr. Heyman died on August 6, 1910. It appears that some months before his death he was incapacitated from the conduct of the business by an accident which caused the loss of his leg and the business was conducted entirely by his wife, and one Samuel Katzen, who was foreman and remained as manager, conducting the business as manager for Ruth Heyman, acting under full authority from her. Mrs. Heyman lived at 4150 North Broad street, and after the death of her husband, Samuel Katzen, who had established some relationship with her, lived in the same house and subsequently married her. Katzen, though continually in Philadelphia, in some way managed to elude legal process, though every effort was made to obtain his attendance, and he could not be secured for examination.

It appears from the testimony that as early as March, 1912, Mrs. Heyman desired to obtain extensions from her creditors, and made financial representations to the banks, through her attorney, Mr. David Mandel, Jr., and also to J. Howard Reber, Esq., and Joseph Greenwald, Esq. These representations were to the effect that the value of her stock on March 1, 1912, not including fixtures, was in the amount of $32,000. The trustee claims to have

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

established a concealment of jewelry of the value of $19,503. Starting with the premise that on March 1, 1912, the bankrupt was chargeable with a stock of goods in amount of $32,000, he makes an allowance on this amount of the amount of stock that came into the hands of the trustee at $3,000, an allowance for stock returned by the bankrupt prior to the bankruptcy, and other further allowances itemized and set forth in the statement as follows:

Stock on hand March 1, 1912, at least			$32,000 00
Purchases from March 1, 1912, to June 4, 1912, both dates inclusive			360 00
Total stock and purchases			$32,360 00
Stock on hand June 4, 1912, less than			3,000 00
Merchandise to be accounted for			$29,360 00
Sales between March 1, 1912, and June 4, 1912, both dates inclusive, on an average cost of		$5,892 34	
Made up as follows:			
Cash deposits in People's Trust Company		4,074 25	
Cash deposited in Merchants' Union Trust Company		3,529.09	
Total cash deposited between March 1, 1912, and June 4, 1912, both dates inclusive		7,603 34	
Deduct cash received from other sources than sales of merchandise by bankrupt		2,200 00	
Net cash deposited, proceeds of sales on basis of cost, between March 1, 1912, and June 4, 1912, both dates inclusive		5,403 34	
Amount of cash, proceeds of sales between March 1, 1912, and June 4, 1912, both dates inclusive, not deposited, based on wages paid out by bankrupt		489 00	
Total cash received from sales on basis of cost		5,892 34	
Loss on merchandise sold by bankrupt between March 1, 1912, and June 4, 1912, both dates inclusive (testimony on general examination, meeting of October 3, 1912, pages 13 and 14)		1,200 00	
			$7,092 34
Merchandise returned or given by bankrupt in payment of debts, between March 1, 1912, and June 4, 1912, both dates inclusive, as follows:			
Philadelphia Inquirer	$429 40		
L'Opinione	207 50		
Ingersoll	100 00		
Castiglioni	200 00		
J. R. Wood & Sons	372 00		
Abel Bros	250 00		
E. A. Bliss & Co	300 00		
Bennett & Sawyer	200 00		
Ehrlich	100 00		
Jacobson	40 00		
Insurance man	13 00		
Morgan Jewelry Co	150 00		
Zieger	37 00		
Finberg	37 50		
Kant	40 00		
Schwab	37 50		
Miscellaneous	250 00—	2,763 90—	9,856 24
Merchandise transferred, removed, or concealed by bankrupt, costing			$19,503 76

—showing that the result obtained was a balance of jewelry chargeable to her of the value of $19,503.76.

In support of the contention that the bankrupt should be charged with stock on hand of a value of $32,000, as of March 1, 1912, he examined before

me Mrs. Heyman, David Mandel, Jr., Joseph Greenwald, J. Howard Reber, Mary Dorian, Alfred T. Steinmetz, and John A. Abel.

On page 241 of the record Mrs. Heyman admits going to the Girard National Bank, the People's Trust Company, and the Bank of Commerce for the purpose of obtaining loans and making statements that her stock was worth approximately $30,000, and she wrote out a statement for Mr. Greenwald (pp. 362 to 365).

On May 14th J. Howard Reber testifies (page 366) Ruth Heyman called upon him and he had a personal interview with her with reference to two claims he held for collection, and that she stated to him her total liabilities were $4,600, and her total assets at cost were approximately $40,000 (page 367), and her stock was very valuable, but it could not be readily disposed of, and she gave as one item heavy gold chains to the value of over $5,000.

John Abel testified he was one of the firm of Abel Bros., dealers in jewelry in the city of New York, having been in the business for 28 years. He was in Mrs. Heyman's place in the months of February and March, and later on the 30th of May, 1912. He testified his visit in the early part of February, 1912, was for the purpose of trying to get some payment on the account due them by Mrs. Heyman; that he observed in the store what he called a very complete stock of goods, consisting of a lot of diamonds, diamond jewelry, lot of gold watches, and gold rings, worth between $30,000 and $40,000 (see record, page 404), and Mrs. Heyman stated to him that she had a poor business in December, and therefore had a large amount of stock left over. On his second visit in March he found the condition of the store about the same as to the stock of goods. When he went there on Decoration Day, the stock was practically all gone, and he saw nothing there but plated jewelry.

The only contradictory testimony is that of Mrs. Heyman, and I do not consider it entitled to any weight, as she admits herself having made false statements, and from the general character of her testimony I find it to be incredible. I therefore find as a fact that Ruth Heyman can be charged with having a stock of goods on hand in the amount of at least $30,000 on the 1st of March. I also find that she actually did carry away and conceal property. This is shown by the testimony of Mary Dorian, who was a servant in her employ, who testified that in the course of her chamber work in the house she came across a trunk which she thought was full of clothing, and on lifting up the upper contents of the trunk she came across a lot of concealed jewelry, consisting of ladies' and gentlemen's gold watches and a number of gold chains and diamonds done up in tissue paper. (See record, page 332.)

It would appear that the trustee's estimate of the stock on hand in the possession of the bankrupt as of March 1, 1912, in the amount of $32,000, is justified by the testimony; but, as in recommending an order I wish to make a liberal allowance, I prefer to take the amount of stock on hand at that date as established by the statement made by the bankrupt to the banks, to wit, $30,000; this amount being the minimum estimate of the witness Abel, from his inspection of the store in the month of March, 1912, who testified the stock on hand he estimated at a value of from $30,000 to $40,000. To the estimated value of the stock as of March 1, 1912, the trustee adds the amount of $360 for purchases made by the bankrupt after March 1st.

I find from the testimony of the bankrupt (page 309) that this charge should be allowed. This makes a balance of $30,360, against which is to be allowed deduction of diminution of the stock from that date to the date of bankruptcy, together with an allowance of the stock on hand that came into the possession of the receiver. The property that came into the hands of the receiver was scheduled by the bankrupt in amount of $6,000. After having carefully considered the testimony, I find that the credit of $3,000 allowed by the trustee appears to be liberal; but, as the amount is an approximation, I prefer to give the bankrupt the benefit of every doubt, and make the allowance $4,000.

I find that the allowance in amount of $5,892.34 for merchandise between March 1, 1912, and June 1, 1912, as set forth in the trustee's schedule of allowances, is sustained by the proof. As to merchandise returned by the bankrupt, I find the trustee is justified in estimating this amount at $2,763.90; but, as there is some uncertainty in the bankrupt's testimony as to a date

when certain items were returned to J. R. Wood & Sons, in order to make a liberal allowance, I take the estimate made in her testimony (page 281) of $4,000.

I allow for loss for merchandise returned as estimated by the trustee $1,200. I sustain the charge of $40 for a chronometer, as claimed by the trustee, which disappeared from the bankrupt's store within a few days of the failure.

Recapitulation

I charge the bankrupt with stock on hand March 1, 1912, of the value of		$30,000 00
Add to this for additional purchases		360 00
One chronometer		40 00
Total		$30,400 00
Against this amount the following credits are allowed:		
Stock on hand at time receiver took possession	$4000 00	
Loss on merchandise returned	1200 00	
Sales between March 1, 1912, and June 4, 1912, both dates inclusive	5892 34	
Merchandise returned	4000 00	$15,092 34
Leaving a balance in amount of		$15,307 66

—which represents the value of jewelry in the possession of the bankrupt.

I therefore find she concealed gold chains in amount of $5,000, and watches, diamonds, jewelry, and rings and miscellaneous jewelry in the amount of $10,307.66.

McPherson, J., in his opinion in Re Kramer & Muchnick states: "I do not decide that an order to deliver merchandise must describe the goods minutely, but I merely hold that an order directing the delivery of 'merchandise,' without more, is not sufficient. The degree of particularity that such an order should exhibit need not be dwelt upon; probably no precise rule can be laid down that would fairly and reasonably meet every situation; all that is now decided is that an order to deliver 'merchandise' is too indefinite."

I think the testimony that I have cited as to the character of the goods concealed is sufficiently definite. I therefore, in accordance with the practice in Re Epstein, enter the following order:

And now I enter an order on the said Ruth Heyman to deliver to Alfred T. Steinmetz, trustee of her estate in bankruptcy, merchandise consisting of gold chains, watches, rings, diamonds, and a chronometer in amount of $15,307.66, to be delivered to the trustee within thirty days.

Carr, Beggs & Steinmetz and Alfred T. Steinmetz, all of Philadelphia, Pa., for trustee.

Joseph Singer, of Philadelphia, Pa., for bankrupt.

DICKINSON, District Judge. In view of certain aspects of this case which present themselves to the court, we deem it best not to express any opinion at this time of its legal merits. There may be occasion to discuss and apply the legal principles involved at a later stage in the progress of the case. For the present, however, we content ourselves with the formal ruling, which we now make, that the findings of the referee be and are approved, and the order made by him is affirmed, with the modification that the bankrupt shall have 30 days from May 25, 1914, in which to comply with the order.

ALEXANDER et al. v. FIDELITY TRUST CO. et al.

(District Court, E. D. Pennsylvania. June 25, 1914.)

No. 1147.

1. COURTS (§ 347*)—FEDERAL COURTS—PRACTICE—EQUITY RULES—PLEADING.
Demurrers having been abolished by new equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi), whether a bill on its face avers such facts as constitute a valid cause of action in equity, or whether complainants are barred of the right to relief by laches, can now be raised by motion to dismiss the bill or by answer, and, when raised by motion to dismiss, the motion may be heard on five days' notice, but when raised by answer it may be disposed of as a matter of pleading or as a trial question, in the discretion of the court.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

2. COURTS (§ 347*)—FEDERAL COURTS—PRACTICE—PLEADING.
Where a defense of laches was raised to a bill in equity by answer, the question was thereby taken out of the domain of pleading and transferred to the domain of trial questions, but such fact did not preclude respondents from raising the question at the outset of the trial as if it were a question of pleading or by objections to evidence.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

3. COURTS (§ 347*)—FEDERAL COURTS—PRACTICE—PLEADING—LACHES.
Where a defense of laches is disposed of as a question of pleading, it must be determined according to the record as it stands, but, when it is raised as a trial question, complainants may move to amend their record, and if the amendment is allowed, and no surprise is pleaded, the trial proceeds on its trial merits without regard to the old state of the pleadings, and the defense must be ruled in accordance with the new record.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

In Equity. Suit by John S. Alexander and others against the Fidelity Trust Company, as executor, etc., and others. On motion to dismiss for laches alleged by way of answer. Denied.

Frank A. Harrigan, of Philadelphia, Pa., and Henry A. Wise, of New York City, for plaintiffs.

J. L. Wetherill and H. Gordon McCouch, both of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. The questions now raised come before us as on a demurrer in substance, and therefore only through the pleadings in the cause. As a consequence, we are concerned now only with the juridical history of the case. This, in its general outlines, is as follows:

The complainants have filed a bill in which they aver that they are the real owners of 60 shares of the capital stock of the Corn Exchange National Bank of Philadelphia. This stock stood on the books of the bank, and the certificate stood in the name of John Alexander, who was what may be called the holder of the mere legal title. The averment is of the existence of a simple dry trust in favor of the com-

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

plainants. John Alexander, in whose name the stock belonging to the complainant was, died February 27, 1895. He left a will in which no specific mention is made of this stock, but, if it belonged to him, it is disposed of by being included in the bequests which he makes of his residuary estate. A copy of the will is attached to the bill. It disclosed a state of relations with at least some of the children of the testator out of which sprang just such trust relations as are set forth in the bill of complaint. There is no date given us in the bill of the time when letters testamentary were granted. The bill also avers an assignment to have been made on March 8, 1895, by one of the beneficial owners of the stock of his interest therein as part of the claim of title of the complainants, and avers also a transfer to Lucien H. Alexander, one of the respondents, by the other respondent. The will discloses a distribution of his residuary estate among some of his children and by the creation of trusts for the benefit of others. There are also averments of the usual jurisdictional facts. Answers were filed to the bill of the complainants, which answers, among other things, raise the question of the existence of laches as shown on the face of the bill and also put in issue the fact of laches.

A perusal of the bill itself might provoke any one of several inferences. These inferences would owe their existence perhaps not entirely or alone to the facts as set forth but to the facts aided to some extent by the imagination of the reader. He might infer or imagine conditions out of which the bald and meager facts given us arose which would raise equities in the complainants of overwhelming strength. He might just as easily infer or imagine, for here again he would probably be influenced in his conclusions by his imagination, that the case of the complainants was without any merit, legal or equitable. He might just as readily arise from the perusal of the bill with the thought on his mind that he was not prepared to reach any conclusion until a further statement of facts had been made or he had heard the testimony and evidence out of which the statement of facts as given in the bill arose, and finally he might conclude that the bill, as framed, was ingeniously conceived and framed in the effort to make out a simple prima facie case of more or less doubtful character.

It is clear that no chancellor would extend to the complainants the relief asked for until the case had been relieved of all imputation of the rank staleness with which it is chargeable.

[1] Under the practice in chancery, before the adoption of the present equity rules, this bill might undoubtedly have been met with a demurrer based upon the proposition that an inference of laches arose out of the lapse of time during which the complainants had remained inactive in the assertion of their rights, and, as there were no averments in the bill to rebut this inference, the bill showed laches on its face, and the prayers of the complainants should therefore be denied. Demurrers, however, are now abolished by rule 29 (198 Fed. xxvi. 115 C. C. A. xxvi). The question of whether the bill on its face avers such facts as "constitute a valid cause of action in equity" can now be raised by a "motion to dismiss" the bill, or it may be raised in the answer. Under rule 29, when raised by motion to dismiss, the motion

may be set down for hearing upon five days' notice. When raised by answer, it may be disposed of by the court as a matter of pleading, or as a trial question, in the discretion of the court. In this case the question has been raised by answer.

[2] It has thus been taken out of the domain of questions of pleading and been transferred to the domain of trial questions. This does not preclude the respondents at the trial of the case from raising the question at the outset as if it were a question of pleading, for the reason that it would be idle to go on with the trial of the case when the result of it could be determined at the outset.

[3] There is a distinction, however, between disposing of the question as a trial question and disposing of it as a question of pleading either on a demurrer, as under the old practice, or on a motion to dismiss, under the present practice. The distinction is this: Cases disposed of upon demurrers in form must necessarily be decided according to the record as it then stands, and the same thing is true of a motion to dismiss under the present rules. When the question is raised as a trial question, then, as on all questions of like character raised in the trial of the case, the plaintiff may move to amend his record, and if the amendment is allowed, and no surprise is pleaded, the trial proceeds upon its trial merits without regard to the old state of pleadings. The distinction referred to, therefore, involves a right of the complainants, which is, or at least may be, of very great practical value.

Because of this the motion as now made is overruled, without prejudice to the right of the respondents to move to dismiss the bill at the beginning of the trial, or, if it can be raised in that way, to raise the question on rulings of evidence. The court feels further called upon to take this form of giving notice to counsel for the complainants that, if the question is raised at the commencement of the trial, the court will exercise the discretion given to it under equity rule 29 and may determine the case on that motion. If, because of this, an amendment is to be asked for, notice of the amendment proposed to be made may be given in advance to counsel for respondents, so that they may be prepared to have the trial proceed to a conclusion, and the question raised may be disposed of either on the present state of the pleadings or as they may be amended, if an amendment is asked for and allowed, or may be disposed of as a conclusion of fact after trial.

UNITED STATES v. ATLANTIC COAST LINE R. CO.

(District Court, S. D. Florida. May 28, 1913.)

RAILROADS (§ 254*)—SAFETY APPLIANCE ACT—CONSTRUCTION—AIR BRAKES—COUPLERS—SWITCHING OPERATION.

It is no defense to an alleged violation of the Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), requiring carriers engaged in interstate commerce to have at least 85 per cent. of the cars in a train equipped with air brakes so that they may be operated by the engineer, and also requiring all cars used in interstate commerce to be equipped with operating, automatic couplers, that the cars and train in question were only being moved in switching operations.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 764–772; Dec. Dig. § 254.*]

Action by the United States against the Atlantic Coast Line Railroad Company to recover penalties for violation of the Safety Appliance Act. On demurrer to defendant's pleas. Sustained.

H. H. Eyles, Asst. U. S. Atty., of Miami, Fla.

Kay & Doggett, of Jacksonville, Fla., for defendant.

CALL, District Judge. The declaration contains three causes of action:

(1) For hauling a St. L. & S. F. 120729 car from Lakeland northward when coupling and uncoupling apparatus on B end of said car was out of repair and inoperative.

(2) For hauling a S. A. L. car 35741 in and about Tampa when the coupling and uncoupling apparatus on B end of said car was out of repair and inoperative.

(3) For operating on its line one train of eight of its own cars, in and about Tampa, when only two cars had their brakes operated by the engineer on the locomotive drawing said train, less than 85 per cent. of the cars of said train.

To this declaration defendant interposed:

(1) The plea of not guilty.

(2) The special plea to the second and third causes setting up that the cars were "merely being moved about in switching operation at the times and places in said counts alleged."

To the second plea a demurrer and motion to strike was interposed by the government.

On the argument the court was requested by counsel for the government and defendant to rule particularly on the demurrer before considering the motion to strike, and recognizing the importance of the ruling the court will accede to this joint request and consider the demurrer first.

The demurrer and plea raises the question, "Is the defendant exempt from the requirements of the safety appliance act while performing switching operations?"

Defendant relies upon Erie R. Co. v. U. S., 197 Fed. 287, 116 C. C. A. 649. This case seems to exempt railroads from the necessity of

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

complying with section 1 of the act of 1893 and the second section of the act of 1903 (Act March 2, 1903, c. 976, 32 Stat. 943 [U. S. Comp. St. Supp. 1911, p. 1315]) while performing switching operations. The opinion of Circuit Judge Buffington says:

"It is conceded by the government that this act does not apply to, or at least has never been enforced as to, switching operations. Manifestly such is the reasonable construction of the act."

The government in this case does not concede this fact, but, on the contrary, contends otherwise, and cites the case of Chicago, M. & St. P. Ry. Co. v. U. S., 165 Fed. 123, 91 C. C. A. 373, 20 L. R. A. (N. S.) 473, holding that:

"There had been no delivery of the car in question at the ultimate destination, and the switching of it from the time it was taken by defendant's employés * * * to the time of the discovery of the defect was in the course of such delivery and constituted a case in interstate commerce."

This last case had reference to defective coupler.

The section of the act which the defendant is charged with having violated in the third count of the declaration is as follows:

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

Section 2 of the act of 1903 provides for the percentage of cars in such train which shall have their brakes used and operated by the engineer, and that the Interstate Commerce Commission may increase this minimum by proper order.

The object of the Congress in passing the safety appliance acts was undoubtedly to safeguard interstate commerce, the life of the passengers, and the life and limb of the employés engaged therein. In doing this it has seen fit to prescribe the use of certain appliances for handling trains. Under these acts it is unlawful "to use any train in such traffic" without the safety appliances named therein. Do these words or the context mean only while the train is moving from point to point in the journey, or do they mean any running of a train of cars so engaged?

It would seem that the movement of such a train for the purpose of placing cars in position for delivery or for the purpose of making up a train would still be a violation of the act unless the provisions were complied with. The absence of power brakes from a sufficient number of cars to handle the train from the engine would endanger the lives of the brakemen on such a train as much as would their absence in the train after it had been made up. And we must not lose sight of the fact that Congress intended to protect this very class in providing for the use of power brakes instead of the hand brake in all interstate traffic. I am constrained to think that a train of cars used in interstate traffic falls within the meaning of the act as amended, whether used in regular transit or switching operations, and that

therefore the demurrer to the second plea to the third count is well taken.

I now consider the demurrer to the second plea to the second count of the declaration.

The Supreme Court, in Southern Ry. Co. v. U. S., 222 U. S. 20, on page 26, 32 Sup. Ct. 2, on page 4 (56 L. Ed. 72), have this to say:

"For these reasons it must be held that the original act as enlarged by the amendatory one is intended to embrace all locomotives, cars, and similar vehicles used on any railroad which is a highway of interstate commerce."

And then holds said act so constructed within the powers of Congress. The decision in the case of Erie R. v. U. S. and line of reasoning can have no bearing on the decision of this question. The charge in the second count is for a failure to have the car properly equipped with a coupling as required by the act. It is no defense to this charge to say, "It is true the car was not properly equipped, but we are switching it and other cars on our line or in our yards." There is no denial that the defendant was a railroad engaged in interstate commerce and the cars mentioned engaged in interstate commerce, except it be by reason of the switching operations, and the Supreme Court in the case above referred to has construed the requirements of these acts in no uncertain terms.

The demurrer to the second plea to the second and third counts will therefore be sustained.

The demurrer having been considered, the motion to strike is not considered.

In re HAWLEY DOWN DRAFT FURNACE CO.

Appeal of NATIONAL TRUST & CREDIT CO.

(District Court, E. D. Pennsylvania. June 2, 1914.)

No. 4521.

BANKRUPTCY (§ 228*)—ADMINISTRATION OF ESTATE—REFERENCE—FINDINGS OF REFEREE—REVIEW.

Where a referee's findings were not sufficiently definite to enable the court on a petition to review to determine the legal questions involved, the proceeding would be remanded to the referee for further hearing and additional findings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Hawley Down Draft Furnace Company. On petition of review of a referee's order denying the petition of the National Trust & Credit Company for an order directing the trustee to pay over a specified sum of money collected on accounts of the bankrupt assigned to petitioner. Case remanded to the referee for further findings.

John W. Creekmur, of Chicago, Ill., and Kirkpatrick & Maxwell, of Easton, Pa., for claimant.

E. J. & J. W. Fox, of Easton, Pa., for trustee.

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

DICKINSON, District Judge. At the argument of this cause at bar, it was stated by counsel on both sides that the referee had decided it on the narrow ground that a fact, which could not very well be in serious controversy, had not been formally proven. It was further stated that the point on which the case was made to turn was one which counsel for the trustee had not made, but was one which had been burnished up by the referee himself. In a case involving the amount which is involved here, to impale a litigant upon a point as sharp and fine as this would be painful alike to the victim and all beholders of the tragedy.

We have been able to glean enough from the report to acquit the referee of this charge. He has evidently ruled the case upon no such pin point. The facts of the case, however, have neither been presented nor found with sufficient definiteness to enable any one, with any degree of satisfaction, to pass upon whatever question may arise out of the real facts. Some of the facts do appear, but there is an indefiniteness and elusiveness about the presentation of others which makes the case unnecessarily cloudy and shadowy. A sketch outline of the facts would seem to be this:

The bankrupt had customers with whom it ran accounts. It was in need of money. The National Trust & Credit Company agreed to finance the bankrupt from time to time by buying its outstanding accounts receivable at a discount, paying therefor a certain percentage of the face amount in cash, and the balance when the account was paid by the debtor. The accounts so bought were agreed to be assigned to the purchaser, for whom thereafter the bankrupt was to act as a collecting agent and was responsible to the purchaser for the return of "its own with usury." All collections as made were to be handed over in the original package. The bankrupt collected a number of accounts, covering, in their aggregate amount, the sum here claimed. These moneys were not sent to the Trust Company, but were deposited by the bankrupt in bank to its credit, and were turned over to the receiver appointed by the state court of Northampton county, Pa., and by him in turn handed on to the trustee in bankruptcy. The Trust Company claims to have been the owner of these accounts receivable, and asks that the trustee in bankruptcy be directed to turn over the moneys, representing in part these accounts, to the petitioner as its property, and as no part of the assets of the bankrupt estate.

These are about all the facts of which we may be sure. The mind which looks them over returns from the survey with very much the feelings of Noah's dove. There is no place upon which to plant your feet. Both of these corporations recite themselves to be Ohio corporations. Further than this we are without information, and the fact referred to may be of no importance. We have no evidence beyond the recital in the paper of the place of the contract. This may be of importance, although here again presumption may supply the place of findings. This preliminary contract sufficiently appears, as apparently it was agreed that the paper submitted was a copy of an original contract duly executed and delivered.

At this stage, we do not feel called upon to state our views of what this contract is in its legal effect, nor to comment upon it further than to suggest that it may become important to know whether it is bona fide an agreement to purchase at a price, or whether it is a more or less thinly disguised attempt to give a loan or advancement on usurious terms the form of an agreement of purchase. There is manifestly a clear-cut and important difference between an agreement by the bankrupt to sell and assign and an actual sale and assignment by it. We ought to have a specific finding as to this, in order that we may know whether there was such a sale, and, if so, when and where and how it was made, and the consideration, if any, given, and what, if any, delivery accompanied it, and whether the sale was made by mere oral declarations of transfer or by a writing, and, if the latter, a copy. Some facts bearing upon the existence of a written assignment are given us, but nothing fully or definitely. We are given the negative fact that none of the debtors were notified of any assignment, nor were any of them informed of it. We are informed of the valueless fact that when the bankrupt assigned any accounts the assignment took the double form of a sweeping draft on a number of listed debtors, accompanied with copies of the accounts in the form of bills, coupled with a formal assignment of the accounts so listed. We are given no specific finding, however, of whether any of the accounts with which we are now concerned were in fact in form so assigned, or, if there is such an assignment what, if anything, there was in the nature of a delivery of the property assigned, and whether these assigned accounts were collected and the proceeds of the collection are now in the hands of the trustee. We do not feel called upon to brief up either the case of the claimant or the defense of the trustee, and the information we have as to the facts is too meager to enable us to do so.

We therefore content ourselves with referring the case back to the referee, with instructions to grant a rehearing and to give leave to every party in interest to submit new or additional evidence, and offer fresh or additional testimony relevant to the questions which have been raised or which may arise in the cause, and to report back his findings thereon to this court.

In re CRUMLING.

(District Court, E. D. Pennsylvania. May 26, 1914.)

No. 4925.

1. BANKRUPTCY (§ 340*)—CREDITORS—WIFE OF BANKRUPT.
The fact that an alleged creditor of a bankrupt is his wife does not bar her assertion of her rights as a creditor, but, if her claim is disputed, the burden is on her to establish it by proof.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.*]

2. BANKRUPTCY (§ 340*)—GIFTS BY BANKRUPT TO WIFE—NOTE—VALIDITY.
While under the Pennsylvania law a husband may give his wife a note which is a promise to pay money, as well as any other property, yet, if he does so and becomes a bankrupt, the burden is on her to establish its validity.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.*]

In Bankruptcy. In the matter of the bankruptcy proceedings of Harris L. Crumling On petitions of Charlotte Crumling and U. G. Dissinger for review of a referee's orders allowing Charlotte Crumling on a claim $2,075, instead of $6,200, as claimed, and disallowing the claim of Dissinger. Affirmed.

Ellwood H. Deysher, of Reading, Pa., for trustee.
Thomas I. Snyder, of Reading, Pa., for claimants.

DICKINSON, District Judge. This case turns upon the correctness of the findings of fact by the referee. The merits of the claims presented before the referee are not such as to incline the court to strain the well-known principle applied in all jurisdictions that the findings of fact made by the tribunal to which the law confides the duty of making such findings should not ordinarily be disturbed. We need not pause to vindicate the wisdom of the principle and the justness of its application to the facts of this case are clear.

Claims are presented against the bankrupt's estate by his wife and other members of his family for services rendered to him in such numbers and for such amounts as if allowed would make of these bankruptcy proceedings nothing but a means of transferring his estate from his creditors to himself under the guise of a dividend on debts contracted by him. It is common sense, common justice, and hornbook law that all such claims should be closely scrutinized. These have failed to pass the scrutiny of the referee. For this the referee is to be commended.

As destructive as the Pennsylvania statutes are of well-considered common-law principles growing out of the marital relation, and far flung as they are in the direction of establishing the independent entity and property rights of the wife, they still fall short of placing any compulsion upon the courts of that state to take the property of the husband from out of the reach of his creditors and to transfer it to his

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

wife merely because the husband has declared that he would like to have this done.

The argument of counsel for these claimants is based upon false premises into assuming which he has been misled by a misconception of the questions involved and the conditions out of which these questions arise.

[1, 2] The general question involved is one of the distribution of an insolvent estate. The parties to the cause are therefore the claimants on the one side and the other creditors of the bankrupt on the other. The issue is between them, and not between the claimants and the bankrupt. If the wife, for instance, were suing the husband, his notes as self-disserving declarations would unquestionably be evidential and persuasive to the point of convincement perhaps. The minds of both the lawyer and the laymen would be inclined to the same conclusion. The husband should be required to pay the debt which he had declared to be owing. In an issue between the wife and the creditors of the husband, however, how can the declaration of the husband in her favor (whether it take the form of a promissory note or of a mere expression of his wish that she should have the creditor's money) possibly be evidential of anything except that the husband wants the wife to have the money? We could safely assume this without any proofs. To say that the courts are bound to take the money from the creditors and give it to the wife, simply because the husband wishes this done, is a proposition against which every principle of law and of justice and every canon of common sense revolts. If he cannot do this by the mere expression of a wish, it is just as clear that he cannot do it by saying that he owes her the money. His say so does not against creditors make it so. If she is a creditor, under the law of Pennsylvania she is entitled to payment out of the assets of the husband along with the other creditors. The fact that she is his wife is no bar to the assertion of her right as a creditor. If, however, she is called upon (as in this case she was) to prove her claim she must prove it. This she attempted to do but in this she failed. When her proofs fell down, her claim fell with it, except to whatever extent the proposition holds good that under the law of Pennsylvania a husband may give his wife a note as he may give her anything else. This gift of a promise of money, however, can do no more than to bring her case directly within the well-considered rule and within the range of the well-known decisions which counsel for the claimants admits the referee properly interpreted, but which counsel mistakenly asserts have no bearing upon the case. The principle and the rulings bear directly upon this feature of the case.

What has been said about the claim of the wife applies to the claim of the son-in-law.

The findings of the referee are approved and the orders made by him affirmed.

In re FARMERS' STORE & SUPPLY CO.

(District Court, N. D. West Virginia. June 26, 1914.)

BANKRUPTCY (§ 165*)—PREFERENCES—PAYMENTS WITH KNOWLEDGE OF INSOLVENCY.

Where certain creditors of a bankrupt, with knowledge of its insolvency, endeavored to save it from bankruptcy, and in doing so placed a representative in charge, and furnished goods necessary to replenish the stock on credit, and would have carried the scheme to a successful conclusion, had not one creditor secured judgment and issued execution thereon, which precipitated bankruptcy, payments made on account of the goods so sold within four months prior to the bankruptcy adjudication were preferential.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. § 165.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Farmers' Store & Supply Company. Petitions of the Morris Grocery Company and another to revise orders of the referee declaring that petitioners were accountable in dividend payments for certain alleged preferences. Affirmed.

R. S. Douglass, of Clarksburg, W. Va., for petitioners.

Charles G. Coffman, of Clarksburg, W. Va., for objecting creditor.

DAYTON, District Judge. This case illustrates that some hardships arise in the administration of the law that cannot be avoided. There cannot be the slightest doubt of the fact that these two petitioning creditors, the Morris Grocery Company and the Koblegard Company, finding the bankrupt company so involved in debt and bad management as to be unable to pay its debts, and therefore in the legal sense insolvent, in good faith and for the best interests of themselves and all other creditors, undertook to relieve the bankrupt from its embarrassment, place it on its feet, and enable it to pay in full its debts and establish itself in business. To this end they substantially took charge of the business, with Cole, an efficient man, in charge, who made reports from time to time to them, and succeeded in making a net reduction of over $600 in the bankrupt's liabilities within a comparatively short period of time. To carry on the business and accomplish this result these petitioners furnished upon credit goods necessary to replenish stock and received payments from time to time on account thereof.

It is to be regretted that this very meritorious plan to save this bankrupt could not have been carried to what, in my judgment, would have been a very successful conclusion. One creditor prevented this. He instituted suit, secured judgment, and issued execution thereon. These petitioners were then confronted with either the necessity of practically assuming and paying off this creditor in full, or of giving up their effort and allowing the bankruptcy court to take charge. They very naturally chose the latter alternative. It appears that Cole, the manager, at or near this time, paid out of the assets of the company to

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

petitioner the Morris Grocery Company, on account of goods sold during the arrangement above referred to, the sum of $356.94, and to petitioner the Koblegard Company $80.62, which payments were, of course, within four months of the adjudication in bankruptcy. The referee has held these payments to be preferential, and decreed petitioners to be accountable therefor in dividend payments upon their debts. To reverse this order, these petitions have been filed.

The whole matter must stand upon the construction of the statute given by the Supreme Court. So far as I can see, the cases are uniform in their holdings:

"Where a creditor has a claim for a balance due against an insolvent debtor afterwards adjudicated a bankrupt, upon an open account for goods sold and delivered four months before the adjudication in bankruptcy, and during said period makes a number of sales of merchandise on credit to the insolvent debtor, which becomes a part of the debtor's estate, and during the same period receives payments of sums on account, from time to time, which payments are received in good faith, without knowledge of the debtor's insolvency on the part of the creditor, the sales exceeding in amount during said period the payments made during the same time, he has not received a preference which he is obliged to surrender before his claim shall be allowed." Yaple v. Dahl-Millikan Grocery Co., 193 U. S. 526, 24 Sup. Ct. 552, 48 L. Ed. 776; Jaquith v. Alden, 189 U. S. 78, 23 Sup. Ct. 649, 47 L. Ed. 717; Pirie v. Chicago T. & T. Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171; Wild v. Provident Trust Co., 214 U. S. 292, 29 Sup. Ct. 619, 53 L. Ed. 1003.

It is clear from these decisions that merchants may sell goods to an insolvent customer, and may receive payments from him on account thereof within the four months prior to adjudication in bankruptcy, without such payments constituting a preference, provided the creditor so selling has no knowledge of the insolvency of his customer. If he has such knowledge, then such payments become preferential. The conclusion is inevitable in this case that petitioners knew of the insolvency of the bankrupt when they sold these goods and received the payments. Their taking substantial control, through Cole, of the bankrupt's business, with the very generous and laudable purpose of saving it from the results of such insolvency and inability to pay its debts, shows this knowledge, and, as stated in the beginning, the hardship to them arising from the regrettable failure of such effort is one arising under the law's administration, for which I can see no remedy.

The ruling of the referee must be affirmed.

UNITED STATES v. RUBIN et al.

(District Court, D. Connecticut. June 3, 1914.)

No. 247.

CRIMINAL LAW (§ 627½*)—IMPEACHMENT OF INDICTMENT—RIGHT TO INSPECT MINUTES OF GRAND JURY.

A defendant is not entitled to an order for the inspection of the minutes of the grand jury; but where a motion therefor alleges, and is supported by affidavits tending to show, that the indictment was found without any legal evidence to support it, such allegations should be answered, and a hearing had upon the issues joined.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1431, 1434, 1435; Dec. Dig. § 627½.*]

Criminal prosecution by the United States against Philip Rubin and others. On motion by defendants for an order for inspection of the grand jury minutes. Denied.

Frederick A. Scott, of Hartford, Conn., for the United States.

Benjamin Slade, of New Haven, Conn., Edward L. Seery, of Waterbury, Conn., and Alfred Frankenthaler and Max Monfried, both of New York City, for defendants.

THOMAS, District Judge. The defendant Philip Rubin and nine others have been jointly indicted by the grand jury for unlawfully and knowingly conspiring together to commit an offense against the United States; that is to say, the offense denounced by section 29b (1) of the Bankruptcy Act approved July 1, 1898 (30 Stat. 554, c. 541 [U. S. Comp. St. 1901, p. 3433]). Motions on behalf of all defendants, represented by various attorneys (excepting Louis Glickman), were made for an order for the inspection of the grand jury minutes. In denying the various motions I am guided by the opinion of Judge Hand, of this circuit, as found in the case of United States v. Violon (C. C.) 173 Fed. 502, in which he said:

"I cannot satisfactorily speculate upon the evidence which must have been before the grand jury, nor will I either myself inspect, or permit another to inspect, its minutes. The grand jury is designed to protect the citizen from baseless accusation; but he has no other protection than its proper action. If it has been moved by insufficient evidence, or has failed to consider all the evidence, it is an injustice which the court cannot, and should not seek to, redress. There is no precedent, so far as I can find, for such control of the grand jury, and I am the last who would initiate it."

In support of the motions the moving defendants have filed affidavits which set out certain facts as a basis for the granting of said motions. No answer was filed by the government, and a hearing was had upon the motions and without evidence being introduced by either the government or any of the defendants. The controversy with reference to the facts set out in the motion papers was between counsel on both sides. I find that sufficient facts are set up which should be answered. The government did not file an answer with reference to

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

the allegations contained in the motions, but, on the contrary, the learned district attorney, upon argument of this motion, admitted in open court certain facts referred to and set out in the motion papers. In United States v. Kilpatrick (D. C.) 16 Fed. on page 774, Judge Dick said:

"If a bill of indictment be found without evidence, or upon illegal evidence, or for any improper conduct of the jury, or for any improper influence brought to bear upon the jury, such matters may be pleaded in abatement, or may be ground for quashing an indictment, but cannot be availed of by motion in arrest. All such objections must be made before a trial."

The complete protection of the rights of citizens must necessarily commence and does commence at the inception of any criminal proceeding. It not infrequently happens that persons are accused of crime, even though their complete innocence is ultimately satisfactorily established. An unblemished reputation is a valuable asset to every individual, and experience has shown that great harm may flow to one unjustly accused, even though such person ultimately establishes his innocence. These reasons are sufficient to sustain the doctrine that the grand jury is forbidden to make an accusation against a person without legal evidence to support it. U. S. v. Heinze (C. C.) 177 Fed. 770; U. S. v. Rosenthal (C. C.) 121 Fed. 862; U. S. v. Edgerton (D. C.) 80 Fed. 375.

Upon the facts set out in the motion papers and the statements made by the learned district attorney, I would be remiss in my duty if I did not, in this memorandum, suggest that a hearing should be had before the court, upon issue joined, respecting the facts alleged in the present motion. The moving defendants request an inspection of the grand jury minutes to lay a support for a motion to quash the indictment or to plead in abatement. In view of the finding of the court bearing upon these questions, the motions of the various defendants are denied.

Let an order to that effect be entered.

In re WILDBERGER.

(District Court, E. D. Pennsylvania. June 26, 1914.)

No. 11207.

ALIENS (§ 65*)—CITIZENS (§ 13*)—NATURALIZATION—EXPATRIATION—STATUTES.

Act Cong. March 2, 1907, c. 2534, 34 Stat. 1228 (U. S. Comp. St. Supp. 1911, p. 490), provides that any American citizen shall be deemed to have expatriated himself by becoming naturalized by any foreign state under its laws or by taking an oath of allegiance to a foreign state. It also declares that any naturalized citizen who has resided for two years in the foreign state from which he came, or for five years in any foreign state, shall be presumed to have ceased to be an American citizen. *Held*, that such act is penal in its character and should be strictly construed as limited to citizens; and hence the fact that an honorably discharged soldier of the United States army, while an alien, returned to the repub-

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

lic of Switzerland and for a time held an elective office there, did not bar his right to become a citizen as one of the privileges of his military service, as provided by Rev. St. § 2166 (U. S. Comp. St. 1901, p. 1331).

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 129; Dec. Dig. § 65;* Citizens, Cent. Dig. §§ 20–22; Dec. Dig. § 13.*]

Application of Hermann Wildberger to be admitted to citizenship. Granted.

Jerome C. Shear, of Collingswood, N. J., Special Examiner, for United States.

DICKINSON, District Judge. The applicant enlisted in the armies of the United States, serving in the regular forces, and was honorably discharged as a soldier of the United States. He is fairly and fully within the provisions of section 2166 of the Revised Statutes (U. S. Comp. St. 1901, p. 1331), and without anything more appearing is admittedly entitled to all the privileges accorded honorably discharged soldiers by the acts of Congress. Personally the applicant has been shown to be deserving of admission to citizenship, unless there is some legal obstacle to his admission. It has, however, been suggested by the Bureau of Naturalization that the applicant is debarred from admission by the provisions of the second section of the act of Congress approved March 2, 1907 (34 Stat. 1228, c. 2534 [U. S. Comp. St. Supp. 1911, p. 491]), and the Bureau objects to his admission solely on this ground.

The pertinent provisions of this act are that any American citizen shall be deemed to have expatriated himself by the act, either of becoming naturalized by any foreign state under its laws, or of taking an oath of allegiance to a foreign state. Another provision is that any naturalized citizen who has resided for two years in the foreign state from which he came, or for five years in any foreign state, shall be presumed to have ceased to be an American citizen. There are some exceptions with which we are not concerned. The fact is set up that this applicant, being a citizen of the republic of Switzerland, returned to that country as his native land, and for a time held and filled an elective office there. Because of this it is claimed he has brought himself within the provisions of the expatriation act.

In determining the question raised, one or two observations are called for bearing upon each of these acts of Congress. The policy of the law embodied in section 2166 of the Revised Statutes is obvious and to be promoted by the courts. The provisions of the act of March 2, 1907, are highly penal, and therefore by every accepted canon of construction are not to be extended to include any persons not within its purview. It relates to the subject of the expatriation of citizens and their protection abroad. In its terms it applies only to citizens—in its one provision to all citizens, and in its other to naturalized citizens. The applicant is not within the letter of the statute. It is clear, also, that its provisions were never intended to embrace persons not citizens. As the applicant was not a citizen at the time referred to, it follows

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

the act of Congress does not affect his status as either an alien or an honorably discharged soldier. As the act presents no obstacle to his admission, the objection on that score falls harmless.

The applicant is therefore admitted to citizenship upon taking the required oath and complying with the provisions of the law. An exception to this ruling may be noted at the instance of the Bureau of Naturalization.

In re BELL ENGRAVING CO., Inc.

(District Court, E. D. Pennsylvania. May 26, 1914.)

No. 3977.

BANKRUPTCY (§ 345*)—CLAIMS AGAINST ESTATE—PAYMENTS BY BANKRUPT—APPLICATION.

Where it was agreed between the bankrupt and its landlord that a counter indebtedness of the landlord to the bankrupt should be applied as it arose to other indebtedness of the bankrupt to the landlord, it would be so applied, regardless of the fact that such application left a larger claim due the landlord for rent, which was entitled to priority.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. § 345.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Bell Engraving Company, Incorporated. On certificate of the referee to review an order for the payment to H. H. Pakradooni of $1,131.84 as a preferred rent claim. Affirmed.

Norman W. Harker and Francis C. Adler, both of Philadelphia, Pa., for landlord.

George H. Stein and William B. Linn, both of Philadelphia, Pa., for objecting creditor.

DICKINSON, District Judge. This case was presented to us under a misnomer. The question, as is clearly shown by the learned referee's report, is not whether the landlord's claim for rent has, under the facts of this case and the law applicable thereto, priority of payment, but whether there was in fact any rent due and payable. Its priority of payment, if owing, or, in other words, the preference in payment accorded to it, is conceded. What is denied is that any rent is owing. It is further admitted that the sum claimed is owing to the landlord. The only question is whether this sum is owing on a rent account which by law has priority in payment, or whether it is owing on another account to which the incident of preference in payment does not attach.

Priority in payment is merely the result of a decision of the other question in favor of the landlord. In itself there is no question either raised or possible. Whether any rent is owing would, at the most, be a question of application of payments under the well-known rules pertaining to that subject in Pennsylvania. This would be, if it arose

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

here, in some of its aspects a legal question. Under the conditions of this case, neither it nor any legal question arises. The only possible question which could arise is one of the correctness of the findings of the referee upon a pure question of fact, which was to be determined upon the testimony of the witnesses and evidence in the form of what might be called bookkeeping entries, which were submitted to and inspected and analyzed by him.

Under all the evidence, oral and documentary, the referee has found that the parties, when competent to contract, agreed for mutual good considerations that the so-called payments, which were in reality a counter indebtedness of the landlord to the bankrupt, should be applied as it arose to the other indebtedness of the bankrupt to the landlord. This fact (unless the finding is overturned) admittedly leaves the rent claim unpaid. Nothing has been shown to the court to justify the disturbance of the finding.

The findings of the referee are therefore approved, and the order made by him affirmed.

WILKES-BARRE & W. V. TRACTION CO. v. DAVIS, Collector.

(District Court, M. D. Pennsylvania. June 3, 1914.)

No. 510.

[INTERNAL REVENUE (§ 9*)—CORPORATION TAX ACT—"DOING BUSINESS."

Where a street railroad company, under authority of the state law, leased at a graded annual rental its system of street railways, which it owned, operated, and controlled, to another company for a long term, and thereafter engaged in no other business than to maintain and preserve its corporate existence, receiving the rent, and distributing the income among its stockholders, it was no longer "doing business" as a traction company, and was therefore not subject to franchise taxation, under Act Aug. 5, 1909, c. 6, 36 Stat. 112, § 38 (U. S. Comp. St. Supp. 1911, p. 946), which is only applicable to corporations doing business in a corporate capacity as authorized.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. § 9.*

For other definitions, see Words and Phrases, vol. 3, pp. 2155–2160; vol. 8, pp. 7640, 7641.]

In Equity. Suit by the Wilkes-Barre & Wyoming Valley Traction Company against G. T. Davis, Collector, to recover a corporation tax paid under protest. On rule for judgment for want of a sufficient affidavit of defense. Rule absolute.

R. W. Archbald, of Scranton, Pa., and Geo. R. Bedford, of Wilkes-Barre, Pa., for plaintiff.

Rogers L. Burnett, U. S. Atty., of Scranton, Pa., for defendant.

WITMER, District Judge. This suit was brought to recover a tax collected from the plaintiff under the Corporation Tax Act of 1909 (Act Aug. 5, 1909, c. 6, 36 Stat. 112, § 38 [U. S. Comp. St. Supp. 1911. p. 946]), which was paid under protest.

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

The plaintiff was incorporated under the act of May 22, 1887, to operate a system of street railways in Luzerne county, Pa. On January 1, 1910, by authority of the state law, it leased and transferred for a rental, graded and ranging from $360,000 to $400,000 per annum, to the Wilkes-Barre Railway Company, for a term of 800 years, the system of street railways which it owned, operated, and controlled. Thereafter, and since, it appears, the railway company has been in the full and exclusive possession and control of the railways, and has operated them as undertaken by the lessor; the latter having engaged in no other business whatever than to maintain and preserve its corporate existence, conserving the enjoyment of its corporate property to its lessee, receiving therefrom the rent reserved by the lease, and distributing its income among its stockholders.

The tax provided for by the act of 1909 is not imposed on the franchises of the corporation, nor on its property, but only on the "doing of business" in a corporate capacity as authorized. Flint v. Stone-Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; Zonne v. Minneapolis Syndicate, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428; McCoach v. Minehill Railway Co., 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842. As was held in the latter case, from which it cannot be distinguished, the defendant was not "doing business" as a traction company during the years 1910 and 1911 over the lines covered by the lease. The business of serving the public as a common carrier, which was the prime object of its incorporation, was turned over to its lessee. For this purpose the defendant must be regarded as out of business.

The taxes were unlawfully imposed, and the rule for judgment is made absolute.

PACIFIC MAIL S. S. CO. v. SCHMIDT.†

(Circuit Court of Appeals, Ninth Circuit. May 18, 1914.)
No. 2352.

1. ADMIRALTY (§ 13*)—JURISDICTION—SUIT FOR SEAMAN'S WAGES—VESSEL IN PORT.

The claim of a steward of a steamship, regularly signed under shipping articles, for his wages while the vessel is in port discharging at the end of a voyage and preparing for another, is maritime and within the admiralty jurisdiction, where, although he was discharged before sailing, his term of service had not expired, and up to the time of discharge he was engaged in cleaning the ship, storing supplies, and otherwise in discharging the duties of his position.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 164–176; Dec. Dig. § 13.*]

2. SEAMEN (§ 2*)—WHO ARE SEAMEN—STEWARD.

Under the general maritime law, as well as under Rev. St. § 4612 (U. S. Comp. St. 1901, p. 3120), which provides that every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board a vessel shall be deemed a seaman, the steward of a steamship is a seaman.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 1–3; Dec. Dig. § 2.*

For other definitions, see Words and Phrases, vol. 7, pp. 6374–6375.]

3. SEAMEN (§ 33*)—WAGES ON DISCHARGE—PENALTY FOR NONPAYMENT.

Under Rev. St. § 4529, as amended by Act Dec. 21, 1898, c. 28, § 4, 30 Stat. 756 (U. S. Comp. St. 1901, p. 3077), which provides that the master or owner of any vessel who shall without sufficient cause refuse to make payment of wages to a seaman at the times therein specified "shall pay to the seaman a sum equal to one day's pay for each and every day during which payment is delayed, which sum shall be recoverable as wages in any claim made before the court," the entry of a decree for wages in favor of a seaman does not merge his entire cause of action, including that for the penalty, which by the express terms of the statute continues until payment is made, and where the respondent without sufficient cause appeals from the decree and stays its execution the appellate court may remand the cause, with directions to add the appropriate penalty.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 218, 219; Dec. Dig. § 33.*]

Dietrich, District Judge, dissenting.

Appeal from the District Court of the United States for Division No. 1 of the Northern District of California; M. T. Dooling, Judge.

Suit in admiralty by Ed. Schmidt against the Pacific Mail Steamship Company. Decree for libelant, and respondent appeals. Affirmed.

For opinion below, see 209 Fed. 264.

Knight & Heggerty, of San Francisco, Cal., for appellant.

James W. Ryan, of San Francisco, Cal., for appellee.

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

ROSS, Circuit Judge. The appellee shipped as steward, at the wages of $100 a month, on board the steamship City of Sydney, the

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

† Rehearing denied October 13, 1914.

home port of which was New York, under shipping articles of date July 24, 1913, signed on behalf of the respective parties, then "bound from the port of San Francisco to Ancon, Canal Zone, and such other ports and places in any part of the world as the master may direct, and back to the final port of discharge in San Francisco, the United States, for a term of time not exceeding six calendar months." Among the terms specified in the articles were the following:

"And it is hereby agreed that any embezzlement or willful or negligent destruction of any part of the vessel's cargo or stores shall be made good to the owner out of the wages of the person guilty of the same. * * * And it is also agreed that the master has the option to transfer any and all of the within mentioned persons, members of the crew, to any other American, British, or other foreign vessel bound to San Francisco, California, in the same capacity or as a passenger and at the same rate of wages for final discharge any time during the period of time called for by these shipping articles."

The case shows that the ship left San Francisco on the 24th of July, 1913, for Balboa, returning to San Francisco on the 23d day of the following September, and that on the next day, September 24th, the appellee received from the shipping commissioner all of his wages for that round trip—the ship then being tied up at the wharf discharging her cargo. What the appellee did during that time, and what is referred to by the trial judge and by counsel as the custom then prevailing at the port of San Francisco, is thus stated by the appellee in his testimony, of which we find no contradiction in the other evidence:

"Q. What was the procedure after you returned from the voyage regarding receiving your money? A. I got paid off by the shipping commissioner, my wages due to me for that voyage.

"Q. Why did you remain on board the ship? A. I was still chief steward on the boat, and not notified I had been discharged for anything, and I worked on board as chief steward.

"Q. What are the duties of the chief steward on the steamer? A. During the voyage?

"Q. Yes; during the voyage. A. He is simply the head of the commissary department; keeps the rooms clean, and looks after the passengers, and so on.

"Q. What else? A. To look after his help, and see that the work is done.

"Q. What does the chief steward do?

"The court: Q. You have charge of the rooms of the passengers, have you? A. Yes, sir.

"Mr. Ryan: Q. What does the chief steward do after he arrives in port? A. After he arrives here we clean the ship.

"Q. You mean you superintend it? A. Yes; and see that the stores are put on board for the next voyage—get the ship ready for sea for the next voyage.

"Q. Is your work while in port very similar to that while on the voyage? A. Yes.

"Q. What is the difference between your duties while on the voyage and while the ship is in port? A. The difference is we have no passengers on board. While we are in port we do not cook any meals. We just clean up, and see that repairs are done and the stores put on board for the next voyage.

"Q. When are the supplies ordered, and who orders them? A. I put in a requisition for supplies and deliver the requisition book to the port steward.

"Q. Who places those provisions on board? A. The chief steward. He sees that it is put on board.

"Q. How many men are employed under you while the vessel is on the voyage? A. The steward's department, or what they call the commissary department, in that company, has 22.

"Q. That includes the title of what positions? A. The steward, the steerage cooks and bakers, butchers, cooks, waiters.

"Q. How long after the ship arrives at the dock do the seamen go before the shipping commissioner and receive their wages? A. Generally it is the day after.

"Q. And how long before the vessel leaves the dock do the seamen go before the shipping commissioner and sign new articles? A. One day before leaving on that voyage."

The evidence is that the appellee was allowed $1 a day for his meals while in port, as no cooking was done on board during the time, and that such was the custom at the port of San Francisco. The day before the ship was to sail on its next voyage the appellee was discharged, at which time there was due him for his wages and meals while in port $30.33, the amount of which was not questioned; but when he demanded it on the 1st day of October, 1913, the appellant steamship company refused to pay it, on the contention that certain silverware, which the company claimed was intrusted to him as chief steward when he shipped in July, was not accounted for by him at the end of the trip or thereafter, amounting in value to $32.90, which sum the company claimed the right to offset against his wages of $30.33 earned while in port; and this set-off it pleaded as a defense to the appellee's libel for his wages, which libel also contained a demand against the steamship company for one day's pay for every day his wages were unpaid after October 1, 1913, as a penalty under and by virtue of section 4529 of the Revised Statutes as amended by Act Dec. 21, 1898, c. 28, § 4, 30 Stat. 756 (U. S. Comp. St. 1901, p. 3077), for which penalty, together with the wages due, the court below awarded the libelant a decree. The section of the Revised Statutes, as so amended, is as follows:

"The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he shipped, or at the time such seaman is discharged, whichever first happens; and in the case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall, at the time of his discharge, be entitled to be paid, on account of wages, a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to one day's pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to the masters or owners of any vessel the seamen on which are entitled to share in the profits of the cruise or voyage."

[1] It is contended on the part of the appellant company that the case is not within the admiralty and maritime jurisdiction of the court, for the reason that the service of the appellee while the ship was at the port of San Francisco was not a maritime service. There is nothing in the decision of the case of California-Atlantic S. S. Co. v. Central Door & Lumber Co., 206 Fed. 5, to justify the contention, nor is there in the case of The Sirius (D. C.) 65 Fed. 226. In the latter case the keeper of a vessel in her home port and then out of commission

filed a libel against her for his services, and the court said, among other things:

"The libelant, we have seen, rendered the service of a ship keeper in the home port of the vessel. He was hired particularly to take care of the engine and boilers, and also to look after the vessel in general. In this he was assisted by a deck watchman. How his duties, assuming them to have been efficiently rendered, contributed to the navigation of the Sirius, it is difficult to see. The vessel was not then engaged in navigation. She could not do so, being out of commission. She was laid up, without cargo, or even master and crew. Giving the libelant's claim the most favorable consideration, it can only be said that his services tended to the preservation of the vessel, so that when she should be enrolled as an American vessel she might be fitted out for a voyage less expensively and more expeditiously. But such service did not contribute to the navigation of the vessel. Merely keeping a vessel in safe custody, protecting it from the depredations of thieves or the danger of fire, or preserving her machinery from unnecessary decay and deterioration, does not, of itself, constitute a maritime service. It must be connected with the navigation of the vessel. It is difficult to see, therefore, upon what ground it can be said that the libelant rendered a service of a maritime nature. His services did not contribute to the present navigation of the vessel, because she was then laid up; nor to her prospective navigation, because she had no voyage in contemplation. To be sure, it concerned the vessel; but it did not concern the vessel with reference to her navigation, present or prospective. Looking at the question in the light of the authorities, we find that, although there has been, and is yet, some conflict as to whether a mere ship keeper or watchman can be deemed to have rendered a maritime service, the weight of authority is against the right of individuals performing such services to a vessel in her home port to recover in a court of admiralty, for the reason that it is not regarded as a maritime service, within the signification of that term. But the cases, while establishing this general rule, have also created exceptions which, if given full latitude, may become almost as wide as the rule itself. The reason for the exceptions is that, if the ship keeper or watchman, in connection with his duty as such, render any distinctively maritime service, such as moving the vessel to a different anchorage, or preparing or fitting her out for a voyage, or in brief any service connected with the navigation or voyage of the vessel, then the court of admiralty will not only take cognizance of the maritime service rendered, but, if it be sufficiently broad and pronounced, will treat the entire service as maritime."

In the present case the vessel was in active service, the present libelant a regular seaman under shipping articles, whose term of service had not expired, and who, while the ship was discharging her cargo preparatory to another voyage, was cleaning ship, storing supplies therein, and otherwise performing the duties pertaining to his position of steward.

In the case of Leathers v. Blessing, 105 U. S. 626, at page 628 (26 L. Ed. 1192), which was an action of tort, the Supreme Court held that the jurisdiction in admiralty is not ousted by the fact that when the wrong was done on the vessel by the negligence of her master she had completed her voyage and was securely moored at the wharf, where her cargo was about to be discharged, the court saying, among other things:

"The only question raised by the appellants is as to whether the suit was one of admiralty jurisdiction in the District Court. They maintain that jurisdiction of the case belonged exclusively to a court of common law. Attention is directed to the facts that the Circuit Court did not find that the libelant was an officer, seaman, passenger, or freighter, or that he had any connection with the vessel or any business upon her or about her, except

that when he went on board of her he was expecting a consignment of cotton seed by her, and went on board to ascertain whether it had arrived, and that the vessel had fully completed her voyage and was securely moored at the wharf at the time the accident occurred. It is urged that the case is one of an injury received by a person not connected with the vessel or her navigation, through the carelessness or neglect of another person, and that the fact that the person guilty of negligence was at the time in control of a vessel which had been previously engaged in navigating waters within the jurisdiction of the admiralty courts of the United States cannot give jurisdiction to such courts. Although a suit might have been brought in a common-law court for the cause of action sued on here, the District Court, sitting in admiralty, had jurisdiction of this suit. The vessel was water-borne in the Mississippi river at the time, laden with an undischarged cargo, having just arrived with it from a voyage. The findings sufficiently show that her cargo was to be discharged at the place where she was moored. Therefore although the transit of the vessel was completed, she was still a vessel occupied in the business of navigation at the time. The facts that she was securely moored to the wharf and had communication with the shore by a gangplank, did not make her a part of the land or deprive her of the character of a water-borne vessel."

In the case of The Steamship Jefferson, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. 125, 17 Ann. Cas. 907, which was a case of salvage, and where the jurisdiction of the court was challenged on the ground that at the time the services sued for were rendered the ship "was in a dry dock undergoing repairs, was not on the sea, but was virtually on the shore, and was consequently at such time not an instrumentality of navigation, subject to the dangers and hazards of the sea," the Supreme Court said, among other things:

"By necessary implication it appears from the averments of the libel that the steamship, before being docked, had been engaged in navigation, was dedicated to the purposes of transportation and commerce, and had been placed in the dry dock to undergo repairs to fit her to continue in such navigation and commerce. As said in Cope v. Dry Dock Co., 119 U. S. 625, 627 [7 Sup. Ct. 336, 337 (30 L. Ed. 501)]: 'A ship or vessel used for navigation and commerce, though lying at a wharf and temporarily made fast thereto, as well as her furniture and cargo, are maritime subjects, and are capable of receiving salvage service.' In reason, we think it cannot be held that a ship or vessel employed in navigation and commerce is any the less a maritime subject within the admiralty jurisdiction when, for the purpose of making necessary repairs to fit her for continuance in navigation, she is placed in a dry dock and the water removed from about her, than would be such a vessel if fastened to a wharf in a dry harbor, where, by the natural recession of the water by the ebbing of the tide, she for a time might be upon dry land. Clearly, in the case last supposed, the vessel would not cease to be a subject within the admiralty jurisdiction merely because, for a short period, by the operation of nature's laws, water did not flow about her. Nor is there any difference in principle between a vessel floated into a wet dock, which is so extensively utilized in England for commercial purposes in the loading and unloading of vessels at abutting quays, and the dry dock, into which a vessel must be floated for the purpose of being repaired, and from which, after being repaired, she is again floated into an adjacent stream. The status of a vessel is not altered merely because, in the one case, the water is confined within the dock by means of gates closed when the tide begins to ebb, while, in the other, the water is removed and the gates are closed to prevent the inflow of the water during the work of repair. It was long ago recognized by this court that a service rendered in making repairs to a ship or vessel, whether in or out of the water, was a maritime service. Peyroux v. Howard, 7 Pet. 324 [8 L. Ed. 700]. But we need not further pursue the subject, since the error of the contention that a vessel, merely because it is in a

dry dock, ceases to be within the admiralty jurisdiction, was quite recently established in The Robert W. Parsons, 191 U. S. 17 [24 Sup. Ct. 8, 48 L. Ed. 73]. In disposing of the proposition we are now considering, it was further said (191 U. S. 33, 24 Sup. Ct. 13, 48 L. Ed. 73): 'A further suggestion, however, is made that the contract in this case was not only made on land, but was to be performed on land, and was, in fact, performed on land. This argument must necessarily rest upon the assumption that repairs put upon a vessel while in dry dock are made upon land. We are unwilling to admit this proposition. * * * A dry dock differs from an ordinary dock only in the fact that it is smaller, and provided with machinery for pumping out the water in order that the vessel may be repaired. All injuries suffered by the hulls of vessels below the water line, by collision or stranding, must necessarily be repaired in a dry dock, to prevent the inflow of water; but it has never been supposed, and it is believed the proposition is now for the first time made, that such repairs were made on land. * * * But, as all serious repairs upon the hulls of vessels are made in dry docks, the proposition that such repairs are made on land would practically deprive the admiralty courts of their largest and most important jurisdiction in connection with repairs. No authorities are cited to this proposition, and it is believed none such exists.'"

[2] It seems to be now settled that the services of stevedores in loading or unloading a vessel are maritime in character, which is, of course, based upon the theory that the voyage of the vessel does not end in the one case until the cargo has been discharged, and in the other that the voyage commences at the time the vessel begins to receive cargo. 1 Cyc. p. 833, and note to the case of Baltimore Steam Packet Co. v. Patterson, 66 L. R. A. 193, and numerous cases there cited. That the appellee was a seaman of the City of Sydney in rendering the services in question, and as such within the admiralty jurisdiction, we regard as clear. Section 4612 of the Revised Statutes expressly provides, among other things, that:

"In the construction of this title, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman.'"

But, regardless of the statute, we think that under the general maritime law the present libelant was a seaman, and as such entitled to sue in admiralty. In Benedict's Admiralty (4th Ed.) § 189, it is said:

"The term 'mariner' includes all persons employed on board ships and vessels during the voyage to assist in their navigation and preservation, or to promote the purposes of the voyage. Masters, mates, sailors, surveyors, carpenters, coopers, stewards, cooks, cabin boys, kitchen boys, engineers, pilots, firemen, deck hands, waiters—women as well as men—are mariners."

In the case of The Queen v. Judge of the City of London Court and the Owners of the S. S. Michigan, 25 Law Reports, Q. B. D. 339, the ship having arrived at the port of London, which was her destination, her crew, including the mate, were paid off. The mate, after being so paid, and without signing any fresh articles for the outward voyage, remained on board by the direction of the owner for the purpose of superintending the discharge of the inward cargo and the loading of a fresh cargo for the outward voyage. After the inward cargo had been discharged and a portion of the outward cargo had been shipped on.

board, the ship was taken into dock for repairs, and the mate continued on board by the owner's direction to superintend the execution of such repairs. The question was whether the services so rendered by the mate were maritime services, and the judges thus disposed of the question:

"Lord Coleridge, C. J. We have had an opportunity of consulting the learned judge of the Admiralty Court, who has had a large experience in these matters, and although my own impression was at first the other way, I defer to his authority, and come to the conclusion that the County Court judge was wrong, and that an action in rem will lie at the suit of a person in the position of the present plaintiff. To allow of that remedy in such cases as this has, it appears, been the practice of the Admiralty Court. I find that we are not embarrassed with the consequences which I was afraid would follow if our decision proceeded upon the definition of the term 'seaman' in the Merchant Shipping Act—a definition which would undoubtedly include such a person as a stevedore. For the question here does not depend in any way upon the Merchant Shipping Act, inasmuch as the act of Parliament giving admiralty jurisdiction to County Courts does not incorporate that act. The action ought to be heard. The rule must, therefore, be made absolute.

"Wills, J. I am of the same opinion. I have had the opportunity, not only of speaking to my Brother Butt upon the subject, but also of looking into the question for myself, and, upon consideration of the authorities, I have independently arrived at the same conclusion. The case seems to me to be practically governed by the case of The Jane and Matilda, where Lord Stowell held that the woman who had acted as caretaker was entitled to claim against the ship—a decision which, so far as I can make out, seems to be entirely in accordance with the uniform current of authority. The right to proceed in rem for services rendered on board a ship apparently extends to every class of person who is connected with the ship as a ship, as a seagoing instrument of navigation, or of transport of cargo from one place to another and to services rendered by such persons in harbor just as much as to services rendered by them at sea. It is, of course, matter of common knowledge that one of the most essential parts of the chief mate's duty is to look after the cargo, and see that proper care is taken of it. I am of opinion that the services rendered by the plaintiff were maritime services, although the vessel was actually in harbor at the time."

In the subsequent case of Corbett v. Pearce, [1904] 2 K. B. D. 427, the court said:

"What is usually understood by the term 'seaman' in its ordinary acceptation? It seems to me that a correct definition was given in the case, to which we have been referred, of Reg. v. City of London Court, where it was held that a person whose ordinary duties led him to take part in the navigation of a seagoing ship was entitled to a remedy against the ship for his wages, although the services rendered by him consisted in superintending repairs to the ship while in port. It was there said: 'The right to proceed in rem for services rendered on board a ship apparently extends to every class of person who is connected with the ship as a ship, as a seagoing instrument of navigation, or of transport of cargo from one place to another, and to services rendered by such persons in harbor just as much as to services rendered by them at sea.' That description of the persons who may popularly be called seamen is very applicable to the present case."

The trial court in the instant case was, in our opinion, right in holding that the set-off pleaded in defense of the libel was not sustained by the evidence. There was nothing tending to show any bad faith on the part of the steward, or even tending to show any negligence or lack of care on his part in the performance of his duties; nor was

there, as said by the trial judge, sufficient evidence of the alleged missing articles ever having been delivered into his keeping. On the contrary, the appellant's San Francisco port steward testified that it was usual on voyages for a small amount of the silverware of the ship to be taken by the passengers "for souvenirs, and for medicine, and for one thing and another"—usually $5 or $6 worth, said the witness. In the present case the amount claimed to have been lost was, as has been said, of the value of $32.90.

We are of the opinion that no sufficient cause was shown for the refusal of the appellant to pay the libelant his wages upon his discharge from service.

The only remaining question is whether the provision of section 4529 of the Revised Statutes, as amended December 21, 1898, imposing the designated penalty for failure to pay the wages within the required time, is applicable to the case.

It is first contended on behalf of the appellant that the section referred to expressly relates to "seamen shipped under an agreement." That is true; but the answer is, as has been above pointed out, that the libelant was a seaman and rendered the service for which he libeled the ship under shipping articles duly executed and in force at the time of the rendition of the service.

The further contention is made that it has been uniformly held that the penalty will not be imposed in any case where there is a fair ground of dispute. Conceding the justice of the rule, we are of opinion that the evidence in the present case does not show any such fair ground of dispute.

It has been suggested that the libelant's entire cause of action was merged in the judgment entered in the trial court, that the delay in paying that judgment is compensated for by interest thereon, and also that the prescribed penalty is too severe to impose upon a litigant while acting in good faith. Apart from the fact that the court has no right to hold the penalty which Congress saw fit to prescribe is too severe, the latter suggestion is, we think, answered by the above statement to the effect that in this case the appellant had no fair ground upon which to base its refusal to pay the seaman his wages.

Nor do we think the ordinary rule respecting the merger of a cause of action in a judgment applicable to such a case as the present; for, while the statute declares that the prescribed penalty "shall be recoverable as wages in any claim made before the court," it does not limit it to the time of the entry of the judgment of the trial court, but, on the contrary, expressly declares that the master or owner who refuses or neglects to make payment of the seaman's wages in the manner therein specifically prescribed "without sufficient cause shall pay to the seaman a sum equal to one day's pay for each and every day during which payment is delayed beyond the respective periods."

Certainly, by appealing from the judgment of the court of first instance and procuring a stay of that judgment, the appellant as effectively delayed the payment of the wages adjudged to be due the seaman as it did by refusing without sufficient cause to pay him upon his discharge, and we can see no valid ground for holding that a court of

admiralty, in disposing of a cause so brought before it, may not give effect to the express requirement of the statute by directing the court below to enter the appropriate judgment upon the return of the cause to it. Congress did not see fit to allow the legal interest on the judgment first entered by the trial court to compensate the seaman for the delay in the payment of his wages in the prescribed circumstances, but expressly declared that he should be allowed "a sum equal to one day's pay for each and every day during which payment is" so delayed.

It results that the judgment of the court below was correct when rendered, but, as under the provisions of section 4529 of the Revised Statutes the appellee is entitled to one day's pay for every day since October 1, 1913, in addition to the amount due him for services, the cause is remanded to the court below, with directions to enter a decree in accordance with the views above expressed, with costs to the appellee in both courts.

DIETRICH, District Judge (dissenting). I am unable to concur in that part of the opinion in which it is held that the lower court should now enlarge the original decree by including therein the statutory penalty for the time which has elapsed since the decree was entered. I fail to see any substantial reason for concluding that the plaintiff's cause of action was not merged in and swallowed up by the decree, as is the general rule. United States v. Price, 50 U. S. (9 How.) 83, 93, 13 L. Ed. 56.

As to the severity of the penalty, there is, of course, no thought of suggesting that a court can properly decline to enforce a statute because it may seem to be unnecessarily harsh. But the question being, what is the meaning of the statute, what penalty Congress really intended to impose, it is deemed proper to consider the effect of the law in practical operation, for if, under one of two possible constructions it will operate with extreme and unnecessary severity, and under the other it will operate reasonably and yet accomplish the purpose for which it was enacted, other considerations being equal, I conceive it to be the duty of the court to adopt the latter meaning. What will be the result of establishing the rule now laid down by the court? The case is itself fairly illustrative: It is not often that an appeal can be heard and decided so quickly, and yet upon an obligation of $30, penalties amounting to approximately $800 have already accrued during the pendency of the appeal. The right of appeal is thus virtually denied, for no sensible litigant of ordinary resources would attempt to assert it in the face of such hazards. The appeal here is prosecuted in good faith. True, we have found that there was no fair ground originally for declining to pay the appellee's claim; but that does not necessarily imply bad faith or a willingness to oppress. It is a case of bad judgment rather than of bad faith. Besides, the rightfulness of its refusal to pay the claim is not the only question which appellant brings to this court. It also presents here, as is its right, the question of the correctness of the lower court's holding that the case falls within the provisions of section 4529 of the Revised Statutes, imposing the penalty complained of; and this I conceive to be a fair question, the answer to which is not free from serious doubt.

It is to be borne in mind that the law is rendered harsh, not by interpreting it in the light of a general principle, that is, the principle of merger, with which it may be assumed Congress was familiar, but by holding that it is exempt from the operation thereof, and is an exception to the rule. No reason is assigned for such a course, except that which may be found in a rigidly literal reading of the provision. But why should we insist that the strict letter prevail over the presumption that Congress intended that in the administration of the law regard should be had for the general principles under which other laws of like character are administered. A decision directly in point is that of Massachusetts v. Western Union Telegraph Co., 141 U. S. 40, 46, 11 Sup. Ct. 889, 35 L. Ed. 628. A statute of Massachusetts imposed a penalty for the nonpayment of taxes "at the rate of twelve per cent. per annum until the same [the taxes] are paid." There, as here, by the strict terms of the law there was to be a continuous accumulation of the penalty until the principal obligation was discharged. But the court said:

"The penal rate of 12 per cent. interest ran only until the amount to be recovered was judicially ascertained. Since the date of the decree below, interest is to be computed on the lawful amount of the decree at the rate of 6 per cent. only."

Upon principle I cannot see how that case can be distinguished from this, and it should, I think, be held to be conclusive.

Appreciating the strain, the appellee suggests that, this being an admiralty case, the trial here is de novo, and that final decree is in this court; but this is an erroneous assumption. Benedict's Admiralty (4th Ed.) § 566. As appears from the opinion, there has been no new trial, nor will any decree be entered here.

CONNOR et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 4, 1914.)

No. 2240.

1. EQUITY (§ 409*)—REFERENCE BY CONSENT—FINDINGS OF MASTER.

When, pursuant to a stipulation of the parties, all of the issues in a suit in equity are referred to a master, to take the proofs and report the same, together with his findings, his findings of fact are not subject to be set aside and disregarded at the mere discretion of the court; but so far as a finding depends on conflicting testimony or on the credibility of witnesses, or so far as there is any competent testimony consistent with a finding, it must be treated as unassailable. Nor may the court disregard such findings, and proceed to make findings of its own, because the master failed to make findings on all the issues, or for other insufficiency in his report; but in such case the cause should be resubmitted, with proper instructions.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 904, 920–923; Dec. Dig. § 409.*]

2. PUBLIC LANDS (§ 120*)—SUIT FOR CANCELLATION OF PATENT FOR FRAUD—MEASURE OF PROOF REQUIRED.

To authorize a court to set aside and cancel a patent to lands issued by the United States on the ground of fraud, the evidence must be clear,

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

unequivocal, and convincing, and it cannot be done on a bare preponderance of evidence, which leaves the issue of fraud in doubt. Especially should such rule be observed where the patent sought to be canceled is one for a desert entry, and, under Act March 3, 1877, c. 107, 19 Stat. 377, to which section 7 was added by Act March 3, 1891, c. 561, § 2, 26 Stat. 1096 (U. S. Comp. St. 1901, p. 1550), the result of cancellation would also be a forfeiture of the amount paid for the land.

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

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

Evidence considered, and *held* insufficient to warrant the cancellation of patents to desert lands on the ground that the testimony on which final proof was made was false and fraudulent with respect to the reclamation of the land and the quantity of water owned or appropriated by the entrymen for irrigation purposes.

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

4. PUBLIC LANDS (§ 37*)—DESERT LAND ACT—CONSTRUCTION—AMOUNT OF IRRIGATION REQUIRED.

Desert Land Act March 3, 1877, c. 107, 19 Stat. 377, as amended by Act March 3, 1891, c. 561, § 2, 26 Stat. 1096 (U. S. Comp. St. 1901, p. 1548), does not require an entryman to irrigate or conduct water upon such parts of the tract entered as are incapable of profitable cultivation, nor beyond the portion cultivated, which must, however, equal one-eighth of the entire tract.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 81; Dec. Dig. § 37.*]

Appeals from the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Suits in equity by the United States against William Connor and against Ida Connor (consolidated). Decrees for the United States, and defendants appeal. Reversed.

On the 30th day of June, 1899, the appellant Ida Connor, proceeding under and by virtue of the provisions of the act of Congress of March 3, 1877, entitled "An act to provide for the sale of desert lands in certain states and territories," as amended by the act of Congress approved March 3, 1891, filed in the land office of the United States at Helena, Mont., her declaration of intention to reclaim, by conducting water upon the same, the S. ½ of section 20, township 15 N., range 4 W., of the principal meridian of the state of Montana, containing 320 acres. At the time of the filing of her declaration of intention to reclaim, the appellant paid to the receiver of the land office the sum of $80, being at the rate of 25 cents per acre for the whole of the land filed upon and entered by her. The lands passed to final proof on August 22, 1901, at which time, pursuant to law, the appellant filed with the register of the land office her deposition, together with the depositions of two witnesses, in each of which it was alleged and set forth, among other things, that the entry woman owned and controlled and had a clear right to the use of water sufficient to irrigate the whole of the land entered upon, and for keeping the same permanently irrigated; that the water was obtained from three springs and their branches on and adjoining the lands, and had been acquired by means of appropriation of 100 inches and maintained by actual use; that from the personal knowledge of each of the affiants water had been conducted upon the land so as to produce a crop of hay thereon; that for the purpose of irrigating and reclaiming the land the appellant had constructed four main ditches, each about 2 feet wide and 2 feet deep; that the amount expended in the construction of these ditches and in the reclamation of the

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

land was over $3 per acre; that each of the affiants many times during the irrigating seasons of 1901 and 1902 had seen water distributed by means of said ditches over all of the said lands in each legal subdivision thereof, and that during the irrigating season of 1900 each of the affiants had seen water distributed by means of ditches over a large part of the lands. On March 2, 1908, the appellant paid to the receiver of the United States land office the final payment for the lands entered upon by her, amounting to the sum of $320, and thereafter, and on June 25, 1908, a patent covering the land was issued to the appellant by the United States of America.

On June 30, 1899, one William Thompson, proceeding under and by virtue of the provisions of the aforementioned act of Congress of March 3, 1877, entitled "An act to provide for the sale of desert lands in certain states and territories," as amended by the act of Congress approved March 3, 1891, filed in the land office of the United States at Helena, Mont., his declaration of intention to reclaim, by conducting water upon the same, the N. W. ¼ of section 20, township 15 N., range 4 W., of the principal meridian of the state of Montana, containing 160 acres. At the time of the filing of the declaration of intention, the applicant paid to the receiver of the United States land office the sum of $40, being at the rate of 25 cents per acre for the whole of the land so filed upon and entered by him. On July 1, 1901, Thompson, by a certain instrument in writing of that date, transferred and assigned all his right, title, and interest in and to the land so entered upon by him to the appellant herein, William Connor, which assignment was thereafter filed in the United States land office at Helena, Mont., together with an affidavit of the assignee that he was qualified to take the land under the desert land laws of the United States. The land passed to final proof on August 22, 1901, at which time, pursuant to law, the appellant William Connor filed with the register of the land office his deposition, together with the depositions of two witnesses, in each of which it was alleged, among other things, that the appellant owned, controlled, and had a clear right to the use of water sufficient to irrigate the whole of the lands and keep the same permanently irrigated; that the water was obtained from three springs and their branches, and had been acquired by means of appropriation of 100 inches and maintained by actual use; that from the personal knowledge of each of the affiants water had been conducted upon all of the land so as to produce agricultural crops or paying crops of hay thereon; that for the purpose of irrigating and reclaiming the lands the appellant had constructed four main ditches, each about 2 feet wide and 2 feet deep, and that the amount expended in the construction of these ditches and in the reclamation of the lands was over $3 per acre; that each of the affiants, many times during the irrigating seasons of 1900 and 1901, had seen water distributed by means of said ditches over all of the land and each legal subdivision thereof. On March 2, 1908, the appellant paid to the receiver of the United States land office the final payment for the land so entered by him, amounting to the sum of $160, and thereafter, and on June 25, 1908, a patent covering the land was issued to the appellant by the United States of America.

The bills of complaint filed against the appellants by the Attorney General of the United States in August, 1909, are in all substantial respects identical. It is in each alleged that the deposition of each of the appellants, and the deposition of each of their witnesses, made, entered, and filed with the register of the United States land office at the time of the making of final proof on the lands involved in these suits, on August 22, 1901, were false and fraudulent, and were made and filed with intent to deceive the officers of the United States, and fraudulently to obtain title to the lands and by fraud and deceit to procure a United States patent therefor, by means of false and fraudulent statements and testimony contained in the depositions and in each of them, in this: That neither of the appellants owned nor controlled, nor had any clear right, or any right, to the use of water sufficient to irrigate the whole or any part of the lands entered upon by them, respectively, and for keeping the same, or any part thereof, permanently irrigated. at the time of the making of final proof, or at any other time. or at all; that water had not been and never was conducted upon the lands, or any part thereof, from

springs and their branches on and adjoining the land, or any other source of supply, nor had the same, or any part thereof, been irrigated or reclaimed by the appellants; that the appellants had not constructed and did not construct four main ditches, each about 2 feet wide and 2 feet deep, or any other ditch or ditches, of any length, size, or dimension; that the appellants had not expended in the cultivation and reclamation of the land the sum of $3 per acre, or any other amount; that the appellants did not during the irrigating seasons of 1900, 1901, and 1902, or at any other time, or at all, see water distributed through and by means of ditches over all the land in each legal subdivision, or any part thereof. The bills further alleged that the statements so made by the appellants and their witnesses, contained in the depositions and testimony filed at the time of final proof, and which are specifically set forth and contained in the bills, were utterly false, fraudulent, and untrue, as the appellants then and there well knew.

The appellants, in the separate answers filed by them to the bills of complaint, denied specifically each and all of the material allegations of the bills, and in answer to the allegations of fraud therein contained alleged that the depositions filed at the time of the making of final proof were made by them in good faith, believing that the statements therein contained were true in substance, and that at the time the same were made they did own and control water sufficient to irrigate their lands and to keep the same permanently irrigated, so far as the same was necessary and practicable, and that the statements that from their own personal knowledge water had been conducted upon the lands so as to produce crops thereon were true; that likewise the statement that they had constructed four main ditches, in the manner described in the depositions, as well as the other statements in the depositions contained, were true; and that the appellants had at all times complied with the law in securing title to the desert lands so reclaimed by them. Pursuant to stipulation of the attorneys for the respective parties, an order was entered in each of the cases that all and singular the issues in each case be referred to a master in chancery, to take the proofs therein and report the same, together with his findings, to the court. A further stipulation was entered into providing that the cases be consolidated and tried as one case.

The master, by his report, found that the allegations of the bill of complaint in each of the cases were not sustained by the evidence, and that, as a conclusion, both of the bills should be dismissed for failure of proof, and he so recommended. Exceptions to the report were thereupon filed by the United States attorney, the exceptions being thereafter sustained by the court below; the judge thereof concluding that the entries and patents involved in the suits were procured by deceit and fraud of the appellants, and that the complainant was entitled to the decrees prayed for in the bills. Thereafter decrees were entered in the court below, wherein it was ordered and adjudged that the patents theretofore issued by the United States of America to the appellants be canceled, annulled, and held for naught, and vacated and set aside, and, further, that the appellants had no right, title, or interest whatever in or to the tracts of land involved in the suits, or any part or parcel thereof. From these decrees the appellants appealed to this court.

E. A. Carleton, of Helena, Mont., for appellants.

James W. Freeman, U. S Atty., of Great Falls, Mont., and S. C. Ford, Asst. U. S. Atty., of Helena, Mont.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] 1. A preliminary question arises in these suits with respect to certain assignments of error of the appellants wherein it is alleged that it was error on the part of the trial court to refuse to approve the report of the master in chancery, and to order the bills dismissed as the

master recommended, and, further, that the decrees were erroneous, in that, the causes having been tried before the master under a consent agreement, whereby the master was to try all of the issues and report the same to the court, the District Court had no jurisdiction in the matter, except to examine the testimony and see if there was any evidence to support the master's findings, and the testimony being contradictory, and there being evidence in the record to support the master's findings, the only power or jurisdiction the District Court had was to approve these findings and order the bills dismissed.

The stipulation entered into in each of the causes, between counsel for the respective parties, provided that:

"The issues in said matter are referred to said master, and after the testimony and briefs of the respective parties are filed said master shall make his report in accordance with the rules of practice of said court and district."

Pursuant to the stipulation an order was entered by the clerk in each case, which provided that:

"All and singular the issues in the above-entitled case be and the same are hereby referred to Oliver T. Crane, Esq., standing master in chancery of this court, to take the proofs therein and to report the same, together with his findings, to this court."

It is apparent from this stipulation and order that it was the intention of the parties that the master in chancery should exercise powers greater than those which he would have been authorized to exercise upon an ordinary reference, wherein his duties would have been merely to take the testimony in the case and return the same into court. In the latter case, any information which he might communicate by his findings, upon the evidence presented to him, would have been merely advisory to the court, which it might accept and act upon or disregard in whole or in part, according to its own judgment as to the weight of the evidence. Street on Federal Equity Practice, § 1509. But even in cases in which an ordinary reference is made, the rule is that a report on disputed questions of fact will not be set aside or modified, unless the error is entirely plain, or unless it appears to be palpably wrong by the most persuasive weight of evidence. Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; Fordyce v. Omaha, etc., Ry. Co. (C. C.) 145 Fed. 544.

In the present case, however, it was ordered that all and singular the issues be referred to the master in chancery to take the proofs therein and to report the same, together with his findings, to the court; and we are of opinion that the reference clearly falls within the rule laid down by Mr. Justice Field in the case of Kimberly v. Arms, 129 U. S. 512, 524, 9 Sup. Ct. 355, 359 (32 L. Ed. 764). In that case the learned justice said:

"When the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, and report his findings, both of fact and of law, and such reference is entered as a rule of the court, the master is clothed with very different powers from those which he exercises upon ordinary references, without such consent; and his determinations are not subject to be set aside and disregarded at the mere discretion of the court. A reference by consent of parties of an entire case for the determination of all its issues, though not strictly a submission of the controversy to

arbitration—a proceeding which is governed by special rules—is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise. * * * To disregard the findings and treat the report as a mere presentation of the testimony is to defeat, as we conceive, the purpose of the reference and disregard the express stipulation of the parties."

And the Supreme Court in that case accordingly held that the lower court had failed to give to the findings of the master the weight to which they were entitled, and that they should have been treated as so far correct and binding as not to be disturbed, unless clearly in conflict with the weight of the evidence upon which they were made.

In Davis v. Schwartz, 155 U. S. 636, 15 Sup. Ct. 237, 39 L. Ed. 289, Mr. Justice Brown, delivering the opinion of the Supreme Court of the United States, said:

"As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions * * * thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a Circuit Court in a case tried by the court under Rev. St. § 649 [U. S. Comp. St. 1901, p. 525], or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable. Wiscart v. Dauchy, 3 Dall. 321 [1 L. Ed. 619]; Bond v. Brown, 12 How. 254 [13 L. Ed. 977]; Graham v. Bayne, 18 How. 60, 62 [15 L. Ed. 265]; Norris v. Jackson, 9 Wall. 125 [19 L. Ed. 608]; Insurance Co. v. Folsom, 18 Wall. 237, 249 [21 L. Ed. 827]; The Abbotsford, 98 U. S. 440 [25 L. Ed. 168]. As there is nothing to show that the findings of fact were unsupported by the evidence, we think they must be treated as conclusive. To the same effect are Crawford v. Neal, 144 U. S. 585, 596 [12 Sup. Ct. 759, 36 L. Ed. 552]; Furrer v. Ferris, 145 U. S. 132 [12 Sup. Ct. 821, 36 L. Ed. 649]."

See, also, Sandford v. Embry, 151 Fed. 983, 81 C. C. A. 167; Chauncey v. Dyke Bros., 119 Fed. 21, 55 C. C. A. 579; Murphy v. Southern Ry. Co., 115 Fed. 259, 53 C. C. A. 477; Walker v. Kinnare, 76 Fed. 101, 22 C. C. A. 75; Third National Bank of Philadelphia v. National Bank, 86 Fed. 852, 30 C. C. A. 436.

The master in chancery to whom the issues in the present case were referred reached the conclusion that the evidence in the two cases failed to substantiate the allegations of the bills of complaint; that at most it only showed that through stupidity or ignorance there may have been and probably was a slightly erroneous estimating of the amount and value of the reclamation work and improvements contained in the final proof depositions; that possibly as a fact the appellants in some particulars fell somewhat short of fulfilling all the requirements of the act of Congress, and the regulations of the Department of the Interior, to strictly entitle them to receive patents for the land; and that the testimony fell far short of proving that any er-

ror or misrepresentation was intentionally and knowingly made on that subject by the defendants or their witnesses, with the intent and purpose to deceive the officers of the United States, and fraudulently to obtain patents to the land. He therefore found that the allegations of the bills of complaint were not sustained by the evidence, and, as a conclusion, that both of said bills should be dismissed for failure of proof.

But it appears from the memorandum opinion filed in the case that the learned judge of the court below, although mindful of the rule in reference to the consideration to be given to a master's report where the issues are referred to him by agreement of the parties, was of the opinion that the master's report in this case disclosed its errors, and that it then became the duty of the court to itself examine the evidence and make findings and conclusions of its own. In the opinion of the court below the errors disclosed in the master's report were the following: (1) The master proceeded on the theory that the complainant was under the obligation to prove to the most minute particular every allegation of fraud set out in the bills, and, not having done so, he made his findings against it. (2) The report did not contain specific findings on each issue in the suits.

The stipulations of the parties and the orders of the court had created a special tribunal for the trial of the issues in these cases, subject to the direction of the court as to procedure. This the parties had the right to do, and if in the opinion of the court the master had failed to perform his duty with respect to the findings upon the material and substantial, as distinguished from the literal and immaterial, allegations of the bills of complaint, the proper practice was to order the causes resubmitted to the master with instructions to report findings upon the material and substantial allegations of the bills of complaint in accordance with the stipulations and orders of reference. The objection that the report did not contain specific findings on each issue appears to be based upon the failure of the master to find that certain allegations of the bills of complaint were true. These allegations of the bills of complaint were admitted by the answers to be true, and were, therefore, no longer issues in the cases. But if for the sake of fullness and completeness in the report findings upon such admitted allegations were deemed necessary, a re-reference for that purpose would have cured that defect in the report.

The appellants were entitled to the findings of the master upon the issues in accordance with the terms of the stipulations and the orders of reference, and if the master failed to report in accordance with such stipulations and orders of reference, and no such report was required by the court, it had the effect of depriving the appellants of a right secured to them by the stipulations entered into with the appellee. The remedy was then for the court to have ordered that the master report in accordance with the terms of the orders of reference, and no technical objection to the report should have been allowed to prevail over appellants' right under the stipulations. The attorney for the complainant did in fact move the court for an order of re-reference, but this motion was made secondary to an alternative motion first made to

permit the complainant to file exceptions to the report in the court. The court allowed this last-mentioned motion, and set aside the report, and thereupon proceeded to consider and determine the case as though no report had been made by the master. This we think was error. The causes should have been either re-referred for an amended report, or the report then before the court should have been considered on its merits with respect to material and substantial issues in accordance with the rule laid down in Kimberly v. Arms and Davis v. Schwartz, supra.

But disregarding the feature of informality, and certain immaterial and unnecessary expressions in the master's report concerning the evidence, we think the findings should have been sustained.

[2] 2. In a number of decisions the Supreme Court of the United States has laid down inflexible rules respecting the weight and character of proof necessary to be adduced before a patent issued by the United States of America can be ordered delivered up and canceled on the ground of fraud. Probably the leading case on the subject is that of the Maxwell Land Grant, 121 U. S. 325, 381, 7 Sup. Ct. 1029 (30 L. Ed. 949). In that case Mr. Justice Miller said:

"We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence, which leaves the issue in doubt. If the proposition, as thus laid down in the cases cited, is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In this class of cases, the respect due to a patent, the presumptions that all the preceding steps required by the law have been observed before its issue, the immense importance and necessity of the stability of titles dependent upon these official instruments, demand that the effort to set them aside, to annul them, or to correct mistakes in them should only be successful when the allegations on which this is attempted are clearly stated and fully sustained by proof. It is not to be admitted that the titles by which so much property in this country and so many rights are held, purporting to emanate from the authoritative action of the officers of the government, and, as in this case, under the seal and signature of the President of the United States himself, shall be dependent upon the hazard of successful resistance to the whims and caprices of every person who chooses to attack them in a court of justice; but it should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

By a long line of decisions we find that this rule has been uniformly adhered to in the numerous suits instituted by the government to set aside its patents on the ground of fraud and misrepresentation. In the late case of United States v. Stinson, 197 U. S. 205, 25 Sup. Ct. 426, 49 L. Ed. 724, Mr. Justice Brewer stated the rule as follows:

"The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. 'It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.' Maxwell Land Grant Case, 121 U. S. 325 [7 Sup. Ct. 1015, 30 L.

Ed. 949]; United States v. Iron Silver Mining Co., 128 U. S. 673, 677 [9 Sup. Ct. 195, 32 L. Ed. 571]; United States v. Des Moines, etc., Co., 142 U. S. 510 [12 Sup. Ct. 308, 35 L. Ed. 1099]."

There is another feature in this case that should not be overlooked. The complainant not only seeks to cancel the patents and forfeit the lands which had been in the possession of the appellants for more than ten years when the complaints were filed, but the effect of such a decree, under section 7 of the act of March 3, 1891 (26 Stat. 1098, c. 561 [U. S. Comp. St. 1901, p. 1521]), will be the forfeiture to the government of the amount paid by the appellants for such land, namely, $200 in one case, and $400 in the other case, and in addition all the improvements placed upon the land by the appellants. In United States v. Budd, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384, the Supreme Court of the United States, speaking through Mr. Justice Brewer considered—

"the hardship of such a result, so different from that which is always enforced in suits between individuals, makes it imperative that no decree should pass against the defendants unless the wrong be clearly and fully established."

Measured by this clearly defined rule, we are not prepared to agree with the judge of the court below that the evidence in the present cases clearly and convincingly sustained the charges of the bills, and that the alleged wrongs were clearly and fully established.

[3] The allegations of fraud in the final proof testimony and depositions of the appellants and their witnesses, set forth in the bills, may be summarized under five general heads: (a) That the appellants did not own and did not control, and had not a clear right, or any right, to the use of water sufficient to irrigate the whole or any part of the lands, and for keeping the same, or any part thereof, permanently irrigated. (b) That water had not been conducted upon the lands, or any part thereof, from springs and their branches on and adjoining the lands, or any other source of supply; nor had the lands been reclaimed by the appellants. (c) That the appellants had not constructed ditches upon the land. (d) That the appellants had not expended in the cultivation and reclamation of the lands the sum of $3 per acre, or any amount. (e) That the lands had not been irrigated during the seasons of 1900, 1901, and 1902.

The testimony in the case is very voluminous, and the bounds of an opinion do not permit us to set it forth at any considerable length. We can only direct attention to portions of the testimony which we think clearly and substantially refute the allegations of fraud contained in the complainant's bills.

Leo Garrow, a witness for the appellants, testified that he lived about a mile and a half from the appellants; that the land that could be irrigated on the claim of William Connor was 75 acres; that he had seen springs on that entry, and also several irrigation ditches; that he had also observed on that claim some reservoirs, or remnants of reservoirs, that had been washed out; that the soil on the William Connor claim was a black loam, capable of raising crops, if irrigated; that it did not need any irrigating in the year 1907, for the reason that

the rainfall was sufficient to irrigate it; that he had seen the appellants irrigating; that he had seen them taking water from a reservoir, or something of that kind, and spreading it over the land; that he had also noticed some ditches on the Ida Connor claim; that he had seen some hay cut on one or the other of these two claims; and that he had seen grass growing on both of them as the result of irrigation.

Eva Connor, a daughter of the appellants, testified that she knew of a reservoir on her father's claim; that it was built of dirt and rocks and timber; that she should judge that the reservoir was about 20 or 25 feet across; that it was washed out by the high water of 1907 and 1908; that she had also noticed four ditches on her father's claim; that she had seen water in those ditches from 1900 up until 1907; that she had seen water running over the ground from those ditches on her father's claim from 1900 up until 1907; that the appellants had gotten a good crop of hay from the claim in 1900, and every year from that time up until the present time; that she had seen hay stacked on her father's claim during each of those years; that the crops of hay were raised by irrigation. The witness further testified that she had seen three reservoirs on her mother's claim, and also four ditches; that she had seen water in them; that she had seen grass growing on her mother's claim, produced by irrigation, from 1900 to 1907; that she knew that hay was cut on her mother's claim every year from 1900 up until the present time; and that the hay was produced by irrigation.

Wesley Gibbons, a witness on behalf of the appellants, testified that he had known the appellants for 15 years; that out of the 160 acres in the N. W. ¼ of the section, known as the William Connor claim, he was pretty sure that at least 20 acres could be cultivated and plowed. This witness also testified that he had seen ditches on the land on both claims of the appellants since the year 1901.

James G. Allen, a witness for the appellants, testified that he resided on the William Connor section and about four miles from the home of the appellants: that he had lived there for 11 years; that from 60 to 75 acres of the Ida Connor claim were susceptible of irrigation; that it required 2 inches of water to the acre in that section of the country for irrigating purposes for hay land, on land similar to the Connor entries; that that was the usual and customary amount of water that was used in that section of the country for irrigation purposes, on land similar to the land of the appellants; that he believed the supply of water that he had seen on the Ida Connor claim was sufficient to irrigate the tillable land on that claim, so as to produce a paying crop of grain; that he had seen several springs on the William Connor claim in the years 1899, 1900, 1901, and 1902; that he had also seen two main ditches and several branches or laterals on that claim; that at some time during the years mentioned there were reservoirs on the William Connor quarter section; that he saw one on Spring creek and one in the vicinity of a big spring; that the reservoirs were about 20 feet wide, 8 feet deep, and about 200 feet long; that taking the dimensions and capacities of these two reservoirs, together with the ditches, the water supplied by them would be sufficient in ordinary seasons to irrigate the irrigable land on the William Connor

claim so as to produce a paying crop of hay; that he had seen water being distributed over the irrigable land on the William Connor claim in the years 1899, 1900, 1901, and 1902.

Maud Connor, a daughter of the appellants, testified that there were four ditches and one reservoir on her father's claim; that hay had been cut on both of the claims of the appellants ever since they had been interested in them; that she had seen hay stacked on her father's claim every year; that it was raised by irrigation and discing; that she had seen water from the ditches spread over the tillable land on her father's claim ever since 1900; that paying crops of hay had been raised on it every year by means of that irrigation. The witness further testified that she had seen four ditches and one reservoir on her mother's claim; that she knew of grass being raised on her mother's claim by means of irrigation ever since she had it; that the grass land was irrigated by the ditches; that she had seen water distributed by means of the ditches on her mother's claim over the tillable land.

Raoul Menard, a witness for the appellants, testified that he knew of two springs on the William Connor claim, and that he had seen where there was the appearance of being one reservoir; that he should judge that 70 or 75 acres of that claim could be plowed; that he had noticed three or four ditches on the claim; that he knew grass had been cut on that claim, and that he had seen it stacked there; that he thought there were two reservoir cites on the Ida Connor claim; and that probably 140 or 150 acres on the Ida Connor claim could be plowed or tilled.

Wallace Herbert Tyrrell, a witness for the appellants, testified that he had seen four ditches on the William Connor claim; that these ditches reached each one of the four 40's in that quarter section, or touched it at some point; that there was one reservoir on that claim; that he had seen water in it in 1900 and 1901; that he had also seen irrigating on that claim in 1900 and 1901; that he had seen 40 or 50 acres irrigated, with water on them, in 1901, the water being distributed by means of the ditches; that the tillable land on the William Connor claim was reclaimed by the system of irrigation which he had described; that from the system of irrigation on that claim there was water enough to irrigate the tillable land on the claim; that paying crops of hay were raised by means of irrigation from the ditches in 1900 and 1901, and that during those years hay had been cut on the William Connor claim and stacked thereon. The witness further testified that he had seen four ditches on the Ida Connor claim; that the system of irrigation which he saw on that claim would be sufficient to cover the tillable land on that claim; that he had seen 50 acres actually irrigated on the Ida Connor claim in 1900 and 1901; that grass was cut on that claim in 1900 and 1901; and that the land was irrigated in those years sufficient to produce paying crops of grass.

The appellant Ida Connor testified in her own behalf. During her testimony, and in connection therewith, there were introduced in evidence two certain notices of appropriation of water, from which it appeared that the appellant had appropriated 200 inches of water, 100 inches thereof from "southerly Spring creek" and 100 inches thereof

from "northerly Spring creek." It further appeared from the notices of appropriation of water that the purpose for which the water was claimed was for irrigating land, and for domestic, mechanical, and other useful purposes, and that the place of intended use was the S. ½ of section 20, township 15 N., range 4 W., in Lewis and Clark county, Mont., and other lands. This appellant testified that the charges of the government in its bill of complaint, with respect to false and fraudulent statements made in the affidavits of the appellants and their witnesses, concerning the irrigation of the land and the reclamation thereof, was a mistake on the part of the government; that the affidavits were true; that she did not make nor procure false affidavits for the purpose of imposing upon the land officers and fraudulently receiving a patent for the land, but that she and her husband had taken the land in good faith. The appellant further testified that there were three reservoirs on her claim and one on the claim of William Connor; that she considered the cost at about $100 each; that there was irrigating done on the claim of William Connor in the years 1901 and 1902; that she had seen hay cut and stacked on that claim during those years; that it was raised by means of irrigation; that paying crops of hay were raised on both claims during those years; that 20 acres of her husband's claim, and 40 acres of her own, might be plowed; that both she and her husband had expended $3 per acre for the total amount of acreage contained in their claims; that in her estimate of $3 per acre that had been expended on the land she had taken into consideration the ditches and the fences, but not the reservoirs, for the reason that the cost of the two former items was sufficient to make up that amount.

The appellant William Connor testified that he had expended $3 an acre and over for each acre of land on his claim; that this expenditure was for fences, ditches, and getting in water, and that he had done quite a lot of plowing, and built a reservoir, on his claim; that there was lots of water that came down from the hills, and it would stop at the reservoirs, and from the reservoirs he had ditches to run it over the land; that he had six or seven ditches on his claim; that from this system of ditches one might irrigate 40 or 50 acres; that he believed that he had irrigated every 40 of his claim, and that when he made final proof he had a ditch on every 40; that the first year he was on the place, 1900, he had an oat crop; that in 1900 and 1901, and in mostly every year since that time, he had stacked either natural hay or oat hay on his claim; that perhaps 60 or 70 acres on his place could be cultivated and plowed; that there were three reservoirs and four ditches on the claim of the appellant Ida Connor, two of the ditches being 375 yards long, one 400 yards long, and one 100 yards long, and that he built the three reservoirs on the claim of Ida Connor, and the reservoir on his own claim, in 1899 and 1900. The appellant testified that he had never tried to deceive the officers of the United States into giving him a patent for his land.

Two witnesses on behalf of the complainant, Edgar S. Foley and Henry J. Goodall, were special agents of the General Land Office authorized to examine the reclamation work on these two tracts of land,

which they did in April, 1909, and it was doubtless on their reports that these two suits were brought in August, 1909. But the question before the court was not what was the condition of the reclamation work in 1909, but what it was at the time final proof was made in August, 1901. The significance of this difference in time is made apparent by the testimony that there was a flood in this section of the country in June, 1908, which swept away substantially all of the improvements on these two tracts of land, so that the testimony of the special agents might be true as to the condition of the land in April, 1909, and not true as to its condition in August, 1901; and such seems to be the reasonable explanation of the conflict in the testimony in these cases.

In the face of such testimony, we cannot say that the presumptions in favor of appellants' patents have been overcome, that the allegations of the complaints have been proven by testimony clear, unequivocal, and convincing, and that the wrongs complained of have been clearly and fully established.

[4] 3. The act of March 3, 1877, known as the "Desert Land Act" (19 Stat. 377, c. 107 [U. S. Comp. St. 1901, p. 1548]), provides as follows:

"It shall be lawful for any citizen of the United States, or any person of requisite age 'who may be entitled to become a citizen, and who has filed his declaration to become such' and upon payment of twenty-five cents per acre, to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter. * * * Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him: Provided, that no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres which shall be in compact form."

On March 3, 1891, this act was amended (26 Stat. 1096), and there was added thereto, among others, the following section:

"Sec. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application

shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: Provided, that proof be further required of the cultivation of one-eighth of the land."

In the case of United States v. Mackintosh, 85 Fed. 333, 29 C. C. A. 176, the Circuit Court of Appeals for the Eighth Circuit had under consideration two suits the facts in which were strikingly similar to those involved in the case at bar. In these cases suits had been brought by the United States to vacate and set aside, on the ground of fraud, patents for lands entered under the Desert Land Act of March 3, 1877. The lands had been entered, and had passed to final proof, prior to the amendment of March 3, 1891. It was alleged in the bill of complaint in the Mackintosh Case (the bills in both cases were substantially the same), among other things, that at the time of final proof the claimant had testified that she owned and had a right to the use of water sufficient to irrigate the whole of the land and for keeping the same permanently irrigated, and that water had been conducted during one season upon the land so as to cover the whole thereof excepting about 10 acres; that the same had been irrigated and practically reclaimed from its desert condition; that there were ditches thereon, of a given depth and width, for conducting water, and that she had seen water distributed through the ditches. The bill further charged that the claimant had procured her witnesses at the time of making final proof to support her claim with affidavits containing substantially the facts set forth in her affidavit; and that the patent issued by the United States had been procured by the claimant through fraud, covin, and deceit in connection with the statements contained in the affidavits filed at the time of making final proof. In construing the Desert Land Act of March 3, 1877, the court said:

"In the search after fraud, the inquiry must be limited to such matters as the statute requires to be established in making the final proof. This proof is 'satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid.' 'The manner aforesaid' evidently refers back to the first clause, and to the words 'by conducting water upon the same.' This statute, of course, in all its provisions, should receive such construction as will reasonably carry out and effectuate the legislative intent. It was the manifest purpose of Congress to hold out to the citizens of the United States an inducement to reclaim the waste and desert lands of the public domain, and thus render them subservient to the uses of husbandry by process of irrigation. This was to be accomplished by such a system of ditches as would carry to the subdivisions of the land, capable of being reached by the surface flow, a supply of water such as, when let out of the ditches by drawgates or smaller ditches, might spread over the accessible parts, and stimulate vegetable life. If the main ditches were thus constructed, with the acquired adequate supply of water to irrigate the lands for the purpose of cultivation in the ordinary method of carrying it out over the surface of the ground, we think the reclamation contemplated by the statute was accomplished, without showing that this appropriation was followed by actual use and cultivation. This seems to be in accord with recent rulings of the land office department. Dickinson v. Auerbach, 18 Land Dec. Dep. Int.

16; Instructions of Secretary Teller to Commissioner McFarlan, 3 Land Dec. Dep. Int. 385. The courts, in dealing with the rights of settlers and locators under these land laws, have regard to the rulings and regulations of the department, when they do not contravene the letter and spirit of the statute. Orchard v. Alexander, 157 U. S. 383, 15 Sup. Ct. 635 [39 L. Ed. 737]."

The Circuit Court had dismissed both bills. The Circuit Court of Appeals affirmed the decrees in both cases. It is true that in the present case there must be considered in connection with the original act of March 3, 1877, the amendment of March 3, 1891. The act, as thus amended, has never been construed by the courts, but in the Case of Alonzo B. Cole, 38 Land Dec. Dep. Int. 420, the Secretary of the Interior, after quoting from the case of United States v. Mackintosh, supra, said:

"There is nothing contained in the amendatory act of March 3, 1891, which requires a character of reclamation different from that required by the original act, except that under the amendment an expenditure of $3 per acre must be shown, and one-eighth of the land embraced in the entry must be cultivated and so shown in final proof. * * * Cultivation of desert land without actual irrigation would be a useless proceeding, and inasmuch as the cultivation of the amount stated is required, it is also necessary that this area must have been actually irrigated by placing water upon it prior to final proof. Beyond this the rule should be as given in the court decision above quoted. Water in the arid regions is a valuable commodity, and its waste by the irrigation of lands unprepared for any agricultural use should not be required as a mere matter of proof that the lands can be watered from the system constructed. As a general rule, water rights in the Western states extend only to the amount of water 'beneficially used.' In fact, the Desert Land Act itself undertakes to limit the right to use water to the amount 'necessarily used'; and as the act requires only one-eighth of the land to be cultivated, prior to proof, and if no more than this amount be cultivated, it appears, generally speaking, that the flowing of water over the remaining portion would be unnecessary waste."

There is ample testimony tending to show that the irrigated and cultivated land on the claim of each of the appellants in this case exceeded the amount required by the act of Congress as amended.

The decrees of the court below are reversed, with directions to confirm the report of the master and dismiss the bills of complaint.

UNION CENT. LIFE INS. CO. OF CINCINNATI, OHIO, et al. v. DRAKE.

DRAKE v. BURGOYNE et al.

(Circuit Court of Appeals, Eighth Circuit. April 16, 1914.)

Nos. 4003, 4005.

(Syllabus by the Court.)

1. SUBROGATION (§ 17*)—RIGHTS OF MORTGAGEE—PAYMENT OF PRIOR LIEN.

Where money is lent in reliance upon an express promise and representation or contract of the mortgagor that it shall be used to discharge existing incumbrances upon the borrower's property and that the lender is to be secured by a first lien upon that property, and by reason of the breach of the agreement or the making of the representation false by the borrower it becomes necessary for the lender to pay the existing in-

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

cumbrances in order to make his mortgage a first lien, and he does pay them and cause them to be released, he has the right in equity to subrogation to the rights of the holders of those incumbrances as against the borrower or his assignee in bankruptcy, or any other party who has not been induced to change his relation to the mortgaged property to his injury in reliance upon the releases.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 44–46, 59, 91; Dec. Dig. § 17.*

Subrogation to rights of mortgagees, see note to Rachal v. Smith, 42 C. C. A. 304.]

2. EQUITY (§ 65*)—BAR TO RELIEF—UNCONSCIONABLE ACTS.

One who has been guilty of bad faith, fraud, or any unconscionable act in the transaction which forms the basis of his claim is entitled to no relief in equity on account of the transaction. "He who has done iniquity cannot have equity."

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185–187; Dec. Dig. § 65.*]

3. JUDGMENT (§ 713*)—RES JUDICATA—SECOND SUIT.

When the second suit is upon the same cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the former.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234–1237, 1239, 1241, 1247; Dec. Dig. § 713.*]

4. JUDGMENT (§ 713*)—ESTOPPEL—SECOND SUIT.

When the second suit is upon a different cause of action but between the same parties as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action, but it is not conclusive relative to other matters which might have been, but were not, litigated or decided.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1234–1237, 1239, 1241, 1247; Dec. Dig. § 713.*]

5. JUDGMENT (§ 951*)—ESTOPPEL—IDENTITY—BURDEN OF PROOF.

Where the record is such that there is or may be a material issue, question, or matter in the second suit upon a different cause of action, which may not have been raised, litigated, and decided in the former action, the judgment therein does not constitute an estoppel from litigating this issue, question, or matter, unless by pleading or proof the party asserting the estoppel establishes the fact that the issue, question, or matter in dispute was actually and necessarily litigated and determined in the former suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1808–1812; Dec. Dig. § 951.*]

6. JUDGMENT (§ 725*)—ESTOPPEL—IDENTITY OF CAUSES.

The true test of the identity of causes of action is the identity of the facts essential to their maintenance.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1255–1257; Dec. Dig. § 725.*]

7. ACTION (§ 53*)—SPLITTING CAUSES OF ACTION—LIENS.

The rules that one seeking to enforce a claim in court must present to it all his grounds for the judgment or decree he seeks or forfeit the right to use them thereafter, and that he may not split his cause of action and present it piecemeal, does not require him to present in a single suit distinct causes of action each of which would authorize independent relief, though they exist at the same time, might be considered together and relate to the same property.

It does not require a plaintiff who has separate liens upon the same

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

real estate each of which would authorize by itself independent relief to present more than one of them in a single suit, although they exist at the same time and might be considered together.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549–551, 553–623; Dec. Dig. § 53.*]

8. ESTOPPEL (§ 68*)—CHANGE OF CONTENTION—APPLICATION OF DOCTRINE.

The rule that where a defendant has given a specific reason for his refusal to perform his contract or discharge his duty he may not, after suit is brought to compel performance, change his position and defeat the suit upon another ground, is inapplicable to estop a plaintiff who is defeated on one of several independent causes of action from prosecuting the others or to one who has a choice of remedies for a wrong.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165–169; Dec. Dig. § 68.*]

9. ELECTION OF REMEDIES (§§ 5, 11*)—NECESSITY FOR ELECTION—CAUSES OF ACTION—PURSUIT OF WRONG REMEDY.

One may prosecute seriatim or simultaneously consistent independent causes of action or remedies for a wrong until full satisfaction is secured.

And one who is in doubt which of two inconsistent causes of action or remedies for a wrong is the right one may pursue both until he recovers full satisfaction, and, in the absence of facts constituting an equitable estoppel, his pursuit of a wrong remedy or a defective cause of action to defeat will not estop him from subsequently prosecuting the right remedy to victory.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. §§ 6, 14; Dec. Dig. §§ 5, 11.*

Validity and finality of election of remedy as affected by mistake, see note to Rankin v. Tygard, 119 C. C. A. 603.]

10. EQUITY (§ 423*)—DECREE—CONDITIONS TO RELIEF.

A court of equity may, in a case where the rules and principles of equity demand it, condition its grant of relief sought by the plaintiff with the enforcement of a claim or equity held by a defendant which by reason of the statute of limitations, an adjudication, or otherwise, the latter could not enforce in any other way.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 986–990, 992–998, 1009–1014; Dec. Dig. § 423.*]

11. JUDGMENT (§ 585*)—ESTOPPEL—LIENS.

A. had three liens on a tract of land, one by subrogation to the lien of the first mortgagee, one by a second mortgage, and one by a third mortgage. He brought suit to foreclose the third mortgage, and his suit was dismissed on the merits because that mortgage evidenced a voidable preference under the bankruptcy law.

Held, the decree of dismissal of the suit upon the third lien did not render the causes of action on his other liens res adjudicata nor estop him from prosecuting them to judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062–1064, 1067, 1073, 1084, 1085, 1092–1095, 1132; Dec. Dig. § 585.*]

12. BANKRUPTCY (§ 311*)—ALLOWANCE OF CLAIM—ESTOPPEL.

A creditor of a bankrupt who in good faith has received and retained a voidable preference until he is deprived of it by the judgments of the courts at the suit of the trustee has the right thereafter to prove the bankrupt's debt to him as a general creditor, to have his claim allowed, and to receive from the bankrupt's estate the same dividends as other general creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497–500; Dec. Dig. § 311.*]

Appeal from the District Court of the United States for the District of Nebraska; Wm. H. Munger, Judge.

Suit by Royal P. Drake, as trustee in bankruptcy of the estate of Patrick E. McKillip against Harry L. Burgoyne and another. From the decree, both parties appeal. Reversed and remanded.

See, also, Burgoyne v. McKillip, 182 Fed. 452, 104 C. C. A. 590; 31 Sup. Ct. 718, 220 U. S. 604, 55 L. Ed. 605.

These are appeals from a decree granting to a second mortgagee who paid prior mortgages, subrogation to the rights of the prior mortgagee as against the mortgagor, and denying a creditor deprived of a voidable preference permission to prove his claim as a general creditor. A statement of the facts is necessary to a clear understanding of the questions of law in controversy. On August 12, 1907, Patrick E. McKillip owned three tracts of land of 40 acres each in Boone county, Neb. Upon each of these forties there was a separate mortgage of $3,200 made by McKillip. On that day he conveyed these tracts to John T. Steffes for his own use and benefit, and Steffes held them in trust for McKillip without any beneficiary interest in them himself. McKillip was a member of the firm of McKillip & Swallow, agents of the Union Central Life Insurance Company, to procure applications for loans on mortgages upon land and to receive from the company and to apply the money borrowed to the payment of prior mortgages on the land so that the mortgages taken to the company should be first liens thereon. McKillip caused Steffes to make an application to the company for a loan of $10,000 upon his mortgage upon the three forties, which was to constitute a first lien upon the three forties, to appoint one Leonard and the firm of McKillip & Swallow, Steffes' agent to procure the loan for the purpose of refunding indebtedness assumed upon said land at the time of the purchase, and to authorize Leonard and McKillip & Swallow, or the insurance company, to pay off prior liens upon the land. The company granted the application, Steffes made his mortgage to the company for $10,000 upon the land, the company on August 14, 1907, recorded the mortgage and sent the $10,000 to McKillip & Swallow with directions to pay off the prior liens upon the land which amounted to $9,600. McKillip withdrew this money from the firm of McKillip & Swallow, diverted it to his own personal use without Swallow's knowledge or consent, and left the mortgage to the insurance company a second lien upon the three forties, subject to the three prior mortgages for the aggregate amount of $9,600. On December 18, 1907, Steffes conveyed the three forties back to McKillip. On December 20, 1907, McKillip conveyed this land, subject to the four mortgages and several other pieces of land and some personal property, to Harry L. Burgoyne, trustee, in trust to secure the payment to the insurance company of the aggregate amount of about $55,000 which he owed that company on account of this and similar transactions. The trust was created and evidenced by deeds and assignments by McKillip to Burgoyne and by a trust agreement dated December 20, 1907, which together in fact constituted a mortgage upon the property described therein, and which hereafter will be spoken of as the mortgage of December 20, 1907. On February 28, 1908, after the A. T. Land & Livestock Company, the mortgagee in the three mortgages, which were respectively first liens upon the three forties, had threatened to foreclose them, the insurance company paid $10,080 to that company to satisfy these mortgages and took and recorded releases of them, thereby making its mortgage for $10,000 thenceforth a first lien upon the land. On April 1, 1908, a petition in involuntary bankruptcy was filed against McKillip. On May 11, 1908, he was adjudged a bankrupt, and on June 8, 1908, Royal P. Drake was elected trustee of his estate.

On July 2, 1908, Burgoyne and the insurance company brought a suit in equity against Drake and McKillip to quiet the title to the property described in the mortgage to Burgoyne, or to procure a decree that it created a lien on the property therein described to secure McKillip's indebtedness to the insurance company superior to the title and claim thereto of the trustee of the bankrupt's estate, and that the property be sold to satisfy that indebted-

ness. Drake answered that the transaction of December 20, 1907, constituted a fraud upon the creditors of McKillip and a voidable preference under the bankruptcy law and prayed that the complaint be dismissed. On October 13, 1909, after a final hearing on the merits, a decree that the complaint "be dismissed for want of equity" was rendered, and on October 10, 1910, that decree was affirmed by this court. Burgoyne v. McKillip, 182 Fed. 452, 104 C. C. A. 590.

On July 7, 1908, five days after Burgoyne and the insurance company brought their suit against Drake, the latter brought this suit against them to avoid the mortgage of December 20, 1907, and to compel the conveyance and delivery of the property therein described and its proceeds to him; but this suit was held in abeyance until the suit of Burgoyne and the insurance company was finally decided, and the pleadings in the record in this suit were not filed until January, 1912. Meanwhile, under a stipulation between the parties, the three forties had been sold for $8,608.59 more than sufficient to pay the mortgage thereon for $10,000 to the insurance company, and this surplus was in the hands of the trustee to abide the result of this suit. Drake filed an amended and supplemental complaint in which he prayed the decree of the court that this $8,608.59 be decreed to be his property as trustee of McKillip's estate to be distributed among the general creditors. The insurance company filed an answer and cross-petition wherein it prayed the payment of this $8,608.59 to itself on the ground that by reason of the payment of the $10,080 in satisfaction of the prior mortgages on the three forties for the purpose of protecting its inferior mortgage of $10,000, it was entitled, as against the trustee of the bankrupt's estate, to be subrogated to the rights of the mortgagee in the three prior mortgages, and it also prayed for leave to file and prove its claim against McKillip as a general creditor upon the surrender of its voidable preference evidenced by the transaction of December 20, 1907. The court below sustained the insurance company's claim to the $8,608.59, and Drake appealed. It denied the insurance company's prayer to be permitted to prove its claim as a general creditor, and the insurance company appealed.

C. C. Flansburg, of Lincoln, Neb. (Leonard Flansburg, of Lincoln, Neb., on the brief), for Union Cent. Life Ins. Co., of Cincinnati, Ohio, and Burgoyne.

F. A. Brogan, of Omaha, Neb. (A. M. Post, of Columbus, Neb., on the brief), for trustee.

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

SANBORN, Circuit Judge (after stating the facts as above). McKillip, the bankrupt, caused Steffes to apply to the insurance company for the loan of $10,000, to represent to it that his mortgage for that sum on the three forties which he held for the exclusive benefit of McKillip, should be a first lien thereon, and that the money derived from it would be applied to the payment of the liens prior to his mortgage of August 14, 1907, and to covenant with the insurance company in that mortgage that the mortgaged property was free and clear of prior liens and that he would warrant the title thereto against them, so that McKillip and the three forties were bound by these representations and covenants as completely as was Steffes. Laying aside the question of res adjudicata, which will be subsequently considered, Drake, the trustee in bankruptcy of McKillip's estate, took these three forties subject to the legal and equitable claims of the insurance company, under which McKillip held them, as against the claim of the insurance company to the $8,608.59, which was realized from them in excess of

the amount required to pay the mortgage for $10,000. He stands in the shoes of McKillip and has no greater or better equity or right in this surplus fund than McKillip, his grantor, had, so that the rights and equities of Drake and the insurance company in this sum of money are the same that they would have been if Drake had owned the property, made the representations and covenants of Steffes, and committed the wrongful acts of McKillip. Hence the first question in this case reduced to its lowest terms is: If a mortgagor induces a mortgagee to loan him $10,000 in consideration of his mortgage on his land that is incumbered by prior mortgages for $9,600, by means of his representation and agreement that he will pay and satisfy those mortgages with the money so borrowed so that his mortgage for the $10,000 shall be a first lien upon his land, and he thereby obtains and then misappropriates the $10,000 to his personal use so that the mortgagee is subsequently compelled to pay, and does pay, $10,080 more to secure releases of the prior mortgages and to make his mortgage a first lien, and the mortgaged property subsequently produces at a lawful sale $8,608.59 more than the amount required to pay the mortgage for $10,000, is the equity of the mortgagor to this surplus fund so superior to that of the mortgagee as to move the conscience of a chancellor to grant him a decree for it? Many reasons occur why this question must be answered in the negative.

[1] In the first place, it is a settled and salutary principle of equity jurisprudence that where money is lent in reliance upon an express promise, representation, or contract of the mortgagor that it shall be used to discharge existing incumbrances on the borrower's property, and that the lender is to be secured by a first lien on that property, and by reason of the breach of the agreement or the making of the representation false by the borrower it becomes necessary for the lender to pay the existing incumbrances in order to make his mortgage a first lien, and he does pay them and cause them to be released, he has the right in equity to subrogation to the rights of the holders of those incumbrances as against the borrower or his assignee in bankruptcy, or any other party who has not been induced to change his relation to the mortgaged property to his injury in reliance upon the releases. Memphis & Little Rock R. R. v. Dow, 120 U. S. 287, 301, 7 Sup. Ct. 482, 30 L. Ed. 595; Cumberland Building & Loan Ass'n v. Sparks, 111 Fed. 647, 651, 652, 49 C. C. A. 510, 514, 515; In re Lee, 182 Fed. 579, 582, 105 C. C. A. 117, 120; Platte Valley Cattle Company v. Bosserman Gates Live Stock Co., 202 Fed. 692, 696, 121 C. C. A. 102, 106, 45 L. R. A. (N. S.) 1137, and cases there cited; Union Mortgage Banking & Trust Co. v. Peters, 72 Miss. 1058, 18 South. 497, 30 L. R. A. 829, 833; Skinkle v. Huffman, 52 Neb. 20, 71 N. W. 1004.

[2] In the second place, Drake, the trustee in bankruptcy, is the actor in this suit. He stands in the shoes of the mortgagor and subject to the equities of the insurance company against McKillip so that he, whose grantor in violation of his representation, covenant, and promise, by means of which he procured the $10,000 of this insurance company and then diverted that money to his personal use and compelled the company to pay out $10,080 more to make its mortgage a

first lien, thereby causing it an irreparable loss, for he is insolvent, and even if the company secures the $8,608.59 it must still lose by his misappropriation, brings this suit and appeals to a court of equity to set its seal of approval upon the iniquity of his grantor and to render its decree to carry it into effect and to take from the insurance company that which by right of subrogation ought in equity to be its property. "He who has done iniquity cannot have equity," and, "He who comes into a court of equity must come with clean hands," are familiar maxims in equity. And the rule that one who has been guilty of bad faith, fraud, or any unconscionable act in the transaction which forms the basis of his claim is entitled to no relief in equity on account of that transaction forbids such a decree. 1 Pomeroy's Equity Juris. §§ 397, 398, 400; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 227, 2 Sup. Ct. 436, 27 L. Ed. 706; Marble Co. v. Ripley, 10 Wall. 339, 357, 19 L. Ed. 955; Michigan Pipe Co. v. Fremont Ditch Pipe Line & Reservoir Co., 111 Fed. 284, 287, 49 C. C. A. 324, 327. So it is that the equity of the insurance company in the surplus fund in controversy is so vastly superior to the supposed equity of the trustee in bankruptcy, if he have any, and that equity appeals to the conscience of a chancellor with such compelling power, in view of the facts of this case and of the principles of equity to which reference has been made, that it must be sustained unless some inviolable rule of law or equity presents an insuperable obstacle to such a disposition of the controversy.

[3] Counsel for the trustee contends, however, that the suit of the insurance company and Burgoyne against Drake, the trustee in bankruptcy, and the judgment of dismissal thereof, have rendered the issue whether or not the company's equity in the surplus fund by virtue of its subrogation to the rights of the first mortgagee is superior to the equity of the trustee in bankruptcy therein, res adjudicata and has estopped it from obtaining in this suit the relief granted to it by the court below. The two suits are between the same parties. The rules of estoppel by which this contention must be tested are: When the second suit is upon the same cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the former.

[4] When the second suit is upon a different cause of action, but between the same parties as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action, but it is not conclusive relative to other matters which might have been, but were not, litigated or decided. Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195; Grider v. Groff, 202 Fed. 685, 689, 121 C. C. A. 95, 99; Linton v. Ins. Co., 104 Fed. 584, 587, 44 C. C. A. 54, 57; Commissioners v. Platt, 79 Fed. 567, 571, 25 C. C. A. 87, 91; Board v. Sutliff, 38 C. C. A. 167, 171, 97 Fed. 270, 274; Southern Pac. Co. v. United States, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. Ed. 355; Southern Minn. Ry. Extension Co. v. St. Paul & S. C. R. Co., 55 Fed. 690, 5 C. C. A. 249.

[5] Where the record is such that there is or may be a material issue, question, or matter in the second suit upon a different cause of action, which may not have been raised, litigated, and decided in the former action, the judgment therein does not constitute an estoppel from litigating this issue, question, or matter, unless by pleading or proof the party asserting the estoppel establishes the fact that the issue, question, or matter in dispute was actually and necessarily litigated and determined in the former action. Russell v. Place, 94 U. S. 606, 608, 24 L. Ed. 214; Ætna Life Ins. Co. v. Board of Commissioners, 54 C. C. A. 468, 474, 117 Fed. 82, 88; Cromwell v. County of Sac, 94 U. S. 351, 359, 24 L. Ed. 195; Nesbit v. Independent District, 144 U. S. 610, 619, 12 Sup. Ct. 746, 36 L. Ed. 562; Railway Co. v. Leathe, 84 Fed. 103, 105, 28 C. C. A. 279, 281; Harrison v. Remington Paper Co., 140 Fed. 385, 400, 401, 72 C. C. A. 405, 420, 421, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314.

Counsel for the trustee assert and counsel for the insurance company deny that this suit is upon the same cause of action as was the former suit, and that it is therefore governed by the first rule cited above. The insurance company and Burgoyne brought the first suit to obtain a decree that the mortgage of December 20, 1907, made by McKillip to Burgoyne to secure the debt of McKillip to the insurance company, was valid and should be foreclosed. In their complaint they allege that on December 20, 1907, McKillip was indebted to the insurance company in the sum of $55,000 on account of his misappropriation of the $10,000 it had sent him in August, 1907, to pay off the three prior mortgages on the three forties he mortgaged to it, and on account of his misappropriation of other moneys sent him to pay off other liens on other property in similar transactions, that McKillip made the mortgage of December 20, 1907, to Burgoyne to secure the payment of the debt due to it from him and to secure the repayment of any moneys it might pay to discharge liens prior to its mortgages and to make its mortgages first liens, that in February, 1908, it paid $45,940 for this purpose (a part of which was the $10,080 paid to obtain releases of the prior liens on the three forties), and that the amount due it from McKillip at the time of the filing of the complaint July 2, 1908, was $52,399.99, and they prayed that the legal title to all the property described in the mortgage of December 20, 1907, be quieted in Burgoyne under and by virtue of that mortgage, that the amount due to the insurance company from McKillip be adjudged, and that the property described in the mortgage of December 20, 1907, be sold and the proceeds applied to the payment of that debt.

In his answer to this complaint Drake, the trustee, denied that he had knowledge or information regarding the facts alleged with reference to the indebtedness of McKillip to the insurance company, and he averred that the mortgage of December 20, 1907, was made to defraud the creditors of McKillip, and that it constituted a voidable preference under the bankruptcy law, and he prayed that he be dismissed from the suit and that he recover his costs. After a full hearing his prayer was granted, he was dismissed from the suit on the ground that the mortgage of December 20, 1907, constituted a void-

able preference, and a decree was rendered that the complaint of Burgoyne and the insurance company be dismissed and that Drake recover of them his costs without more.

Five days after the former suit was commenced, Drake, the trustee, brought this the second suit to recover from Burgoyne and the insurance company the property which had been conveyed to Burgoyne by McKillip by the mortgage of December 20, 1907. In his final amended and supplemental complaint which was not filed until after the decision of the former suit, he set forth a description of the property which was conveyed to Burgoyne by means of the mortgage of December 20, 1907, alleged that the transaction evidenced by that mortgage constituted a voidable preference under the bankruptcy law, that the courts had so decided in the former suit, that the insurance company would claim the $8,608.59 surplus after paying the mortgage debt for $10,000 out of the proceeds of the sale of the three forties by right of subrogation to the liens of the first mortgages which it paid, but that it was not entitled to that surplus because it took releases instead of assignments of those mortgages and because its right to this surplus fund by subrogation was adjudged against it in the former suit, and he prayed that the mortgage of December 20, 1907, be adjudged a voidable preference, and that he recover all the property and its proceeds mortgaged to Burgoyne so that he might distribute it among the general creditors of the bankrupt estate.

In its answer the insurance company set forth the facts on which it relies for subrogation to the rights of the first mortgagee to these liens on the three forties, denied that it set up the payment of the $10,080 for the release of the first mortgages, and asked to be subrogated to their liens in the former suit, and denied that there was any such issue or any adjudication of any such issue therein, but alleged that it set forth in its pleading in that suit the various amounts, including the $10,080, aggregating together about $50,000 which it paid after December 20, 1907, to obtain releases of first mortgages on various pieces of property covered by the mortgage of that date for the purpose of showing its good faith and its attempt to save the mortgaged property from appropriation by third parties, and that on the 12th day of September, 1910, with the permission of the bankruptcy court, it commenced a suit in the district court of Boone county, Neb., to foreclose its mortgage of $10,000 upon the three forties and to be subrogated to the rights of the first mortgagee thereon, and that thereafter the land was sold by the trustee in bankruptcy herein and the proceeds were applied first to the payment of the mortgage for $10,000, and that there remained this surplus fund of $8,608.59 which was held pursuant to the stipulation of the parties to abide the result of this suit. The insurance company prayed that in case the court should grant the prayer of the plaintiff and should adjudge the mortgage of December 20, 1907, to be void, it should also adjudge that the insurance company was entitled to the surplus fund realized from the sale of the three forties.

This review of the pleadings in the two suits discloses these facts: When these suits were brought, and when the former suit was tried,

the insurance company had a first lien on the three forties for $10,080 by virtue of its subrogation to the rights of the holder of the three first mortgages upon it which it had paid, it had a second lien upon them for $10,000 by virtue of Steffes' mortgage to it of August, 1907, and it had a third lien upon them and upon a large amount of other property for about $50,000, the indebtedness of McKillip to it by virtue of the mortgage of December 20, 1907. The former suit was brought by the insurance company to sustain and foreclose this mortgage which evidenced the third lien upon the property. The present suit was brought by the trustee in bankruptcy to recover from Burgoyne and the insurance company the property which had been conveyed to them under the mortgage of December 20, 1907, for the reason that that mortgage constituted a voidable preference, and the partial defense to this suit here presented is: (1) The subrogation of the insurance company to the rights of the holder of the first liens upon the three forties and upon their proceeds thereof, and (2) "He who seeks equity should do equity," and a decree for any relief to the trustee ought to be conditioned by the requirement that he pay the surplus fund of $8,608.59 derived from the three forties to the insurance company because this fund was produced and brought into the estate of the bankrupt by virtue of the insurance company's payment of the $10,080 to obtain releases of the first liens upon these tracts of land.

The pleadings in the former suit neither aver nor deny the existence of these defenses nor of the causes of action in favor of the insurance company on which they rest. It is true that in the pleading and evidence in that case the entire history of the transactions of the parties is detailed and that there were statements in the briefs of counsel for the company to the effect that, even if the mortgage of December 20, 1907, was held void, the court should give it a lien upon all the property covered by it for the amount advanced by it under that mortgage for the purpose of paying off prior liens amounting to about $40,000. But there was no pleading of or prayer for a subrogation of the insurance company to the rights of the first mortgagee to his liens upon the three forties, and evidence without pleading is as futile to sustain an adjudication of an issue as pleading without proof.

[6] Moreover, the true test of the identity of causes of action is the identity of the facts essential to maintain them. Harrison v. Remington Paper Company, 140 Fed. 385, 400, 72 C. C. A. 405, 420, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314. It was a fact indispensable to the maintenance of the cause of action in the former suit that the mortgage of December 20, 1907, was made and delivered, but that fact is immaterial to the cause of action for subrogation in the present suit. It was indispensable to the cause of action in the former suit that the mortgage of December 20, 1907, did not constitute a voidable preference, but that fact is immaterial to the cause of action in this suit. It was a fact indispensable to the cause of action for subrogation in this suit that the insurance company had the mortgage for $10,000 on the three forties in February, 1908, when it paid the prior mortgage, but that fact was immaterial to the cause of action in the

former suit. It was a fact indispensable to this suit that the insurance company paid the $10,080 on account of the liens prior to its mortgage upon the three forties, but that fact was not essential to the cause of action in the former suit, because, without that, the indebtedness of McKillip to the insurance company was greater than the value of the property mortgaged on December 20, 1907, and that mortgage, if valid, would have swept it all away regardless of the $10,080. The facts that a petition was filed and an adjudication in bankruptcy rendered against McKillip, that the insurance company had reasonable cause to believe that the mortgage of December 20, 1907, was made with intent to prefer it to other creditors were indispensable to the defense of the former suit, but they constitute no defense and are immaterial to the cause of action and to the defense of subrogation. The amounts involved, the property affected, the relief sought, the times when the causes of action on the mortgage of December 20, 1907, and on the subrogation of February, 1908, to the three prior mortgages, the facts essential to the maintenance and defense of the two causes of action, all differed, and the suit, of which the mortgage of December 20, 1907, was the subject-matter, was not upon the same cause of action as is the present suit, nor did it involve either as a cause of action or a defense the claim of the insurance company to a first lien by subrogation upon the three forties, so that the decree in the former suit constitutes no estoppel of the insurance company from litigating in this suit the issue of its subrogation to the liens of the first mortgagee upon the three forties, or to the issue of its superior equity in the $8,608.59 by reason thereof, for the record fails to prove that either of those issues was ever actually or necessarily litigated or determined in the former suit.

[7] And here is the answer also to the contentions that the insurance company is estopped from defending this suit on the ground of its subrogation to the rights of the holder of the first liens on the three forties by the familiar rules that a litigant must present every point and claim relative to the subject-matter of the litigation, and that he may not split his cause of action, and that if he fails to comply with either rule he may not litigate his omitted claim in a subsequent suit, for the subject-matter of the litigation within the meaning of these rules is the matter at issue, the cause of action in the former suit, and these rules fail to estop one from subsequent litigation of claims and issues not relevant to the cause of action or issue presented in the former suit. They do not estop one who has litigated one of several separate and independent causes of action relating to the same property from subsequently litigating the others, as where one has a mechanic's lien and a mortgage, or several mortgages upon the same property. The insurance company had three separate causes of action upon three separate liens—its lien by subrogation, its lien by the mortgage for $10,000, and its lien by the mortgage for about $50,000 upon the three forties and other property. The third lien originally valid was subsequently avoided by the bankruptcy proceedings against McKillip. It brought its former suit on that lien alone

and was defeated by the bankruptcy proceedings and the voidable preference, facts which constituted no defense to its first and second liens, and the judgment against it was no bar to its maintenance of its cause of action by subrogation or to its maintenance of its cause of action on its mortgage for $10,000. The principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or the proofs, or both, all the grounds upon which he expects a judgment in his favor, and is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail, does not require distinct causes of action; that is to say, distinct matters, each of which would authorize by itself independent relief, to be presented in a single suit, though they exist at the same time, and might be considered together. Stark v. Starr, 94 U. S. 477, 485, 24 L. Ed. 276; The Haytian Republic, 154 U. S. 118, 125, 14 Sup. Ct. 992, 38 L. Ed. 930; Johnson & Johnson v. Herold (C. C.) 161 Fed. 593, 598. Cases like those cited by counsel for the trustee of decrees in suits wherein the defendants were summoned to present all their claims to property against which the plaintiffs demanded decrees adjudging perfect titles to those who should thereafter claim the land under them, such as Dowell v. Applegate, 152 U. S. 327, 341, 14 Sup. Ct. 611, 38 L. Ed. 463, National Foundry Co. v. Oconto Water Supply Co., 183 U. S. 216, 237, 22 Sup. Ct. 111, 46 L. Ed. 157, Stover v. Tompkins, 34 Neb. 465, 467, 51 N. W. 1040, and Rector v. Rotton & Rotton, 3 Neb. 171, 178, which well illustrates this class, wherein a decree of foreclosure and sale of a tract of land was held to be a bar to a subsequent suit by the defendant to recover the land on the ground that it was his homestead when the former suit was brought and adjudged, are readily distinguishable from the case at bar and those of its class above cited, because the defendants were required by the law and practice to present all their claims to the property involved or to have them foreclosed by the proposed decrees in the latter class of cases, while in the former class it was optional with the plaintiffs to present one or more of their distinct causes of action against the property and the defendant, and those which they did not present remained unadjudicated.

[8, 9] Nor was it a fatal objection to the insurance company's maintenance of its lien for the $10,080 upon the surplus fund by subrogation that it had endeavored to collect this amount by the foreclosure of its mortgage of December 20, 1907, and had been defeated by the bankruptcy of McKillip. The rule available in some circumstances, that where a defendant has given a specific reason for his refusal to perform his contract or discharge his duty may not, after suit has been commenced to compel his performance in reliance upon his statement of his reason, change his position and successfully defend on another ground (Railway Company v. McCarthy, 96 U. S. 258, 267, 24 L. Ed. 693; Ballou v. Sherwood, 32 Neb. 666, 690, 49 N. W. 790, 50 N. W. 1131; State v. Board of Commissioners, 60 Neb. 566, 570, 83 N. W. 733), is not applicable to this case: First, be-

cause it is founded on an equitable estoppel, and while the insurance company brought a futile suit to foreclose the mortgage of December 20, 1907, the record fails to convince that it ever specified or misled the trustee into the belief to his injury that that mortgage was the only reason it would not surrender the three forties; second, because the rule is inapplicable to cases where the party against whom it is invoked has independent affirmative causes of action and remedies for the wrong it has suffered; and, third, because the controlling rule in cases of the class to which this suit belongs is that even where the victim of a wrong has inconsistent remedies, and he is doubtful which is the right one, he may pursue any or all of them until he recovers through one, and in the absence of facts creating an equitable estoppel, and there are none in this case, his prosecution of a wrong remedy to defeat will not estop him from subsequently pursuing the right one to victory. Rankin v. Tygard, 198 Fed. 795, 806, 119 C. C. A. 591, 602; Bierce v. Hutchins, 205 U. S. 340, 347, 27 Sup. Ct. 524, 51 L. Ed. 828; Thomas v. Sugarman, 218 U. S. 129, 133, 30 Sup. Ct. 650, 54 L. Ed. 967, 29 L. R. A. (N. S.) 250; Standard Oil Co. v. Hawkins, 74 Fed. 395, 398, 399, 20 C. C. A. 468, 472, 473, 33 L. R. A. 739; Barnsdall v. Waltemeyer, 142 Fed. 415, 420, 73 C. C. A. 515, 520; Harrill v. Davis, 168 Fed. 187, 195, 94 C. C. A. 47, 55, 22 L. R. A. (N. S.) 1153; In re Stewart (D. C.) 178 Fed. 463, 468; Nauman Co. v. Bradshaw, 193 Fed. 350, 354, 113 C. C. A. 274, 278.

[10] Finally, this is not a suit by the insurance company for affirmative relief. It is a suit by the trustee to recover the surplus proceeds of the three forties from the insurance company, and, even if there were error in the conclusion that the company was not barred by the decree in the former suit from maintaining an affirmative suit upon its claim of subrogation, a court of equity would not be prevented by the former adjudication from conditioning its grant of relief to the trustee with the requirement that he first allow or pay to the insurance company the $8,608.59 to which it is equitably entitled. A court of equity may always require him who seeks equity to do equity, and in a case in which the rules and principles of equity demand it, as they do in the case at bar, it may condition the grant of relief sought from it by a plaintiff with the enforcement of a claim or an equity held by a defendant which by reason of the statute of limitations or a former judgment the latter could not enforce affirmatively or in any other way. Pomeroy's Equity Juris. §§ 386, 393, note 4; Brent v. Bank of Washington, 10 Pet. 596, 9 L. Ed. 547; Farmers' Loan & Trust Co. v. Denver, L. & G. R. Co., 126 Fed. 46, 51, 52, 60 C. C. A. 588, 593, 594, and cases there cited and reviewed; Central Improvement Co. v. Cambria Steel Co., 201 Fed. 811, 824, 120 C. C. A. 121, 135. There was no error in the provision of the decree which required the trustee to pay or allow to the insurance company the surplus fund derived from the sale of the proceeds of the three forties after deducting the amount required to pay the mortgage of $10,000.

[11] The insurance company complains of that part of the decree which denies its prayer that it be allowed to prove its claim against

McKillip as a general creditor of his estate. Burgoyne and the insurance company brought their suit to confirm and foreclose the mortgage of December 20, 1907, in July, 1908, and in the same month the trustee, Drake, brought this suit to set that mortgage aside as a voidable preference and to recover the property it conveyed. On October 13, 1909, the court below rendered its decree in the former suit and dismissed the complaint on the ground that the mortgage constituted a preference. That decree was affirmed by this court on October 10, 1910 (182 Fed. 452, 104 C. C. A. 590), and the appeal from that decree was dismissed by the Supreme Court on April 17, 1911 (220 U. S. 604, 31 Sup. Ct. 718, 55 L. Ed. 605). In January, 1912, amended and supplemental pleadings were filed in this suit; on December 27, 1912, after final hearing, the court below filed its opinion to the effect that the mortgage of December 20, 1907, be set aside because it constituted a voidable preference and that the trustee recover the property therein described. During this litigation a large portion of this property had been surrendered to and had been sold by the trustee under stipulations that the proceeds should be held to abide the result of this suit, but no surrender of its right to insist upon its claim to this property and its proceeds was made by the insurance company until January 7, 1913, when it offered to surrender them, and prayed that its claim against McKillip be allowed as a general claim against his bankrupt estate. In view of this state of facts, the court below was of the opinion that, if the company had made its surrender immediately after the close of the litigation in the former suit wherein the mortgage was adjudged to be a voidable preference, it would have been entitled to the proof and allowance of its claim as a general creditor, but that because it failed to do so and held on to the property until the opinion in this case was filed in December, 1912, its application so to do should be denied. But the trustee presented no demand and made no prayer for a surrender of the mortgaged property in the former suit. He asked for a dismissal of that suit to foreclose the mortgage only, and the decree therein accordingly left the question of subrogation and many questions of accounting between the trustee and the insurance company upon a surrender of the property mortgaged undetermined, and it was not until this suit was brought to trial that these questions could be legally adjudicated. Thirteen days after the opinion in this suit was filed the insurance company offered to surrender the property it obtained by virtue of its preferential mortgage. That mortgage was taken in good faith to secure a just debt and was valid until a petition in bankruptcy was filed within four months after its execution. The insurance company had the legal and equitable right to hold this mortgage and the property covered by it until the courts having jurisdiction of its claims adjudicated them, their extent and the terms under which it was required, if at all, to surrender its preference. Keppel v. Tiffin Savings Bank, 197 U. S. 356, 363, 25 Sup. Ct. 443, 49 L. Ed. 790.

As we have seen, where one has inconsistent remedies and is doubtful which is the right one, he may pursue any or all of them until he recovers through one, and in the absence of facts creating an eq-

uitable estoppel his unsuccessful prosecution of the wrong one will not prevent him from subsequently successfully prosecuting the right one. Rankin v. Tygard, 198 Fed. 795, 806, 119 C. C. A. 591, 602, and the authorities cited under it above.

[12] And a creditor of a bankrupt who in good faith has received and retained a voidable preference until he is deprived of it by the judgment of a court at the suit of the trustee has the right thereafter to prove the bankrupt's debt to him as a general creditor, to have his claim allowed, and to receive from the bankrupt's estate the same dividends as other general creditors. Keppel v. Tiffin Savings Bank, 197 U. S. 356, 362, 364, 373, 25 Sup. Ct. 443, 49 L. Ed. 790; Page v. Rogers, 211 U. S. 575, 581, 29 Sup. Ct. 159, 53 L. Ed. 332; In re Oppenheimer (D. C.) 140 Fed. 51, 52; In re Otto F. Lange Co. (D. C.) 170 Fed. 114, 116. The insurance company was guilty of no delay or inequitable conduct that deprived it of the benefit of these principles of equity, and the court below should have adjudged that it was entitled to prove and to have its claim allowed against the estate of the bankrupt and to receive in dividends from that estate the same percentage of its claim as other general creditors.

Pursuant to the precedent established in Page v. Rogers, 211 U. S. 581, 29 Sup. Ct. 162, 53 L. Ed. 332, "solely for the purpose of accomplishing this result, the final decree in the case is reversed, and the case is remanded to the District Court to take proceedings in conformity with this opinion."

STEBLER v. RIVERSIDE HEIGHTS ORANGE GROWERS' ASS'N et al.

(Circuit Court of Appeals, Ninth Circuit. May 30, 1914.)

No. 2394.

INJUNCTION (§ 26*)—RESTRAINING INFRINGEMENT SUITS—SUITS AGAINST BOTH MANUFACTURER AND USERS—STAY.

Where the owner of a patent who derives his profit from the manufacture and sale to users of the patented machines has recovered a decree against a manufacturer of infringing machines for an accounting for both damages and profits, he is not entitled to maintain suits against users of machines so sold by defendant, and, where such suits would be likely to cause irreparable injury to the business of defendant, the court in the principal suit may properly enjoin the bringing or prosecution of such suits until the rendition of final decree on the accounting.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 24–49, 54–61; Dec. Dig. § 26.*]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Olin Wellborn, Judge.

Suit in equity by Fred Stebler against the Riverside Heights Orange Growers' Association and George D. Parker. From a temporary restraining order, made on petition of defendants, enjoining the prosecution by complainant of other suits for infringement of the Gamble

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

reissue patent, No. 12,297, for a fruit grader, complainant appeals. Modified and affirmed.

For opinion below, see 211 Fed. 985. See, also, 205 Fed. 735, 124 C. C. A. 29.

On May 24, 1910, the plaintiff filed his bill of complaint in the court below wherein he alleged, among other things, that there had been duly issued to him and to one Austin A. Gamble, by the United States of America, reissue patent No. 12,297, for a fruit grader; that subsequent thereto Austin A. Gamble had sold, transferred, and assigned to the plaintiff all his right, title, and interest in and to the letters patent and that the plaintiff was the sole and exclusive owner thereof; that notwithstanding the issuance of the letters patent, the defendants, without the consent of the plaintiff, and in violation of the letters patent owned by him, had made and used, and had sold to others to be used, fruit graders embracing and containing the invention described, claimed, and patented in the letters patent owned by the plaintiff. The plaintiff asked for an injunction, restraining and prohibiting the defendants from further infringing upon the letters patent owned by him, and, further, that the defendants be decreed to account for and pay over unto the plaintiff all damages suffered by him by reason of the infringement of his patent and also all profits realized by the defendants by reason of such infringement. The defendants answering denied the validity of the plaintiff's patent and denied infringement, and in an amendment to the answer they alleged that the device manufactured, sold, and used by the defendants was made under and in accordance with the invention embodied in United States letters patent No. 997,468, granted to George D. Parker under date of July 11, 1911, for an improved fruit sizer or grader. Such proceedings were thereupon had in the court below that on September 30, 1912, a final decree was entered therein, wherein it was ordered and decreed that the plaintiff's bill be dismissed, that court holding that claims 1 and 10 of the patent issued to the plaintiff (the only claims involved in the suit) were valid in law, but that they had not been infringed by the defendants.

An appeal to this court was taken by the plaintiff from the judgment entered against him in the court below, and by a decree entered herein on June 12, 1913; the judgment of the court below was reversed, and the cause remanded, with instructions to grant the relief prayed for in the plaintiff's bill. Stebler v. Riverside Heights Orange Growers' Ass'n, 205 Fed. 735, 124 C. C. A. 29.

Thereafter a petition for a writ of certiorari was presented by the defendants to the Supreme Court of the United States. The petition was denied.

On November 7, 1913, pursuant to the mandate of this court, an interlocutory decree was entered in the court below vacating and setting aside the judgment dismissing the plaintiff's bill theretofore entered in that court. By the interlocutory decree it was ordered that the plaintiff recover of the defendants, and each of them, the profits, gains, and advantages which the defendants, and each of them, had derived, received, or made by reason of the infringement of the plaintiff's patent, and that the plaintiff recover from the defendants, and from each of them, any and all damages which the plaintiff had sustained or should sustain by reason of the infringement by the defendants, or either of them. The interlocutory decree further provided that the cause be referred to a master to take and state the account of such gains, profits, and advantages, and to assess such damages, and to report thereon with all convenient speed. The defendants, together with their agents, clerks, and employés, were required by the interlocutory decree to attend before the master from time to time, and to produce before him such books and papers as he might require.

No proceedings appear to have been taken by the plaintiff pursuant to this decree.

On November 25, 1913, the defendants filed a petition in the court below setting forth the various proceedings hereinabove set forth, and alleging that subsequent to the rendition of the decree of this court, and before the entry of the interlocutory decree in the court below in compliance therewith, the

plaintiff had instituted in the lower court 27 suits in equity, based upon the reissue patent owned by him, against various defendants particularly set forth in the petition, as infringing users of fruit graders which had been manufactured and sold by the defendants prior to the entry of the interlocutory decree in the court below. It was further alleged in the petition that all of the defendants in the suits were customers of the defendants, and that the acts of infringement complained of in and sought to be enjoined by the suits, were the use by the defendants therein of fruit graders manufactured by the defendants herein and sold by them to the defendants named in the suits mentioned in the petition; that all of such machines were subject to the accounting against the defendants to be had under the interlocutory decree entered in the court below; that the plaintiff had threatened to bring many similar suits against the customers of the defendants and that unless restrained by the court the plaintiff would bring and prosecute such suits; that the defendants were financially able to respond to any judgment which might be rendered against them on the accounting ordered in this suit, and, that inasmuch as all of the machines complained of in the suits were made and sold by them, they were all subject to the accounting ordered by the interlocutory decree entered in the court below; that the plaintiff was a manufacturer and seller of the patented machines, and was not a user of the same, and that he derived his profit from his patent solely by the manufacture and by the unconditional sale direct to the users of the patented machines; that, upon the satisfaction by the defendants of any judgment that might be finally rendered against them upon the accounting to be had herein, the infringing machines manufactured and sold by them to their customers would be released from the patent monopoly and the defendants in the various suits instituted and threatened to be instituted by the plaintiff would not be liable to the plaintiff; that if the plaintiff was not restrained by the court from continuing the prosecution of the suits set forth in the petition, and from bringing other suits of like nature against the customers of the defendants, irreparable injury and damage would result to the defendants by the loss to them of their customers, who, on account of the harassment, annoyance, and expense occasioned by the acts of the plaintiff, would cease to patronize them in their general business, and in the purchase of other machinery for packing houses, of various kinds and natures, in which the petitioners were dealers. The relief prayed for was that the plaintiff be enjoined from further prosecuting the suits set forth in the petition, and from bringing any additional suits of like nature, against the customers of the defendants, for the infringement of the letters patent owned by the plaintiff; the injunction order to be continued until the rendition of the judgment of the court below upon the master's report on the accounting ordered herein.

On February 18, 1914, an order was entered in the court below adjudging and decreeing that the defendants' motion that the plaintiff be enjoined and restrained from any further prosecution of those certain suits set forth in the petition, and from bringing any other suit or suits against users of machines manufactured in substantial accordance with letters patent of the United States No. 997,468, be allowed.

The present appeal is prosecuted from the last-mentioned order.

Frederick S. Lyon, of Los Angeles, Cal., for appellant.

Nicholas A. Acker and William F. Booth, both of San Francisco, Cal., for appellees.

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

MORROW, Circuit Judge (after stating the facts as above). 1. The plaintiff is a manufacturer and seller of the machines covered by his patent, and the sole profits which he derives from his patent are those arising from the manufacture and sale of the machines covered thereby. The suits brought by the plaintiff, and sought to be enjoined

by the petition of the defendants, are against users of machines which had been manufactured and sold by the defendants prior to the rendition of the opinion of this court and the entry of the interlocutory decree in the lower court pursuant thereto.

The theory of the defendants' petition is that, under the accounting ordered in the interlocutory decree entered in the court below, the plaintiff would receive full compensation for all infringing machines which had been manufactured and sold by the defendants in violation of the plaintiff's patent; that such machines would be thereafter released from any claim on the part of the plaintiff by virtue of his patent; and that the plaintiff, pending the entry of the final judgment against the defendants in this suit, is not entitled to bring or maintain any suits against the persons or corporations, customers of the defendants, to whom the infringing machines had been sold by the defendants, and who were users of them at the time of the institution of the various suits sought to be enjoined.

The defendants were manufacturers of and general dealers in machinery of various kinds used in the business of fruit packing, and it is not to be denied that the institution and prosecution of the suits set forth in the petition, and similar suits, against customers of the defendants, would have the effect of harassing and annoying the defendants' customers; that they would be put to heavy expense; and that the probable outcome would be the loss to the defendants of the patronage of such customers and the consequent depreciation and destruction of their business as dealers in packing house machinery and supplies.

The bill of complaint filed by the plaintiff in this case asked that the defendants be decreed to account for and pay over unto the plaintiff the gains and profits realized by the defendants from and by reasor of the infringement, and, further that the defendants be decreed to account for and pay over unto the plaintiff the damages suffered by him by reason of the infringement; and the interlocutory decrees entered in the court below provided:

"That complainant recover of the defendants, and each of them, the profits, gains, and advantages which said defendants, and each of them, have or has derived, received, or made, by reason of said infringement, and that the complainant recover of the said defendants, and each of them, any and all damages which complainant has sustained or shall sustain by reason of said infringement by defendants, or either of them."

Pursuant to this decree, the matter was referred to a master of the court to ascertain and report to the court the amount of such damages and also the amount of such gains, profits, and advantages.

There was thus distinctly provided a method whereby the plaintiff might recover all losses suffered by him by reason of the infringement of his patent—those in the nature of damages as well as those in the nature of profits received by the infringing defendants. There is no controversy in the case as to the financial ability of the defendants to respond to whatever judgment might be finally rendered against them upon the final hearing of the case. To permit the plaintiff, under such circumstances, to institute and maintain suits against the customers of the defendants, to whom the infringing machines have passed, would, it is obvious, be harassing, annoying, and expensive, and would place

the plaintiff in a position to maintain the suits to recover full compensation in a double proportion for the losses suffered by him by reason of the infringement. The plaintiff derives his profits from the manufacture and sale of the fruit-grading machines covered by the patent. These profits consist of the difference between the cost of manufacture and the prices for which he sells the machines. These profits are therefor the only compensation which he receives for the machines manufactured and sold by him during the entire life thereof. When final judgment is entered against the defendants pursuant to the accounting which has been ordered against them, the plaintiff will receive thereunder full compensation for the use of the machines by the vendees of the defendants herein for such period as they are capable of being used, in the same manner and to the same extent as he would have done had he sold the machines himself. This being true, a decree against the defendants for the profits which they received by reason of the sales of the infringing machines, together with whatever damages the plaintiff may have suffered by reason thereof, must be held to vest the right to the use of the machines in the defendants' vendees free from any further claim by the patentee.

The rule laid down in the case of Birdsell v. Shaliol, 112 U. S. 485, 5 Sup. Ct. 244, 28 L. Ed. 768, which is earnestly commended to our attention by counsel for the plaintiff, is in no respects inconsistent with these views. In that case Birdsell had brought a suit in equity for infringement of his patent, against the Ashland Machine Company, a manufacturer and seller of the machines covered by his patent. A perpetual injunction had been decreed and the case had been referred to a master before whom damages sustained by Birdsell were proved and claimed. The master reported that the Ashland Machine Company had made no profits for which it should account, and that if any damage had been sustained it had been sustained by the Birdsell Manufacturing Company, a stranger to the suit, and a corporation to whom Birdsell had granted an exclusive license to make, vend, and use his invention. The master accordingly reported that Birdsell was entitled to recover only $1 as nominal damages. Subsequently Birdsell, together with the Birdsell Manufacturing Company, brought suit against one Shaliol and another, who had used one of the machines manufactured by the Ashland Machine Company, and which was embraced in the master's report in the former suit against that company. The defendants contended that the second suit was barred by the recovery of nominal damages by Birdsell in the former suit against the manufacturing company. The Supreme Court held that a judgment for and payment of nominal damages in favor of a patentee upon a bill in equity against one person for making and selling a patented machine was not a bar to a subsequent suit by the patentee against another person for afterwards using the same machine, within the term of the patent. The court then added:

"If one person is in any case exempt from being sued for damages for using the same machine for the making and selling of which damages have been recovered against and paid by another person, it can only be when actual damages have been paid, and upon the theory that the plaintiff has been deprived of the same property by the acts of two wrongdoers, and has received

full compensation from one of them. In that view, the case of the patentee, whose right of property under his patent has been invaded, would be analogous to that of one from whom personal property had been taken."

In the present case, not only has it been decreed that the plaintiff is entitled to actual damages suffered by him by reason of the infringement of his patent, but he has also been awarded the profits received by the defendants by reason of such infringement. It therefore falls within the rule stated by the court that if the plaintiff has been deprived of his property by two wrongdoers, and has received full compensation from one of them, the other is exempt.

We find the case of Allis v. Stowell (C. C.) 16 Fed. 783, an authority upon this question. It was held in that case that, where a patentee recovers from an infringing manufacturer full damages and profits on account of the infringement, the purchaser from such manufacturer, who is a user of the machine, will be protected in such use against a suit for infringement, as he would be if he were a licensee from the patentee. It was also held that to prevent a multiplicity of suits the court may, in a proper case and upon a proper showing, require the prosecution of suits between the patentee and the mere user of a patented machine to be suspended, and await the result of a suit pending between the patentee and the principal infringer, from whom the user purchased the machine.

In the case of National Cash-Register Co. v. Boston Cash Indicator & Recorder Co. (C. C.) 41 Fed. 51, Circuit Judge Colt held that:

"The power of a court of equity, by petition in the main suit against a manufacturer, to restrain a complainant from bringing further suits against the purchasers or users of a patented article, seems to be recognized in this country, and to be founded upon sound principles of equity"—citing a number of cases, including Allis v. Stowell.

In Kelley v. Ypsilanti Mfg. Co. (C. C.) 44 Fed. 19, 10 L. R. A. 686, Judge Brown (afterwards Associate Justice of the Supreme Court of the United States) held that where suits had been brought in other districts against customers of an alleged infringing manufacturer, before suit brought against the latter, the suits in the other districts would not be enjoined because comity demanded that the application should be made to the court in which the suits were pending. The court refers to the decision in Allis v. Stowell, and says it fully concurs in the doctrine of that case, "although we think the application should be made to the courts in which these suits are pending." The court says further:

"There would seem to be, however, no objection to the court in which such actions are brought staying proceedings in them until the validity of plaintiff's patent and the infringement of the defendant have been judicially ascertained in one of the principal suits; and perhaps in an aggravated case of threatened irreparable injury to defendant's business, or, if there were any evidence of malice, oppression, or bad faith on the part of the plaintiff, the court might enjoin temporarily the commencement of new suits."

The doctrine of Allis v. Stowell is not in conflict with Birdsell v. Shaliol, but on the contrary is entirely in accord with that case, and we think states the true doctrine upon the question under consideration.

But the plaintiff contends that the accounting ordered in the interlocutory decree entered in the court below must be limited to the joint acts of the defendants and that such accounting cannot embrace acts of one of the defendants independent of acts of the other defendant. There is no merit in the contention. It arises from a misconception of the decree. The recovery there awarded is for profits and damages against the defendants "and each of them." The plaintiff will under the decree be entitled to receive such profits as may be found to be due to him, as well as such damages as may be found to have been sustained by him, by reason of the acts of infringement of either of the defendants, without regard to the acts of infringement of the other.

2. The prayer of the defendants' petition was for an order enjoining the plaintiff from further prosecuting the several suits set forth in the petition "and from bringing any more suits of like nature against the customers of said Parker for the infringement of said patent by the use of fruit grading machines made and sold to them by said Parker; said injunction order to be continued until the rendition of the judgment of this court upon the master's report on the accounting in the present entitled cause." The order and decree of the court below is that plaintiff "be enjoined and restrained from any further prosecution of those certain suits hereinafter set forth by name of party and number, and from bringing any other suit or suits against users of machines manufactured in substantial accordance with letters patent of the United States No. 997,468." We are of opinion that the order and decree should have provided further, as prayed for in the petition, that the injunction should be "continued until the rendition of the judgment of the court upon the master's report on the accounting" ordered in the interlocutory decree. We are also of opinion that the order and decree enjoining the prosecution of suits by the plaintiff against infringers should be limited in its operation to infringements of complainant's patent by machines constructed under the Parker patent, and by him sold to the users.

The case will be remanded, with directions to the court below to modify the order of injunction entered by it to conform with the views herein expressed, with costs in this court in favor of the appellant and against the appellees.

FRASER et al. v. COLE et al.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1914.)

No. 2054.

1. EXECUTORS AND ADMINISTRATORS (§ 508*) — SETTLEMENT OF ESTATE — ACCOUNT IN PROBATE COURT.

An order of the probate court, recasting and confirming the account of an executor required to pay a specified sum to a legatee, makes the legatee a creditor of the executor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2192–2198; Dec. Dig. § 508.*]

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

2. COURTS (§ 493*)—ENFORCEMENT OF CLAIM OF LEGATEE—JURISDICTION OF FEDERAL COURT.

A right of action by a legatee against an executor to recover the legatee's share of the estate in the executor's hands, provided an order has first been made on the executor to pay, given by Hurd's Rev. St. Ill. 1911, c. 3, § 118, may be asserted in the federal court provided proper diversity of citizenship exists.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1346–1352; Dec. Dig. § 493.*]

3. CREDITORS' SUIT (§ 25*)—PARTIES.

A bill by a legatee against an executor, ordered by the probate court to pay specified sums to legatees named, to recover the legacy and to realize on the claim by a sale of land fraudulently conveyed by the executor, is in the nature of a creditor's bill, and the presence of all the other legatees is not indispensable to jurisdiction to proceed at the instance of complainant, whose claim against the executor is separate and distinct from the claims of the other legatees.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 100–111; Dec. Dig. § 25.*]

4. COURTS (§ 313*)—FEDERAL COURTS—JURISDICTION.

The jurisdiction of a United States District Court, obtained by reason of diversity of citizenship, of a suit by a legatee against an executor in the nature of a creditor's bill, is not lost by permitting other legatees to intervene, though thereby the requisite diversity of citizenship will be lacking, for they come in as proper or necessary, but not indispensable, parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 859; Dec. Dig. § 313.*

Citizenship as affecting the jurisdiction of the federal courts, see note to Shipp v. Williams, 10 C. C. A. 249.]

5. COURTS (§ 313*)—FEDERAL COURTS—JURISDICTION.

That a legatee and his counsel, before filing a bill in a United States District Court against an executor, understood that other legatees would ask leave to intervene, and by the same counsel, did not affect the jurisdiction of the court, obtained by reason of the diversity of citizenship of complainant and defendant, though on permitting the intervention the requisite diversity of citizenship would be lacking.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 859; Dec. Dig. § 313.*]

6. EXECUTORS AND ADMINISTRATORS (§ 438*)—CREDITORS' ACTION—PARTIES.

In a suit by a legatee against an executor, ordered by the probate court to pay specified sums to enumerated legatees, to reach real estate fraudulently conveyed by the executor, a coexecutor is not an indispensable party.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1765–1785, 1790; Dec. Dig. § 438.*]

7. FRAUDULENT CONVEYANCES (§ 241*)—SETTING ASIDE—CONDITIONS PRECEDENT.

Though an order of the probate court directing an executor to pay to enumerated legatees specified sums is not a judgment on which execution may issue, yet, where the executor has fled from the state, is insolvent, and has fraudulently conveyed her real estate in the state, which is the only source from which the claims may be realized, a bill in equity to enforce payment of a legacy and to reach the real estate fraudulently conveyed is maintainable without first obtaining judgment and execution at law in the state court or in the federal court within the state.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 694, 696–726; Dec. Dig. § 241.*]

8. FRAUDULENT CONVEYANCES (§ 239*)—SETTING ASIDE—OTHER REMEDIES.
Where an executor, ordered by the probate court to pay specified sums to enumerated legatees, fled from the state, was insolvent, and fraudulently conveyed her real estate in the state, which was the only source from which the claims could be realized, an attachment was not an adequate remedy, but equity was available to avoid the fraudulent conveyance.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 681–683; Dec. Dig. § 239.*]

9. FRAUDULENT CONVEYANCES (§ 248*)—SETTING ASIDE—LACHES.
Time consumed in state courts by a legatee in litigating with an executor to establish his claim cannot be counted by the executor against the legatee as laches on the legatee suing in the federal court, by reason of diversity of citizenship, to enforce his claim and to reach real estate fraudulently conveyed by the executor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 730–734; Dec. Dig. § 248.*]

10. COURTS (§ 311*)—JURISDICTION—DIVERSITY OF CITIZENSHIP—PARTIES.
Where a bill by a legatee, a citizen of California, against an executor, a resident of Massachusetts, sought to reach real estate fraudulently mortgaged by the executor to a trustee residing in Illinois to secure a note owned by a resident of Illinois, the trustee, made a party, was bound by any decree respecting his representative defense, and the trial court could, by ancillary bill, bring in the holder of the note, if that should be deemed necessary or advisable, without affecting the diversity of citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 858; Dec. Dig. § 311.*]

11. VENDOR AND PURCHASER (§ 260*)—VENDORS' LIENS—PRIORITIES.
Where a creditor, who was the attorney of an executor, knew of her dealings with the assets of the estate, his lien pending a controversy over the settlement of the estate was subordinate to an equitable lien in the nature of a vendor's lien growing out of a foreclosure sale of testator's real estate, provided such a lien accrued.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 664–669; Dec. Dig. § 260.*]

12. TRUSTS (§ 343*)—VENDOR AND PURCHASER (§ 266*)—VENDORS' LIENS—WAIVER.
Where money used by an executor in buying real estate belonged partly to legatees, the legatees, by insisting in the state court that the executor abide by the purchase, thereby waived title through a resulting trust, but they did not waive a purchase-money lien, if one in fact arose from the ratified purchase, for a vendor's lien may be availed of by beneficiaries not direct parties to the sale.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 507, 508; Dec. Dig. § 343;* Vendor and Purchaser, Cent. Dig. §§ 687, 713–750; Dec. Dig. § 266.*]

13. EXECUTORS AND ADMINISTRATORS (§ 144*)—CLAIMS OF LEGATEES—LIENS.
Where the legal title to money converted into land that executors through foreclosure sold to a purchasing executor was in the executors, an equitable lien accrued to the executors for the benefit of the legatees.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 579–584; Dec. Dig. § 144.*]

14. EXECUTORS AND ADMINISTRATORS (§ 456*)—CLAIMS OF LEGATEES—ENFORCEMENT—SOLICITOR'S FEES.
In a suit by a legatee to enforce his claim against an executor and to reach real estate fraudulently conveyed by her, the court may not in-

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

clude in the claim of the legatee solicitor's fees and to that extent increase the indebtedness of the executor, though the legatee, as the original complainant, may be given such an allowance out of the recovery as against colegatees intervening.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1941–1967; Dec. Dig. § 456.*]

Appeals from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Christian C. Kohlsaat, Judge.

Suits by Arthur H. Cole, administrator with the will annexed of Donald Fraser, deceased, against Grace Fraser and others. From decrees for complainant and intervenors, defendant Grace Fraser alone appeals in one case, and she and defendant E. F. Mann both appeal in the other case. Modified and affirmed.

John C. Murphy, of Aurora, Ill., for appellants.

Rufus S. Simmons and S. C. Irving, both of Chicago, Ill., for appellees.

Before BAKER and MACK, Circuit Judges, and ANDERSON, District Judge.

BAKER, Circuit Judge. Two cases are presented on the one record. Each decree sustains a bill in equity by Cole, administrator c. t. a. of the estate of Donald Fraser, to enforce a claim against Grace Fraser and to realize upon it by sale of land in Illinois, in one case fraudulently mortgaged to E. F. Mann and fraudulently conveyed to Katherine Mechler, and in the other fraudulently conveyed to Gertrude Kelly. Mechler and Kelly each filed a disclaimer, and Grace Fraser defended as owner. In one case Grace Fraser alone appeals; in the other, she and Mann are appellants.

Facts common to both appeals are these: In 1895 William Fraser, husband of Grace and brother of Donald, died childless and testate. In his will William devised and bequeathed certain real and personal property to his widow in lieu of dower, but she elected to take under the law. By the next item he made a general bequest of $4,000 to his brother Donald. Other collateral kin were given in subsequent and separate items of the will general money bequests of named sums. Grace Fraser and George McDonald were nominated executors, with a direction that they should not be required to give bond, and they qualified and acted. Among the assets were notes of Sadler to William Fraser for $25,800, secured by purchase-money mortgage of what is known in the record as the Fraser Farm. Grace Fraser, being advised that under the law she took all the estate's personalty, bid at the sale under the executors' foreclosure decree on the Sadler mortgage the full amount of the debt. Learning better afterwards, Grace Fraser asked the foreclosing court to set aside the sale and offer the property anew. This was done, and at the resale she acquired the farm for $10,000. Donald Fraser and the beneficiaries of the other separate bequests sued out a writ of error from the Appellate Court of Illinois to test the right of the foreclosing court to relieve Grace Fraser from her mistake of law. In Fraser v. Fraser, 128 Ill. App. 73, the second

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

sale was set aside and the original one reinstated. Thereupon the legatees petitioned the probate court to revise the final account of Grace Fraser, as executrix, which had theretofore been approved. In the order confirming the recast account the probate court ordered "said executors, and each of them, to pay to each of said legatees the several sums named in said order." Donald Fraser's estate, after being charged with amounts received under prior reports, was found to be entitled to $3,357; and the amounts severally due to other legatees, each less than $500, were likewise found. On appeal the recast account was confirmed. Fraser v. Fraser, 149 Ill. App. 186.

Grace Fraser owned certain real estate in her own right, known herein as the Elgin Flats. Cole, as administrator of Donald Fraser's estate, a citizen of California, filed his bill in the court below against Grace Fraser, a citizen of Massachusetts, and Gertrude Kelly, fraudulent grantee, a citizen of New York, to reach this real estate. His bill set forth the above-stated facts, and additionally that the William Fraser estate was insolvent; that Grace Fraser and George McDonald had left the state of Illinois and had abandoned their trust as executors; that Grace Fraser was insolvent; that she had appropriated to herself all the William Fraser estate after payment of debts; and that there was no property in Illinois out of which to satisfy complainant's claim except the real estate fraudulently conveyed by Grace Fraser. The other legatees were permitted to intervene, file their claims, and adopt the allegations of the bill. Grace Fraser, both before and after the intervention, filed certain pleas challenging the right of the trial court to entertain the suit. On the overruling of these pleas, she declined to plead further, and the decree for complainant was thereupon entered. The nature of the pleas will be understood from our statement of the reasons why the bill was properly sustained.

[1] 1. Donald Fraser's estate, by virtue of the legacy to Donald and the recast account in the probate court, was a creditor of Grace Fraser. McDonald v. People, 222 Ill. 325, 78 N. E. 609; Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80.

[2] 2. Chapter 3, § 118, Hurd's Ill. Stat. 1911, gives a legatee a right of action against an executor to recover the legatee's share of the estate in the executor's hands, provided an order has first been made on the executor to pay. And this right of action may of course be asserted in the federal as well as in the state court, if proper diversity of citizenship exists. Waterman's Case, supra.

[3] 3. A creditor's bill was therefore the character of the bill in question. If all the other legatees, as creditors, were indispensable parties to the bill, the requisite diversity of citizenship would be lacking. But while in any creditor's pursuit, for himself and others who may join, of his debtor's fraudulently conveyed property the presence of the other creditors may be necessary in order to enable the court to do exact justice in the distribution, their presence is not indispensable to jurisdiction to proceed at the sole instance of the complainant. Payne v. Hook, 74 U. S. (7 Wall.) 425, 19 L. Ed. 260; Hotel Co. v. Wade, 97 U. S. 13, 24 L. Ed. 917; Williams v. Crabb, 117 Fed. 193, 54 C. C. A. 213, 59 L. R. A. 425; O'Neil v. Wolcott Mining Co., 174

Fed. 527, 98 C. C. A. 309, 27 L. R. A. (N. S.) 200. Donald's claim against Grace Fraser was as separate and distinct from the claims of other legatees as if she had been a banker and he one of her depositors.

[4] 4. Jurisdiction obtained on the bill was not lost by permitting the other legatees to intervene, for they came in as proper or necessary but not indispensable parties, and the jurisdiction over them was not original but dependent or ancillary.

[5] 5. Though complainant and his counsel before filing the bill understood that the other legatees would ask leave to intervene, and by the same counsel, the right of the court in permitting intervention, the right of complainant to insist that jurisdiction be taken on his bill, and the right of the other legatees to seek intervention, were exactly the same as if there had been no such understanding. There can be no fraudulent collusion respecting jurisdiction in presenting and maintaining legal grounds of jurisdiction. Lehigh Mining Co. v. Kelly, 160 U. S. 327, 16 Sup. Ct. 307, 40 L. Ed. 444; South Dakota v. North Carolina, 192 U. S. 286, 24 Sup. Ct. 269, 48 L. Ed. 448.

[6] 6. George McDonald, coexecutor, whose citizenship according to the averments of the plea was in New York, was not an indispensable party. His presence would not disturb the diversity of citizenship; but in the trial court, considered not as a federal court but as a court of equity, his presence was dispensable because nothing was asked against him, and because it was not only equitable but also in his interest that Grace Fraser, who had appropriated all the assets of the William Fraser estate, should be made to pay.

[7] 7. Though the order of the probate court was not a judgment on which execution could issue, the bill discloses a suit maintainable without first obtaining judgment and execution at law in Illinois, because Grace Fraser had fled from the state, was insolvent, and had fraudulently conveyed her real estate in Illinois, which was the only source from which the claim against her could be realized. Case v. Beauregard, 101 U. S. 688, 25 L. Ed. 1004; National Tube Works v. Ballou, 146 U. S. 522, 13 Sup. Ct. 165, 36 L. Ed. 1070.

[8] 8. Attachment was not an adequate remedy. Without the aid of equity in avoiding the fraudulent conveyance the legal writ would be unavailing.

[9] 9. Time consumed in the state courts by complainant in litigating with Grace Fraser to establish his claim cannot be counted by her against him as laches. Northern Pac. Ry. Co. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931.

By the other bill complainant sought to reach the Fraser farm. The whole situation was disclosed; Grace Fraser filed the same pleas; and she abided by the order overruling them. Since this bill is also sustainable as a creditor's bill, it is immaterial whether complainant has further equities as against Grace Fraser. But appellant Mann, against whom the bill as a mere creditor's bill would not be sufficient, answered, and the issues so made were referred to the master, whose report in favor of complainant was confirmed by the chancellor.

[10] In his answer Mann's first insistence was that, inasmuch as

the trust deed to him was executed to secure Grace Fraser's $1,500 note owned by Fisher, the court could not proceed in the absence of Fisher. As Mann and Fisher were both citizens of Illinois, Fisher's presence would not affect the diversity of citizenship. If Fisher is not cut off by a proceeding in which his trustee defends in his behalf (Lewis v. Peck, 154 Fed. 273, 83 C. C. A. 211), at least Mann is bound by the decree respecting his representative defense, and the trial court has jurisdiction by ancillary bill to bring in Fisher if that should be deemed necessary or advisable (Julian v. Central Trust Co., 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629).

[11] On the merits Mann contended that the note and trust deed were given and taken in good faith and for full value. Absence of actual fraudulent intent was admitted; but, as Fisher was attorney for Grace Fraser and had full knowledge of her dealings with the assets of the William Fraser estate, his lien, taken pending the controversy, is subordinate to the equitable lien in the nature of a vendor's lien growing out of the foreclosure sale of the Fraser farm, if such a lien accrued.

[12, 13] Equitably the money Grace Fraser used in buying the farm belonged partly to the legatees. By insisting in the state courts that she abide by the purchase, they waived all claim to the title to the land through a resulting trust. But that does not mean that a purchase-money lien was waived if it in fact arose from the ratified purchase. A vendor's lien may be availed of by beneficiaries who were not direct parties to the sale. Zeiser v. Cohn, 207 N. Y. 407, 101 N. E. 184, 47 L. R. A. (N. S.) 186, cited in Gerstell v. Shirk, 210 Fed. 223, 127 C. C. A. 41. Here the legal title to the money (converted into land that the executors through foreclosure sold to Grace Fraser) was in the executors; and so, in our opinion, an equitable lien accrued to the executors for the benefit of the legatees. And if in a suit by the beneficiaries against the purchasing executor the executors should have been parties, the challenge would go only to the capacity of the beneficiaries to sue in their own names and right—a question not raised.

[14] An allowance of $1,000 solicitors' fees was included. No law of Illinois warranted the increase of Grace Fraser's indebtedness by such an addition. Washburne v. Burke, 84 Ill. App. 587. Nor can equity in a suit upon a creditor's bill or a vendor's lien bill enlarge the defendant's debt in that way. Cole, as the original complainant, might be given such an allowance out of the recovery as against interveners; but we assume that this is not needed because all the legatees were represented by the same counsel.

The decrees are modified by striking out the allowance of solicitors' fees, and as modified are

Affirmed.

In re YARYAN NAVAL STORES CO.

(Circuit Court of Appeals, Sixth Circuit. May 15, 1914.)

Nos. 2598, 2599.

BANKRUPTCY (§ 18½ New, vol. 8 Key-No. Series)—CORPORATIONS—INVOLUNTARY PROCEEDINGS—DEFENSES.

Under Bankr. Act July 1, 1898, c. 541, § 4, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3423), as amended by Act June 25, 1910, c. 412, §§ 3, 4, 36 Stat. 839 (U. S. Comp. St. Supp. 1911, p. 1494), which provides that any corporation, with specified exceptions, may become a voluntary bankrupt, or may be adjudged an involuntary bankrupt, "and shall be subject to the provisions and entitled to the benefits of this act," an order of a court of equity appointing receivers for the property of a corporation, enjoining the corporation and its officers from interfering with the possession of the receivers, and all creditors from taking steps to enforce their claims other than proving them in that suit, does not interfere with the right of the corporation or any of its creditors to institute proceedings to have it adjudged a bankrupt.

Appeal from the District Court of the United States for the Northern District of Ohio; John M. Killits, Judge.

In the matter of the Yaryan Naval Stores Company, bankrupt. On appeal from order of adjudication. Affirmed.

C. A. Seiders, of Toledo, Ohio, for appellants Brunswick Bank & Trust Co. and others.

G. P. Kirby, of Toledo, Ohio, for appellants James S. Brailey and others.

C. F. Chapman and C. A. Schmettau, both of Toledo, Ohio, for appellees.

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

SESSIONS, District Judge. The Yaryan Naval Stores Company is an Ohio corporation having factories and places of business located at Brunswick in the state of Georgia and at Gulfport in the state of Mississippi. On May 24, 1913, in a suit brought by a creditor of the corporation, the United States District Court for the Southern District of Georgia appointed receivers of its property. The same receivers were appointed in Mississippi. They immediately qualified and took possession of all the property of the corporation in those states. The order appointing the receivers was in the usual form in such cases, commanding the officers, agents, and employés of the Yaryan Naval Stores Company to turn over and deliver to the receivers all of its property, authorizing the latter to continue the business and to operate the plants at Brunswick, Ga., and Gulfport, Miss., requiring all creditors to intervene in that suit and assert their claims, and enjoining—

"the defendant company and its officers, directors, agents and employés and all other persons claiming to act by, through, or under said company, and all creditors and persons whomsoever, from interfering or attempting to interfere in any manner whatsoever with the possession, use, operation, or control of any part of said property, or interfering in any way so as to prevent the discharge of the duties of said receivers or the operation of said property, * * * and from instituting or prosecuting any actions, suits or proceed-

ings against the defendant, the Yaryan Naval Stores Company, or any action, suits, or proceedings affecting any property in which the Yaryan Naval Stores Company is interested, without the order and permission of this court."

In accordance with the terms of this order, the receivers have continued the business of the company, and in so doing have incurred debts and have entered into various contracts which are in process of performance. No ancillary proceedings have been instituted in the state of Ohio, where a small part of the company's property is located.

On December 1, 1913, three unsecured creditors of the Naval Stores Company, who had not appeared in the suit in Georgia, nor obtained leave of that court so to do, filed a petition in the United States District Court for the Northern District of Ohio, Western Division, praying that the company be adjudged a bankrupt. On December 15, 1913, the board of directors of the company adopted a resolution and caused a written copy thereof to be delivered to one of the petitioning creditors, whereby the company, in writing and substantially in the language of the Bankruptcy Act, admitted its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground. Thereupon the creditors' petition was amended by leave of court, so as to allege the above admission as an act of bankruptcy. The answer of the company "admits each and every allegation contained in said petition and said amendments." Answers were filed by upwards of 20 opposing creditors and the receivers appointed by the court in Georgia, proofs were taken, a hearing had, and an order entered adjudging the Naval Stores Company a bankrupt upon the sole ground that it had committed an act of bankruptcy by its admission above set forth. This appeal from such order is prosecuted by the opposing creditors and the receivers.

The precise contention of the receivers and opposing creditors, urged in the court below and here, is thus stated by their counsel:

"The acts of the petitioning creditors in filing the original petition and the amendment thereto, and the several acts of the company in passing the resolutions admitting its inability to pay its debts and its willingness to be declared a bankrupt, the admission in writing of the same, and the filing of its answer to the petition and amendment, were each and all acts in violation of the order of injunction made by the District Court of Georgia, and in contempt of that court, and therefore null and void, and should not have been recognized or given effect by the court below."

It will be observed that the claim made is, not that the requisite conditions of bankruptcy did not exist, but that, because of the injunction, the parties who alone could assert those conditions to procure an adjudication were powerless to act.

The unsoundness of this contention is declared and demonstrated by the plain and positive provisions of the Bankruptcy Act itself. Section 4 thereof provides that:

"Any [every] person * * * shall be entitled to the benefits of this act as a voluntary bankrupt," and "any [every] natural person * * * and any [every] moneyed, business, or commercial corporation, * * * owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act."

This language is so broad and comprehensive as to be all-embracing and all-inclusive. It clearly manifests the intention of Congress to confer the rights and privileges of the Bankruptcy Act upon all persons and all corporations except those expressly exempted from its operation. Rights and privileges so positively bestowed cannot be destroyed, denied, or abridged by any power save that which created and brought them into being. Nor, in the absence of specific declaration, will it be presumed that any court intends to make an order which must be ineffective because in direct conflict with the legislative will and mandate.

The settled rule is that the jurisdiction of the courts in bankruptcy in the administration of the affairs of insolvent persons and corporations is exclusive and paramount. In re Watts & Sachs, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933; Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208; United States Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055; Leidigh Carriage Co. v. Stengel (C. C. A. 6) 95 Fed. 637, 37 C. C. A. 210.

In the present case, the Naval Stores Company had the undeniable right to go into voluntary bankruptcy, and to take any legitimate steps to bring about that result, and to obtain for itself and its creditors the benefits of the Bankruptcy Act. The petitioning creditors were also clearly within their rights when they applied for and obtained from the court having jurisdiction an order adjudging the company a bankrupt. Indeed, upon the showing made, the court of bankruptcy could not have denied the relief which it alone had jurisdiction and authority to grant.

In the appointment of the receivers and the issuance of the injunction, the powers of the court in Georgia were likewise properly exercised. There the solvency of the company was averred and admitted. The necessary element of involuntary bankruptcy was wanting. Only a court of equity could give the desired relief. But the order of that court must be read and interpreted in the light of, and in connection with, the relevant and explicit provisions of the controlling act of Congress. When so read and interpreted, it contains nothing which indicates an intention to prohibit a due application being made to the appropriate bankruptcy court, or the exercise by the latter court of its special jurisdiction and powers, whenever the requisite statutory conditions might be found to exist.

We are not impressed with the argument that the bankruptcy act was not properly invoked on the ground that the receivership was not an act of bankruptcy, and, if it had been, was not assailable because bankruptcy proceedings were not begun within four months thereafter. This contention overlooks the consideration that the act on which the adjudication is based is not the original receivership, but the debtor's admission of insolvency, presumably occurring or discovered subsequent to the original receivership. To deny the right of the debtor, when such insolvency is found to exist, to take the benefit of the act and thereby secure a discharge from its debts, is to deny the ultimate

paramountcy of the act, which is designed, not merely for the benefit of creditors, but for that of the debtor as well.

The present appeal does not involve nor require the determination of any conflicting claims concerning the right to the immediate possession of any portion of the property of the bankrupt, and no such question is decided.

The order of the District Court will be affirmed.

STODDARD v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 11, 1914.)

No. 3951.

1. PUBLIC LANDS (§ 19*)—INCLOSURE—UNLAWFUL FENCES.

Where a fence was so constructed by defendant that in combination with natural barriers it constituted a complete obstruction to the passage of range stock from the township east into township 138, which contained public lands open for grazing, it constituted a violation of Act Cong. Fed. 25, 1885, c. 149, § 3, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), providing that no person by fencing or inclosing shall prevent or obstruct any person from peaceably entering upon or establishing a settlement or residence upon any tract of public land subject to settlement or entry under the land laws of the United States, or shall prevent or obstruct free passage or transit over or through public lands; such section not being limited to the passage of individuals, but requiring that the lands also be left open to the passage of stock.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.*]

2. PUBLIC LANDS (§ 19*)—FENCES—CONSTRUCTION.

Where a fence in combination with natural barriers was so constructed as to completely obstruct the passage of range stock from one township to another, containing public lands, it was illegal, though it was built entirely on land belonging to defendant, in which the government had no interest.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.*]

Appeal from the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Bill by the United States against John B. Stoddard. Judgment for the United States, and defendant appeals. Affirmed.

This was a bill in equity, brought by the United States under the provisions of the act of Congress approved February 25, 1885 (23 Stat. 321, c. 149 [U. S. Comp. St. 1901, p. 1524]), to enjoin the defendant, the appellant here, from obstructing the free transit over and through certain public lands of the United States. The particular charge against the defendant was that he constructed and maintained a barbed-wire fence along or near to the eastern boundary line of township 138 north, range 103 west of the fifth principal meridian, so that it, taken in connection with certain buttes or gullies on the surface of the land, formed an effective obstruction to the free passage of range cattle and horses into and upon the public lands lying within that township, thereby preventing the ranchers living on the adjacent eastern township from enjoying the privilege of a free range for their cattle and horses and appropriating the grazing privilege to their own use. The answer

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

admitted the erection of certain fences in connection with the natural conditions of the surface of the ground for the purpose of protecting defendant's stock while being pastured and herded, but denied that the same constituted an unlawful obstruction within the meaning of the act of Congress. The case was heard on its merits, and an injunctive order was granted, requiring the defendants within a fixed time to make certain specified openings in the fence which he had erected, and in case of failure to do so that the United States marshal remove the fence at the cost of the defendant. From this decree the defendant appealed to this court.

W. F. Burnett, of Dickinson, N. D., for appellant.

Edward Engerud, of Fargo, N. D. (M. A. Hildreth, of Fargo, N. D., on the brief), for appellee.

Before HOOK, ADAMS, and SMITH, Circuit Judges.

ADAMS, Circuit Judge (after stating the facts as above). The facts as disclosed by the record are substantially these:

The defendant was the owner by mesne conveyance from the Northern Pacific Railroad Company, the original grantee from the government, of all the odd-numbered sections in township 138, and was the lessee and had the right of possession of two other sections of land in that township. The even-numbered sections, embracing about 7,000 acres of land, were still unoccupied public lands.

In the year 1912, before the defendant built the fence complained of, the condition of things was this: A fence or series of fences extended from section 36 in the southeast corner of the township along its southern boundary line and to its southwest corner, and the defendant owned or controlled substantially all the lands adjacent to and extending along the northern line of the township. Section 1 in the northeast corner of the township was inclosed by a fence, and on section 24, near the middle of the eastern boundary line of the township, there was a homestead entry inclosed by a fence. The defendant was lessee from the state of North Dakota of section 36 in the southeast corner of the township.

In that year the defendant put up a barbed-wire fence, commencing near the southwest corner of section 1, running thence in a southerly direction near to the eastern line of section 11, to the side of a precipitous butte located about midway the eastern line of the section; thence southerly from the southern edge of this butte to the southeast corner of section 11, where it connected with another butte; thence from the eastern side of the last-mentioned butte, along and near to the northern line of section 13, to the eastern boundary line of the township; thence southerly along this eastern boundary line to a fence surrounding a homestead entry in the northeast quarter of section 24; from about the southwest corner of this homestead entry a crescent-shaped butte extended in a southeasterly direction to a point near to the northeast corner of section 25; from the south end of this butte the defendant constructed his fence to the northeast corner of section 25, thence southerly along the eastern line of that section to a gully, thence from the south end of the gully along or near to the eastern boundary line of section 36, to a connection with the fence constructed along the southern boundary line of the township.

The defendant's testimony tended to show that he left certain openings in the fence, and he claims that these openings afforded adequate means for the passage of stock into the township; but the government contends that the fences were so constructed in connection with precipitous buttes and impassable gullies just referred to, as to create an effective obstruction to the free range of stock from the township lying immediately east and thereby to appropriate the grazing privileges of township 138 exclusively to the use of the defendant.

[1] Did the fence as constructed constitute an obstruction within the meaning of the law? Section 3 of the act of February 25, 1885, provides:

"That no person, by force, threats, intimidation, or by any fencing or enclosing, or any other unlawful means, shall prevent or obstruct * * * any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, *or shall prevent or obstruct free passage or transit over or through the public lands.*"

The trial court found that the fence was so built that, in combination with natural barriers, it constituted a complete obstruction to the passage of range stock from the township east into township 138. Careful consideration of the evidence produced and of the physical facts of the case convinces us that the learned trial judge was clearly right in that finding.

We cannot follow the location and course of the fence, and observe its connection with the buttes and gullies on the land, without discerning a manifest design on the part of defendant to so utilize the two as to form one continuous barrier along the eastern portion of the township to all free grazing by outside ranchers occupying the lands on the east of the township. The defendant in his own testimony in effect admits that in building the fence he had the double purpose of preventing his own cattle from drifting and protecting the range from outside cattle, and we think he can be accorded the credit of accomplishing his purpose very well. The contention that the openings left by him at different places in the fence were adequate for the free passage of stock into the township is not, in our opinion, sustained by the proof.

Defendant's counsel make an argument that section 3 of the act of Congress of 1885, when properly construed, does not forbid the obstruction of free passage or transit over or through the public lands of *stock,* but that the obstruction referred to is the obstruction of free passage or transit over the public lands of *persons* only. That argument rests on this: That as a clause in the forepart of section 3 provides against preventing or obstructing "*any person* from peaceably entering upon or establishing a settlement" etc., therefore that the later clause "or shall prevent or obstruct free passage or transit over or through the public lands" must relate back to the word "person" and be treated as if it read in this way, "or shall prevent or obstruct free passage or transit of *any person*" through the public lands, etc. We think this is a forced and unwarrantable construction of the language employed. The act, in our opinion, was intended to prevent the obstruction of free passage or transit for any and all lawful purposes over public

lands. It is a well-known fact that the free herding and grazing of cattle on the public lands is a legitimate use to which they may be put, and we think Congress must have had the preservation and protection of this use in mind in the enactment under consideration.

[2] It is also argued that as the defendant built his fence on his own land, and not upon land belonging to the government, he did no more than he had the lawful right to do with his own. This argument is fully answered by the case of Camfield v. United States, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260. See, also, Golconda Cattle Co. v. United States, 119 C. C. A. 519, 201 Fed. 281. The fence, in our opinion, as constructed by him, effectually accomplished the purpose intended by him, and as effectually served the purpose of thwarting the obvious intent of the act. It in fact prevented and obstructed the free passage over the public lands by ranchers and their stock, and, except for the relief granted by the court below, would permit the defendant to enjoy a monopoly of the grazing on the public lands within township 138.

We think the decree below was right and it is affirmed.

STEIFF v. GIMBEL BROS.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 270.

TRADE-MARKS AND TRADE-NAMES (§ 95*)—UNFAIR COMPETITION—IMITATION.

Where complainant had obtained an injunction restraining B. from making and selling toy animals copied from complainant's models, and defendant purchased such animals from B. for resale, complainant was entitled to an injunction restraining defendant from selling such toys until it was established by proof that the animals so sold by defendant had not been copied from complainant's models.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.*

Unfair competition, 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 Southern District of New York.

An order of the District Court of the United States for the Southern District of New York denied a motion for a preliminary injunction restraining the defendants from alleged unfair competition in trade in selling stuffed toy animals in imitation of similar animals which, for many years, have been made and sold by the complainant. An injunction granted under somewhat similar circumstances was affirmed by this court in Steiff v. Bing, 206 Fed. 900, 124 C. C. A. 560.

Arthur v. Briesen, Fred A. Klein, and Hans v. Briesen, all of New York City, for appellant.

Augustus T. Gurlitz, of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

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

COXE, Circuit Judge. The question involved upon this appeal is a close and interesting one but in view of our former decision in Steiff v. Bing, involving animals identical in appearance, we think the burden should be upon the defendants to prove that the animals which they purchased from Bing were not copied from those designed by the complainant. In other words, these defendants should not be permitted to sell to the public the toys which we held could not be sold by their vendor, until they have proved by witnesses who can be cross-examined that their animals were made without any aid from the complainant's animals. So far as the present record is concerned, we have little doubt that the person who designed the animals sold by the defendant had before him similar animals designed by the complainant's employés. The similarity is too great, even in minute details, to be the result of accident. In this way Bing has dispensed with original research. It has not been necessary for him to employ persons of originality and genius. Mere copyists and mechanics were all that he required. In this case, as in the former case, we cannot avoid the conclusion that the Bing toys were made with the Steiff toys as models. The small points of difference such as placing the orange patch of the terrier on the right instead of the left side rather accentuates the intent to get all of the advantages of the complainant's design without expending any original thought or labor thereon.

To state the situation in a few words, we think that after a preliminary injunction has been sustained by this court, the sale of the prohibited goods which are in all respects similar to those condemned should cease until the defendant has proved by witnesses who can be cross-examined that the defendant's goods were not copied from the complainant's. It may be that it can do this, but until it does it should suspend its sales. Enterprise Mfg. Co. v. Landers, Frary & Clark (C. C.) 124 Fed. 923; on appeal 131 Fed. 240, 65 C. C. A. 587; Yale & Towne Mfg. Co. v. Alder, 154 Fed. 37, 83 C. C. A. 149.

The order is reversed.

THE BERN.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 227.

COLLISION (§ 93*)—STEAM VESSELS CROSSING—STARBOARD HAND RULE.

A decree finding a tug solely in fault for a collision between her tow and a crossing ferryboat in East River affirmed, where the starboard hand rule applied and it was the duty of the tug to keep out of the way.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 194, 195; Dec. Dig. § 93.*]

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

On appeal from a decree of the District Court for the Southern District of New York in favor of the libelant adjudging the tug Bern solely liable for damages sustained by the ferryboat Mineola by reason

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

of a collision with one of the barges in tow of the tug. The Philadelphia and Reading Railway Company, claimant of the Bern, appeals. Affirmed.

Pierre M. Brown, of New York City, for appellant.
De Lagnel Berier, of New York City, for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The testimony as to the collision was taken in open court and presents a clear question of fact, the decision of which should not be disturbed unless we are clearly of the opinion that the trial judge was in error. The tug was about 250 feet from the pier line on the New York side and was destined for pier 28, East River. She had two loaded coal barges on her starboard side. The tide was strong ebb. The ferryboat came out from her slip on the Brooklyn side intending to cross to the slip on the New York side. At this time the tug was a little below the New York ferry slip, to which the Mineola was destined. The vessels were on crossing courses, the Bern had the Mineola on her own starboard side and the starboard hand rule was clearly applicable. We do not see why the Bern could not have stopped and backed on the ebb tide, or ported and gone astern of the Mineola. The trial judge was of the opinion that she could not have done this because she was not navigating in the middle of the river as required by the East River statute and was not permitted to plead a disability based upon her own violation of the law. We are, however, inclined to think that the violation of the East River statute had little to do with the collision. As the parties navigated with reference to each other, it would probably have happened, even if the Bern had been in the middle of the river. Wherever she was, it was the duty of the Bern to keep out of the way.

The decree is affirmed with costs.

THE M. E. LUCKENBACH.

THE HUGH KELLY.

(Circuit Court of Appeals, Second Circuit. April 28, 1914.)

No. 250.

COLLISION (§ 110*)—STRANDING OF TOW—PROXIMATE CAUSE.

The stranding of a barge, which was one of three in a tow, after she had been cast off by the barge ahead, because of a slight collision with a schooner, so as to permit the schooner to pass through the tow, *held* due to the fault of her own master in not properly anchoring, as directed by the tug, and not to the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 233; Dec. Dig. § 110.*]

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

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

This cause comes here on appeal by libelant from a final decree of the District Court, Eastern District of New York, holding the tug M. E. Luckenbach at fault for a collision with the schooner Hugh Kelly at or near the junction of the Main Ship and Swash channels in New York Harbor. The court dismissed the libel filed against the steam tug for negligent towage, and the petition of the claimants of said steam tug bringing in the said schooner under the fifty-ninth admiralty rule (29 Sup. Ct. xlvi), the court finding that the collision was not the proximate cause of the stranding of libelant's barge William H. Conner, but was caused through the fault of the master of said barge in not using ordinary care to prevent his barge from drifting and stranding. Affirmed.

For opinion below, see, 200 Fed. 630.

Peter Carter, of New York City, for appellant.

Samuel Park, of New York City, for the Hugh Kelly.

J. K. Symmers, of New York City, for the M. E. Luckenbach.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. We have no doubt that the place of stranding is where the government witnesses locate it. That being so, it seems very plain that the stranding was due to the barge's failure to anchor in time and with sufficient chain. Judge Veeder has very fully and carefully discussed the testimony. We concur with his reasoning and conclusion.

The decree is affirmed, with costs, on his opinion.

EMERSON & NORRIS CO. v. SIMPSON BROS. CORPORATION.
SIMPSON BROS. CORPORATION v. EMERSON & NORRIS CO.

(Circuit Court of Appeals, First Circuit. May 21, 1914.)

Nos. 1050, 1051.

1. PATENTS (§ 325*)—SUIT FOR INFRINGEMENT—COSTS.

On an accounting for damages and profits, following a decision on the merits in 202 Fed. 747, *held*, that the patent in suit was limited to molds made substantially of sand, as described in the opinion.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 607–612; Dec. Dig. § 325.*]

2. APPEAL AND ERROR (§ 1022*)—REVIEW—FINDINGS OF FACT.

The rule applied that, where a District Court has concurred with the findings of a master on questions of fact, such findings should not be disregarded by an appellate court, except for strong reasons. See Texas & P. R. Co. v. Railroad Commission, 232 U. S. 338, 34 Sup. Ct. 438, 58 L. Ed. —.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015–4018; Dec. Dig. § 1022.*]

3. WORDS AND PHRASES—"SAND."

"Sand" is a water-worn detritus finer than that to which the name "gravel" would ordinarily be applied.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6326, 6327.]

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

Appeals from the District Court of the United States for the District of Massachusetts; Clarence Hale, Judge.

Suit in equity by the Emerson & Norris Company against the Simpson Bros. Corporation. From a decree awarding damages and costs, both parties appeal. Affirmed.

See, also, 202 Fed. 747, 121 C. C. A. 113.

R. A. Parker, of Detroit, Mich., and Louis W. Southgate, of Worcester, Mass., for plaintiff.

Laurence A. Janney, of Boston, Mass. (Frederick L. Emery and Emery, Booth, Janney & Varney, all of Boston, Mass., on the brief), for defendant.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. [1] These are cross-appeals growing out of the judgment we entered with reference to the same litigation on January 30, 1913, directing a decree in favor of the Emerson & Norris Company against Simpson Bros. Corporation for an injunction and an accounting. On the mandate being filed in the District Court a master was appointed, who made a report in favor of Emerson & Norris Company carrying comparatively small damages, which report was accepted by the District Court, and a judgment was entered with costs in favor of Emerson & Norris Company to and including the mandate heretofore sent down for both the District Court and this court. Costs, however, were awarded by the District Court in favor of Emerson & Norris Company for only one-thirteenth of the costs before the master. Both parties appealed from the allowance of costs. The principle on which only one-thirteenth of the costs before the master was taxed against Simpson Bros. Corporation was that at the hearing before the master which was strenuous and long continued, and in the main resulted against Emerson & Norris Company, only a small portion of what they claimed being allowed, as we will show later on, they had attempted to raise again an issue which the mandate had settled. Simpson Bros. Corporation appealed against any allowance of costs, claiming that at least the same apportionment of costs should apply to the costs to and including the time when the prior mandate went down from us; but the rules applicable thereto are fundamentally different. On general rules the original complainant, having recovered something, was entitled to full costs to the time of our first mandate, while the course taken by it since that mandate enables us, according to equitable rules, to approve the apportionment of costs made by the District Court. Therefore we affirm the decision of the District Court as to costs in all respects.

We will next take the appeal of Simpson Bros. Corporation on the merits, because it is easily disposed of. It may be, and it is probable, that the amount of damages awarded by the District Court exceeded in some particulars a just amount; but Simpson Bros. Corporation concluded its brief as follows:

"On the whole case, therefore, we submit that no course remains but for this court to adopt the findings of fact by the master, confirmed by the District Court, and then, by merely reiterating its opinion, to resolve all questions and to settle this litigation once and for all."

We regard this, and justly so, as waiving any claims that Simpson Bros. Corporation had, if any, on these appeals, except as to the mere matter of costs.

[2, 3] This leaves us to take up the appeal by Emerson & Norris Company, whose proceedings before the master, and here, are based on a grave misunderstanding of what was clearly decided by us according to our prior mandate. We will start with the proposition that the matters now involved are strictly questions of fact. Not only this, but the facts are of a mechanical or chemical nature, not ordinarily within the cognizance of the court, even so far as they may be experts with reference to any question which may come before them as triers of facts. This is particularly so with regard to the use of the word "sand" in the claims in issue here. Yielding to the fact that these claims are addressed to the practical art of foundrymen, we lean towards the construction of the word "sand" as it would be understood by them, that is, molding sand; but just what molding sand is, even for foundrymen, seems to be looked at from different standpoints. It is ordinarily supposed to contain a minimum of loam, or almost invisible vegetable growths which incline towards practically adhering to each other when somewhat moistened. Sand proper is, as shown by the definitions found in the briefs here, the result of attrition, or a "water-worn detritus finer than that to which the name gravel would ordinarily be applied"; and it sometimes lies in beds or sheets so solid that it seems to be preparing to return to its condition of ledge or rock. Sands that are understood as molding sands have different aspects with different foundrymen, and with different makers of encyclopedic and other dictionaries; and, also, the proportion of talc as a binder is somewhat differently understood. At any rate, all these things mean a certain amount of peculiar investigation of facts which are particularly of the class as to which the concurrence of two tribunals below is very impressive, although one of the tribunals is only a master in chancery or referee in bankruptcy, the latest illustration of which class is shown in Texas & Pacific Railway v. Railroad Commission, 232 U. S. 338, 34 Sup. Ct. 438, 58 L. Ed. ——, decided on February 24, 1914. In this case we have the concurrence of a master in chancery known to us to be a master of integrity, ability, and experience, with the learned judge of the District Court; and the result impresses us very gravely, and should not be disregarded except for reasons much stronger than any which we find.

Now, we have said that the component on which the complainant relies was, as shown in its claims, relatively dry sand, which "sand absorbs the surplus moisture from the compound." As said by the master in this case, we held it strictly to this proposition, and so strictly that we ruled as follows:

"It is not important for this part of the case that we should point out again that Sellar's invention was for a mold or molds and not for a process; but wherever it appears, and from every point of view, it was for a mold of composite material. A comparison of these claims with the simple claim of the patent in this case at once makes clear the real issue here. The latter claim gives no material for the mold except molding sand, which is to be relatively dry, expressly operating by absorption."

We especially made this emphatically and strikingly clear by the citation in our prior opinion from the expert Carpenter, in the following language:

"The fact that a dampened sand mold would hold its shape, and at the same time absorb water so as to compact a nearly liquid stone compound, is certainly a phenomenon which would never have been believed had it not been tried."

Under the ruling of the District Court, the complainant was not entitled to recover except for the use of molds made of sand as described by us and by the patentee's claim, without anything in the nature of a binding unless of a negligible amount. The following facts appear from the report of the master, as confirmed by the court:

The respondent found that it could not manufacture the product required successfully by the process invented by Stevens, as we have described it; and, after an unsuccessful attempt to the contrary, the respondent adopted the method pointed out by one Walter P. Butler in a patent issued to him on August 22, 1905, for a process of making artificial stone. This patent described the process at much length, involving many details with which we are not concerned; but it described the elements of the whole as follows:

"The addition to and as a part of a molding compound of the powdered mineral substances having soapy, sticky, smooth, or slippery properties, such as are possessed by talc and soapstone, forms a perfect substitute for loam, and causes the particles of sand to cohere or stand up when slightly moistened, and thus it is possible with such a compound to make clean-cut, sharp, smooth and perfect molds, such as could not heretofore be made in the sand alone."

For the comparatively small amount of the respondent's product, made according to the process patented by Stevens, the master and the court awarded against the respondent $164.79. This relieved the respondent from all liability for the product obtained by it under the alleged process according to Butler's patent. This was based on the conclusion that, according to the process shown by Butler's patent, the respondent used talc or some other binder to a practical and efficient amount. We do not find enough in the record to justify our reversing the result reached by them.

As the only question which it is apparent from this opinion was involved is one purely of fact, so that the result can never amount to a precedent of any consequence, we do not deem it worth while to follow the topic further.

As neither party can be said to have prevailed substantially over the adverse party on these appeals, the judgment in each case is:

The decree of the District Court appealed from is affirmed, and neither party recovers any costs on appeal.

PREPAYMENT CAR SALES CO. v. ORANGE COUNTY TRACTION CO.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 219.

1. PATENTS (§ 278*)—ACTION FOR INFRINGEMENT—REVIEW ON WRIT OF ERROR.
On trial to the court of an action at law for infringement of a patent involving a number of claims, the court found certain of the claims void for lack of patentable invention, and without passing on the validity of the other claims held them not infringed. *Held*, that the appellate court on writ of error was not limited to a review of the decision of the trial court on the question of infringement, but might consider both that question and the question of the validity of the remaining claims, in the light of the decision of the trial court as to the claims passed on.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 436; Dec. Dig. § 278.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PASSENGER CAR.
A judgment for defendant in an action for infringement of the Rowntree patent, No. 935,929, for a passenger car of the so-called "pay as you enter" class, tried to the court, affirmed.

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, Eastern District of New York in favor of defendant in error, which was defendant below. The opinion of Judge Veeder will be found in 214 Fed. 402.

S. E. Darby and Walter C. Noyes, both of New York City, for plaintiff in error.

C. P. Byrnes, of Pittsburgh, Pa., for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

PER CURIAM. This is an action at law for infringement of United States patent No. 935,929, granted October 5, 1909, to Harold Rowntree for a passenger car of the so-called "pay as you enter" class; it is referred to in the briefs as a "pay within" car for the reason that the conductor and the box for the deposit of fares are so located that the "conductor can readily and easily collect the fares from a point inside the car from the passengers as they enter the car."

The trial began before a jury, but by stipulation (in conformity with the statute) was continued and concluded before the judge. This does not change the situation; the findings and conclusions of the court take the place of the jury's verdict, and are to be accorded the same measure of conclusiveness as to all facts in controversy that a verdict would have.

There are 16 claims; those relied on are Nos. 3 to 16. The trial court held on a voluminous record containing much prior art and conflicting testimony of experts, that claims 3, 4, 5, and 6 could not be sustained because the combination which they covered did not disclose patentable novelty. That was a finding of fact. To this finding of fact error was specifically assigned, but counsel for plaintiff in er-

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

ror has chosen not to argue these assignments, stating on the oral argument that upon the record he did not think he could sustain them. It must be taken then as settled here that the combination set forth in each and all of these four claims does not disclose patentable invention.

As to claims Nos. 7 to 16, inclusive, the trial judge held that they embodied elements in construction, combination, location, and relative arrangement of parts which differentiate them from the elements present in defendant's structure and held them not to be infringed, without making any finding as to each specifically whether it was or was not valid. This is assigned as error, and the assignment has been argued here.

[1] It seems to be contended that on the question of infringement, this court is confined to a comparison of defendant's structure with the text of the several claims; that we may not construe them in the light of the specifications, of the prior art and of the finding of fact as to nonpatentability of the structure disclosed in claims 3, 4, 5, and 6. We do not concur in this view of the practice on writ of error. If the other claims of the patent were found to disclose nothing different from the particular combination covered by claims 3 to 6, inclusive, which disclose no patentable novelty, it would be an intolerable practice to send the whole cause back for a new trial, merely because the trial judge has made no separate specific findings as to the nonpatentability of claims 7 to 16, inclusive. If it were necessary to take up these last-named claims and compare them with defendant's structure the court of review in construing them would, of course, be guided by the conclusion reached as to the patentability of the device disclosed by claims 4 to 6.

[2] We find it unnecessary, however, to go into any discussion as to the details of the several claims or of defendant's structure. When a patent cause is tried before a jury and the testimony is closed, the court is not bound, under all circumstances, to send it to the jury on the question whether or not the combination of the patent discloses patentable invention. Although invention is generally spoken of as a question of fact, it does not necessarily follow that it must always be sent to the jury; other questions of fact arising in actions at law are frequently disposed of by the court, when upon the whole case the judge is satisfied that a verdict different from his own conclusion, if rendered, would have to be set aside. We are satisfied that this is the situation in the case at bar. Judge Veeder has very fully discussed the prior art; it is unnecessary to review it here. In such prior art are found passenger cars having a main car body space and a vestibule opening unobstructedly into each other, with a movable door in the side of the vestibule and means for operating the same from a point distant from the door; sometimes this point of control was in one place, sometimes in another; sometimes it was operated by the conductor, sometimes by the motorman. All that Rowntree seems to have evolved was a place for the conductor to stand (the conductor operating the means of control of the door) where he could see into the car and be seen by the passengers therein. The case is

closely parallel to the one considered by us in Fowler v. City of New York, 121 Fed. 747, 58 C. C. A. 113, involving the "island stations" in the subway; it is clearly within the decisions in Fond du Lac County v. May, 137 U. S. 395, 11 Sup. Ct. 98, 34 L. Ed. 714, and Aron v. Manhattan Railway Company, 132 U. S. 84, 10 Sup. Ct. 24, 33 L. Ed. 272. Since we are clearly of the opinion that the trial judge (had the jury continued to sit) could properly have directed a verdict for defendant at the close of the case, there can be no error found in his making a similar disposition of the case when tried before himself without a jury, finding, as the judgment states "a verdict in favor of defendant" on the whole case, although in his opinion he discussed some of the claims from the viewpoint of patentability and others from the viewpoint of infringement.

We may add that we have examined claims 7 to 16, and if it be possible to construe them so narrowly that they might cover some minor details sufficiently distinctive to be patentable, they would be not infringed by defendant's structure.

The judgment is affirmed.

LAGONDA MFG. CO. v. ELLIOTT CO.

(Circuit Court of Appeals, Third Circuit. February 25, 1914. Rehearing Denied June 11, 1914.)

No. 1778.

1. PATENTS (§ 285*)—SUIT FOR INFRINGEMENT—LICENSE—BILL.
   Where several patents formed parts of a co-operating set and were all involved in the construction of a license agreement which alone could justify defendant's noninfringing use of any of them, they were all properly made the subject of a single bill for infringement on complainant's theory that the license did not warrant defendant's use.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 445; Dec. Dig. § 285.*]

2. PATENTS (§ 211*)—LICENSE—LIMITATIONS.
   Where a settlement agreement involving patents to boiler tube cleaners conferred on defendant the right to manufacture, use, and sell to others for use throughout the United States the combination of a patent, but declared that the license should not authorize the manufacture, sale, or use after July 1, 1908, of any form of cleaner head or motor that infringes letters patent on cleaner heads or motors "now or hereafter owned by complainant," the license limited defendant's right to a sale of the devices in the United States.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 304–311; Dec. Dig. § 211.*]

3. PATENTS (§ 129*)—LICENSE—SUBSEQUENT PATENTS—VALIDITY—RIGHT TO CONTEST—ESTOPPEL.
   Where a license to manufacture, use, and sell throughout the United States a combination patent provided that it should not authorize the manufacture, sale, or use after July 1, 1908, of any form of boiler cleaner head or motor that infringed letters patent on cleaner heads or motors then or thereafter owned by complainant, it did not estop defendant to thereafter question the validity of subsequently issued patents owned by

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

complainant not mentioned in the agreement and covering inventions not shown to have been then conceived.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 182½–186; Dec. Dig. § 129.*]

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Bill in equity by the Elliott Company against the Lagonda Manufacturing Company for patent infringement. Decree for complainant (205 Fed. 152), and defendant appeals. Modified and affirmed.

Staley & Bowman, of Springfield, Ohio, for appellant.

Bakewell & Byrnes, of Pittsburgh, Pa., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the plaintiff, the Elliott Company, the owner of several patents—viz., No. 656,446, granted August 21, 1900, to W. S. Elliott; No. 830,808, granted September 11, 1906, to A. H. Swartz; No. 874,174, granted December 17, 1907, to W. S. Elliott and F. M. Faber; No. 983,032, granted January 31, 1911, to W. S. Elliott and F. M. Faber; and No. 983,034, granted January 31, 1911, to W. S. Elliott and F. M. Faber—filed a bill against the Lagonda Manufacturing Company charging infringement thereof. After final hearing, that court, in an opinion reported at 205 Fed. 152, held said charges of infringement were sustained. From a decree so holding the defendant appealed to this court.

The case is somewhat complicated, but by reference to the opinion cited we avoid needless restatement. It there appears that some of these patents were the subject of an agreement between these parties, dated February 8, 1908. This appeal, in principal part, turns on the meaning and effect of that paper. The case was so fully discussed by the court below, and, as we concur, save in one minor detail, with that court's views, we will limit ourselves to briefly stating the conclusions we have reached.

[1] First. The subject-matter of these patents, their conjoint use as component parts of a co-operating set, the fact that they were all involved in the construction of the agreement which alone could justify a noninfringing use of any of them, were factors which made it peculiarly fitting that infringement thereof should be made the subject of a single bill. The introduction of the license in the bill was a mere incident to the correct statement of the complaint. The plaintiff was the owner of the patents named in the agreement. That agreement was the only possible justification for defendant's use of the devices covered by such patents. It therefore follows that, as such agreement did not warrant such use, the case was in reality one of infringement.

[2] Second. We are of opinion the court below was right in holding that the license granted by the agreement to manufacture, use, and sell to others for use throughout the United States, extended no far-

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

ther than the United States. Bearing in mind the situation of the parties when this agreement was made, the expressed purpose throughout the agreement to restrict, in several particulars, the licenses covering the several patents—in one a time limit and in all a personal restriction—we think the court below properly gave to the license the territorial limitation its wording plainly expressed.

[3] Third. We think, however, the court erred in holding the Lagonda Company was estopped to question the validity of Patents Nos. 983,032, 983,034, and 874,174. If the Lagonda Company were a licensee by contract, it could not, of course, do this. But it is here charged with infringement. We find no contract relation which creates an estoppel and forbids it raising the question of the validity of these patents. They are not specified in the agreement, nor are any licenses granted the Lagonda Company under them. If that company has infringed them, no warrant for such tort is found in this agreement. Indeed, the implication of any such license is expressly negatived by the contract, which after granting a license under patent No. 656,446, adds:

"But such license shall not be held to authorize the manufacture, sale, or use by said Lagonda Company after July 1, 1908, of any form of cleaner head or motor that infringes letters patent on cleaner heads or motors now or hereafter owned by the Liberty Company."

Such being our conclusions, the injunctions granted should be modified so as not to cover the three patents just mentioned. As to them, the case may proceed in due course.

So modified, the decree below is affirmed.

LAGONDA MFG. CO. v. ELLIOTT CO.

(Circuit Court of Appeals, Third Circuit. February 25, 1914.)

No. 1779.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Bill by the Lagonda Manufacturing Company against the Elliott Company. From a decree (205 Fed. 149) dismissing the bill, complainant appeals. Affirmed.

Staley & Bowman, of Springfield, Ohio, for appellant.

Bakewell & Byrnes, of Pittsburgh, Pa., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

PER CURIAM. In this case the court below, in an opinion reported at 205 Fed. 149, dismissed a bill brought by the Lagonda Company charging the Elliott Company with infringing patent No. 776,877, granted December 6, 1904, to Henry F. Weinland, for a turbine motor for boiler-tube cleaners. On entry of a decree dismissing the bill the Lagonda Company took this appeal. As we agree with the views of the court expressed in said opinion, and the subject-matter is there fully and sufficiently discussed, we avoid needless repetition by adopting the lower court's opinion and affirming its decree.

T. B. WOOD'S SONS CO. v. VALLEY IRON WORKS.

(Circuit Court of Appeals, Third Circuit. March 27, 1914.)

No. 1802.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SHAFT HANGER.

The Wood patent, No. 790,609, for a shaft hanger, construed, and *held* not infringed.

Appeal from the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Suit in equity by the T. B. Wood's Sons Company against the Valley Iron Works. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 206 Fed. 172.

Prindle & Wright, of New York City, for appellant.

Brock, Beeken & Smith, of New York City, and Wm. P. Beeber, of Williamsport, Pa., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below T. B. Wood's Sons Company, the plaintiff, by its bill charged the Valley Iron Company with infringing patent No. 790,609, granted May 23, 1905, to Charles D. Wood, for a shaft hanger. That court, in an opinion reported at 206 Fed. 172, held infringement had not been established. From a decree dismissing the bill, plaintiff appealed.

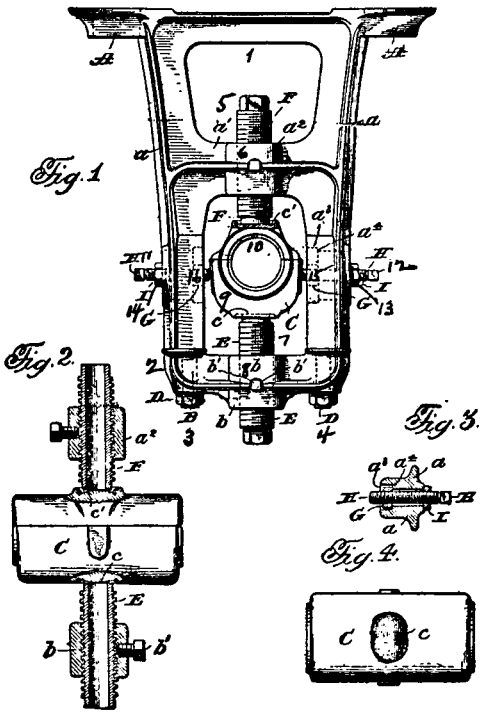
This patent was before the lower court in 191 Fed. 196, and before

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

this court in 196 Fed. 780, 116 C. C. A. 46. The three cases cited so fully describe the device in question that reference thereto obviates restatement here. In our opinion (196 Fed. 780, 116 C. C. A. 46) we noted that the surfaces on the top and on the bottom of the bearing-box, with which the large top and bottom screws engaged to hold the box, were cylindrical in form, and that this cylindrical form had the functional effect of allowing a variation in the position of the box. What we there said was:

"The invention thus appears to consist of a combination by which the box which supports the shaft may be readily adjusted to any position of the shaft vertically and horizontally with firmness and accuracy. The patent accomplishes this by means of horizontal screws on the sides and large screws on the top and bottom; these last screws having plain surfaces, but bearing upon a countersunk cylindrical surface or a flanged cylindrical surface. The surface upon which the flat screw bears allows a variation in position of the box; but, when once adjusted, the flat surface of the screw has sufficient bearing to prevent further movement when the large screw or flange is fastened with a set screw."

The cylindrical form was thus noted in pursuance of the disclosures of the specification and the limitations of the claims. In that regard the specification says, referring to accompanying figure:



"The bolt *E* bears against a surface *c* upon the under side of the bearing-box, which surface is countersunk or is surrounded with a rib to prevent the escape of the box from engagement with the ends of the bolt *E*, and which *surface is curved transversely to the end of the box, so that the box can rock upon the end of the screw or plunger E with the shaft to accommodate itself to the cutter.* * * * The surfaces *c* and *c'* are struck from a common center, so that, in effect, they form, with the screws or plungers *E* and *F*, a ball and socket joint. * * * It will be seen that the bearing-box, while strongly and firmly supported, can rock vertically longitudinally of the shafting, owing to the curvature of the surfaces *c* and *c'*."

Such cylindrical surfaces were likewise embodied in all claims granted, viz.:

"A bearing-box supported between said screws and having on its upper and lower sides cylindrical surfaces whose axes are transverse to the axis of the bearing."

Indeed, an examination of the file wrapper shows that the grant of the patent was urged on applicant's insistence that:

"The cylindrical surfaces *c c'* on the bearing-box permit the box to rock vertically. * * * Because of the fact that the axes of the cylindrical surfaces are transverse to the shaft, * * * the box can be adjusted vertically without disturbing the vertical screws."

Such being the limited character of plaintiff's patent, it follows, as is sufficiently pointed out at length in the opinion below (206 Fed. 173), that the defendant's structure, with its flat, noncylindrical, surfaces on the top and bottom of the bearing-box, does not infringe.

The decree below is therefore affirmed.

TALIAFERRO et al. v. WASHINGTON TIN PLATE CO.

(District Court, W. D. Pennsylvania. May 23, 1914.)

No. 215.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—TIN PLATE CLEANING MACHINE.

The Taliaferro and Reynard patent, No. 709,184, for a tin-plate-cleaning machine, was not anticipated and discloses invention; the prior art not disclosing the elements of the claims combined in an organized machine operating upon the principle of the patented machine. Also *held* infringed.

In Equity. Suit by John C. Taliaferro and Edwin Norton against the Washington Tin Plate Company. On final hearing. Decree for complainants.

Wesley G. Carr, of Pittsburgh, Pa., and Sturtevant & Mason, of Washington, D. C., for plaintiffs.

John S. Weller, of Pittsburgh, Pa., and V. H. Lockwood, of Indianapolis, Ind., for defendant.

ORR, District Judge. John C. Taliaferro and Edwin Norton complain that the Washington Tin Plate Company is using certain tin-plate-cleaning machines in violation of the plaintiffs' rights, as owners of United States patent No. 709,184, for a tin-plate-cleaning machine, to Taliaferro and Reynard, and seek the customary relief. The defenses are: (a) Invalidity of the patent for lack of novelty and invention; and (b) noninfringement. Defendant's contention is thus succinctly stated in the following paragraph taken from the brief filed in its behalf:

"If the patent is construed so as to cover defendant's machines, it is squarely met in the prior art and invalid. If construed to avoid the prior art, it clearly does not cover defendant's machine. From this logic there is no escape, although the patent is really neither valid nor infringed."

There are some facts which may be considered to throw light upon the controversy in this case before entering upon a detailed examination of the prior art and the relation of such prior art to the patent in

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

suit. The machines complained of were made by the Anderson Foundry & Machine Company and are known as "Anderson Machines." It may fairly be found as a fact that almost all the tin-plate manufacturers in the United States use either Anderson machines or machines made by plaintiffs. It is a matter of common knowledge that the tin-plate industry in this country has grown to immense proportions. If, therefore, the Anderson machines and plaintiffs' machines have supplanted other machines, which have been described in prior patents, it is a reasonable conclusion that they accomplish better results than the older machines. Because they accomplish better results, therefore, if they are found to be made according to the disclosures of the same patent, such results fairly indicate that there is some degree of novelty in the disclosures. If there be better results obtained by the use of machines in which there are found novel features, and if such machines have practically supplanted all others, it is fair to presume some degree of invention was necessary to conceive them, or at least to arrange or rearrange in combination such parts of the machines as may be found here and there in the specifications or claims of prior patents. These observations have been educed because of the insistence by the defendant that the patent in suit is met in the prior art. The prior manufacturer had the prior art but did not have the present machines. His foresight did not include them. The present manufacturer, looking backwards, sees in the foreground the present machines and may reasonably be surprised that his predecessor was content with prior machines, parts of which could so easily be combined to form machines like those now in use.

The specification of the patent is much too long to be quoted at length in this opinion. Briefly stated, the object is to provide a machine, by means of which the grease covering the surface of freshly-tinned sheets may be removed without injuring them by passing the same through a body of bran or other cleansing material by the co-operative action of cleaning-rolls covered with sheepskin or other soft, fibrous covering revolving in the body of bran; said rolls to have no direct contact with the sheets but to grip them with or through the layers of bran on the sheets and on the rolls. To increase the rubbing action, the rolls are revolved at different speeds; that is to say, a high-speed upper roll and a low-speed lower roll being alternately arranged. The bran is heated by the sheets, thereby cleaning them better, and is stirred by the rollers, which it tends to make more free from oil or grease. It is fed into the bran box at the top. Such of it as is carried out during the operation falls to the bottom and is then elevated to the top to be refed to the box. The patentees say:

"Our invention also consists in the novel construction of parts and devices and in the novel combinations of parts and devices herein shown and described, and specified in the claims."

The claims in issue are:

"(1) In a tin-plate-cleaning machine, the combination with a box or receptacle, containing a mass or body of bran or cleaning material, and having slots or openings at its ends for the sheets to pass through, of cleaning-rolls revolving together in pairs in the body of the cleaning material with a space be-

tween the rolls of each pair, and carrying on their surfaces layers of bran or cleaning material in contact with the sheets passing between them and operating to feed and force the sheets forward by the agency of the cleaning material itself, substantially as specified.

"(2) The combination with a box or receptacle containing a mass or body of cleaning material, of a pair of separated rolls revolving in said body or mass, and operating to force the sheets through said body or mass by the agency of the cleaning material itself, substantially as specified.

"(3) The combination with a box or receptacle containing a mass or body of cleaning material of a pair of separated rolls, said rolls having different surface speeds, revolving in said body or mass and operating to force the sheets through said body or mass by the agency of the cleaning material itself, substantially as specified.

"(4) The combination with a receptacle containing a mass or body of cleaning material, of a series of pairs of separated rolls having fibrous coverings revolving in said body or mass and feeding or forcing the sheets through said body or mass through the agency of the cleaning material itself between the rolls and the sheets passing between them, substantially as specified.

"(5) The combination with a receptacle containing a mass or body of cleaning material of a series of pairs of separated rolls, having fibrous coverings revolving in said body or mass and feeding or forcing the sheets through said body or mass through the agency of the cleaning material itself between the rolls and the sheets passing between them, a feed or supply pipe for delivering the cleaning material to said box or receptacle and a discharge pipe or hopper for the cleaning material, substantially as specified.

"(6) The combination with a receptacle containing a mass or body of cleaning material of a series of pairs of separated rolls revolving in said body or mass and feeding or forcing the sheets through said body or mass through the agency of the cleaning material itself between the rolls and the sheets passing between them and dusting or polishing rolls, substantially as specified."

"(10) In a tin-plate-cleaning machine, the combination with a bran-holding box, of pairs of fast and slow cleaning-rolls, revolving in the body of cleaning material, substantially as specified."

"(13) In a tin-plate-cleaning machine, the combination with a box or receptacle containing a mass or body of bran or cleaning material, having slots or openings at its ends for the sheets to pass through, of cleaning rolls revolving together in pairs in the body of the cleaning material with a space between the rolls of each pair carrying on their surfaces layers of the bran or cleaning material in contact with the sheets passing between them, and a brush at the exit-slot in said box for the sheets to prevent the cleaning material issuing too rapidly at the exit slot, substantially as specified."

The claims are too numerous to be separately analyzed. Each, however, is somewhat different from the others. The elements of none are all found together in the prior art as it has been presented in this case. Few of the many patents offered by the defendant need be referred to herein with special mention of their disclosures.

Fewster Player's English patent of 1888, No. 4,784, for machines for cleaning and polishing tin and terne plates, does not show rolls revolving in bran, but does show rolls in chambers on each side of bran chambers to cause plates to pass through bran to polishing rolls and to reciprocating polishers. It shows brushes to remove bran from plates and to prevent its escape from bran box.

British patent to Player and Mainwaring, No. 16,108, of 1893, for machine for cleaning and polishing metal plates and sheets, contains no suggestion of a bran box. It provides for pairs of rollers, the two rollers of each pair revolving at different speeds and kept apart at the proper distance by springs between the bearings, and, as the surfaces

wear, the slack is taken up by screwing them together. It suggests that rollers may be joined by belts which would be running at different speeds. The provisional specification only of that patent refers to the cleansing of tin plate. The language is as follows:

"For polishing tin plates it is only necessary to pass them through the machine, but for removing the grease the rollers or belts must be fed with bran or some other cleaning material."

British patent to Jenkins, No. 3,892, of 1877, for "improvements in cleaning tin and terne plates and in the machinery apparatus or means to be employed therein," discloses vertically disposed revolving barrels of wood placed in a surrounding casing containing bran with elevator carrying bran from bottom to top for use again.

United States patent to Burton, No. 594,149, of November 30, 1897, is for a complicated machine movable on tracks from place to place as needed, which is to be noted as providing a means for feeding bran or other cleaning material to cylindrical brushes which form cleaning or polishing rolls, for the covering of which sheepskin is suggested.

In addition to what has been said as to each one of said prior patents, it should be stated that there was no satisfactory evidence offered that the machines of any of them would satisfactorily accomplish their purpose. After careful consideration of all the evidence produced, the court is satisfied that, under the circumstances above outlined, there was inventive skill exercised in the conception of the plaintiffs' machine, and that, if said machine be made according to the design of the patent in suit, said patent is valid.

Notwithstanding defendant's contention that plaintiff's machines are not made according to the patent, and that if so made they would not accomplish desired results, we are constrained to find otherwise. It would be an unnecessary refinement of reasoning to discuss every point raised by defendant in support of such contention, as, for example, that the plates are not as "hot" or as "delicate" as the patentees intended they should be when entering the machine. However, it is specially urged by the defendant that, if plaintiffs' machines were really manufactured according to the specifications of the patent, they would not accomplish their purpose for the reason that, if the rolls are separated as called for therein, they would have no effect upon the sheets through the medium of cleaning material. It is true that "separated rolls" are called for by the patent. The degree of separation is not expressed in terms of absolute distance, but in terms which are relative to the uncleaned plate and to the cleaning material. The patentees say:

"The rolls of each pair being separated or at a distance apart, so as to have no direct contact with the tin plate or sheet passing between them, and operating to grip, convey, and rub the sheet simply by or through the agency of continual but constantly changing layers of bran or cleaning material," etc.

Had "separated" not been used to qualify "rolls," the public would naturally give to the latter word its ordinary meaning. Its use, however, indicates clearly that it was not intended that the "rolls" should have any direct action by pressure or otherwise upon the sheets.

While the evidence is somewhat conflicting, the court is satisfied that the rolls in plaintiffs' machines do not have a direct action upon the sheets and are separated, with the meaning of the specifications.

The Anderson machines contain the elements of and operate upon the principle set forth in the claims of the patent in suit. Their rolls are separated as directed by the patent. This was vigorously denied. However, an experiment with a lead pencil shows that it will go between the Anderson rolls at any point. Infringement necessarily must be found after the conclusion is reached that the claims of the patent are valid. While the reasons for holding the claims valid have been heretofore indicated, they may be summed up in one general reason, to wit, the prior art does not disclose the elements of the claims combined in an organized machine operating upon the principle discovered by the patentees.

The plaintiffs are entitled to relief. Let a decree be drawn.

UNDERFEED STOKER CO. OF AMERICA v. WESTINGHOUSE MACH. CO.

(District Court, W. D. Pennsylvania. April 29, 1914.)

No. 17.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—FURNACE.

The Daley patent, No. 644,664, for an underfeed furnace, *held* valid and infringed, on a motion for preliminary injunction.

In Equity. Suit by the Underfeed Stoker Company of America against the Westinghouse Machine Company. On motion for preliminary injunction. Granted.

Fish, Richardson, Herrick & Neave, of New York City, and Christy & Christy, of Pittsburgh, Pa., for plaintiff.

Jonathan S. Green, of East Pittsburgh, Pa., and Thomas B. Kerr, of New York City, for defendant.

ORR, District Judge. In this patent litigation the complainant has moved for a preliminary injunction to restrain the defendant and those acting for and in behalf of the latter from infringing letters patent of the United States No. 644,664, issued March 6, 1900, to Fred A. Daley for a furnace. The Daley patent has been sustained as valid in several cases. In Underfeed Stoker Co. of America v. American Ship Windlass Co., 185 Fed. 65, 77, Judge Brown, sitting in the Circuit Court for the District of Rhode Island, held that the patent was valid and infringed by United States patent No. 782,862, issued to E. E. Taylor June 20, 1905. The patent in suit was also considered in American Stoker Co. v. Underfeed Stoker Co. of America, 182 Fed. 642, 652, by Judge Young, sitting in this court, whose decision was sustained upon appeal by the Circuit Court of Appeals for this circuit in 188 Fed. 314, 110 C. C. A. 292. The patent in suit was also held valid by Judge Brown, sitting in the District Court for Massachusetts in Underfeed Stoker Co. of America v. Riley, 207

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

Fed. 963. A consideration of the opinions in each of the said cases, as well as a consideration of the several patents and affidavits introduced upon the hearing of the motion now before the court, has satisfied this court that the patent is valid and should be sustained with respect to its several claims, which are as follows:

"1. In a furnace, the combination with a fire-box, of an elongated horizontally disposed fuel-retort, dead-plates upon each side of the retort, said retort and dead-plates serving to afford a sealed space beneath the fire-box and retort, twyer openings provided along the longitudinal sides of the retort and affording communication between the fire-box and the space beneath the same, and means for forcing air under pressure into the space beneath the fire-box, substantially as described.

"2. In a furnace, an imperforate fuel-bearing surface and a retort, dividing the furnace into a fire-box and an air-chamber, the retort being provided with twyer openings or passages for establishing communication between the air-chamber and the fire-box, and means for conveying air under pressure to the air-chamber, substantially as described.

"3. In a furnace, the combination with a fuel-retort of a fuel-supporting means alongside of the retort, said means and retort separating the furnace into a fire-box and an air-chamber, the retort being provided with twyer openings or passages for establishing communication between the air-chamber and the fire-box, and means for conveying air into and maintaining it under pressure in the air-chamber, substantially as described.

"4. In a furnace, the combination with a fuel-bearing plate, and a fuel-retort dividing the furnace into a fire-box and an air-chamber, the retort being provided with twyer openings or passages for establishing communication between the air-chamber and the fire-box, and means for conveying air into and maintaining it under pressure in the air-chamber, substantially as described.

"5. In a mechanical stoker, the combination with fuel-bearing plates and an elongated fuel-retort, the said retort being located between the plates and serving therewith to divide the furnace into a fire-box and an air-chamber, the retort being provided with twyer openings or passages for establishing communication between the air-chamber and the fire-box, means for conveying air into and maintaining it under pressure in the air-chamber, and means for forcing fuel into the retort, substantially as described.

"6. In a mechanical stoker, the combination with imperforate fuel-bearing plates and an elongated retort, the said retort being located between the plates and serving therewith to divide the furnace into a fire-box and an air-chamber, the retort being provided with twyer openings or passages for establishing communication between the air-chamber and the fire-box, means for conveying air under pressure to the air-chamber, and means for forcing fuel into the retort, substantially as described."

In applying those claims to the apparatus manufactured by the defendant, there must be kept in mind certain portions at least of the specifications of the patent to which each of the claims makes reference. The inventor says:

"The furnace constructed in accordance with the preferred embodiment of my invention employs side dead-plates which are imperforate, or sufficiently so to maintain the air forced into the air-chamber beneath the side fuel supports under pressure, so that the air will be forced in jets directly from the air-chamber through the twyer openings into the retort. I do not wish, however, to be limited to a construction in which the side fuel-supporting means along the upper edges of the fuel-retort are perfectly imperforate."

And as well also:

"I do not wish to be limited in all embodiments of my invention to the employment of imperforate dead-plates. While I have shown my invention in

its application to certain forms of boilers and embodied in a certain mechanical structure, I wish it to be understood that I do not intend to limit it in its application or details of construction to the precise forms shown."

While the furnace shown in the drawings of the patent in suit is a horizontal furnace, and the furnace of the defendant is a furnace extending downwardly from the front to the back at an angle of about 20 degrees, such difference is not worthy of consideration. While the drawings of the patent indicate but one retort, and the apparatus of the defendant is composed of a number of retorts side by side, such differences need not be considered in the disposition of this case. On each side of each retort of the defendant's apparatus there are fuel-supporting surfaces or dead-plates, upon which rest the ashes or fuel in an advanced stage of combustion. The fuel-retorts in the defendant's apparatus are not quite horizontal, but the introduction of the fuel therein forces it above the top of the retort upon the dead-plates on either side. The air is forced by pressure into the space underneath the dead-plates on either side of the fuel-retort. It enters into the furnace and into the fuel through openings from the space below the dead-plates or fuel-retort along the sides of the fuel-retort at or near the top thereof.

But it is said the fuel-supporting means, otherwise known as dead-plates, as found in the defendant's apparatus, are not imperforate. It is clear that they are sufficiently so for all purposes, and within the meaning of that word as used by Daley in his patent. The furnace of the defendant is remarkably like the furnace of the Taylor patent above mentioned. Certain openings for the passage of air from the air-chamber underneath the fuel supports are changed in form and slightly in location, but not sufficient to distinguish the furnace of the defendant from the Riley furnace, save in the matter of certain small openings directly upon the upper surface of the dead-plates. But these openings on the surface of the dead-plates and the other openings must not be held to render the dead-plates of the defendant's furnace wholly insufficient "to maintain the air forced into the air-chamber beneath the side fuel supports under pressure."

Being satisfied that the patent in suit is valid, and that the furnace of the defendant is within the claims of that patent, it necessarily follows that the plaintiff is entitled to relief. A preliminary injunction should issue.

Let the proper order be presented.

KENTUCKY COAL & TIMBER DEVELOPMENT CO. v. KENTUCKY UNION CO. et al.

(District Court, E. D. Kentucky. January 21, 1914.)

No. 2495.

1. PUBLIC LANDS (§ 151*)—LOCATION OF ENTRIES OF STATE LANDS.

In locating an entry of state land in Kentucky in accordance with the certificate of survey and the patent, where the description contains a number of elements, the location should be made to conform to all of such elements, if possible, and, if not, to as many of the more material elements as possible, including fixed monuments, natural or identified boundaries, and quantity, and bearing in mind that, as between courses and distances, the former are to be preferred, and that under the law of the state a rectangular shape is to be preserved, when consistent with the entry.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 411–437; Dec. Dig. § 151.*]

2. PUBLIC LANDS (§ 151*)—LOCATION OF ENTRIES OF STATE LANDS—ENTRY AS EVIDENCE.

Under the law of Kentucky, in locating an entry of state lands the court cannot look beyond the patent, and although the certificate of survey may be considered for the purpose of correcting any mistake in transcribing the description into the patent, the entry itself, if admissible for any purpose, as it may be only in case of ambiguity in the description in the certificate and patent, is not controlling as to the boundary.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 411–437; Dec. Dig. § 151.*]

3. EVIDENCE (§ 274*) — DECLARATIONS AS TO BOUNDARIES — DECEASED SURVEYORS.

The Kentucky decisions do not preclude the admission in evidence of declarations of persons since deceased as to the lines and landmarks of ancient private boundaries, and such a declaration with respect to a boundary 125 years old, made by a surveyor near the same time in the course of his official duty, as shown by his record of subsequent surveys, and on which numerous other surveys were based, is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1121–1134; Dec. Dig. § 274.*]

4. ADVERSE POSSESSION (§ 103*)—EXTENT OF POSSESSION—RELATION TO EACH OTHER OF DIFFERENT PARTS OF SAME PREMISES.

If a person enters upon and takes possession of land within a well-defined boundary, under claim of ownership to such boundary, there is a presumption that he intends to take possession to such extent, and it gives possession to that extent, if nothing else appears; but if he has the right to enter upon a part of the land within the boundary, and not to enter on another part, and his actual entry is only on the part to which he has the right, he acquires no possession beyond such part, although he may intend to take possession of the whole; and the same rule applies to the possession of his grantee, although the conveyance is to all the land within the boundary. If, however, his entry is on the part to which he has no right, or is extended to any portion of such part, however small, his possession will extend to the entire boundary, if so intended, and be adverse to the true owner of such part.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 590–594; Dec. Dig. § 103.*]

In Equity. Suit by the Kentucky Coal & Timber Development Company against the Kentucky Union Company and others, in which J.

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

M. Noble and Louisa H. Goodlett intervene by cross-bill. On final hearing. Petition of intervention and cross-bill dismissed, and decree for defendant.

S. D. Rouse, of Covington, Ky., and J. J. C. Bach, of Jackson, Ky., for plaintiff.

W. B. Dixon, of Louisville, Ky., for defendant.

J. W. Gaines, of Nashville, Tenn., for interveners.

COCHRAN, District Judge. This cause is before me for final decree. As originally brought, it is a suit by the plaintiff company against the defendant company to enjoin the cutting of timber growing on a certain tract of land in Breathitt county, in this district, on the waters of the South fork of Quicksand, a tributary of the North fork of the Kentucky river, the title to which is in dispute between them; and the sole question it involves is as to the ownership thereof. The plaintiff claims ownership under a patent from the commonwealth of Kentucky to Stephen G. Reid, of date June 15, 1872, the same under which its immediate predecessor in title, the Breathitt Coal, Iron & Lumber Company, claimed ownership of the tract of land involved in the case of Taylor & Crate v. Breathitt Coal, Iron & Lumber Co., 185 Fed. 854. The defendant company denies plaintiff's ownership and claims title in itself by adverse possession. As plaintiff has connected itself with the Reid patent, and the land in dispute is within the boundaries thereof, the question of ownership in dispute between the two companies is limited to whether title has been divested from those claiming under the patent and vested in the defendant company by adverse possession.

Pending the suit the defendants Noble and Goodlett intervened, and claimed that they were the owners of the land. They so claimed under two patents from the commonwealth of Virginia to James Reynolds, of date May 18, 1786; i. e., before the separation of Kentucky from the mother state. By one patent a tract of 126,140 acres was granted, and by the other one of 50,000 acres; the two adjoining. Their claim was of the ownership of the north half of the 126,140 acres and the whole of the 50,000-acre tract. I do not understand that the claim is that any portion of the land so in dispute is within the north half, or any portion, of the 126,140-acre tract. The claim is that it is wholly within the 50,000-acre tract; the sole reliance on the 126,140-acre tract being as an indispensable aid to the location of the 50,000-acre tract. Seemingly the claim of the intervening defendants is not limited to the land in dispute between the original parties, but includes other lands claimed by the plaintiff under the Reid patent and the defendant company by adverse possession, which they claim is within the 50,000-acre tract. By their cross-bill they seek to be adjudged to be the owners of all the land so claimed by them, and that plaintiff and their codefendant be enjoined from committing any trespass thereon. This claim of ownership is denied by both defendants to the cross-bill, and the defendant company asserts title by adverse possession as against them also.

After the preparation of the case, and pending its consideration, the defendants by written stipulation settled the controversy between them. Thereby they agreed that the original defendant is the owner by adverse possession of certain portions of the land in contest between them, and that the cross-bill be dismissed as to same without prejudice as to other portions. I am unable to tell whether the land which it has been so agreed the original defendant owns by adverse possession is the whole of the land in dispute between it and plaintiff. If it is, the intervening defendants have no longer any concern in the ownership thereof. Their concern would be limited to so much of the Reid patent outside of the land in dispute between plaintiff and their co-defendant as it claims is within the 50,000-acre tract. But in that contingency, even, the question whether the land so in dispute is within the 50,000-acre tract would still be relevant. It would be relevant in connection with the controversy between those parties; for, if it is, then the plaintiff is not the owner thereof, and the original defendant is entitled to a dismissal of the bill on this ground alone, and this would relieve me of the necessity of passing on the question whether the original defendant had acquired title thereto by adverse possession as against plaintiff.

I proceed, therefore, to a consideration at once of the question whether the 50,000-acre tract covers any portion of the tract which plaintiff claims. This depends on whether the former tract is located as the intervening defendants have always claimed, and the original defendant now claims, it is. If it is not so located, then it does not cover any of the portion of the Reid patent. The burden is on the defendants to make good the claim that it is so located.

The 50,000-acre tract is four-sided. It is a rectangular parallelogram of greater breadth than length. The description in the certificate of survey and the patent is exactly the same. It is described as being in Fayette county, Va., and is not otherwise described generally. The specific description given is as follows, to wit:

"Beginning at the third corner of a survey of an entry made by Jacob Weaver, John Phillips & Company on the left or north fork of Kentucky (126,-140 acres) at a poplar and two white oaks and running thence N. 81° E. 3,000 poles, to B, an ash; thence S. 9° E. 2,666⅔ poles, to C, a black walnut; thence S. 81° W. 3,000 poles, to D, a sugar tree and buckeye; and thence N. 9° W. 2,666⅔ poles, to the beginning, having crossed two small runs on the fourth line."

The timber called for at each of the four corners, to wit, a poplar and two white oaks at the first, an ash at the second, a black walnut at the third, and a sugar tree and a buckeye at the fourth, have not been identified. Indeed, it is agreed that they never had any existence. The law, as it then stood, required the surveyor, in the making of a survey, to see that it was "bounded plainly by marked trees, except where a water course or ancient marked line shall be the boundary"; but this he often failed to do. Indeed, he would not go on the land at all, except possibly to mark the beginning corner, or to so do and run a line or so. He would make the survey in whole or in part by protraction, and call for imaginary trees at the corners not actually

marked. Such a survey would be the basis of the certificate on which the patent would issue. The neglect on his part to comply with the statute did not invalidate the survey, as its requirement was directory merely.

As stated, it is agreed that the survey covered by the certificate and patent for the 50,000-acre tract was an office survey, and that wholly so. The surveyor did not go on the ground to mark so much as the beginning corner. There is nothing, therefore, in the calls for trees at the corners that enables it to be identified. The letters called for, to wit, A, B, C, and D, are letters on the plat accompanying the certificate of survey. The two small runs called for are also shown on the plat crossing the fourth line as stated in the certificate. There is nothing in the call for these two small runs or the course or shape of them on the plat to help in identifying the land. The position that the survey was an office survey and that the two runs and the course and shape given them on the plat are an aid to the location of the boundary are inconsistent.

But for one call, then, the land would be incapable of identification. That call is for the third corner of the survey of the entry for the 126,140-acre tract, said to be on the left-hand or North fork of the Kentucky river, as the beginning corner of the boundary. If the third corner of that survey can be identified, then the beginning corner of the 50,000-acre tract can be identified also, and the tract fully identified. Otherwise this cannot be done. The crucial question here, then, is as to the location of that third corner. It will be noted that the call is for the third corner of the survey of the entry for the 126,140-acre tract, and not for any corner of that entry. At that time no patent had been issued; and if we go by the certificates of survey for the two tracts of land, there had not been any survey of the 126,140-acre tract. According to the certificate for the 50,000-acre tract, the survey was made June 30, 1784, and to that for the 126,140-acre tract it was made July 8, 1784. I take it that the meaning intended to be conveyed was, not that the surveys were made on those dates, but that they were then completed. Both surveys and certificates thereof were made by the same surveyor, to wit, Richard Ellis, deputy for Thomas Marshall. In making the survey for the 126,140-acre tract, as will later appear, he did go on the ground and do as much as mark a tree as the beginning corner; but in view of the fact that the certificate of survey for the 50,000-acre tract calls for the third corner of the survey for the 126,140-acre tract, it must be taken, notwithstanding the date of the completion of the latter is given as over a week later than that of the former, that Surveyor Ellis, before making the survey of the 50,000-acre tract, had marked the beginning corner of the 126,140-acre tract, and at least protracted the result thereof. But possibly the whole of the survey of the 126,140-acre tract rested in intention merely. The entry for the larger tract was earlier than that for the smaller. The date of the one is April 22, 1784, and of the other June 19, 1784.

This completes all consideration that need be given to the location of the 50,000-acre tract. The interest now shifts to that of the 126,140-acre tract, and particularly to the location of the third corner

thereof. The 126,140-acre tract is four-sided also; and on the face of the certificate of survey and patent, which are the same, it, too, is a rectangular parallelogram, the length here being greater than the breadth. It also is described generally as lying and being in Fayette county, Va., and more particularly as on the left-hand or North fork of Kentucky river, hereafter referred to as the North fork. The specific description given is as follows, to wit:

"Beginning 15 miles from the mouth of said fork, when reduced to a straight line, at a small beech marked with the letters R. E. B., standing near the edge of said fork, being the uppermost corner of a tract of land entered by P. D. Roberts, Tarrason Bros. & Co. &c. and represented on the plat by the letter A and running along their land N. 9° W. 6,400 poles, to three sugar trees and a cherry at B; thence N. 81° E. 3,148 poles, to a poplar and two white oaks at C; thence S. 9° E. 6,400 poles, to the edge of the aforesaid left-hand or north fork of Kentucky; thence down the river their several courses viz.: S. 51° W. 240 poles, S. 75° W. 360 poles, N. 85½° W. 480 poles, N. 67° W. 140 poles, S. 28° W. 220 poles, west 800 poles, N. 46° W. 190 poles. S. 79° W. 240 poles, S. 64° W. 640 poles, to the beginning, but when reduced to a straight line is 3,148 poles."

The statement that on the face of things this tract is a rectangular parallelogram should be qualified. It is so, assuming the North fork line to be one straight line. But as it is not, and the tract runs with the meanders of the stream, it is not in fact a parallelogram at all. It is simply rectangular at its northern or outer end. No timber is called for at the fourth or upper corner—on the North fork. That called for at the second and third corners was imaginary. That called for at the third corner was a poplar and two white oaks, the same as called for in the description of the 50,000-acre tract, and the survey, except as to the beginning, was an office survey. There are three calls for the beginning corner, as follows, to wit: Fifteen miles from the mouth of the North fork, when reduced to a straight line; "the uppermost corner of a tract of land entered by P. D. Roberts, Tarrason Bros. & Co. &c.;" and "a small beech marked with the letters R. E. B., standing near the edge" of the fork. The second call is exactly the same as the first; i. e., the uppermost corner called for in the entry for that tract of land is 15 miles from the mouth of the North fork on a straight line. The tree called for was thought to be at the point called for by the other two calls. It is described in two particulars, one specific, to wit, "marked with the letters R. E. B.," the letters "R. E." no doubt standing for Richard Ellis, the surveyor, and the letter "B." for beginning; and the other general, to wit, "standing near the edge of said fork." If it was not at that point, but at a different one, the latter must be taken as the beginning corner, on the principle that distance must give way to monuments. Whether it was at that point or not will be considered later. For the time being I take it that it was, and dispose of the location of the land as thus described and of the third corner thereof on this basis.

This description contains elements which enable the land covered by it to be located. They are the call for the beginning corner, that for the line of P. D. Roberts, the Tarrason Bros. & Co. land, and that for the North fork. The North fork and its mouth are to-day, substan-

tially at least, where they were then. The call for the North fork requires that the land shall bind thereon and that whether the course and distances called for conform to it or not. If they do not, they must be rejected. In that contingency the two calls are inconsistent. Both cannot be followed, and of the two that for courses and distances must give way. There can be no question whatever as to this, and it is not essential to cite any authorities to support it. The location of the P. D. Roberts, Tarrason Bros. & Co. &c. land is known and not disputed. What makes the location of the 126,140-acre tract of land and the third corner thereof a problem calling for solution is that running a line N. 9° E. 6,400 poles from the third corner, taking it to be the point which would be reached by running the first line from the beginning corner with the line of the P. D. Roberts, Tarrason Bros. & Co. &c. land N. 9° W. 6,400 poles, and the second from thence N. 81° E. 3,148 poles as called for, will not strike the North fork. It comes short of so doing by more than its length; i. e., over 6,400 poles, or 20 miles.

The reason for this is that Surveyor Ellis in protracting the survey mistook the course of the North fork above the beginning corner. The way he came to make this mistake was this: The P. D. Roberts, Tarrason Bros. & Co. &c. tract of land contained 300,306⅔ acres of land. It was entered February 28, 1784; i. e., the winter before the entering and surveying of the 126,140 and 50,000 acre tracts of land. The entry called for a base line of 20 miles extending from the end of the 15-mile line heretofore referred to westwardly and down the river to the point where it strikes the river at the end of 20 miles, and for running lines from each end of this base line at right angles thereto until a line at right angles with the two last lines and parallel to the base line would include the quantity of 300,306⅔ acres. The survey thereof was made in the following May, after the entry of the 126,140-acre tract, but before the survey thereof and the entry and survey of the 50,000-acre tract. It was mainly an office survey. It was such except as to the base line and the meanders of the river. According to it the lower or western end of the base line of 20 miles struck the river below the South fork thereof at a point 5 miles below the junction of the North fork and the Middle fork. It was surveyed, not in one body, but in 22 different tracts, extending in five lines down from the river. The length of the side lines was 25 miles. The river between the two ends of the 20-mile base line curved away or northward somewhat from that line, but the base line followed the general course of the river. The course of the base line from the lower end to the upper, and also of the outer line parallel thereto, was N. 81° E., and of the two side lines N. 9° W. The survey was thus four-sided and a rectangular parallelogram, but for the river end, which was rendered crooked by the river on which it bounded. Each of the 22 tracts into which it was subdivided were rectangular parallelograms, except the five binding on the river, and they were only prevented from being such by the irregularities of the river, on which they bounded. All the lines of these 22 tracts extending from the river were N. 9° W.

or S. 9° E., and all the other lines, except those binding on the river, were N. 81° E. or S. 81° W.

This survey was made by Robert Armstrong, another deputy of Thomas Marshall. I have stated that the river on which it bounded was meandered in making the survey. This should be qualified by saying that it was meandered, except where the upper subdivision, allotted to E. Thompson, bounded on it. It is agreed that such was the case. It is a matter of inference from the fact that the meanders of the river as given on the plats for the separate subdivisions conform substantially to the meanders of the river as they are now, except on the plat for the E. Thompson subdivision.

Now, it is to be taken that Ellis, in making the surveys of the 126,140 and 50,000 acre tracts, had the survey of the P. D. Roberts, Tarrason Bros. & Co. &c. tract and its subdivisions before him. Both were intended to be rectangular parallelograms, the same as that survey and its subdivisions, except so far as the 126,140-acre tract was affected by the North fork; and the southern or inner and the northern or outer lines thereof are N. 81° E. or S. 81° W. and the side lines N. 9° W. or S. 9° E., the same as in the case of the older survey. He did not survey the North fork so far as the 126,140-acre tract bounded on it. It is possible that he never went up it beyond the beginning corner. It is certain that he was at the beginning corner, as he took it to be, for he marked the small beech standing there on the edge of the river with the letters "R. E. B." And it is possible that he ascended the river above the beginning corner for a considerable distance—possibly as high up as Quicksand. The reason for admitting this possibility will appear later. But not surveying the North fork above the beginning corner and having the work of Armstrong before him, he took it that the course of the North fork above the beginning corner was substantially N. 81° E. or S. 81° W.; i. e., the same course as the base line of the P. D. Roberts, Tarrason Bros. & Co. &c. survey, and protracted his survey accordingly. This was not the case. The course thereof for some distance below the beginning corner was not in accordance with the base line of that survey. Instead, it was southeastwardly as you ascend, or northwestwardly as you descend. Above the beginning corner it continues this same course for some distance above the town of Jackson, and then turns abruptly to a south and north course. From that point for a distance of 15 miles it runs south as you ascend, or north as you descend, when it turns abruptly again to an east and west and a southeast and northwest course. Counsel for the intervening defendants thus states the course of the North fork above the beginning corner:

"The river runs 20 or 25 miles practically south, when it leaves the beginning point B, and then turns radically southeast."

As I make it, the river first ascends southeast for some distance from the beginning corner, just as below it, then turns south, and then southeast; but after it turns south it so bends that the beginning corner is almost directly north of it. Because of this change in the course of the North fork, the third line of the 126,140-acre patent, running S. 9° E. from the third corner thereof, taking it to be where it would be

if the courses and distances from the beginning corner are followed, instead of striking the North fork at the end of 6,400 poles, or 20 miles, and 3,148 poles, or about 10 miles, up from the beginning corner, strikes it above the town of Hazard at the end of nearly 45 miles from the third corner and over 60 miles above the beginning corner. If this be taken as the third line, and the river from the point where it strikes it to the beginning corner as the fourth line, we will have a boundary containing 256,000 acres, considerably over twice as much as the acreage called for.

It is this condition of things that presents us with our problem. Counsel for the plaintiff originally contended that the true location of the land was as first stated, by which it is made to include 256,000 acres, instead of 126,140 acres, as called for. His argument was that in thus going to the third corner the calls of the certificate of survey and patent are followed, and that as the next two calls are to go to the North fork, and thence with it to the beginning, leaving out the distance called for on the third line and the courses and distances called for in the fourth and closing lines, they should be followed and the calls for distances as to the third line and for courses and distances as to the fourth line rejected. But this is an impossible location, and, as it seems to be no longer insisted on, nothing further need be said as to it. I am not entirely sure what is the present position of plaintiff's counsel, and do not deem it necessary to make an attempt to state it. He seems to think that the third corner of the survey is at the point reached by running the first and second lines according to courses and distances from the beginning corner, and, as the description of the 50,000-acre tract calls for the third corner of the survey, and not of the patent, as its beginning corner, it must be located at that point, however the third corner of the patent may be located. But the third corner of the survey is not at a different point from that of the patent. The third corner of both is at the same point, so the location of the beginning corner of the 50,000-acre boundary depends on the location of the third corner of the patent for the 126,140-acre tract. If I mistake not, it is the position of defendant company's counsel that the third line should be dropped from that point in the same plane until it strikes the North fork and then the ends thereof connected by parallel lines with the beginning and second corners, thus yielding a rhomboidal, instead of a rectangular, parallelogram. According to this location the third corner will be at the northern end of the third line so dropped. It is the position of counsel for intervening defendants and their surveyor, Blakeman, that the North fork should be ascended from the beginning corner to such a point that a line connecting the second corner with the northern end of a line extending from such point N. 9° W. 6,400 poles will include 126,140 acres, the acreage called for. The northern end of the line so extended is the location of the third corner.

I do not understand these two positions to be the same. A location of the land either way places the third corner a few miles south of a line due east from the beginning corner and the whole of the third line opposite to and parallel with the major part of that portion of the North fork constituting the fourth line, instead of the third corner be-

ing over 20 miles north of such a line and the whole of the third line being opposite to and parallel to the first line, if the North fork had run as Surveyor Ellis assumed it to run. It also places the third corner so that, if it is taken as the beginning corner of the 50,000-acre tract, that tract will cover all the land in dispute—that according to the intervening defendant's counsel certainly so, and that according to the defendant company's counsel probably so. I will not undertake to respond directly to either of these two positions, but proceed to a solution of the problem along my own lines.

It is clear that the mistake of the surveyor does not render his work and the patent based on it void. Such is not always, or even generally, the effect of mistaken and repugnant calls in the description given in the certificate and patent. Such calls are rejected, so far as following them is concerned, and, if possible, a location is made according to the main intent of the description in the certificate and patent. I have sometimes said that such location is made as it is reasonable to conclude the surveyor himself would have made it, had he been aware of his mistake. Possibly this is an objectionable way of putting the matter. It seems to involve a new location, and this may be thought to be unfair to adjacent proprietors. But this way of putting it means no more than that the location should be made according to the main intent of the description in his certificate transcribed into the patent. It is possible that the location may to a certain extent be artificial. But it is deemed to be better that this should be the case, rather than that the patent should be overthrown. In determining the main intent, all the elements of the description should be considered, and it should be viewed in the "united light" of such of them as do not have to be rejected. It is the contention of intervening defendants that the entry pursuant to which the survey of the 126,140-acre tract was made should be considered in so determining. But for the time being I will leave the entry entirely out of consideration and limit myself wholly to the description contained in the certificate and patent.

This is the fourth time I have had occasion to consider the problem involved here; that is, how a four-sided tract of land should be located when there had been a mistake in some of the courses and distances called for, and my solution of the problem in two instances has been published. I refer to the cases of Davis v. Commonwealth Land & Lumber Co. (C. C.) 141 Fed. 740, and Taylor & Crate v. Breathitt Coal, Iron & Timber Co. (C. C.) 185 Fed. 854. In each of the three former instances my consideration was limited to the description contained in the patent. This is the first time that the terms of the entry have been urged upon me as having any bearing on the matter. It is in order, then, that I may place all my decisions on the same basis, that for the time being I dismiss the entry from all consideration. After I have reached a conclusion on this basis, the bearing of the description of the entry on the problem will be considered.

[1] What, then, are the different elements contained in the description of the 126,140-acre tract of land as set forth in the certificate and patent? As I make them out to be, they are as follows:

First. That the beginning corner of the tract is at a small beech

tree standing on the edge of the North fork, which is itself 15 miles in a straight line from the mouth thereof, and the uppermost corner of the P. D. Roberts, Tarrason Bros. & Co. &c. land.

Second. That it contains 126,140 acres of land.

Third. That it has four sides.

Fourth. That it is slightly over twice as long as broad.

Fifth. That lengthwise it extends nearly north and south.

Sixth. That on its western side it binds on the P. D. Roberts, Tarrason Bros. & Co. &c. tract of land.

Seventh. That on its southern side it binds on the North fork.

Eighth. That the first, second, and third lines are straight, and the fourth as crooked as the North fork on which it binds.

Ninth. That the angles formed by the first and second lines and the second and third lines are right angles—so that at its northern or outer end it is rectangular.

Tenth. That if the fourth line from the fourth to the beginning corner were straight, it would be parallel to the second line, and that end also would be rectangular, and the whole tract form a rectangular parallelogram.

Eleventh. And that the courses and distances of the four lines are as set forth in the description.

I think there can be no question that the description under consideration contains each and all of these separate elements, and if it is possible to make a location fitting all of them it would have to be so made. Any other location would not be proper. But it cannot be so made. The description falls down at least as to the last element in part; i. e., at least in so far as the fourth line is concerned. None of the courses and distances of that line are correct. The reason for this is that the North fork, instead of ascending from the beginning corner nearly east, ascends first southeast for a short distance, then south for a much longer distance, and then again southeast. A location cannot, therefore, be made fitting any of the courses and distances so given. They have to be rejected from any location that is made. If a location could be made fitting the other ten elements, and all of the last one except such courses and distances, it would have to be so made—this on the idea that it is not proper to reject any more of the description than is absolutely essential to secure a location. But this is not possible. A location can be made by shortening the distance of the second line and lengthening that of the third, involving a modification of the fourth element, so as to make the length exceed the breadth to a greater extent, which otherwise fits all the elements of the description. Such a location can be made by ascending the North fork from the beginning corner to such a point that a line running N. 9° W. therefrom until it strikes a line running from the second corner S. 81° E. will include 126,140 acres of land. This will yield a four-sided body of land beginning at the small beech so marked, containing 126,140 acres, binding on the P. D. Roberts, Tarrason Bros. & Co. &c. tract of land and the North fork, all of the lines of which are straight except the fourth, and of the course called for, and whose outer end is rectangular in shape. This tract is the tract of the description save in

so far as the courses and distances of the fourth line, the distances of the second and third lines, and the comparative length and breadth of the tract are concerned. No other location can be made which conforms so well to the description. And it is of necessity that this location cannot conform thereto in these particulars.

It seems to me, therefore, that this is the correct location of the tract. It is in accordance with the main intent of the description of the certificate and patent. Of course, what is here said is subject to be controlled by the result of the consideration of the terms of the entry, when that comes to be taken up.

The location contended for by the intervening defendants cannot be accepted, because, though it runs counter to the elements of the description in no more particulars than the one I have held to be the true one, the particulars in which it runs counter thereto are more material. Each runs counter thereto in four particulars; the latter as to courses and distances of the fourth line, the distance of the second line, the distance of the third line, and the shape. It runs counter to it in the last particular merely in elongating or narrowing the tract. The former runs counter thereto as to the courses and distances of the fourth line, the distance of the second line, the course thereof, and the shape. It runs counter thereto in the last particular in eliminating entirely its rectangular character at the northern or outer end. It is well settled in Kentucky that as between course and distance the former is to be preferred. In the case of Beckley v. Bryan, Ky. Dec. 91, it was said:

"When a departure from either course or distance becomes necessary, reason as well as law seems to suggest that the distance, taken in our mode of mensuration, ought to yield, as being much the more uncertain of the two."

And in Pearson v. Baker, 4 Dana (Ky.) 321, it was said:

"In general, distance yields to course, or, in the absence of any circumstance bringing the mind to a contrary conclusion, the courses shall be first pursued, contracting or extending the distance, as the case may require, to make the survey close."

That it is the thought of the description that the northern or outer end of the tract should be rectangular in shape appears, not only from its terms, but from the fact that when it was made, beyond question, the survey of the P. D. Roberts, Tarrason Bros. & Co. &c. tract of land was before the surveyor. According to it the northern or outer end thereof, and of each of the subdivisions thereof, and the inner end of each of the subdivisions, except those binding on the river, were rectangular in shape, and the sides were all N. 9° W. or S. 9° E. and N. 81° E. or S. 81° W. Clearly it was the intent of the surveyor to make the northern or outer end of the 126,140-acre tract conform in shape to the like ends of the other tract and its subdivisions alongside which it was placed. But such was not only the thought of the surveyor, the law preferred that shape. It required that in surveying entries they should be laid off in square or rectangular shape, unless there was something in the entry forbidding or inconsistent with it. In the Taylor & Crate Case, not then

knowing any better, I attributed the conception of the numerous rectangular parallelograms, of which the boundary involved therein was one, running across Buckhorn, to the surveyor. Their existence was due rather to this preference of the law. In the case of Massie v. Watts, 6 Cranch, 153, 3 L. Ed. 181, Mr. Justice Marshall, in referring to the matter of surveying entries, said:

"When a given quantity * * * is to be laid off on a given base, it shall be included within four lines, so that the line proceeding from the base shall be at right angles with it, and the line opposite the base shall be parallel to it, unless this form be repugnant to the entry."

Again he said:

"To the court it seems that the rectangular principle is always to be preserved; * * * that is, where there is no call in the entry applying to the lines which control them, and that where it is necessarily departed from, the departure should not be extended further than the necessity requires."

And again he said:

"The principle that the rectangular figure is to be preferred to any other, and is to be preserved whenever it can be preserved, originates in the necessity of adopting some regular figure, in order to give to locations that certainty which is not always to be found in their terms, and in the superior convenience of that figure over every other, with respect to the adjacent residuum."

The location contended for by intervening defendant is dominated by a desire to preserve the third line intact. And it should not be preserved at the expense of the course of the second line and the rectangular shape of the northern or outer end.

The fatal objection to the location contended for by the defendant company is that according to it either the tract does not bind on the North fork or it includes more than the acreage called for. As I understand its position, the rhomboidal parallelogram, formed as I have put it, contains the exact acreage contained in the rectangular parallelogram from which it has passed by dropping the third line in its plane to the North fork and extending the second and fourth sides. If so, the acreage between the fourth line of the parallelogram and the North fork is in addition to that contained therein, to wit, 126,140 acres. If, then, it limits its location to the parallelogram, it does not bind on the North fork, or if it includes the land between it and the North fork, so as to make it bind thereon; it covers more than 126,140 acres. Possibly I have misunderstood its position. If it is intended to be the same as put forth by the intervening defendants, it is subject to the criticisms already made of it.

But how does the solution of the problem here involved, which I have advanced, comport with the solutions advanced by me of the problems involved in the Davis and Taylor & Crate Cases? Are those two decisions consistent, and, if so, is the decision here consistent with them? I think that there is no conflict whatever between the two decisions. The controlling factor in each case was the thought of the description in the patent in question as to the shape of the tract. In the Davis Case the courses and distances given of the four sides in the description yielded a tract of land of a certain shape. It was the thought thereof, therefore, that the tract was of that shape.

A change in the course or distance, or both, of one line, would disturb the shape and run counter to that thought. In order, then, to preserve the shape and have the location in accordance with that thought, it was held that the same mistake in the course of one of the lines should be imparted to the opposite line, thus making the two opposite lines have the same relation to each other in the location that they had in the description, and thereby preserving the shape of the description in the location. In that case the description contained no other thought as to shape than that formed by the relation of the opposite lines to each other. In the Taylor & Crate Case such was not the case. Whilst the thought of the description therein was that the shape of the tract was that formed by the relation between the line of the creek and the outer line, such was not the whole thought of the description as to shape. It was also its thought that the outer end of the tract was rectangular, and this was the more material. If, then, the mistake in the creek line was imparted to the outer line in order to preserve the relation between the two, as in the Davis Case, violence would be done to the thought of the description that the outer end should be rectangular, and, as now appears, no consideration would be given to the preference of the law for such shape. The decision in that case was to no extent affected by the circumstance that there was another tract of land on the opposite side of the creek which, with the tract in question, formed a rectangular parallelogram. It would have been exactly the same had there been no such other tract.

Now the case we have here is the Taylor & Crate Case over again. For me not to hold as I have done would be to depart from my decision in that case.

[2] This brings me to consideration of the bearing, if any, of the entry on the question as to the location of the patent boundary and of its third corner. Seemingly it is the position of intervening defendants that it is controlling, and seemingly, further, it is because they so regard it, that they claim that the true location thereof is as heretofore stated. Indeed, it is not certain that if the entry were out of the case that they would contend for that location. The position that the entry has a bearing and is controlling is merely assumed. No authorities are cited which support it. Tennessee decisions are not in point, for the law of that state in this particular is different from what it is in Kentucky. In the case of Blunt v. Smith, 7 Wheat. 248, 5 L. Ed. 446, Mr. Chief Justice Marshall says:

"In Kentucky and in Virginia the rule is that a court of common law cannot look beyond the patent; but in Tennessee it is understood to be otherwise. The courts of law in that state allow the parties in an ejectment to go back to the original entry and to connect the patent with it. This rule is founded on the land laws of North Carolina, which has been construed in Tennessee to permit and require it. * * * The effect of entries, then, as well as their dates, is considered by the courts of Tennessee."

Nor are the Kentucky decisions, either by the Kentucky Court of Appeals, or by the Supreme Court of the United States in cases going there from Kentucky, involving the right of a patentee as to land west

of the Tennessee river under a patent based upon an entry made after December 26, 1820, in point. This is so because by a Kentucky statute (Laws 1820, c. 155) of that date it was provided that any such patent issuing on a survey made contrary to the entry should be void to all intents and purposes so far as the same might be different and variant therefrom. The case of Croghan v. Nelson, 3 How. 187, 11 L. Ed. 554, was a case of that sort. Nor are such Kentucky decisions in cases involving the right of a senior entryman as against a senior patentee in point. These decisions are very numerous and all of an early date. They are not in point because there the plaintiff's right was based solely on his entry. He claimed to be the equitable owner of the land covered thereby as against the holder of the legal title, and he sought in equity to compel the latter to convey such title to him. Of course, in such a case the question as to what the entry covers is the vital question therein, and if the patent conflicts therewith it must yield thereto. Here the intervening defendants' rights are based on their patent, and reliance is had on the entry pursuant to which it issued, to justify a location of the patent different from what I have held, without reference thereto, is the true location thereof. No decisions, so far as I have been able to make out, have been cited warranting such a use of the entry. Nor do I know of any. It is well settled that the certificate of survey and plat are pertinent to a determination of the location of the land covered by the patent. This, however, is for the purpose solely of correcting a mistake in transcribing the description of the certificate into the patent, and, so far as the plat accompanying the certificate is concerned, possibly, also, a mistake in transcribing the notes of the survey into the certificate. It was on this same principle, no doubt, that it was held in the case of Swan v. Wilson, 1 A. K. Marsh. (Ky.) 100, that the entry as well as the certificate was admissible in evidence to establish a mistake in the patent as to the name of the patentee. There is no transcription from the entry to the certificate as to the land covered by it. It is true that the entry defines the boundary. It would not be good if it did not. But the function of the survey to which the certificate relates is different. It indicates or points out the boundary so defined, so as to render it visible, and the certificate sets forth the visible boundary as disclosed by the survey.

If it be conceded that an entry ever has any bearing whatever on the location of the patent boundary, it certainly is not controlling. It can only be considered in construing the description of the certificate and patent, and only in case such description is ambiguous. If there is no ambiguity in such description, the entry cannot be used even to this limited extent; and there is no ambiguity in the description of the certificate and patent here. If one confines himself to the description set forth in the certificate and patent, there is no trouble. It is only when he goes beyond that, and comes to make it fit the ground, that trouble arises. It does not fit, and that not because of any ambiguity in the description, but because of the mistake of the surveyor as to the course of the North fork above the beginning corner. This mistake renders it impossible to fit the description as to all its elements. That it cannot be so fitted necessitates the rejection of such elements as will make

the description fit according to its main intent. It does not necessitate or permit of calling in the entry. The entry is no more pertinent than it would be if the description of the certificate and patent fit entirely, but varied from the entry. And even in case of a description that is in itself ambiguous there are circumstances which may weaken, if not destroy entirely, its effect in solving the ambiguity. I am not advised whether in the early days the entryman or the surveyor was the author of the terms of the entry. I have an idea that, even if the latter was, frequently the surveyor who made the survey was a different person from the one who made the entry. And even if the surveyor who made the survey and certificate were the same person who made the entry, so that in construing the certificate with the aid of the entry one would have before him two acts of the same person, and not acts of two different persons, the construction placed upon the entry would be in accordance with the rules laid down by the courts, which it is not unlikely would be different from the thought of the person who made the entry. Entries in the early days were very general in form, and one cannot read the decisions dealing with them without being struck with the great skill and ingenuity required to construe them aright. Inasmuch, then, as the description of the certificate and patent here is not ambiguous as to its meaning, the entry is not relevant, even if otherwise it might be.

These considerations relieve me of the necessity of considering the description in the entry, which intervening defendants rely on to support their contention as to the true location of the patent boundary. I do not think, however, that I should dispose of the case without taking notice thereof. The entry calls for 126,140 acres of land and describes it as follows, to wit:

"Beginning on the left-hand fork of the three forks of Kentucky at the end of 15 miles from the mouth of said fork when reduced to a straight line, it being the upper corner on the said fork of an entry made by P. D. Roberts, Tarrason Bros. & Co. &c. of 300,306⅔ acres; thence running from the said fork with their line to their corner; thence to extend from said corner parallel with a line that shall run up the meanders of said fork from the beginning when reduced to a straight line for quantity."

It is the call to extend from the second corner of the P. D. Roberts, Tarrason Bros. & Co. &c. entry, "parallel with a line that shall run up the meanders of said fork from the beginning when reduced to a straight line for quantity," that is relied on as not only justifying, but requiring, the location contended for by the intervening defendants. It is urged that it is inconsistent with this call for the northern or outer end to be rectangular in form. The rule as to the application of the rectangular principle is not that it should be applied in all cases; i. e., in disregard of the calls of the entry. It is only that it should be applied in the event there is nothing in the terms of the entry negativing or inconsistent with its application. The matter was thus put by Judge Boyle in the case of Carland v. Rowland, 3 Bibb, 125:

"The ordinary mode of surveying an entry with similar calls would require the lines to be run at right angles, those extending up the stream to be parallel to the general course thereof so far as it would be included in the survey, and those extending across the stream to be bisected thereby. But in

this case, owing to the peculiar and extraordinary bend of the creek, the rectangular figure cannot be preserved, and at the same time comply with the call to run up the creek on both sides; and as this is an express call, it must control the rectangular figure, that being a form given by construction only, where there is no express indication of the intention of the locator to give to the survey a different shape."

Judge Logan in the case of Calk v. Reed, 4 Bibb, 578, put it thus:

"It has never been held that the intention of a claimant as substantially expressed in his entry shall be sacrificed to the rules of construction and regular figures."

And in combatting the position that the rectangular principle should be applied in that case he said:

"All this by construction, opposed to the express calls of the entry and the obvious meaning of the locator, merely to preserve a taste for pretty figures."

Undoubtedly, then, if the call relied on was inconsistent with the application of the rectangular principle to the northern or outer end of the entry, it was not applicable thereto, and should have been disregarded in making the survey; the call of the entry being followed.

I would note two things in this connection. One is that, though the surveyor in making the survey should not have applied the rectangular principle, yet if in fact he did apply it, in disregard of the calls of the entry, it is what he actually did and not what he should have done that governs in determining the location of the patent boundary. This is indirectly conceded by the intervening defendants. They so concede it because the location for which they contend departs from the entry in two important particulars, and here they do not claim otherwise than that it is the patent and not the entry which controls. One of these is as to the length of the first line and the location of the second corner. The entry calls to run from the beginning corner with the line of the P. D. Roberts, Tarrason Bros. & Co. &c. land to their corner. That line is 8,000 poles or 25 miles long, and its second corner is that distance from the beginning corner. The call of the certificate and patent is for a distance of 6,400 poles or 20 miles. The other particular in which the location for which they contend departs from the entry results from the foregoing departure. By reason thereof the third line of the entry extends the same distance further north of the third line of the location, and so that the second line of the location crosses it south of its northern end. This places the third line of the location east of the third line of the entry. All land, therefore, in the location between the third line of the entry and the second and third lines of the location is outside of the entry. It amounts to 22,140 acres, there being only 104,000 acres of the entry within the location. The location contended for departs, therefore, from the entry in these two important particulars, and it is not claimed that as to them the entry and not the patent should control. Even though, then, the surveyor departed from the entry in applying the rectangular principle to the entry, yet if in fact he did so depart, the patent and not the entry must control. That he did apply the rectangular principle to the northern or outer end of the survey is as certain as that he ran the first line 6,400 poles or 20 miles from the beginning corner, and locat-

ed the second corner at the end of that line instead of at the end of 8,000 poles or 25 miles, as called for in the entry. It is true that the one thought is not as directly expressed as the other is; but it is just as really disclosed by the courses and distances called for as to the first, second, and third lines. Why, then, should not the thought of the certificate and patent in this particular, if such is its thought, control as well as in the other, and as intervening defendants would have in the matter of including 22,140 acres outside of the entry according to their construction thereof?

The other thing that I would note is that, if the call to run the second line parallel with a line running up the meanders of the North fork from the beginning corner when reduced to a straight line was itself inapplicable, because of the extraordinary and unexpected change in the course of the North fork above the beginning corner, it was the duty of the surveyor to disregard it, and, it thus being out of the way, there was nothing left for him to do but to apply the rectangular principle in full force, just as much so as if there had been no inconsistent call. The necessities of this case do not require that I should hold that it was impossible to run a line from the second corner of the entry or of the survey parallel with a line from the beginning corner with the meanders of the North fork when reduced to a straight line. I would, however, have to be better versed in the learning as to surveying entries, which is quite extensive, than I am now before I could hold that it was possible to do so. I am aware that great liberality is to be exercised in giving effect to the word "parallel" in such connections. But it seems to me to be stretching things somewhat to say that this was a case where effect could have been given to it. The second line according to the call was to be parallel to a line running up the meanders of the fork from the beginning corner when reduced to a straight line. This contemplated that the straight line connecting the fourth corner with the beginning should bear relation to the general course of the river between the two points. It was for a line parallel to such a line that the entry called. Now it seems to me that, because of the change in the course of the North fork to which I have referred, it is rather out of the question to say that a line could be run from the second corner of the entry or survey parallel with such a straight line. Certainly until you ascend more than 20 or 25 miles above the beginning corner it is not possible to obtain such a straight line. Had the North fork continued to ascend in a southerly direction, instead of changing its ascent to an easterly and southeasterly direction, it would have been impossible to obtain a straight line following the general course of the North fork parallel to which a line could be drawn from the second corner of the survey or entry. In that contingency the whole of the North fork above the beginning corner, instead of the first 20 or 25 miles, would have been substantially in line with the first line. In the location contended for by the intervening defendants it is rather the third line than the second that is parallel to such a line. This is all that I feel called upon to say in regard to the entry. As it is, if I had nothing before me but the entry, I could not say that its

location should be held to be otherwise than what I have held the location of the survey as set forth in the certificate and patent to be.

I am therefore constrained to hold that, assuming the small beech marked "R. E. B." to have been at the point where a 15-mile straight line from the mouth of the North fork would strike it—i. e., the uppermost corner of the P. D. Roberts, Tarrason Bros. & Co. &c. tract—the 126,140-acre tract and its third corner are not located as contended for by either the intervening defendants or the defendant company, but as I have indicated they are, and that the 50,000-acre tract does not cover the land in contest.

But I am equally certain that that tree was not located at that point, but was located at the mouth of Cedar creek below the beginning corner, the lower corner of the E. Thompson subdivision of the P. D. Roberts, Tarrason Bros. & Co. &c. tract. It seems to me there is no escaping the force of the evidence that it was so located. It must be accepted that the witnesses Thruston and Sewell found a beech at that point marked as they testify on August 28, 1893. The account they give of themselves, as to who they are, and the fact that they are unimpeached, leaves no room to question their truthfulness and integrity. Their character, the circumstances under which they came to discover the tree, the pains taken to preserve the markings, and the detail given in regard to same, is convincing of the fact that this testimony is true. It must also be accepted that the tree which they so found was the tree marked by Surveyor Ellis and called for in his certificate and in the patent. The marks on the tree were of such a character as of themselves to establish that it was the tree so called for. Both Thruston and Sewell testified that in their opinion the letters "R. E. B." on the tree, constituting a part of the marks thereon, were as old as the certificate. This, however, is not all the evidence tending to establish this fact. We have the statement in effect of Lewis Marshall, another deputy surveyor under Thos. Marshall, made March 15, 1786, less than two years after the tree was marked by Ellis, that it was at that point. On June 16, 1784, three days before the entry of the 50,000-acre tract, George Pickett, Lewis Marshall, and George Marshall entered 70,000 acres, and it called to begin at the upper corner of the 126,140-acre tract on the North fork. Its calls are as follows:

"Beginning on the left-hand fork of the three forks of Kentucky river, at the upper corner of an entry of 126,140 acres made in the name of Jacob Weaver, John Phillips & Company, made April 22, 1784, and running thence up the said left-hand fork of Kentucky so far that shall make a line 3,000 poles, then at right angles from said Jacob Weaver & Company's entry, thence out from the river with a line parallel to Jacob Weaver & Company's entry, and with his line to the beginning shall include the quantity."

It has been justly said that the existence of this prior entry binding on the 126,140-acre tract and the North fork forced the location of the 50,000-acre entry off the river, if it was to be laid adjoining the 126,140-acre tract. If it had not been for this intervening entry, it is not at all unlikely that it would have been located as binding on the North fork. The fact that this entry of 70,000 acres, 3,000 poles

broad, intervened between the 50,000-acre entry and the North fork, of which the entryman of the latter tract no doubt was aware, indicates that in his thought the 50,000-acre tract was a good distance back from the North fork, so far that locating it on Licking river, where the location which I have made seems to place it, cannot be said to place it away from where he thought it would be if he gave it any reflection. On March 15, 1786, a tract of 23,160 acres was surveyed out of this entry, known as the "Pickett & Co. tract," and four days later, to wit, on March 19, 1786, another tract of 10,000 acres was surveyed thereout, known as the "John Hopkins tract," both surveys being made by Lewis Marshall, the deputy surveyor whose statement heretofore referred to I am about to set forth. These two tracts adjoin each other, the John Hopkins 10,000-acre tract lying north of the Pickett & Co. 23,160-acre tract. Each may be said to have been a four-sided tract of land. Their eastern lines were in the same plane and ran N. 9° W. or S. 9° E., the same as the courses of the side lines of the 126,140, 50,000, and 300,306⅔ acre tracts of land, and of the 22 subdivisions of the 300,306⅔-acre tract. Together they extended north and south a distance of possibly as much as 20 miles or over. The western and southern sides of the Pickett & Co. 23,160-acre tract bounded on the North fork, and of course were as crooked as it was. The line of the western side began at two sugar trees and a hackberry standing near the bank of the North fork 160 poles below the mouth of Troublesome, a tributary of the North fork, emptying into it from the same side on which that tract was located, which trees were the beginning corner of the survey—the point in the course of the North fork where they were located being a small distance above where the North fork in its ascent from the beginning corner of the P. D. Roberts, Tarrason Bros. & Co. &c. 300,306⅔-acre tract turned from a southeasterly direction to a southerly course—and extended therefrom to the point where the North fork in its ascent turned from a southerly to an easterly course. The southern line consisted of the North fork from that point to the point in its course from which the eastern line of the tract ran N. 9° W. Its ascent was east, then south, and then east. The northern line of the tract ran from the beginning corner N. 86° E. 730 poles, where it angled with the eastern line in its course from the North fork N. 9° W. This line of the Pickett & Co. 23,160-acre tract was the southern line of the John Hopkins 10,000-acre tract. The eastern line thereof, as heretofore stated, was an extension of the eastern line of the Pickett & Co. 23,160-acre tract. Its northern line was of the same course and distance as the southern line and parallel to it. This tract also began at the two sugar trees and the hackberry, the beginning corner of the Pickett & Co. 23,160-acre tract, and its western line ran therefrom down the North fork a distance of 70 poles, thence from the North fork N. 9° W. 240 poles to the North fork again, thence eight courses with the North fork, and thence N. 9° W. 1,320 poles, the course being in the same plane as the preceding course N. 9° W. to the point where it angled with the northern line. The western line, therefore, except where the course of the North fork formed a part of it, ran

N. 9° W. and parallel to the eastern line. In the certificate of survey the courses of N. 9° W. called for in the western line are said to bind on and run with the Jacob Weaver & Co. line; i. e., the eastern line of the 126,140-acre tract. The John Hopkins 10,000-acre survey was thus, except where the North fork constituted a portion of its western line, 730 poles broad. The Pickett & Co. 23,160-acre tract for a short distance from its northern end was of the same breadth, but from that point, owing to the North fork bending somewhat to the west, it was somewhat broader.

This much by way of description of these two tracts to introduce the statement of Lewis Marshall heretofore referred to. In the certificate of survey of the Pickett & Co. 23,160-acre tract and the John Hopkins 10,000-acre tract the beginning corner, to wit, the two sugar trees and hackberry standing near the North fork are said to be "3,148 poles above the upper corner of a survey made by Robert Armstrong for P. D. Roberts & Co." These two surveys thus made by Lewis Marshall were not office surveys. They were actual surveys. It is certain that he actually surveyed the North fork where it bounded the Pickett & Co. 23,160-acre tract on the west and south and the John Hopkins 10,000-acre tract in part on the south. This is so because he gives the courses and distances of those meanders of that stream, and as given they are substantially correct. It being an actual survey, it must be taken that he ran the line 3,148 poles from the upper corner of the Armstrong survey for P. D. Roberts & Co. The entry under which he was making the survey said that it began at the upper corner of the entry for the 126,140-acre tract, which was 3,148 poles from the uppermost corner of the Armstrong survey. The survey of that tract made July 8, 1784, did not call for any marked corner. It did not even call for imaginary timber. Ellis therefore in making the survey, did not mark the fourth corner, and it was not visible to the eye as a starting point when Lewis Marshall made his survey nearly two years later. The only possible way in which Lewis Marshall could find this corner, the beginning corner of his survey, was by measuring from the upper corner of the Armstrong survey of P. D. Roberts, Tarrason Bros. & Co. &c. 300,306⅔-acre tract up the North fork to a point where a straight line 3,148 poles therefrom would strike the North fork. To do this he would have to locate the upper corner of that tract. It was impossible to do so from any marked corner made by Armstrong. I do not understand that Armstrong marked that corner so as to make it visible. He called for two sugar trees at that corner, but there is not the slightest indication that he marked them. It is agreed that he did not meander the North fork on which the Ephraim Thompson 5,000-acre tract, the upper subdivision of the large one, bounded. The trees called for at the upper corner of this subdivision, also the upper corner of the tract, were then imaginary and not actual trees. If such was the case, the only possible way for Marshall to find this upper corner of the tract was either to run the 15-mile line from the mouth of the North fork or to accept Ellis' work as correct and take the small beech tree with the marks on, which were still fresh, as the up-

per corner. It is reasonable to suppose that he adopted the latter course. He had heavy work before him in surveying two tracts of land which he surveyed, and there was no reason whatever why he should lose time in doing over again what Ellis had already done so shortly before. It is not unlikely that before he went up into this country he talked with Ellis about the matter and was given directions to enable him to find the small beech so marked with the least difficulty.

The beginning corner of the Pickett & Co. 23,160-acre tract and the John Hopkins 10,000-acre tract is known. It is at a point 160 poles below the mouth of Troublesome creek on the bank of the North fork. It is possible that some of the trees called for by Marshall are still standing. At any rate, that is the undisputed corner of those tracts. Now the distance from that corner to the point where Thruston and Sewell locate the small beech marked "R. E. B." is substantially 3,148 poles. I am not absolutely sure as to this. But this is what I make out of the evidence relating thereto. The distance should have been actually measured, so as to know it accurately. The statement of Marshall in his certificates of these two surveys that the beginning corner thereof was 3,148 poles above the upper corner of the Robert Armstrong survey of the P. D. Roberts & Co. tract of land was therefore in effect a statement that the small beech marked "R. E. B." was at the point where the tree so marked was found by Thruston and Sewell. In measuring the line it is likely that Marshall discovered its course and that it was not N. 81° E. or S. 81° W. according to Ellis' survey, though in his certificate he did not give its course. If so, he took it no doubt that Ellis had made a mistake, and it is to be noted that he does not undertake to give its course. Had he begun at the true corner of the Armstrong survey of the P. D. Roberts & Co. tract, several miles above the small beech, and run 3,148 poles therefrom in a straight line substantially with the meanders of the North fork, he could not possibly have surveyed the two tracts which he surveyed as he did, if, indeed, he would not have been so puzzled as to how to make the surveys as to abandon the effort to do so. It so happened that the point where the 3,148-pole line from the small beech, taking it to be where Thruston and Sewell locate it, ran out was about the last point to which he could have gone and confined the North fork to being the southern boundary only of the 126,140-acre tract.

Lewis Marshall thus located these two tracts on the basis that the small beech marked "R. E. B." was at the point where the beech so marked was found by Thruston and Sewell, and that that was the upper corner of the Robert Armstrong survey of the P. D. Roberts & Co. tract. Besides, in the same year, to wit, 1786, he located 12 other tracts depending on the location of the Pickett & Co. and Hopkins tracts on the same basis, to wit, the Rice, Gill, Hill, and Coleman tracts on Quicksand, or South Quicksand, and the four Cogswell, two Weakley, and McClardy and Burge tracts on South Quicksand or Troublesome. Of course, the weak point in the argument here is that Marshall did not state that the small beech which Ellis had so

marked was down the North fork from the beginning corner of the two tracts so surveyed by him at a distance of 3,148 poles therefrom, but that the upper corner of the Robert Armstrong survey of the P. D. Roberts & Co. tract was down the North fork from that corner at that distance. But as it was not possible for him to have truthfully made the latter statement, except on the basis that he took the small beech so marked to be that corner, and, according to the testimony of Thruston and Sewell a small beech so marked was in fact at that distance from his beginning corner, it seems to me reasonable to take his statement as amounting in effect to a statement that the small beech was at that distance therefrom. He could not have made the statement except on that basis, because the real corner of that tract was not at the distance of 3,148 poles from his beginning. It lacked several miles from being that distance therefrom.

[3] It is urged that this statement is inadmissible in evidence, and numerous authorities are cited to support this position. I do not deem it best to criticise the authorities so cited but to deal with the question directly in my own way. It is to be borne in mind that the evidence is not relied on to dislocate the P. D. Roberts, Tarrason Bros. & Co. &c. tract of land, by placing its upper corner several miles down the North fork from where it really is. It is relied on solely to show where the small beech marked "R. E. B." by Ellis and taken by him to be that corner was. The question in hand belongs to the subject of the admissibility of extrajudicial declarations of deceased persons as to the location of private boundaries. This subject is dealt with in 4 Chamberlayne on Evidence, §§ 2804 to 2810, inclusive. He notes that in England and Canada such evidence is held to be inadmissible. In section 2804a he says:

"In no connection, perhaps, is the forensic necessity of the proponent for the admission of such evidence so great as where the boundary or landmark is an ancient one. It may be and often is difficult to obtain relevant evidence as to the location of private boundaries other than the unsworn statements of deceased persons familiar with the facts. Should the line be an ancient one—i. e., established for over thirty years—judicial administration may well be justified, in the absence of evidence to the contrary, in assuming that securing other evidence on the point is beyond the power of the proponent. Such is the rule of practice or precedure relative to other ancient facts."

Then in section 2806 he says:

"A distinct step forward has, moreover, been taken in many jurisdictions of the United States. The peculiar circumstances attending the settlement of a new country have made it natural, if not inevitable, for judicial administration in those jurisdictions * * * to receive, by reason of the necessity of the case, the proponent being unable to produce other evidence in support of his contention, unsworn statements as to the position of private boundaries in general, their corners, or their landmarks, if made by deceased persons of adequate knowledge."

In section 2808 he says:

"The circumstance that a declaration regarding private boundaries was a spontaneous one, rather than made as the result of reflection, would undoubtedly add in many instances to its probative force."

By "spontaneous" he means as a part of the res gestæ. And finally in section 2810 he says:

"The propriety of the rulings given elsewhere to the effect that the extrajudicial statements of deceased persons with regard to the position and marks of private boundaries may be received under the present exception to the hearsay rule as secondary evidence of the facts asserted has by no means been acknowledged in all jurisdictions of the United States. In several highly respected courts proof of this nature has been rejected."

One of the courts to which he thus referred is that of Kentucky, and he cited in support of this statement the case of Cherry v. Boyd, Litt. Sel. Cas. 7. This case was a decision, not of the Court of Appeals of Kentucky, but of the Lexington district court, made in the year 1800, and not reported until 1824. It was there held that the declaration of a surveyor who was dead as to the lines appearing on the land in dispute was inadmissible in evidence.

As to the rule in federal courts Mr. Chamberlayne has this to say in note 8 to section 2806:

"Federal courts follow the practice prevailing in the jurisdiction within or for which they are sitting, so far as relates to the reception of extrajudicial statements by deceased persons as to the lines or landmarks of private boundaries."

He then cites the case of Ellicott v. Pearl, 10 Pet. 412, 9 L. Ed. 475, a case that went to the Supreme Court from Kentucky, as "rejecting declarations in accordance with the Kentucky rule." He then continues in these words:

"Should a case occur where the federal court would be at liberty to exercise its independent judgment on this subject, it seems probable that the court would prefer the rule admitting extrajudicial declarations to prove the boundaries of private persons."

In support of this he cites Clement v. Packer, 125 U. S. 309, 8 Sup. Ct. 907, 31 L. Ed. 721; Ayers v. Watson, 137 U. S. 584, 11 Sup. Ct. 201, 34 L. Ed. 803. In these two cases, however, the Supreme Court followed the state rule, the first one going there from Pennsylvania and the other from Texas, and they are cited along with Ellicott v. Pearl in support of the proposition to which it relates. It is because the opinions in those two cases indicate that the Supreme Court favored the rule which it upheld therein that he felt warranted in saying that in the absence of any state rule that court would take the same position.

In the case of Clement v. Packer, Mr. Justice Lamar had this to say as to the case of Ellicott v. Pearl:

"The case of Ellicott v. Pearl, supra, was brought to this court by a writ of error in the Circuit Court of the United States for the District of Kentucky, and in the decision here this court adhered to the English rule, and rejected the evidence of the declaration of a deceased surveyor as to the boundary of a private estate. In so doing this court was simply enforcing the rule as it existed in Kentucky at that time. In Cherry v. Boyd, Litt. Sel. Cas. 8, decided by the Supreme Court of that state in 1800, it was held that evidence of the parol declarations of a surveyor concerning the marks or lines of a private estate were inadmissible. This being the settled law of Kentucky, this court could not have decided otherwise than it did in Ellicott v. Pearl. But even in that case the court uses the following guarded lan-

guage: 'The doctrine in America, in respect to boundaries, has gone further, and has admitted of general reputation * * * between contiguous private estates.' "

In a hasty reading of Mr. Justice Story's opinion in the case of Ellicott v. Pearl, I fail to find any reference to the case of Cherry v. Boyd. It may be there, but it has escaped me. He seems to have decided the question as one of general law. That Mr. Justice Lamar in Clement v. Packer attributed the decision to Cherry v. Boyd, may be one indication that he favored the rule as to the admissibility of such declarations.

The matter then comes to what is the rule in Kentucky on the subject. I do not think that the rule laid down in Cherry v. Boyd is now the law in Kentucky. This is the third case in Littell's Select Cases which I have found to be out of line with the position of the Kentucky Court of Appeals. I referred to one of the two others in the case of Davis v. Commonwealth Land & Lumber Co. (C C.) 141 Fed. 740, 765, and to the other in In re Watson, 201 Fed. 962, 977. This position I justify by the following cases, to wit: Ewing v. Savary, 3 Bibb (Ky) 235; Smith v. Nowells, 2 Litt. (Ky.) 159; Smith v. Cornett (Ky.) 38 S. W. 689. The case of Ewing v. Savary was substantially like the case here. There the question was whether a junior certificate of survey was admissible in evidence to prove the boundaries of the senior. Judge Logan said:

"Where a survey calls for lines or corners of a prior survey, as such prior survey in that case composes a part of the description of the subsequent survey, it would unquestionably be proper evidence; but the subsequent survey can in no case constitute any part of the description of the prior one."

It is not contended that the Marshall surveys constitute any part of the Ellis or Armstrong surveys, and hence so much of Judge Logan's opinion is not pertinent here. But he does not stop with this remark. He continues as follows:

"It can at most amount to but a declaration of the surveyor who made it of the position of the boundaries of the prior survey, and ought to be received as evidence only under circumstances which would render hearsay evidence admissible. General reputation is perhaps in all cases, hearsay is in some cases, admissible evidence in relation to the subject of boundaries, because from its nature it does not admit of more direct and positive proof; but the clear result from all the cases with respect to the admission of hearsay evidence is that proof of what any particular person has said cannot be admitted, unless it appears that such person is absent from the country, or dead, or otherwise incapable of giving evidence in the cause. And as this was not proven to be the case with respect to the surveyor who made the surveys offered in evidence in this instance, the certificates of survey were inadmissible."

This was a clear recognition of the position that if the surveyor had been dead the certificates would have been admissible.

In Smith v. Nowells, it was said:

"The first point proper to be noticed is as to the admissibility of the evidence of the reputed boundaries of Barbour's survey. That the evidence was properly admitted we think there can be but little room to doubt. What any one, even a person who had been at the making of the survey, had been heard to say, would no doubt be inadmissible, unless the death of such person

was first proved; but there is a difference between hearsay of a particular fact and general reputation. From the nature of the thing an old boundary cannot, in general, be proved by direct and positive proof; and reputation is, therefore, from necessity admissible."

Here again there is a clear recognition that a declaration of a deceased person who had been at the making of a survey is admissible in evidence as to the location of the boundaries called for therein.

And in the case of Smith v. Cornett Judge Guffy said:

"It was error to allow witnesses to testify as to statements made to them as to the location of lines or corners by persons who were still living. It is true that hearsay testimony as to the location of corners to land may be admitted when the parties making the statement which it is desired to be proven are dead, but that rule cannot be extended to statements made by persons still living. Such persons should be introduced to prove the fact themselves."

Here it is expressly stated that such statements of deceased persons are admissible in evidence. It is true that recognition and statement of the rule in these three cases is obiter, but they are sufficient to justify me in accepting them as putting forth the law of Kentucky on this subject rather than the case of Cherry v. Boyd, notwithstanding the question was there directly involved. I have considered all Kentucky cases cited on behalf of intervening defendants, and none are in point except Ewing v. Savary, and that is against their position. In this case we have a boundary over 125 years old; the declaration was in writing, was a part of the res gestæ, was made in the course of the performance of official duty, and 14 different surveys were built upon its correctness. I have no doubt, then, as to the admissibility of the evidence, and believe it to be evidence of a very high character. In connection with the testimony of Thruston and Sewell as to their finding a beech tree so marked at a point substantially 3,148 poles down the North fork from the beginning corner of the two Marshall surveys, no other conclusion can be drawn than such tree was the tree marked by Ellis as the beginning corner of his survey of the 126,140-acre tract.

But this is not all in the evidence tending in this same direction. Between the beech tree so marked, found by Thruston and Sewell, and the beginning corner of the two Marshall surveys, two large streams empty themselves into the North fork from the side thereof on which the 126,140-acre tract is located, to wit, Frozen and Quicksand. On the plat accompanying the certificate of survey made by Ellis of the 126,140-acre tract, two streams are shown so emptying into the North fork. It is because of this circumstance that I have heretofore said that Ellis, in addition to marking this beginning corner, may have ascended the North fork at least as far as Quicksand. Of course, if by the two streams on the plat he intended to represent Frozen and Quicksand, he must have done so.

Then the facts set forth in the opinion in the case of Cockrell v. McQuinn, 4 T. B. Mon. (Ky.) 61, decided January 16, 1827, and which involved the location of the southern line of the Reynolds 126,140-acre tract, tend very strongly to indicate that when that case was tried in the lower court, which may have been years before, the small

beech marked "R. E. B.," located as Thruston and Sewell place it, and the two sugar trees and hackberry, the beginning corner of the two Marshall surveys, which it is agreed were 160 poles below the mouth of Troublesome, were accepted as the beginning corner and fourth corners of the 126,140-acre tract on the North fork. The sole question considered and determined in that case was as to the correctness of an instruction given to the jury by the lower court in these words, to wit:

"That the calls in the patent, 'thence from the fourth corner down the river these several courses,' should be construed by the jury as a call to run down the river, binding thereon with the meanders to the beginning, and that the fourth boundary line of the Reynolds survey was the said North fork of Kentucky."

In other words, it was whether the North fork was the southern line of the tract. It was held that the instruction was correct, that such was the southern line of the tract, and that the call for courses and distances should be rejected. There was no dispute as to the location of the beginning and fourth corners. They were treated as well known. Judge Owsley said:

"There was no controversy between the parties as to the beginning or the fourth corner described in the patent. The beginning was proved to be on the north side of the North fork of Kentucky, and the jury were instructed by the court that the fourth corner was at that point on the same side of the fork where, pursuing the course of the third line from the third corner, it would strike the fork, and that instruction was acquiesced in by both parties."

And again he said:

"It should be remarked that no attempt was made on the trial to prove any marked lines or any course between the fourth corner on the North fork and the beginning corner of Reynolds, though it was proved that, instead of following the course of the fork, the courses and distances called for between those corners would cross the fork."

It is to be noted that it was said that it was proved that the beginning corner was on the north side of the North fork, and not said where it was proved that the fourth corner was. It is only said that the jury were told that it was at that point on the same side of the fork where, pursuing the course of the third line from the third corner, it would strike the fork. But there must have been some evidence as to where such a line struck the fork, else it was not possible for the jury to determine where the fourth corner on the fork was. And where is it to be taken that the evidence disclosed that it struck the fork? It is inconceivable that it disclosed that it struck it 55 miles above the beginning corner as claimed by intervening defendants, or even where I have held that it struck it. Had the evidence disclosed this, it certainly would have cropped out in the opinion.

The parties to that litigation, their attorneys, the jury, and the courts, lower and higher, were in blissful ignorance of the problem we have here. There was but one other place for the evidence to have disclosed as being struck by such a line, and that place was the beginning corner of the two Marshall surveys. The John Hopkins 10,000-acre tract, called to bind on that line and that corner, was said in

the certificates for those surveys and the patents issued on them to be 3,148 poles from the upper corner of the Armstrong survey of the P. D. Roberts tract, the beginning corner of the 126,140-acre tract. And it is significant that it is said that following the course of the fork the courses and distances called for between those corners would cross the fork, which is what they would do taking the fourth corner as being at the beginning corner of the two Marshall surveys. It is not unlikely that the matter was put in this general form because the 126,140-acre survey called for no timber or other visible corner, and the corner of the two Marshall surveys was not a corner of that survey. If, then, that was the place where the fourth corner was disclosed by the evidence to be, where was it proved that the beginning corner was? It must have been at the small beech then plainly marked "R. E. B.," which was at a distance substantially 3,148 poles down the fork from that place. And it is not without some significance that amongst the marks found on the beech by Thruston and Sewell were the letters "J. R." and "W. S.," the latter under the former and both above the letters "R. E. B." and also the letters "I. A. S. A." below them, and below these letters the date "August 13, 1813." All these letters and this date are testified to have been about the same age. It is not unlikely that the letters "J. R." were intended for the initials of the patentee, James Reynolds, and "W. S." for the initials of the surveyor who made a survey of the North fork line of the 126,140-acre tract on August 13, 1813, possibly William Sudduth, said to be a surveyor in those days. No other explanation of the other letters has been suggested, and none occurs to me. And it is not unlikely that the survey thus noted on the tree was made in connection with the case of Cockrell v. McQuinn.

There was a circumstance that was likely to cause Ellis, the surveyor, to make the blunder which he made if the small beech so called for by him was located at the point where the beech discovered by Thruston and Sewell was located. That circumstance was that that point is just 15 miles in a straight line from the mouth of the South fork of Kentucky. In running this line then it is possible that Ellis began at the mouth of the South fork, instead of the mouth of the North fork, which is incorrectly shown on the Armstrong map as being directly nort of the mouth of the South fork. Then, again, the timber called for at the upper corner of the Armstrong survey is two sugar trees. The same timber is called for as the corner between the Ephraim Thompson and P. D. Roberts subdivision on the North fork, along with a bounden ash. It seems to be agreed that Armstrong did not survey the North fork above this point. If so, the two sugar trees called for at the upper corner of the whole survey may have been imaginary, and the two called for as the corner on the fork between these two subdivisions actual and marked.

Then there was a circumstance which, if Ellis did make the blunder, was calculated to make him think that the general course of the North fork above the beginning corner of his survey was as he has shown it in the courses and distances called for on his plat. This was that the North fork above where Thruston and Sewell found the beech

tree runs in that general course for some distance, possibly as much as a mile or two. The suggestion here made may possibly conflict with the suggestion heretofore made that Ellis may have gone up the fork at the time of his survey as high as Quicksand. But it is not possible at this late date to make everything fit exactly.

What, then, is there in the case against the position that Ellis made the blunder and began his survey at the point where Thruston and Sewell found the beech. It is that within the recollection of persons now living that point has not been known as the upper corner of the P. D. Roberts, Tarrason Bros. & Co. &c. 300,306⅔-acre tract and the beginning corner of the Reynolds 126,140-acre tract, and that general reputation locates that upper corner at the place up the fork where it rightfully is. I am not sure whether the general reputation now is that such is the beginning corner of the 126,140-acre tract. As I recall, the evidence does not disclose whether there is any general reputation now as to either of the corners on the fork of this tract, or that any one is now claiming under that patent who would look to its calls for the location of its boundaries. I will assume, however, that such is the reputed beginning corner of the 126,140-acre tract also. But this circumstance is not inconsistent with the position that Ellis made the beginning corner at the beech where Thruston and Sewell found it. It simply indicates that, in the long time that has elapsed since the Cockrell v. McQuinn Case, the true corner was ascertained and the claim that that beech was the corner was abandoned and unknown to any one until found by Thruston and Sewell.

If, then, Ellis did begin his survey at that beech, the boundary covered by the patent issued to Reynolds began there also, notwithstanding it was a blunder and thereby the Reynolds tract was made to lap considerably on the P. D. Roberts, Tarrason Bros. & Co. &c. tract, and in determining the location of the third corner thereof, which fixes the beginning corner and location of the 50,000-acre tract, such must be taken as the beginning corner of the 126,140-acre tract. But in determining such location, taking that as the beginning corner, the work of Lewis Marshall has no bearing whatever. His conception as to the true location of the 126,140-acre tract must be put out of the case entirely.

The fact that Ellis began his survey at the beech simply changes the beginning corner of the tract from what it is claimed to be by the intervening defendants. It leaves with us the same problem as to the true location of the 126,140-acre tract that was before us on the assumption that its beginning corner was where it should have been, and it in no wise affects the question as to how that problem should be solved. I am not advised whether, if it should be solved as intervening defendants claim it should be, the 50,000-acre tract would conflict to any extent with the Reid patent. If it does not, then, of course, the mere change in the location of the beginning corner defeats their claim. It is only in case that, with a change in the beginning corner, there is still a conflict that the problem as to the true location of the 126,140-acre tract and its third corner calls for solution. Assuming that there is still a conflict, I think that the location there-

of should be made along the lines heretofore suggested, though with a change in the beginning corner a location according to intervening defendants' position will cause the northern or outer line of the tract to be more in parallel relation with the southern or North fork line than in case the beginning corner is as they claim it to be.

The conclusion of the whole matter is that I think the cross-bill of the intervening defendants should be dismissed.

This brings me to the contest between the two companies, the original parties to the suit. The sole question here is as to whether the defendant company has acquired by adverse possession the title of the plaintiff to the land in dispute between them. If not, the plaintiff is entitled to a decree, as that land is covered by the Reid patent, under which it claims and with which it has connected itself. The burden is on the defendant to establish that it has. To appreciate and properly dispose of the question involved it is well to visualize, as it were, that land.

The Reid patent covers a boundary containing 154,800 acres, from which it excludes 25,800 acres of "patented and otherwise appropriated land"; i. e., land previously "patented and otherwise appropriated." The land to which the plaintiff in its bill asserts title under this patent is so much of a certain boundary of land therein set forth, containing 4,717.4 acres, as is within the boundary of the Reid patent, excluding therefrom 14 smaller boundaries which had been previously patented—one to Jesse Rogers and Isaac Shipley, containing 50 acres, patented January 14, 1823; three to Jonathan Fugate, one of which, containing 50 acres, was patented to him May 20, 1823, and the other two, containing, respectively, 50 acres and ——— acres, August 25, 1841; four to Jesse Fugate, one of which, containing 50 acres, was patented to him June 2, 1848, and the other three, containing, respectively, 50 acres, 25 acres, and 25 acres, April 21, 1860; one to John Fugate, containing 50 acres, patented to him April 21, 1860; and five to Henry Williams, containing, respectively, 50 acres, 100 acres, 50 acres, 50 acres, and 200 acres, alleged to have been patented to him prior to June 15, 1872, but some of which were patented afterwards. It is possible, also, that there was a mistake made in alleging that two parcels were patented to Jonathan Fugate August 25, 1841. The bill alleges that the defendant company claims title thereto. The defendant company in its answer asserts title to the whole of the boundary of 4,717.4 acres of land; but, as the plaintiff only claims so much thereof as is within the Reid patent, excluding that previously patented or otherwise appropriated, the dispute between them relates only thereto.

The only title which the defendant company asserts to the entire boundary is by adverse possession. As stated at the outset of this opinion, the land in dispute is located on South Quicksand. This stream runs in a westerly direction and empties into Quicksand not far from where it empties into the North fork. The boundary of the 4,717.4 acres is up towards the head of South Quicksand and extends along it for a distance of about five miles. At the lower and upper ends the stream runs through it, whereas in the center it is located

almost entirely on the north side; the lower portion thereof not binding thereon, and the uppermost running with it mainly on the southern side. Where the stream runs through it the land extends to the top of the ridge on both sides, and where it is on the north side it extends to the ridge on that side, except where it does not bind thereon. It is the lower end of this boundary that is not within the Reid patent, and is all thereof lying northwest of a line, the closing of the Reid patent, running N. 55° E. from its beginning corner at the mouth of Troublesome. That portion thereof which is within the boundary of the Reid patent extends along South Quicksand nearly four miles. The streams emptying into it from the lower end—i. e., the lower end of so much as is within the Reid patent—to the upper end are as follows, to wit: Lick branch, from the north or left as you ascend; Gunwale hollow, from the south or right as you ascend; Open fork, from the north; Cane and Lick branches, from the south; Hickory and John Noble branches, from the north; Ten acre, Spicewood, and Sanford branches, from the south; Jim's branch, from the north; Spring branch, Cannel Coal hollow, and Old Cove branch from the south; Cane branch, Rabbit hollow, and Laurel fork from the north; and Deadening Bottom branch and Two Mile from the south. Just below the boundary of the Reid patent and within it two important streams empty into South Quicksand from the south, not far apart, to wit, Fugate's fork and Leatherwood, and between them and the boundary of the Reid patent Stacey's branch empties into it from the north. The important streams emptying into South Quicksand from the south are Spicewood and Two Mile, and from the north Open fork, Hickory Log branch, Jim's branch, and Laurel fork. It is at Open fork that the boundary lies wholly to the north of Quicksand, and between it and Hickory Log branch it crosses to the south side, and from that point to just below Jim's branch runs with South Quicksand, mainly on the south side.

The boundary claimed by the defendant, the portion whereof claimed by plaintiff under the Reid patent has been set forth, first came into existence April 30, 1888, or shortly prior thereto. It was on that date conveyed by Charles H. Stoll to the Kentucky Union Land Company. Theretofore, to wit, in the year 1887, he had obtained eight separate deeds from certain individuals claiming separate portions of the land within that boundary. The several deeds set forth the boundaries claimed by them, respectively, and cover possibly only four separate boundaries, known as the Henry Williams, Jesse Fugate, John Fugate, and John Clemons boundaries, coming in this order as you ascend the creek. Without having examined the matter closely, I take it that these separate boundaries cover the whole of the land within the boundary of the 4,717.4 acres. Before making his deed to the Kentucky Union Company, Stoll caused the outside boundary of those several tracts to be surveyed and marked, and he conveyed the whole of the land as one tract by this boundary. In the year 1891 suit was brought in the United States Circuit Court for the District of Kentucky to wind up the affairs of the Kentucky Union Land Company. In that suit a receiver was appointed to take charge of the assets of the com-

pany pending the litigation, and subsequently thereto those assets were sold therein, and the defendant company became the purchaser thereof, including the boundary on South Quicksand, and on the 30th day of July, 1896, it was conveyed to it by the commissioner of that court and it has claimed it ever since. It is this boundary which is set forth in the bill as covering the land claimed by plaintiff.

This suit was brought September 18, 1906, so that from April 30, 1888, down to that date, a period of over 18 years, the Kentucky Union Land Company and defendant have continuously claimed the whole of that boundary. It is a well-defined and well-marked boundary, and has been so during all that time. These two companies have, successively, not only claimed the title to the whole of this boundary, but they have also claimed to be in the actual possession of it. During the whole of the time they have continuously had tenants living within the boundary. It has been looked after on their behalf, first by George W. Miller, and then upon his death by his son, John Miller.

In 1892, after the bringing of the suit referred to and the appointment of the receiver, one W. E. Gunn entered on the land under patents recently obtained by him and others, and built two houses on the north side of South Quicksand, one at the lower end, at the mouth of Stacey's branch, outside of the boundary of the Reid patent, and the other at the mouth of Jim's branch, within it, and toward the upper end. Proceedings for contempt were instituted against him in that court, and he was adjudged guilty and fined $500. These proceedings were bottomed on the fact that the receiver was in the actual possession of this boundary and Gunn had invaded his possession. That was the sole question involved. The rule against Gunn was to show cause why he should not be compelled to surrender to the receiver the possession of certain land in Breathitt county, lying on the waters of Quicksand creek, containing 4,717 acres, and why he should not be punished for contempt of court for interfering with the receiver's possession of said tract of land. Gunn, in response to the rule, denied that the receiver was in the actual possession of any of the land covered by the patents under which he entered. Evidence was heard, and it being held that the receiver was in the actual possession thereof, the result was as stated. Gunn was further ordered to surrender possession of the two houses in which he had placed tenants to the receiver, which he did. Judge Barr in his written opinion said:

"The issue thus made is one of possession, and the title to this land need not be considered, except as it may affect the question of possession."

The position was taken that Stoll's vendors had entered under patents, the boundaries of which were the extent then of their claims, and that as the improvements were made within the patent boundaries they could not acquire possession outside thereof by merely surveying and marking a boundary and claiming to the extent of the boundary thus marked. To this Judge Barr said:

"We think this contention cannot be sustained, either by the facts proven or the law applicable to the facts as proven. The evidence proves that many of the improvements made by the vendors of Stoll, or those under whom they claim, are outside of the boundaries of any of the patents issued to them, as

shown on the map; and some of these improvements are partly outside and partly inside of those patents. Only a few of these improvements are entirely within the boundaries of those patents. This clearly proves that it was not the intention of the parties to confine their claim to the boundaries of the patents. The extent of the claim of the vendors of Stoll prior to 1887 is only material on this rule to show that prior to the conveyances to Stoll they had not confined their claim and possession to the boundaries of the patents, and thus meet the contention that they could not and did not have possession beyond those patent boundaries. It is not necessary to consider the precise extent of these claims and possession for years prior to the conveyances to Stoll, since the evidence is uncontradicted that the lands conveyed to Stoll had been previously marked by clear and distinct boundaries. Whether those marks were old or recent is not material, since the intention to claim to the extent of those boundaries and deliver the same to Stoll is manifest. It is equally manifest that Stoll received the conveyances and the possession from his vendors to the extent of the boundaries described in the conveyances, both inside and outside of the patents, unless there is some rule of law which confined him to the patent lines or the actual inclosures outside of them. We think there is no rule of law that confined those vendors to the patent boundaries or their actual inclosures outside of those boundaries. In Campbell v. Thomas, 9 B. Mon. [Ky.] 83, the court says: 'The land was vacant in 1816, when originally settled on by the individual under whom the defendant claims. Having surveyed and laid off 170 acres, and entered and settled upon it, with the intention of taking possession of the whole, he gained, according to the repeated adjudication of this court in similar cases, where the entry was made under color of title, a possession to the extent of his marked boundary.' In that case the entry was made without title, but claiming a surveyed and marked boundary, and the contest was between such a possessory title and a patent from the state in 1823. See, also, Thomas v. Harrow, 4 Bibb [Ky.] 563; Farmer v. Lyons, 87 Ky. 422 [9 S. W. 248]."

It was thus solemnly adjudged after full hearing that at the time of Gunn's entry the receiver, on behalf of the Kentucky Union Land Company, was in the actual possession of the whole boundary of 4,717 acres, and it and the receiver had been in such possession ever since the deed to Stoll. There can be no question that if this adjudication was correct the receiver and defendant company have been in the actual possession ever since.

Furthermore, the claim of ownership and actual possession on the behalf of the Kentucky Union Land Company, its receiver, and the defendant company since April 30, 1888, has been a notorious one. This contempt proceeding was calculated to give it great notoriety. The deeds to Stoll, by Stoll to the Kentucky Union Land Company, and by the special commissioner on behalf of that company to defendant, were put to record shortly after their execution and delivery. The sale at which defendant company purchased was at public auction at the courthouse door at Jackson, the county seat of Breathitt county, after notice thereof in the newspapers there published. These several parties have regularly assessed this whole boundary for taxation and paid the taxes on it. There is almost a continuous series of inclosed fields in the bottoms along the course of the creek, and there are several houses on it. During all this time the defendant company and its predecessor in title and its receiver have had tenants living within these houses and cultivating those fields, and an agent overseeing and looking after the land. The county road runs up the creek alongside these fields. It was generally known during all this time that the de-

fendant and its predecessor claimed to have and to be in possession of the whole of this land.

Notwithstanding this, it is claimed by the plaintiff that the defendant company and its predecessor in title and its receiver never have had actual possession of any portion of this boundary of land beyond the boundaries of the patented and otherwise appropriated land expressly excluded by the Reid patent from its operation and the extent of such small inclosures as there may be beyond those boundaries. It concedes that, in addition to the previously patented boundaries mentioned in the bill heretofore referred to, there had also been previously patented to William Collins a tract of 50 acres August 25, 1841; to John Clemons three tracts, one of 50 acres, December 29, 1852, one of 50 acres August 8, 1868, and the other of 100 acres August 8, 1868, and one to Daniel Duff of 50 acres on June 23, 1847, all of which tracts were along the creek at the upper end of the tract. It claims the patents mentioned in the bill and these additional ones are located mainly along the creek, and that such of them as are so located form one continuous body extending from the lower to the upper end of the boundary of the 4,717 acres, and substantially cover all the inclosures on that tract, and that such possession as the defendant company and its predecessor in title and its receiver have had of that boundary has been confined to such of the boundaries of them as are within it and to such inclosures as extend beyond those boundaries.

It is certain that, as the plaintiff was no party to the contempt proceedings heretofore referred to, the finding and judgment therein is not only not binding upon it, but is not evidence against it. The question here involved is an open one, as much so as if there had been no such proceedings. It has been referred to as showing the extent of the claim which defendant is asserting, and its notoriety, and as negativing that any inclosure beyond the boundaries of the senior patents, no matter how small was clandestine or due to a mistake.

[4] A few general observations on the subject of possession of land is another particular of approach to the questions in hand that will aid in its solution. There is no such thing as possession of land save in connection with a well-defined boundary thereof. Without a well-defined boundary there can be no possession. To have possession of a well-defined boundary of land, it is not sufficient that one claim it. He may claim it as long and as loudly as he sees fit, but he does not acquire possession of a foot of it. Mere ownership even is not sufficient in and of itself to give one the possession. In order to the possession of a well-defined boundary of land, it is essential that he enter within it. This he does if he settles on the land. But it is not essential that he live on it. It is sufficient if he incloses a portion of it. Whether anything short of inclosure will constitute such an entry as to give possession it is not necessary to determine. But settlement on or inclosure within a well-defined boundary will not give possession to the extent of the boundary, unless there is an intent to take possession to that extent. If, however, the entry is made under a claim of ownership to the extent of the boundary, the pre-

sumption is that it was the intent to take possession to that extent and it gives possession to that extent.

The well-defined boundary which one may thus acquire possession of need not be set forth in an instrument of writing under which he claims. It is sufficient that it is a well-marked boundary, as was held in the case of Campbell v. Thomas, cited by Judge Barr as above. But what has been said as to acquiring possession of a well-defined boundary by entering within it with the intent to take possession thereof to the extent of the boundary needs qualification. What has been said is true, if nothing else appears than what has thus far been set forth. If, in addition, it appears that the person entering has a right to enter on a part of the land within such boundary, and not to enter on another part thereof, and he enters on the part on which he has a right to enter, he acquires no possession beyond the part on which he has the right to enter; and this, notwithstanding there may be no doubt as to his intent thereby to take possession of the whole boundary. The pioneer case in which this was laid down is the case of Trimble v. Smith, 4 Bibb (Ky.) 257. It has been laid down frequently since. Of the cases in which it has been so held are the following, to wit: Smith v. Mitchell, 1 J. J. Marsh. (Ky.) 270; Wilson v. Stivers, 4 Dana (Ky.) 634; Jones v. McCauley, 2 Duv. (Ky.) 14; Whitley County Land Co. v. Powers' Heirs, 146 Ky. 801, 144 S. W. 2; Curtis v. Warden, 144 Ky. 383, 138 S. W. 245.

The matter decided in those cases is generally put in this way. Where a junior patentee enters outside of the lap between his patent and that of the senior patentee, he acquires no possession of the land within the lap. It is but another way of putting it to say, as I have, that if one enters within a well-defined boundary on the part thereof on which he has the right to enter, he acquires no possession of the part on which he has no right to enter and on which he does not enter. In the Taylor & Crate Case, supra, 185 Fed. at page 861, I directed attention to the two reasons given by Judge Boyle in Trimble v. Smith, for this position, and expressed a preference for the second one, which was that otherwise "a party having the right might be divested of his right without any wrong being in fact done him, or any possibility of knowing that any was intended to be done." Indeed, the whole matter comes down to this, that one cannot divest another of his title to land without entering on it. By confining his entry within a well-defined boundary to the part on which he has the right to enter, he does not enter on the part on which he has no right to enter, and as entry thereon is essential to divest the owner thereof of his title, an entry on the part on which he has the right to enter, no matter how long continued, cannot divest the owner of the other part of his title. Claim of ownership and possession is of no avail here, any more than in any other case. Nor is knowledge of the fact of such claim on the part of the owner of any avail. The one essential thing is that there must be an entry on the land. So, aiso, if one who has so entered conveys to another the whole of the boundary, and the vendee enters under the deed, but confines his entry to the

part on which the vendor had entered, his possession does not extend to the part on which he has no right to enter.

Thus far I have dealt with the matter of an entry within a well-defined boundary, on a part of which one has the right to enter, and on the other part of which he has no right to enter; the entry being on the part on which he has a right to enter. It is the same if one enters within a well-defined boundary, on the whole of which he has the right to enter, and thereafter enlarges his boundary to a well-defined extent to take in land adjoining on which he has no right to enter, but does not enter on the enlargement. He may make this enlargement by executing a deed conveying a boundary covering both that on which he had entered, and has a right to enter, and the enlargement, or merely by marking the outside boundary of the enlargement. In the latter case he does not acquire possession of the enlargement by the mere marking. Nor in the former case does the vendee entering under the conveyance acquire possession thereof, if his entry is not on the enlargement. Jones v. Patterson (Ky.) 66 S. W. 377; Bowling v. Breathitt Coal, Iron & Lumber Co., 134 Ky. 249, 120 S. W. 317. This is simply another way of putting the position that one cannot acquire possession of land without an entry on it.

If, however, in a case where it appears that the entry has been within a well-defined boundary, on a part of which there was no right to enter, and on a part there was the right to enter, and the entry was on the former part—i. e., the lap or interference—the position just taken as to acquiring possession of a well-defined boundary by entering within it applies in full force. Thereby possession of the well-defined boundary to the extent of the intent to take possession is acquired. If the entry is not under a claim of title, or under a claim of title, but not to any greater extent than the entry, there is no intent to acquire possession, and none is acquired beyond the entry. If, however, the entry is under a claim of title to the whole of the boundary, possession is acquired to its full extent. So, in case of an enlargement—i. e., a case where the original entry is on a boundary on which there was the right to enter, and thereafter the boundary is enlarged, and an entry is made on the enlargement—possession thereof is acquired to the full extent of the intent to take possession. The enlargement may consist simply of the entry. In such a case there is no intent to take possession, and no possession is acquired beyond the entry. If, however, the enlargement consists in marking a boundary and claiming title to the extent thereof, there is an intent to acquire possession, and possession is acquired to the full extent of the boundary. So, if the enlargement consists in executing a conveyance of a boundary covering both that on which he has entered, and had a right to enter, and the enlargement, and the vendee under the conveyance enters on the enlargement, his intent is to take, and he acquires possession, to the full extent of the enlargement, and that whether or not the vendor had theretofore entered on the enlargement, or, if he had entered, it was with the intent to acquire no more possession than to the extent of his entry. In such a case there is an entry on the owner's land under a claim of title to the whole ex-

tent of the boundary, and hence with the intent to take possession thereof. The extent of the possession of the vendor is immaterial. Immediately upon the execution of the conveyance and entry thereunder on the enlargement—i. e., on the part on which there is no right to enter—there is an intent to take possession thereof, and possession thereof is acquired to its full extent, without regard to what may have been the state of the possession previously. I do not think that there can be the slightest doubt as to the correctness of these several positions which I have taken as to the law of possession in this state. It remains to apply these positions to the facts in this case.

The defendant company does not base its claim of ownership to the 4,717.4-acre tract of land, or any part thereof, on anything that transpired prior to the execution of the deeds to Stoll April 30, 1888. The grantors in those deeds had title, at least, to some portions of the land within the several boundaries, which they claimed under certain of the patents issued previously to the Reid patent hereinbefore set forth. Possibly their title under those patents was affected somewhat by certain old Virginia patents located on South Quicksand, hereinbefore referred to. But defendant company does not claim ownership to such portions of that tract as its grantors may have had title to under those patents because of such title. Its claim of ownership to the whole thereof is limited to a title by adverse possession. And to establish title by adverse possession it does not rely on previous possession by any of its grantors. It is likely that certain of its grantors had acquired title to certain small portions of that tract outside of those patents by adverse possession. It is likely, also, that they had not acquired title to the whole thereof outside of those patents in such a way. Indeed, it is not unlikely that at the time they conveyed to Stoll they did not own in any way the bulk of the land which they claimed; i. e., any of the land outside of those patents and such small portions as they had acquired by adverse possession. It is thus that defendant company has been put to the necessity of basing its title to the bulk of the tract by adverse possession, since at least the date of the deed from Stoll to the Kentucky Union Company April 30, 1888. Possibly it might have dated the adverse possession on which it relies from the date of the deeds to Stoll in 1887; and being thus put to this necessity, it has based its title to the whole of the tract thereon.

The entries relied on by the defendant company, which enabled it thus to acquire title to the tract, are located entirely in the bottom land along the course of South Quicksand. As heretofore stated, there is a series of inclosed fields in this bottom from the lower to the upper end. The plaintiff claims that certain of the patents which issued previous to the Reid patent as hereinbefore set forth, with one not heretofore mentioned, stretch continuously from the lower end and to the upper end of the tract along the course of the creek. They are the Rogers & Shipley 50-acre patent, dated January 14, 1823; the Jesse Fugate 25-acre patent, dated April 21, 1860; a R. P. Davis patent of 50 acres, dated May 28, 1868, not heretofore mentioned; the Jonathan Fugate 50-acre patent, dated May 20, 1823; the

William Collins 50-acre patent, dated August 25, 1841; the John Clemons patent, dated December 29, 1852; and the Daniel Duff patent of 50 acres, dated June 23, 1847. According to this location the Williams boundary covers the lower half of the Rogers & Shipley patent; the Jesse Fugate boundary covers the upper half thereof, the Jesse Fugate patent, and the lower half of the Davis patent; the John Fugate boundary covers the upper half of the Davis patent and the Jonathan Fugate patent; and the John Clemons boundary the rest. Possibly the dividing line between the John Fugate and John Clemons patent is on the Jonathan Fugate patent. These patents it claims were intended to cover mainly the bottoms along the creek. The defendant company questions the location of the Rogers & Shipley, Jesse Fugate, and Daniel Duff patents, made by plaintiff's surveyor Gibson. It makes the point that, when he first testified in the case, he made no attempt to locate these three patents, and left the portion of the creek bottoms where he subsequently testified they are located, as above stated, uncovered by any patent previous to the Reid patent. I do not think, however, that this circumstance is against the correctness of his later testimony. A surveyor, like any one else, is entitled to grow in knowledge, and such seems to have been the case here. It is not claimed that his location of those three patents is absolutely accurate. The claim is only that the location of them is substantially correct. And it is not unlikely that this is so. It is possible, however, that this has not been proved to such a certain extent as to justify its being taken to be so. And if the disposition of the case depended on whether the location thereof is substantially correct, I would have to consider more carefully than I have the defendant's criticism thereof and plaintiff's response thereto. I therefore do not determine whether it is substantially correct, but simply assume that it is, and dispose of the case on this basis.

Now it is agreed that this string of patents according to this location covers substantially the series of inclosed fields stretching from the lower to the upper end of the creek. If it were the fact that these fields are entirely within the boundaries of these earlier patents, it would necessarily follow that defendant company has failed to establish title to the tract which it claims by adverse possession; for in that contingency none of the entries on which it relies would be on plaintiff's land. They would be wholly within the boundaries of these senior patents, which, as we have seen, would not give them possession of the lap or interference. Point is made of the fact that in its bill the plaintiff did not exclude from the Reid patent the Collins, Clemons, and Duff patents at the upper end of the creek, and therefore claimed title to so much. It is urged that, even though the entries within these boundaries was not on plaintiff's land, they were on land claimed by it, and that an entry on land claimed by one serves the same purpose as an entry on land owned by him. Without determining the correctness of the legal position thus taken, I do not think that it can be said that plaintiff really claimed the land covered by these patents. The fact that it claimed them in that bill is not con-

clusive of it. Its real claim was to all of the boundary in the Reid patent not covered by the land previously patented or otherwise appropriated, and to no more. The fact that it may have been ignorant as to certain land previously patented does not make out that it really claimed it. Nor do I think that a proper construction of the Reid patent is that it excluded only 25,800 acres of previously patented or otherwise appropriated land. It excluded all the land of that character. It merely stated that it amounted to 25,800 acres.

But it is also agreed that these senior patents do not cover all of these fields. At least they do not cover the two fields at the upper end of the creek, one on the north at the head of McIntosh branch, a tributary of Two Mile, and the other on the north at the mouth of the upper Cane branch. There is another field on the south side, opposite the mouth of Hickory Log branch, towards the lower end of the creek, which I take it is partially outside of the Rogers & Shipley and Jesse Fugate patents, which adjoin a little above the mouth of Hickory Log branch. Though at that point the defendant company's tract runs with the creek, it runs on the south side thereof, so as to include this field. I am not sure as to the position of the parties as to whether this field is wholly within these two patents as thus located, or, if not, how much is without them. They contend so strenuously as to the correctness of Gibson's location of these two patents that I take it that they must concede that it is substantially within those patents according to that location. But, according to the map filed with plaintiff's brief, it seems to me that it is substantially outside of those patents, and I will so treat it. On the basis that it is outside, at least to a certain extent, plaintiff contends that to the extent that it is outside it was otherwise appropriated land, and hence excluded from the Reid patent by its terms. This it makes out by claiming that at the time of the issue of that patent Jesse Fugate and his heirs had acquired title thereto by adverse possession. It is well settled in this state that land can be acquired by adverse possession as against the state. Such was not originally the law. Chiles v. Calk, 4 Bibb (Ky.) 554; Fowke v. Darnall, 5 Litt. (Ky.) 316; Campbell v. Thomas, 9 B. Mon. (Ky.) 82; Hartley v. Hartley, 3 Metc. (Ky.) 56. But it has been the law since the enactment of the Revised Statutes in 1851. Gray v. Soden, 120 Ky. 277, 86 S. W. 515; Asher v. Howard, 122 Ky. 175, 91 S. W. 270; Richie v. Owsley, 137 Ky. 63, 121 S. W. 1015. It is possible here, also, that it has not been proven that this field had been so acquired by adverse possession to such a certain extent as to justify it to be taken as the fact; but, as the determination of this question does not affect the disposition of the case, I assume that it has, and that the land so acquired is otherwise appropriated land within the terms of the patent, and dispose of the case on this basis.

This leaves two other fields to be reckoned with. It is agreed that both of them are outside of the patents senior to the Reid patent. The defendant company does not rely on the one at the head of McIntosh branch as alone giving it title to the land in question. It claims that

this inclosure was maintained for 14 years after April 30, 1888, the date of the Stoll deed—i. e., until the year 1902 only—and that then it was abandoned. It relies on it in connection with an inclosure at the mouth of Deadening Bottom branch, maintained for a period of 8 years just prior to the bringing of the suit; i. e., from the year 1898 and ever since. Its position is that the time that this latter inclosure was maintained after the abandonment of the other can be added to the time the former was maintained to get the requisite 15 years of maintenance of an inclosure necessary to give a continuous possession of the tract for that period of time, and cites in support thereof the case of Trueheart v. Graham (Tex. Civ. App.) 141 S. W. 281. I think the position sound. But the inclosure at the mouth of Deadening Bottom branch is within the Duff patent according to Gibson's location, and as I am proceeding on the assumption that this location is correct, nothing can be gained by adding the time that inclosure was maintained after the abandonment of the other to the time it was maintained.

The plaintiff seems to question whether the inclosure at the head of McIntosh branch was maintained the length of time claimed by the defendant company. John Miller and George McIntosh are the only witnesses who gave any testimony bearing on the subject, and it thinks that their testimony comes short of proving that it was maintained as long as claimed by defendant. George McIntosh, who gave his testimony in July, 1910, said that he had known it for 18 years, which would be since 1892, and that it had been maintained until about 8 years before; i. e., until 1902, when the fence was burned, and not afterwards rebuilt. But it is conceded that it was made by William McIntosh, one of Stoll's grantors in the deed for the Clemons boundary, and, if so, it is not unreasonable to infer that it had been maintained, not only since Stoll's deed to the Kentucky Union Company on April 30, 1888, but since at least the deed to Stoll, which was made June 29, 1887. The deeds for the several boundaries to Stoll were made June 28, June 29, and July 4, 1887, and on the latter date he was claiming the entire boundary thereunder, and this inclosure from that date was sufficient to give him possession of the whole. It is therefore not unlikely that this inclosure was maintained for a period of 15 years after that date before the fence was burned, which itself was sufficient to give title to the defendant company to the land in dispute. That it does not appear certainly that the fence was not burned earlier than July 4, 1902, is all that is in the way of its having that effect; and this is probably sufficient to prevent its so doing.

The disposition of the case is thus made to hang on the inclosure at the mouth of Cane branch; i. e., the upper Cane branch, emptying into South Quicksand from the north. It is an extension of an inclosure on the William Collins patent, as to the location of which there seems to be no dispute over and beyond its northern boundary. I do not understand that any question is made as to this inclosure having been maintained continuously from the date of the deed to Stoll April 30, 1888, down to the bringing of the suit. It is attempted to be met in three ways: It is claimed that it had been maintained for 15 years

before the issue of the Reid patent, and hence was then appropriated land and excluded from the patent, just as in the case of the inclosure at the mouth of Hickory Log branch; and, if not, that it was in existence at the date of at least the latest of two of the deeds under which it claims, to wit the deed from the patentee, Reid, to Corry Prague and Dunham, of date November 12, 1874, and the deed from Corry Prague and Dunham to the Breathitt Coal, Iron & Lumber Company, its immediate predecessor in title, of date June 22, 1882, thereby rendering that deed champertous and void as to that inclosure, so that neither that company nor plaintiff acquired title thereto. As at present advised, I am not prepared to say that, if the inclosure was in existence at that date and had such an effect, it makes any difference in the disposition of the case. It is sufficient to say that the evidence does not justify the conclusion, either that it was in existence continuously for 15 years before the issue of the Reid patent, or that it was in existence as early as June 22, 1882.

The other way in which it is attempted to be met is that it was too small to amount to such an entry on plaintiff's land as would give possession of the whole land in dispute. It does not appear just how large it is, other than that, in so far as it extends beyond the William Collins boundary, it is quite a small inclosure. Plaintiff characterizes it as a small clearing. Possibly it is not larger than an acre. It is sufficient, however, to show up distinctly on the map made by plaintiff's surveyor Gibson. In brief of defendant's counsel it is said:

"There never has been a case decided by that court [Court of Appeals of Kentucky] which has held that the inclosure on the interference was too small, or had to be of any particular size or any particular percentage of the land claimed, in order to extend the actual possession over the whole: There are 11 cases decided by that court in which the size of the inclosure is not mentioned at all, or in which the approximate acreage shows it to be very small, and in each of those cases it is held that the possession of the claimant under the junior patent or deed, extended over the whole of the interference of the senior patent, by reason of a part of it being inclosed."

The cases referred to are the following, to wit: Fox v. Hinton, 4 Bibb (Ky.) 559; Thomas v. Harrow, 4 Bibb (Ky.) 563; McDowell v. Kenney's Heirs, 3 J. J. Marsh. (Ky.) 516; Summers v. Green, 4 J. J. Marsh. (Ky.) 137; Ware v. Bryant, 21 S. W. 873, 14 Ky. Law Rep. 852; Davis v. Young, 2 Dana (Ky.) 299; Smith v. Morrow, 7 T. B. Mon. (Ky.) 239; Ratcliff v. Bellfonte Iron Works, 87 Ky. 559, 10 S. W. 365; Whitley County Land Co. v. Lawson, 94 Ky. 603, 23 S. W. 369; Hall v. Roberts, 74 S. W. 199, 24 Ky. Law Rep. 2362; Frye v. McKinley, 136 Ky. 31, 123 S. W. 322. I think these cases bear out this statement and sustain the position that this inclosure is sufficient in itself to bar plaintiff's title. The fact that Stoll's vendor may not have claimed beyond this inclosure and had possession of plaintiff's land to no further extent is not against the Kentucky Union Company entering thereon under the deed to it from Stoll and acquiring possession to the full extent of the boundary of that deed. There is no room to claim that the entry on plaintiff's land was by mistake or clandestine, and thus to bring this case within that of Buford v. Cox, 5 J. J. Marsh.

(Ky.) 582. It must be taken that the entry was purposely made under a claim of ownership, and that it was open and notorious.

I am therefore constrained to hold that the defendant company is the owner of the land in dispute between it and plaintiff, and that the bill be dismissed.

UNITED STATES v. LEE WILSON & CO.

(District Court, E. D. Arkansas, E. D. February 20, 1914.)

No. 283.

1. COURTS (§ 367*)—FEDERAL COURTS—AUTHORITY OF STATE DECISIONS.
   The rule of property, established by decision in Arkansas, that a riparian owner on a nonnavigable lake owns to the center of the lake, is binding on the national courts.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. § 367.*]

2. PUBLIC LANDS (§ 59*)—SURVEYS—BOUNDARIES—MEANDER LINES.
   If there were no mistakes made in a survey of public lands, and a permanent body of nonnavigable water was properly meandered, the ownership of the meandered tract is controlled by the laws of the state as to riparian rights, which will be followed by the national courts; but if the surveyors were mistaken, or acted fraudulently, and there was at the time of the survey a large tract of land beyond the meander lines uncovered by a permanent body of water (exceptional dry seasons excepted), purchasers of the fractional tracts bounded by the meander lines are not entitled to the lands not included in the survey, the meander lines in that case constituting boundaries.
   [Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 184, 185; Dec. Dig. § 59.*]

3. PUBLIC LANDS (§ 96*)—PROCEEDINGS IN LAND OFFICE—AUTHORITY OF SECRETARY.
   The Secretary of the Interior has power to inquire into and determine rights claimed in public lands until the legal title has passed out of the government.
   [Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 285–287; Dec. Dig. § 96.*]

4. PUBLIC LANDS (§ 59*)—SURVEY—IMPEACHMENT.
   A nonnavigable lake, shown by a survey of public lands made in 1839 and 1840, surrounded by a meander line inclosing some 800 acres, *held* not to have existed as a permanent body of water at the time the survey was made, nor since that time, on evidence showing that the meander line as shown by the field notes would not close by three-fourths of a mile, that there is no perceptible difference in the level of the land on either side of such line, and that the tract is covered with trees, some of which are over a century old, and nearly all of species which will not grow on land permanently covered by water.
   [Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 184, 185; Dec. Dig. § 59.*]

5. PUBLIC LANDS (§ 59*)—PATENTS UNDER SWAMP LAND GRANT—LAND INCLUDED.
   A patent to a state under the Swamp Land Grant Act of Sept. 28, 1850, c. 84, 9 Stat. 520, Rev. St. § 2479 et seq. (U. S. Comp. St. 1901, p. 1587), for the whole of a designated township of land, except section 16, "con-

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

taining 14,526.11 acres according to the official plats of survey, * * *" did not convey unsurveyed lands designated on such plats as lakes, although erroneously separated from the surveyed land by meander lines, and which were not included in the computed acreage.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 184, 185; Dec. Dig. § 59.*]

6. PUBLIC LANDS (§ 59*)—PATENT—CONSTRUCTION—"PUBLIC LAND"—"PUBLIC DOMAIN."

The words "public land," or "public domain," as used in national legislation, mean such lands as are subject to sale or other disposal under the general land laws of the United States, and unsurveyed lands do not pass by a patent issued under a grant of public lands.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 184, 185; Dec. Dig. § 59.*

For other definitions, see Words and Phrases, vol. 6, pp. 5793–5795; vol. 8, p. 7772; vol. 6, p. 5786.]

7. PUBLIC LANDS (§ 59*)—SWAMP LAND GRANT—TITLE OF STATE.

While the swamp land grant under Act Sept. 28, 1850, c. 84, 9 Stat. 520, (U. S. Comp. St. 1901, p. 1587), is one in præsenti, the title of the state is inchoate until the lands have been identified and patented; and unsurveyed lands, which have never been so identified or selected by the state, although of the character covered by the grant, are, when surveyed, subject to other disposition by the United States.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 184, 185; Dec. Dig. § 59.*]

8. PUBLIC LANDS (§ 59*)—SWAMP LAND GRANT—LANDS PASSING UNDER CONFIRMATION ACT.

Act March 3, 1857, c. 177, 11 Stat. 251 (U. S. Comp. St. 1901, p. 1588), confirming selections of swamp lands theretofore made and reported by the states, so far as the lands remained vacant and unappropriated, did not apply to lands which were at the time unsurveyed, and were therefore not subject to selection, although they were included within the boundaries of a township, the remainder of which had been surveyed, and had been selected, and was afterward patented to the state "according to the official plats of the survey," the patent reciting the acreage of the surveyed land; the acceptance of such patent being conclusive as to the lands intended to be selected and conveyed.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 184, 185; Dec. Dig. § 59.*]

9. PUBLIC LANDS (§ 61*)—SWAMP LAND ACT—ARKANSAS COMPROMISE ACT.

Act April 29, 1898, c. 229, § 3, 30 Stat. 368 (U. S. Comp. St. 1901, p. 1592), by which, as a part of a compromise between the United States and the state of Arkansas, it was provided that the title of all persons who had purchased any unconfirmed swamp land and held deeds for the same was confirmed as against any claim of the United States, did not inure to the benefit of a levee district, which was merely a political subdivision of the state, and to which the state had made a grant of swamp lands; but, on the contrary, such district was bound by a further provision of the compromise by which the state relinquished "all claims or demands, adjusted or unadjusted," growing out of the Swamp Land Act or the subsequent Confirmation Act.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 192–213; Dec. Dig. § 61.*]

10. ESTOPPEL (§ 62*)—SWAMP LAND GRANT—SCOPE OF PATENT—EFFECT OF ENTRIES IN TRACT BOOKS.

Entries on the tract books of the Land Department that certain sections of land, parts of which were surveyed and parts unsurveyed, were

withdrawn from entry and sale, are not an admission that title to the entered sections had passed to the state as swamp lands under a patent to the surveyed parts, which would estop the United States from subsequently claiming the unsurveyed parts.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 151–153; Dec. Dig. § 62.*]

11. PUBLIC LANDS (§ 129*)—SUITS BY UNITED STATES—LIMITATION.

Act March 3, 1891, c. 561, § 8, 26 Stat. 1099 (U. S. Comp. St. 1901, p. 1521), which limits the time for the bringing of suits by the United States to vacate and annul patents to lands, does not apply to a suit to quiet title to land as public land of the United States, on the ground that no patent thereto has ever been issued and that the title has not passed out of the government.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 345; Dec. Dig. § 129.*]

12. LIMITATION OF ACTIONS (§ 100*) — SUITS BY UNITED STATES — PUBLIC LANDS.

Such limitation does not begin to run against a suit based on fraud until the discovery of the fraud by the Interior Department, and knowledge acquired incidentally by a special agent of the Land Office cannot be attributed to the department.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480–493; Dec. Dig. § 100.*]

13. PUBLIC LANDS (§ 61*)—SWAMP LAND GRANT—PROTECTION OF BONA FIDE PURCHASER.

A purchaser of lands patented to the state of Arkansas as swamp lands, who took deeds describing the lands according to the government survey and patent, which showed some of the subdivisions to be fractional, bounded by the meander line of a lake, was not a bona fide purchaser within the meander line, which was unsurveyed, so as to entitle him to protection under Compromise Act April 29, 1898, c. 229, § 3, 30 Stat. 368 (U. S. Comp. St. 1901, p. 1592).

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 192–213; Dec. Dig. § 61.*]

14. ESTOPPEL (§ 62*)—ACTIONS BY UNITED STATES.

In a suit in equity to establish property rights, the United States is subject to the defense of estoppel to the same extent as a private litigant; but it cannot be estopped by the unauthorized or fraudulent acts of its agents or officers, or their mistakes.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 151–153; Dec. Dig. § 62.*]

15. ESTOPPEL (§ 52*)—EQUITABLE ESTOPPEL—ELEMENTS.

To cause an estoppel, the representations must have been made with full knowledge of the facts by the party to be estopped, unless his ignorance was the result of gross negligence, or otherwise involved gross culpability, and the party pleading the estoppel must have relied upon and been induced to act or to refrain from acting by such representations, to his injury if the other party is allowed to repudiate them.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 121–125, 127; Dec. Dig. § 52.*]

16. ESTOPPEL (§ 62*)—ACTIONS BY UNITED STATES.

Letters written by the Secretary and other officers of the Interior Department, giving opinions as to the rights of the United States in unsurveyed lands within the meander lines of lakes, as shown by the government survey and plats, the surrounding lands having been patented to

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

the state as swamp lands, the letters and the inquiries to which they were in answer all being based on the assumption that the meandered lakes were permanent bodies of water when the survey was made, *held* not to estop the government from claiming such lands on subsequent proof that they were not, when the survey was made, covered by permanent bodies of water, and that the survey was fraudulent or erroneous.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 151–153; Dec. Dig. § 62.*]

In Equity. Suit by the United States against Lee Wilson & Co., a corporation. On final hearing. Decree for the United States.

The United States, by its Attorney General, filed this bill to quiet its title to 853.60 acres of land described as follows: Lots 1, 2, 3, 4, 5, 6, 7, 8, and 9, the southeast quarter of the northwest quarter, southwest quarter of the northeast quarter, west one-half of the southeast quarter, and east one-half of the southwest quarter of section 22; lots 1, 2, 3, 4, 5, and 6, northwest quarter of the northeast quarter, northeast quarter of the northwest quarter, and the south one-half of the northeast quarter of section 27; and that fractional part of the west one-half of the northwest quarter of section 26, included within the survey approved April 28, 1910, all in township 12 north, range 9 east of the fifth principal meridian, in the county of Mississippi, state of Arkansas. There were several defendants who were supposed to make claim to these lands, but all filed disclaimers except Lee Wilson & Co., which is now the sole defendant.

The material allegations in the complaint are that these lands are a part of the public domain acquired by the Louisiana Purchase; that prior to the year 1910 they were wild, unoccupied, unappropriated, and unsurveyed; that they were surveyed by the government in 1910, and thereupon held subject to entry under the homestead laws, and such entries were made by various qualified persons in conformity with the laws of the United States and the rules and regulations of the General Land Office; that these persons entered upon these lands and are now in possession in privity with, but not adverse to, the paramount right of the government; that by an act of the General Assembly of the state of Arkansas, approved February 15, 1893 (Laws 1893, p. 24), and subsequent amendments, a certain section of the St. Francis basin in the state of Arkansas, and which includes these lands, was created as a political subdivision of the state as the St. Francis levee district; that until the year 1882 no attempt was made by the officers of the state to tax these lands, but that year they were assessed for taxes, and, the same not being paid, they were sold under the laws of the state of Arkansas; and the defendant deraigns title to these lands under and by virtue of such tax sale and deeds executed thereunder, and also under decrees of the chancery court of Mississippi county, where these lands are lying, in an attempt of the St. Francis levee board to have its title to said lands confirmed.

The bill then sets out defendant's claim of title, showing that: In 1859 the state of Arkansas purported to convey by its patent to W. B. Waldron section 22, the north one-half of the north one-half of section 26, and fractional section 27, township 12 north, range 9 east. Waldron's title was forfeited to the state for nonpayment of taxes. On March 27, 1885, the clerk of Mississippi county executed a deed to the state for these sections in pursuance of a decree of the court in what is called the "Overdue Tax Suit" rendered on February 23, 1883. The sale to the state was confirmed by the chancery court on July 22, 1884. In 1903 the state granted all its lands in Mississippi county to the St. Francis levee district. On December 12, 1894, the said chancery court, by its decree, confirmed title to said lands in the St. Francis levee district, and by certain mesne conveyances these lands were finally conveyed to the defendant. It is charged that all the conveyances under which defendant claims title to these lands are null and void; that the title to these lands never passed out of the United States, as they were un-

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

surveyed lands, but that they are a cloud on the title of the government and the rights of the persons who have entered the lands as homesteads; that the defendant has harassed, intimidated, and interfered with these persons in the quiet possession of their homesteads, and threatens to continue to do so, and thereby prevent them from complying with the requirements of the homestead laws of the United States in respect to cultivation, improvements, and residence upon these lands.

The prayer of the bill is the usual one to cancel defendant's deed and evidence of claim of title, that plaintiff's title be quieted against the claim of defendant, and that the defendant be enjoined from molesting or in any wise interfering with the quiet and peaceable enjoyment of the lands by the persons claiming through plaintiff under the homestead laws.

It is unnecessary to set out the admissions and immaterial denials contained in the answer. The defenses upon which the defendant relies, and which were insisted on in the argument of the cause are, that these lands were by the government surveyed in 1841 as a part of its public domain; that in making said survey the township lines of the township were actually run, surveyed, located, established, and marked on the ground as provided by law, and that true and proper maps, plats, and field notes of said survey were returned to and filed in the General Land Office of the plaintiff at Washington, and were by the surveyor general duly accepted and approved as provided by law; that in the government survey of said township, made in 1841, the lines of the sections and of the subdivisions of sections were actually run, located, established, and marked on the ground as required by law; that at the time of said survey there existed in said township a small inland nonnavigable lake, known as "Moon Lake," which lake was meandered in the survey as provided by law, the meander lines being shown on the official plats of said survey to the General Land Office.

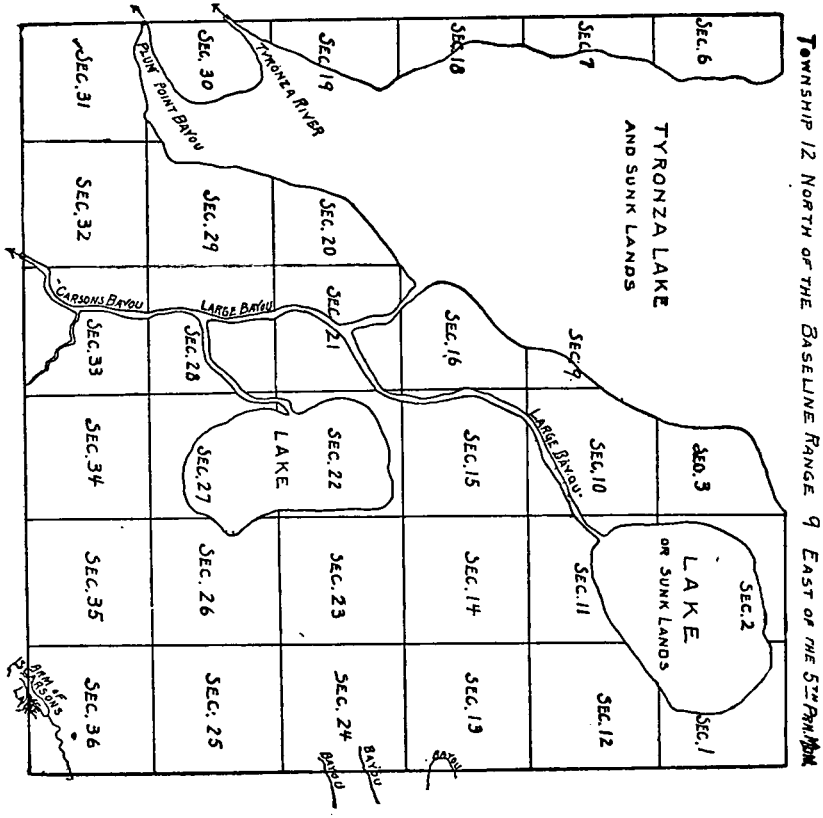
The answer then sets up the act of Congress of September 28, 1850 (9 Stat. 519, c. 84), known as the "Swamp Land Grant," and that the entire township was selected by the state of Arkansas as swamp land in 1852, and approved by the Secretary of the Interior on May 11, 1853; that in accordance with said approval the entire township was, on April 27, 1858, patented by the United States to the state of Arkansas, with the exception of section 16, which had theretofore been granted to the state as school lands; that this conveyance, it is claimed, passed the title to the entire township to the state of Arkansas; that the state conveyed these lands according to the plats and field notes of the survey of 1841, and that by mesne conveyances from the state of Arkansas the title to all of these lands is now in the defendant, which is the owner of all the lands in the three sections inside as well as outside of the meander lines of said lake as it appears in the original plats. It is charged that the state always claimed to be the owner of all of sections 22, 26, and 27 in that township, and that it assessed 640 acres in each of said sections for the years 1900 to 1910, inclusive, and these taxes were paid thereon by the defendant and those under whom it claims title; that the entire township was granted to the state of Arkansas by the Swamp Land Act of 1850 for the purpose of aiding it in the construction and maintenance of levees, to protect the lands in the district from overflow, and also to build drainage canals to reclaim the swamps and make them suitable for cultivation; that levees have been built and a drainage canal dug, and the defendant has been paying the taxes levied for these purposes; that by reason thereof the lands have increased in value; that the defendant purchased them in good faith, for a valuable consideration, believing that they had passed to the state and its grantees.

The answer also pleads the five-year statute of limitations under section 8 of the act of Congress of March 3, 1891 (26 Stat. 1099, c. 561), and an estoppel.

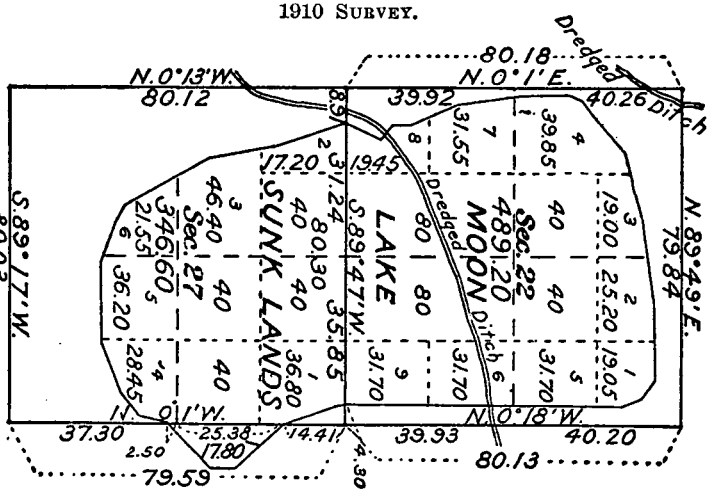
The bill was filed and process issued on August 4, 1911.

The following are the essential portions of the plats referred to in the opinion:

ORIGINAL SURVEY.



1910 SURVEY.



W. H. Martin, U. S. Atty., of Hot Springs, Ark., Willis N. Mills, of San Francisco, Cal., and J. A. Tellier, of Little Rock, Ark., Special Asst. Attys. Gen., for the United States.

Coleman & Lewis, of Little Rock, Ark., for defendant.

TRIEBER, District Judge (after stating the facts as above). It is undisputed that all the lands in that township were swamp and overflowed lands at the time of the enactment of the Swamp Land Act of September 28, 1850 (9 Stat. 519, c. 84), and continued as such until recently, when levees were built and a drainage canal dug; that the lands in controversy were resurveyed in 1910; that the field notes of the survey, made in 1839 and 1840 (although the parties speak of this survey as of 1841) were filed with the surveyor of public lands for Arkansas in 1841, and the plat made therefrom, which was approved in 1845, shows that these lands were described as a nonnavigable lake and meandered as such. But it is claimed on behalf of the plaintiff that, in fact, there was no lake or permanent body of water of any kind there at the time of the original survey and long before that time, and that the survey describing these lands as a lake was fraudulent; that the surveyor never ran any meander lines on the ground, but made them fraudulently, and, the lands being in fact unsurveyed lands, the title thereto never passed from the government; that by the compromise between the United States and the state of Arkansas, approved by Act Cong. April 29, 1898, c. 229, 30 Stat. 368, the state of Arkansas relinquished to the United States all adjusted or unadjusted claims under the Swamp Land Act of 1850 and that of 1857 not theretofore disposed of.

On the other hand, it is insisted that there was a nonnavigable lake or permanent body of water on these lands at the time the original survey was made. In order that the facts may be better understood, a copy of the original plat made from the field notes approved in 1845 is made an appendix to this opinion. From this plat it will be seen that, according to the field notes of the surveyor, there was at that time a lake as claimed by the defendant, and that it was properly meandered. It is therefore claimed that, the defendant being admittedly the owner of all the surveyed lands outside of the meander lines, it is, as the riparian owner, under the laws of the state of Arkansas as construed by the highest court of that state, entitled to the lands described as a "lake," which are the lands now in controversy.

[1] Under the laws of this state the riparian owner on a nonnavigable body of water is the owner to the center of the lake. Railway Company v. Ramsey, 53 Ark. 314, 13 S. W. 931, 8 L. R. A. 559, 22 Am. St. Rep. 195; Chapman & Dewey Land Co. v. Bigelow, 77 Ark. 338, 92 S. W. 534; Rhodes v. Cissel, 82 Ark. 367, 101 S. W. 758; Glasscock v. National Box Co., 104 Ark. 154, 148 S. W. 248; Harrison v. Fite, 148 Fed. 781, 783, 78 C. C. A. 447, a case involving similar lands in the state of Arkansas. A rule of property thus established by the highest court of the state is binding on the national courts. Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808,

838, 35 L. Ed. 428; Hardin v. Shedd, 190 U. S. 508, 23 Sup. Ct. 685, 47 L. Ed. 1156; Kean v. Calumet Canal Co., 190 U. S. 452, 23 Sup. Ct. 651, 47 L. Ed. 1134.

[2] But it is equally well settled by the decisions of the Supreme Court of the United States that the making of a meander line has no certain significance. French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 52, 22 Sup. Ct. 563, 46 L. Ed. 800. "It does not necessarily import that the tract on the other side of the meander lines is not surveyed or will not pass by a conveyance of the upland shown by the plat to border on the lake. It is not always a boundary." Kean v. Calumet Canal Co. supra. Nor does it follow that a patent for the surveyed lands adjoining carries with it the lands inside the meander lines. Horne v. Smith, 159 U. S. 40, 45, 15 Sup. Ct. 988, 40 L. Ed. 68; Niles v. Cedar Point Club, 85 Fed. 45, 29 C. C. A. 5, affirmed in 175 U. S. 300, 20 Sup. Ct. 124, 44 L. Ed. 171; Hardin v. Jordan, supra.

Evidence showing that the meander line was not at or near the water would make it a boundary, and that regardless of whether the running of the water line was a mere oversight or whether the surveyors were of the opinion that the action of the water would soon wash the lowlands away. Security Land & Exp. Co. v. Burns, 193 U. S. 167, 186, 187, 24 Sup. Ct. 425, 48 L. Ed. 662. In Horne v. Smith, supra, it was held:

"Although it was unsurveyed, it does not follow that a patent for the surveyed tract adjoining carries with it the land which perhaps ought to have been, but which was not in fact, surveyed. The patent conveys only the land which is surveyed, and when it is clear from the plat and the surveys that the tract surveyed terminated at a particular body of water, the patent carries no land beyond it." 159 U. S. 45, 15 Sup. Ct. 990, 40 L. Ed. 68.

If no survey was in fact made, or no meander line in fact run, or if no body of water in fact existed near the alleged meander line, the government cannot be estopped by the fact that the field notes and plat made therefrom show the existence of a lake. Kirwan v. Murphy, 189 U. S. 35, 53, 54, 23 Sup. Ct. 599, 603 (47 L. Ed. 698). In that case it was held:

"The Land Department must necessarily consider and determine what are public lands, what lands have been surveyed, what are to be surveyed, what have been disposed of, what remain to be disposed of, and what are reserved. * * * The administration of the public lands is vested in the Land Department, and its power in that regard cannot be divested by the fraudulent action of a subordinate officer, outside of his authority, and in violation of the statute. Whiteside v. United States, 93 U. S. 247 [23 L. Ed. 882]; Moffat v. United States, 112 U. S. 24 [5 Sup. Ct. 10, 28 L. Ed. 623]; Hume v. United States, 132 U. S. 406, 414 [10 Sup. Ct. 134, 33 L. Ed. 393]. The courts can neither correct nor make surveys. The power to do so is reposed in the political department of the government, and the Land Department, charged with the duty of surveying the public domain, must primarily determine what are public lands subject to survey and disposal under the public land laws. Possessed of the power, in general, its exercise of jurisdiction cannot be questioned by the courts before it has taken final action. Brown v. Hitchcock, 173 U. S. 473 [19 Sup. Ct. 485, 43 L. Ed. 772]."

To the same effect are the late decisions in Little v. Williams, 88 Ark. 37, 113 S. W. 340, affirmed in 231 U. S. 335, 34 Sup. Ct. 68,

58 L. Ed. 256; Chapman & Dewey Lumber Co. v. St. Francis Levee District, 232 U. S. 186, 34 Sup. Ct. 297, 58 L. Ed. —— (opinion delivered January 26, 1914).

The rules of law as established by the numerous decisions of the Supreme Court on that subject may be epitomized as follows: If there were no mistakes made in the survey, and a permanent body of nonnavigable water was properly meandered, the ownership of the meandered tract is controlled by the laws of the state in which the lands are situated, and if they hold that such an owner is entitled to claim ownership to the center of the lake, the national courts will follow that rule. If, on the other hand, the surveyors were mistaken or acted fraudulently, and there was at the time of the survey a large tract of land beyond the meander lines, uncovered by permanent bodies of water (exceptional dry seasons of course excepted), purchasers of the fractional tracts bounded by the meander lines are not entitled to the land not included in the survey; the meander lines constituting, in that case, boundaries.

The Secretary of the Interior in 1908, after a hearing upon notice, at which many parties, some of them squatters who wanted to acquire them as homesteads, others claimants as riparian owners, such as the defendant in this case claims to be, and also representatives of the St. Francis levee district, were present and heard, ordered a survey of these meandered lands in order that they might be brought under the operation of the laws governing the disposal of like public lands. Arkansas Sunk Lands, 37 Land Dec. Dep. Int. 345. The Secretary made a finding that these lands were not covered by any permanent body of water at the time of the original survey, or at the time of the enactment of the Swamp Land Act, or when the state made its selection. He further found:

"It seems clear from what is now before the department that a permanent body of water did not occupy these lands at the time of the public survey, and that, except as to a portion shown to be high and dry upland, sometimes referred to as highlands, the great body of the land was swamp and overflowed lands both at the date of the public survey and the passage of the swamp land grant of 1850."

This was adhered to on an application for a rehearing had in 1909. 37 Land Dec. Dep. Int. 462.

[3] That the Secretary of the Interior has the power to inquire into the extent and validity of the rights claimed against the government until the legal title has passed is undoubted. Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 593, 18 Sup. Ct. 208, 42 L. Ed. 591, and authorities there cited. A survey was accordingly made in 1910. This last survey shows the land in controversy, as will be seen from a copy of the plat filed with this opinion.

Assuming, as is claimed by counsel for the defendant, that this finding of the Secretary is not conclusive, there is some contention as to whether it is even prima facie evidence of the facts found. On the part of the defendant it is claimed that the original survey is prima facie correct and the burden of proof is upon the plaintiff to overthrow this presumption, regardless of the findings made by the

Secretary of the Interior. On the other hand, the contention of the plaintiff is that the prima facie presumption of the original survey has been overcome by the resurvey of 1910 ordered to be made by the Secretary of the Interior after a hearing, and that the burden of proof to show that this land was in fact a lake is upon the defendant, and in support of this contention they cite Knight v. United States Land Ass'n, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974; Cragin v. Powell, 128 U. S. 691, 9 Sup. Ct. 203, 32 L. Ed. 566; Tubbs v. Wilhoit, 138 U. S. 134, 11 Sup. Ct. 279, 34 L. Ed. 887; Michigan Land & Lumber Co. v. Rust, supra; Johnson v. Elder, 92 Ark. 32, 40, 121 S. W. 1066.

[4] But the evidence in this case, although very voluminous, each side having introduced a great number of witnesses, is of such a nature that it is wholly immaterial what presumption should be indulged in. The oral testimony is by witnesses who have known something about the land only within the last 30 or 40 years, many of them for a much shorter period. Not a single witness was familiar with the land when the original survey was made. For this reason most of the testimony is either hearsay or opinion evidence. That is conflicting, although the court finds that the preponderance is strongly in favor of the government that these lands were not submerged lands, nor was there a lake there at the time of the survey. The evidence of the topography of this area shows conclusively that no lake or permanent body of water could possibly have been there within the last 100 years or more. It is undisputed and admitted by the defendant that there is no evidence whatever to show that there was a retaining bank or shore line at or near the east meander line. While there is some testimony that there is a retaining bank where the meander line on the west side has been marked in the original survey, the great weight of the evidence is that that line is that of Plum Bayou, that the nearest point is several hundred yards from the meander line, and as it runs south it is farther away from it. Moon Lake, or Half Moon Lake, as it is called by some of the witnesses, which it is claimed is the meandered lake, is, in fact, a small body of water near the west meander line, a mere pond, which at no time exceeded one acre; its banks were well defined, and it is surrounded by a growth of timber, which could not have grown in a permanent body of water. There is also a small body of water near the east meander line, but this covered only a few yards, not large enough to be dignified as a pond, and may properly be designated as what is known in that section as a "hog wallow." It establishes beyond a doubt that no depression can be noticed in the meandered area; that there is no appreciable difference in the elevation between the lands on the two sides of the meander lines. The lines of levels show an elevation of 232.2 at the east meander line, and continuing west it never gets below this, and at the west line it is 233.4. The highest elevation is 235, and is within the interior boundaries of the area marked "lake."

It is also shown by the undisputed evidence, and the many photographs taken and filed as exhibits to the testimony, that there is a

heavy growth of large living trees, which could not possibly have grown on submerged lands. Many of them, as shown by the testimony of Dr. Henry C. Cowells, of the University of Chicago, one of the most eminent ecologists in this country, and also by the testimony of an employé of the Forestry Bureau of the Department of Agriculture, who has had many years' experience, are over 70 and some over 200 years old. These trees are oaks, hackberry, maple, hickory, ash, and red gum. None of these trees, it is shown, could possibly have grown on lands covered for any length of time with water. There are also a number of old cypress trees found in the cypress brakes in this area, and while cypress will live in water under certain conditions, it is shown that they will die if submerged above the swell or buttressed base.

Mr. Janes, also an experienced ecologist, testified that he examined all the timber for a distance of 33 feet on each side of the meander lines, counted the trees, and obtained their diameters; that there was no difference in the lands on either side of the meander lines; that he found the area in dispute to be a forest of many hardwood trees and some cypress trees of various ages and size. He found in the area numerous small mounds of earth, indicating that at that particular point trees of considerable size formerly grew, and were windthrown a long time ago; and at other places he found small depressions where trees had stood and the stumps burned out, which must have been on the land long before 1839. The percentage of trees he found to be as follows: Ash, 49 per cent.; locust, 15.06 per cent.; cypress, 12.07 per cent.; hackberry, 11.26 per cent.; elm, 9.31 per cent.; oak, 7.24 per cent.; maple, 2.30 per cent.; persimmon, 1.49 per cent.; hickory, 1.03 per cent. He counted and examined all the trees on 25½ acres of this land, which strip he testified was a fair average of the entire area. There were 870 trees on that strip, and he found the diameter of these, in inches, as follows: 25.73 per cent., 12 inches; 16.67 per cent., 14 inches; 11.01 per cent., 16 inches; 9.84 per cent., 18 inches; 10.04 per cent., 20 inches; 3.61 per cent., 22 inches; 3.51 per cent., 24 inches; 5.75 per cent., 26 inches; 4.38 per cent., 28 inches; 4.87 per cent., 30 inches; 1.27 per cent., 32 inches; 1.07 per cent., 34 inches; 1.36 per cent., 36 inches; .88 per cent., 38 inches.

The testimony also establishes the fact that according to the original survey of 1839 and 1840 the meander lines of that township were three-fourths of a mile short and therefore could not be closed. This was shown, not only by the testimony of plaintiff's witnesses, but also by that of Mr. Payne, an assistant chief of the surveying division of the General Land Office, who was a witness on behalf of the defendant. From his testimony it appears that this survey was evidently never examined by the Land Office and never checked up at all; otherwise, the incorrectness of the survey would necessarily have been discovered. His testimony on that point, after testifying to the incorrectness of the original survey, is:

"The presumption from the fact that there was a failure to close the lines is, on the face of it, that there was an incorrect survey, and that it was not

examined by this office, and not checked up at all. Q. So that whatever discrepancy or inaccuracy fatal to the integrity of that survey, which might have appeared, may have remained undisclosed until about the year 1910? A. Yes, sir. Q. And for the period of 70 years that alleged survey of the meander line of that unsurveyed area showed on its face in the office that it couldn't close by three-fourths of a mile, and if examined at any time during these 70 years the error would have been discovered? A. Yes, sir."

Without detailing all the testimony, the court is convinced beyond a reasonable doubt that there was no permanent body of water on the land meandered at the time the original survey was made, nor for a long period before that time, nor at the time of the passage of the act of 1850, nor at the time the state made its selection. In the opinion of the court, no meander lines were actually traced by the surveyor. The most charitable view to take is that, the survey having been made in December and January, usually the rainy season in that section, the surveyor found a great deal of water on it, and to save himself the inconvenience of making an actual survey of that wet ground he put it in his field notes as a lake.

Unsurveyed Lands of the Government.

[5] Does the fact that the patent to the state of Arkansas, under the Swamp Land Act of 1850, conveys "the whole of township 12 north, range 9 east" (except section 16), include the unsurveyed lands claimed by the defendant? The state, in its selection, asked for the whole township, "containing 15,003.97 acres." That covered all the surveyed lands in the township as shown by the plat, and did not include any unsurveyed lands. Had there been no meandered tracts, the township would have contained 23,040 acres. The patent of the government is as follows:

"Township twelve north of range nine east; the whole of the township, except section sixteen, containing 14,526.11 acres according to the official plats of survey of the said lands returned to the General Land Office by the surveyor general."

Section 16, excepted from this grant, and which is represented on the plats as containing 438.94 acres, had theretofore been granted to the state for school purposes, and therefore could not again be conveyed under the Swamp Land Act. Deducting this from all the surveyed lands, it would leave 14,526.11. The difference of 39.92 acres between what the state selected and what was granted was probably caused by a mistake of the state officials in adding the acreage of the lands surveyed in the different sections, of which so many were fractional.

[6] The words "public lands" mean such lands as are subject to sale or other disposal under the laws of the United States. Newhall v. Sanger, 92 U. S. 761, 763, 23 L. Ed. 769; Leavenworth, etc., R. R. Co. v. United States, 92 U. S. 733, 741, 23 L. Ed. 634; Bardon v. Northern Pacific R. R. Co., 145 U. S. 535, 538, 12 Sup. Ct. 856, 36 L. Ed. 806; Barker v. Harvey, 181 U. S. 481, 490, 21 Sup. Ct.

690, 45 L. Ed. 963; Minnesota v. Hitchcock, 185 U. S. 373, 391, 22 Sup. Ct. 650, 46 L. Ed. 954. In Barker v. Harvey, the court said:

"'Public domain' is equivalent to 'public lands,' and these words have acquired a settled meaning in the legislation of this country."

And in Bardon v. Northern Pacific R. R. Co., it was held:

"The grant is of alternate sections of public land, and by public land, as it has long been settled, is meant such land as is open to sale or other disposition under general laws."

Unsurveyed lands could, therefore, not be subject to a grant under the act of 1850 and similar acts, as they were not "public lands." Horne v. Smith, 159 U. S. 40, 45, 15 Sup. Ct. 988, 40 L. Ed. 68; United States v. Curtner (C. C.) 38 Fed. 1, 9, 10; Sawyer v. Gray (D. C.) 205 Fed. 160, 163, where the court held:

"The government survey creates, not merely identifies, sections of land."

In Little v. Williams, 88 Ark. 37, 52, 113 S. W. 340, 344, affirmed in 231 U. S. 335, 34 Sup. Ct. 68, 58 L. Ed. 256, it was held by the Supreme Court of Arkansas, in construing the effect of a similar description in another patent to the state for lands acquired under the act of 1850, that:

"Descriptions of lands, according to terminology employed in the system of governmental surveys and plats of lands, is necessarily a reference to the plats of those surveys; for those terms are meaningless unless so considered with reference to the surveys and plats. There is nothing known of townships, sections, and part of sections of lands, except such as are described in the plats of the government surveys. Therefore, giving the word 'township,' used in the stipulation of facts, the meaning which we must attribute to the parties who employed the term, it has reference to the townships surveyed and platted by the government surveyors, and means the townships according to the surveys and plats. A conveyance of the township 'according to plat of the survey' does not include lands which do not appear on the plat of the surveys. We do not mean to hold that the unsurveyed land could not have been selected as swamp lands and patented to the state by the use of proper descriptive terms in the patent; but this was not accomplished by reference to townships, sections, or parts thereof according to the plat of the surveys, when the unsurveyed land did not appear on the plats at all. The plats showed it to be water, and not land."

In affirming this case Mr. Justice Van Devanter said:

"The unsurveyed land within the meander line was never selected by the state, or listed by the Secretary of the Interior, as swamp or overflowed land; nor was it ever patented to the state."

In Chapman & Dewey Lumber Co. v. St. Francis Levee District, supra, in which the same question was before the Supreme Court of the United States, the patent to the state being for all of the township, except section 16, containing 14,329.97 acres, Mr. Justice Van Devanter, speaking for the court, said:

"Of course, the words in the patent, 'the whole of the township, * * *' are comprehensive; but they are only one element in the description, and must be read in the light of the others. The explanatory words, 'according to the official plats of survey of said lands, returned to the General Land Office by the surveyor general,' constitute another element, and a very important one; for it is a familiar rule that, where lands are patented according

to such a plat, the notes, lines, landmarks, and other particulars appearing thereon become as much a part of the patent, and are as much to be considered in determining what it intended to include, as if they were set forth in the patent. Cragin v. Powell, 128 U. S. 691, 696 [9 Sup. Ct. 203, 32 L. Ed. 566], Jefferis v. East Omaha Land Co., 134 U. S. 178, 194 [10 Sup. Ct. 518, 33 L. Ed. 872]. The specification of the acreage is still another element; and, while of less influence than either of the others, it is yet an aid in ascertaining what was intended; for a purpose to convey upwards of 22,000 acres is hardly consistent with a specification of 13,815.67. Ainsa v. United States, 161 U. S. 208, 229 [16 Sup Ct. 544, 40 L. Ed 673]; Security Land Company v. Burns, supra; 3 Washburn on Real Prop. (5th Ed.) 127. Giving to each of these elements its appropriate influence, and bearing in mind that the terms of description are all such as are usually employed in designating surveyed lands, we are of opinion that the purpose was to patent the whole of the lands surveyed, except fractional section 16, and not the areas meandered and returned, as shown upon the plat, as bodies of water. * * * As, then, the lands in controversy were not included in the patent, and, under the findings below, did not pass to the state or to the defendants by riparian right with the adjoining fractional sections and subdivisions, it follows that they remain the property of the United States. Niles v. Cedar Point Club, supra; French Live Stock Co. v. Springer, supra; Security Land Co. v. Burns, supra."

This is conclusive on this court.

[7] It is true, as claimed by the defendant, that the swamp land grant is in præsenti, and passed title to such lands of its date September 28, 1850. As stated by Mr. Justice Field in Wright v. Roseberry, 121 U. S. 488, 509, 7 Sup. Ct. 985, 30 L. Ed. 1039, after a review of all former decisions on that subject:

"The result of these decisions is that the grant of 1850 is one in præsenti, passing the title to the lands as of its date, but requiring identification of the lands to render the title perfect; that the action of the Secretary in identifying them is conclusive against collateral attack, as the judgment of a special tribunal to which the determination of the matter is intrusted; but, when that officer has neglected or failed to make the identification, it is competent for the grantees of the state, to prevent their rights from being defeated, to identify the lands in any other appropriate mode which will effect that object. A resort to such mode of identification would also seem to be permissible, where the Secretary declares his inability to certify the lands to the state for any cause other than a consideration of their character."

In Chapman & Dewey Lumber Co. v. St. Francis Levee District, supra, it was also contended that the title to the lands in controversy, even though not included in the patent, passed to the state under the Swamp Land Act independent of any patent; but this contention was held by Mr. Justice Van Devanter to be untenable, the court holding:

"The lands were never listed as swamp lands, and their listing does not appear to have been even requested, doubtless because they were not surveyed."

In Little v. Williams, supra, the court quotes with approval from Rogers Locomotive Works v. Emigrant Co., 164 U. S. 559, 17 Sup. Ct. 188, 41 L. Ed. 552, the following:

"While, therefore, as held in many cases, the act of 1850 was in præsenti, and gave an inchoate title, the lands needed to be identified as lands that passed under the act; which being done, and not before, the title becomes perfect as of the date of the granting act."

And again (164 U. S. 574, 17 Sup. Ct. 192, 41 L. Ed. 552):

"It belonged to him [the Secretary of the Interior], primarily, to identify all lands that were to go to the state under the act of 1850. When he made such identification, then, and not before, the state was entitled to a patent, and 'on such patent' the fee simple title vested in the state. The state's title was at the outset an inchoate one, and did not become perfect, as of the date of the act, until a patent was issued."

Confirmation Acts of Congress.

[8] It is next claimed on behalf of the defendant that, even if there was no permanent body of water there at the time of the original survey, as all the lands in that township were in fact swamp and overflowed lands in 1850, and were so at the time the state made its selection, which was filed in the General Land Office, on September 22, 1852, and approved by the Secretary of the Interior on May 11, 1853, the Confirmation Act of March 3, 1857, c. 177, 11 Stat. 251, vested the title to the entire township in the state at once, even if no patent had ever been issued by the government. It is also claimed that by section 3 of the act of April 29, 1898 (30 Stat. 368, c. 229 [U. S. Comp. St. 1901, p. 1592]) known as the "Arkansas Compromise Act," the title to these lands was confirmed to the defendant. The act of 1857 declared:

"That the selection of swamp and overflowed lands granted to the several states by the act of Congress approved September 28, 1850, * * * and heretofore made and reported to the Commissioner of the General Land Office, so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing laws of the United States, be and the same are hereby confirmed, and shall be approved and patented to the said several states, in conformity with the provisions of the act aforesaid, as soon as may be practicable after the passage of this law."

Then follows a proviso which is immaterial as to the issues involved in the instant case.

The patent to the state, which was issued in 1858, it is contended, could not derogate from nor limit the extent of the title of this area which had already passed to the state by the act of 1857. Martin v. Marks, 97 U. S. 346, 24 L. Ed. 940, is relied on as conclusive of this claim. In that case Mr. Justice Miller, speaking for the court, declared the intention of the lawmakers in enacting the act of 1857 to have been:

"It seems that, seven years after the passage of the swamp land grant, this failure of the Secretary to act had become a grievance, for which Congress deemed it necessary to provide a remedy, by the act of March 3, 1857."

The report of the case does not show what kind of lands were there involved, whether surveyed or unsurveyed, meandered or not, dry or submerged; nor does the opinion of the Supreme Court of Louisiana (reported in 27 La. Ann. 527), from which court the cause was removed by writ of error to the Supreme Court of the United States, show the nature of the lands involved. In order to ascertain the exact facts in that case the court procured a copy of the original record. This shows that the land in controversy in that case was surveyed

land, was free from water, was not fractional or bordering on a water course, was platted as the "southeast quarter of section seven, in township twenty, of range fourteen, containing 160 acres," had been selected as swamp land by the state of Louisiana, and approved by the General Land Office prior to the enactment of the Confirmation Act of 1857, and sold by the state to one under whom the plaintiff Marks claimed title. For some reason the land had not been withdrawn from entry by the government. Thereupon the defendant Martin entered it under the homestead laws, and received a patent therefor from the United States, dated May 20, 1873. As the facts in that case were different entirely from those shown to exist in the instant case, it is of course, inapplicable, and cannot be considered as an authority for any of the issues herein involved.

If the lands in controversy were unsurveyed, and this is undisputed, then, as hereinbefore shown, they were not "public lands" within the meaning of the act of 1850, and until surveyed did not pass by the grant, nor could they be selected. If there was no grant to the state, there was nothing to confirm. The selection by the state, as shown by the recitals of the patent, were "according to the official plats of survey of the said lands returned to the General Land Office by the surveyor general," giving the acreage of the surveyed lands. The patent to the state is "according to the official plats of survey, containing 14,526.11 acres." In Kirby v. Lewis (C. C.) 39 Fed. 66, 70, Judge Caldwell held:

"The recitals in a deed constitute a part of the title. It is as much a muniment of title as any covenant therein running with the land. * * * The acceptance of a deed by a grantee makes its recitals evidence against him, * * * and parol evidence is inadmissible to contradict or vary material recitals. Whenever the recitals of a patent nullify its granting clause, the grant fails"—citing Penrose v. Griffith, 4 Bin. (Pa.) 231; Improvement Co. v. McCreary, 58 Pa. 304; Smelting Co. v. Kemp, 104 U. S. 636, 644, 26 L. Ed. 875.

[9] Nor does the Compromise Act of 1898 aid the defendant in any way. On the contrary, whatever claim the state had to these lands was relinquished by that compromise. The compromise was made in 1895, approved, with the amendments proposed by Congress, by the General Assembly of the state of Arkansas on March 10, 1897 (Session Acts of Arkansas 1897, p. 89), and for the United States by the act of Congress of April 29, 1898. Section 3 of the act of Congress, upon which defendant relies, provides:

"That the title of all persons who have purchased from the state of Arkansas any unconfirmed swamp land *and hold deeds for the same* be, and the same is hereby, confirmed and made valid as against any claim or right of the United States, and without the payment by said persons, their heirs or assigns, of any sum whatever to the United States or to the state of Arkansas."

The compromise made by the United States and the state of Arkansas provided for a surrender by the government to the state of its bonds, amounting, with the interest, to a very large sum of money, and

as a consideration for the surrender of these bonds the state relinquished and quitclaimed to the United States—

"all claims or demands, adjusted or unadjusted, growing out of the act of September 28, 1850, known as the Swamp Land Act, the acts of March 2, 1855, and March 3, 1857, or any other act."

It will thus be seen that the relinquishment of the claims on the part of the state to the swamp lands granted by the act of 1850, as well as the Confirmation Act of 1857, or any other act, was for a valuable consideration. When that compromise was concluded and approved by the state of Arkansas and the act of Congress of 1898, the state, not only for itself, but for all its subordinate political subdivisions and subordinate agencies, of which the St. Francis levee district was one, relinquished all claims they or it may have had to any lands undisposed of. This was authoritatively settled by the Supreme Court in Little v. Williams, supra. Mr. Justice Van Devanter, delivering the opinion of the court in that case, said:

"Assuming that the inchoate title [of the state] had then passed to the levee district under the act of 1893, was the district in any better situation than the state? The answer turns upon the relation of the one to the other. The district was a mere political subdivision of the state. * * * It was essentially a subordinate agency of the state, was exercising a power of the state for its convenience, could have no will contrary to the will of the state, held its property and revenue for public purposes, and was in all respects subject to the state's paramount authority. In view of this relation, we are quite clear that the state's action was binding upon the district, and that the latter could not by its subsequent deed to the plaintiff invest her with a title which it no longer possessed."

This was reaffirmed in Chapman & Dewey Lumber Co. v. St. Francis Levee District, supra.

As none of these lands were conveyed by the levee district, under whom the defendant now claims title, until after the enactment of the act of 1898, nothing passed to the defendant under these conveyances.

As to the state's patent to Waldron, it is sufficient to say that, if there was no lake or permanent body of water there, then the state's patent to Waldron did not convey any lands beyond the meander lines, even if an inchoate equitable title to these lands had passed to the state under the Swamp Land Act of 1850 and the Confirmation Act of 1857. If still in the state, or its political subdivisions, they were quitclaimed to the government by the compromise of 1898. But even if these lands had passed to Waldron by the state's patent, as they were forfeited to and again became the property of the state, and the defendant makes no claim except through the St. Francis levee district, it cannot claim to hold under the Waldron patents, which had been, in effect, relinquished to the state by the forfeiture.

Aside from that, the state did not by its patents to Waldron attempt to convey any of these unsurveyed lands nor did it do so. The lands it conveyed were described in the patent as follows:

"Fractional section twenty-two, township twelve north, range nine east, containing 164.07 acres."

Section 26 is conveyed in one patent with sections 25, 34, and 35 of that township, and is described:

"Section twenty-six, township twelve north, range nine east."

There is no separate description of the acreage of each section, but the four sections are stated to contain "2,543.83 acres, as shown by the plat of the original survey." Sections 25, 34, and 35 were full sections of 640 acres each; section 26 being the only fractional section conveyed by that patent. As will be seen from an inspection of the original plat, the meandered lake covers only a very small, irregular part of section 26, which accounts for the shortage of only 16.17 acres. In the survey of 1910 this small tract was found to contain 17.80 acres. This slight difference was probably caused by a less accurate survey in 1840. The patent of the state for section 27 included also the north half of section 36, and describes the lands conveyed as:

"North half of section thirty-six, and fractional section twenty-seven, township twelve north, range nine east, containing, in the aggregate, 613 acres."

The north half of section 36 contains 320 acres, leaving the acreage of fractional section 27 293 acres, the exact amount of the surveyed lands of that section, thus showing that the state made no claim to any of the unsurveyed lands, and made no attempt to convey them to Waldron. The consideration paid the state by Waldron was 50 cents an acre for the surveyed lands.

[10] Nor is the contention that the entries on the government tract books at Washington and Little Rock that the whole of sections 22, 26, and 27 had been withdrawn from further entry and sale are an admission on the part of the government that the entire sections of 640 acres each, surveyed and unsurveyed, had been selected and patented as swamp lands under the act of 1850, tenable. These entries only meant that all of the lands in those sections which were "subject to disposal" had been granted to the state, and were, therefore, no longer subject to entry or sale. As unsurveyed lands never were subject to entry or sale, there was nothing to be withdrawn.

By section 4 of the act of 1898, the state of Arkansas—

"relinquished and quitclaimed to the United States all lands heretofore *confirmed*, certified or patented to the state, which have been entered under the public land laws; and does hereby cede, relinquish and quitclaim to the United States all right, title and interest under the acts of September 28, 1850, March 2, 1855, and March 3, 1857, in and to all lands in the state which have been heretofore granted, *confirmed*, certified or patented by the United States under any other acts, and the title to such lands is hereby confirmed in the grantees, their heirs, successors or assigns, anything in this act or any other act to the contrary notwithstanding."

After that act had been passed, having been approved by the state in 1897, as shown by the act of Congress, which recites that fact, the levee district had no more title to these lands than if the Swamp Land Act had never been passed, and, of course, it could thereafter convey no title.

The Statute of Limitations.

[11] The defendant invokes the statute of limitations of section 8 of Act March 3, 1891, c. 561, 26 Stat. 1099 (U. S. Comp. St. 1901, p. 1521). That act, in so far as it applies to this plea, reads:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

Complete answers to this plea are:

1. That this is not an action to vacate or annul a patent heretofore granted by the government. The claim of the government is based solely on the fact that these lands, being unsurveyed, were not and could not have been selected by the state, and no patent had ever issued for them. Therefore, it is claimed, the title thereto had never passed out of the government. United States v. Chandler-Dunbar Water Power Co., 209 U. S. 447, 28 Sup. Ct. 579, 52 L. Ed. 881, earnestly relied on by counsel for the defendant, is based upon a state of facts entirely different from those established in this case, and, therefore, inapplicable. It was there held that the islands in controversy had passed to the state of Michigan upon its admission as a state by reason of being in a navigable stream, and if they had belonged to the United States they would have passed as neglected fragments. These islands, the court found—

"are little more than rocks, rising very slightly above the level of the water, and contained, respectively, a small fraction of an acre, and a little more than one acre. They were unsurveyed and of no apparent value."

The court said:

"We cannot think that these provisions excepted such islands from the admitted transfer to the state of the bed of the streams surrounding them. If they did not, then, whether the title remains in the state or passes to the defendant with the land conveyed by the patent, the bill must fail. The bed of the river could not be conveyed by the patent of the United States alone; but, if such is the law of the state, the bed will pass to the patentee by the help of that law, unless there is some special reason to the contrary to be found in cases like Illinois Central R. R. Co. v. Illinois, 146 U. S. 387 [13 Sup. Ct. 110, 36 L. Ed. 1018]."

[12] 2. As the fraud, even if we assume mistake, of the original survey was not discovered by the department of the government charged by law with the management of the public lands until December, 1908, when the Secretary of the Interior made his findings as hereinbefore set out, and the motion for review of that decision was not disposed of until February 27, 1909, the statute did not begin to run until that time.

The instructions for the survey were given by the General Land Office to the surveyors on March 15, 1910. The survey of these lands was begun on March 21, 1910, and completed April 9, 1910; the plat from the field notes of the surveyor approved by the Commissioner, who was ex-officio Surveyor General for Arkansas, on April 28, 1910; this action was instituted by filing the bill of complaint and causing process to be issued on August 4, 1911.

Considering the many steps necessary to be taken by the different officers of the General Land Office, and the time required for the Department of Justice, after the Land Department requested it to institute these proceedings, to familiarize itself with the facts necessary for the preparation of the bills, the government acted in this matter with unusual celerity. The courts must take judicial notice of the rules and regulations of the departments of the government, and also the fact that a government as large as ours cannot move as rapidly as individuals unhampered by such rules and regulations.

The letter of the special agent, referred to by Secretary of the Interior Hitchcock in his letter of November 17, 1902, shows that the special agent acted in that matter on his own initiative and without authority from the department. He merely expressed his opinion from what he had heard. His letter has not been introduced in evidence, but the letter of the Secretary of the Interior, which is in evidence, shows sufficiently what it contained. The Secretary says:

"A special agent of your office states in his report that in an interview with the officers of said board [meaning the levee board] he learned that it claimed title to the lands in question under the act of March 29, 1893 [the act of the General Assembly of the state of Arkansas granting all of its lands in that section of the state to the St. Francis levee district], and also bases its claim upon letters from your office and from the Secretary of the Interior, declaring, in effect, that if the unsurveyed lands, known as the 'Sunk Lands,' were at the date of the township surveys covered by bodies of water, and were afterwards uncovered by the recession of the waters, such lands would belong to the owners of the adjacent lands as riparian proprietors, and the United States would have no authority to survey and dispose of them, assuming that the lands contiguous to and surrounding the meandered waters have been disposed of. The special agent expresses the opinion that there is no doubt that at the time of the township surveys these lands were simply covered by the overflow of the Mississippi river, and that they may be classed as agricultural lands, and not as covered by permanent bodies of water, and therefore subject to state or riparian ownership; that some of these lands are five miles wide and are covered with the finest timber, which is exceedingly valuable, and when cleared will make fine cotton and corn plantations and become some of the most valuable ones in the state."

Such a communication, made by a subordinate employé of the department, who is not even an officer of the United States (United States v. Schlierholz [D. C.] 133 Fed. 333, and United States v. Schlierholz [D. C.] 137 Fed. 616), without authority from the department, and merely expressing his own opinion, without having taken any evidence or made any personal investigation upon which his opinion is based, can hardly be said to be notice to the government, which can only act through its officers, and for that reason is not chargeable with notice as strictly as an individual. United States v. Kirkpatrick, 9 Wheat. 735, 6 L. Ed. 199; Cooke v. United States, 91 U. S. 389, 398, 23 L. Ed. 237; United States v. Beebe, 180 U. S. 343, 354, 21 Sup. Ct. 371, 45 L. Ed. 563.

Nor is the claim that, as that statute contains no exceptions, the general rule that, in case of a concealed fraud, the statute of limitations does not begin to run until the discovery of the fraud, does not apply, tenable. That this statute does not begin to run until the discovery of the fraud has been conclusively determined by the Circuit Court of

Appeals of this circuit in United States v. Exploration Co., 203 Fed. 387, 121 C. C. A. 491, and Moses v. Long Bell Lumber Co., 206 Fed. 51, 124 C. C. A. 185.

Bona Fide Purchaser.

[13] It is also claimed that the defendant is a bona fide purchaser for value, and therefore within the provisions of section 3 of the Compromise Act of 1898, hereinbefore set out.

The testimony of Mr. Wilson, under whom the defendant claims, shows that he is the owner of practically the entire capital stock of the defendant corporation, and may, therefore, be said to be the corporation. He testified that he owns all the stock of the defendant corporation, except what his wife and son and W. L. Harrison and some of the boys might own, a share that he gave them to hold office. He further testified that, while he could not tell the exact number of shares owned by him, it was something over 90 per cent. Some of the shares he gave to his children a few days before testifying. From this it is reasonable to presume that he and his donees, his wife and children, own 998 of the 1,000 shares of the capital stock of the defendant corporation. The corporation was no doubt formed for the purpose of enabling him to carry on his very extensive interests without the danger of having them injuriously affected or destroyed in case of his death; he being a man well advanced in years. In any event, as he is the president of that corporation, and practically its owner, his knowledge is the knowledge of the corporation.

As the state never owned these lands, and it only attempted to convey the lands which it owned, i. e., "according to the official plats of survey of the said lands returned to the General Land Office by the surveyor general," and as by the Compromise Act of 1898 the St. Francis levee district, under whom defendant claims title, had been divested of all right, title, and interest, legal or equitable, it had nothing to convey, so far as these or any other unsurveyed lands are concerned, after April 29, 1898, the date of the enactment of the act of 1898, even though they were in fact swamp and overflowed lands, and theretofore had been, under the act of 1850, subject to selection by the state. All of these lands were purchased by Mr. Wilson some time after the Compromise Act of 1898 had been enacted, which, as construed in Little v. Williams, supra, and Chapman & Dewey Lumber Co. v. St. Francis Levee District, supra, had been quitclaimed to the government by the compromise.

The evidence shows that the levee district sold the lands in section 22 on June 6, 1898, those in section 26 on June 3, 1898, and those in section 27 on June 6, 1898, nearly two months after the passage of the Compromise Act of 1898. Whether the enactment of this act caused these conveyances to be made so soon thereafter must be left to conjecture. But the divestiture of its title was then complete.

Mr. Wilson bought the lands in section 22 on November 24, 1900, and September 23, 1902, those in section 26 on June 3, 1898, and September 23, 1902, and those in section 27 on November 24, 1900, and September 23, 1902. In addition to these facts, his own testimony shows that, before he purchased the lands, he knew that the title was

still in the government. Referring to his testimony, we find the following:

"Q. Did you have the title examined at the time you bought the interests of these gentlemen, far enough back to ascertain they had no title to the lands within the meander lines? A. I had the title examined, and it showed that they had the title to the lands by the levee board title. Q. That is to say, their title, so far as representing any section as an entirety, was deraigned from the levee board? A. Yes, sir. Q. There was no title so far as you know to any land within the meander line, which can be deraigned by an examination of the records of Mississippi county by a patent from the United States government? A. You mean the unsurveyed land? Q. Yes, sir. A. No, sir. Q. So that at the time you purchased from the St. Francis levee board, or any of its grantees, the lands which purport to be included within the meander line, and when you purchased the lands which may be specifically described as fractional sections about the meander line, you knew that the title which you were acquiring did not emanate from the government by its patent as unsurveyed lands? A. I knew that the unsurveyed lands had not been patented by the government. Q. You acquired, did you, Mr. Wilson, or, that is, the defendant acquired, the title to all this land abutting on the meandered line, whether described as fractional sections or whole sections? A. Yes, sir. Q. And you now say that no part of the alleged shore line, or the present meander line, bounds any part of the surveyed lands of which the title is in some other person besides this defendant company? A. No."

The court finds from the evidence that the defendant is not a bona fide purchaser without notice, and therefore is not entitled to protection as such, without deciding whether, in view of the other findings, even had it been a bona fide purchaser without notice, that would have aided it.

Estoppel.

[14] The defendant also claims an estoppel on the part of the United States. There can be no doubt that in a suit in equity the claims of the government appeal to the conscience of the chancellor with the same, but with no greater or less, force than those of private individuals under like circumstances, and they are determinable by the same rules and principles. State of Iowa v. Carr, 191 Fed. 257, 112 C. C. A. 477; Hemmer v. United States, 204 Fed. 898, 123 C. C. A. 194, and authorities there cited. It is equally well settled that the government cannot be estopped by the unauthorized or fraudulent acts of its agents or officers, or their mistakes. Hunter v. United States, 5 Pet. 173, 8 L. Ed. 86; The Floyd Acceptances, 7 Wall. 666, 19 L. Ed. 169; Filor v. United States, 9 Wall. 45, 48, 19 L. Ed. 549; Whiteside v. United States, 93 U. S. 247, 257, 23 L. Ed. 882; Moses v. United States, 166 U. S. 571, 594, 595, 17 Sup. Ct. 682, 41 L. Ed. 1119; Pine River Logging & Imp. Co. v. United States, 186 U. S. 279, 291, 22 Sup. Ct. 920, 46 L. Ed. 1164.

[15] To cause an estoppel, the representations relied on must have been made with full knowledge of the facts by the party to be estopped, unless his ignorance was the result of gross negligence or otherwise involved gross culpability. Henshaw v. Bissell, 18 Wall. 255, 271, 21 L. Ed. 835; Brant v. Iron Company, 93 U. S. 326, 336, 23 L. Ed. 927; Farmers' & Merchants' Bank v. Farwell, 58 Fed. 633, 7 C. C. A. 391.

Another essential element of estoppel is that the party pleading it should have relied and acted upon the conduct of the other, and be

induced to act or refrain from acting, so that he will be substantially injured if the other party should be allowed to repudiate his actions. Brant v. Iron Company, supra; Ketchum v. Duncan, 96 U S. 659, 666, 24 L. Ed. 868; Bloomfield v. Charter Oak Bank, 121 U. S. 121, 131, 7 Sup. Ct. 865, 30 L. Ed. 923; Comer v. Felton, 61 Fed. 731, 738, 10 C. C. A. 28, 35; New York Life Ins. Co. v. Slocumb, 177 Fed. 842, 101 C. C. A. 56; State Bank v. Hawkeye Gold Dredging Co., 177 Fed. 164, 100 C. C. A. 626; Rhodes v. Cissel, 82 Ark. 367, 101 S. W. 758.

[16] There can be no estoppel by what was said or done by the government officials prior to the compromise between the state and the United States in 1898, for up to that time it was wholly immaterial whether this land was a lake or whether it was merely swamp land. If it was a lake, it passed to the state and its grantees by virtue of the riparian ownership; if it was dry land, but subject to overflow, the inchoate and equitable title passed to the state under the swamp land grant of 1850 and the act of 1857, which could be perfected when the land was surveyed. United States v. Montana Mfg. Co., 196 U. S. 573, 25 Sup. Ct. 367, 49 L. Ed. 604. But by the Compromise Act of 1898 the state relinquished all lands granted to it, whether patented or held by an inchoate and equitable title under these acts, and then, for the first time since the passage of the act of 1850, the United States again became the absolute owner of the legal and equitable title, which had been granted to the state and not sold by it. As the title to none of the unsurveyed lands had ever passed from the United States to the state of Arkansas, the legal title to these lands, if not covered by a lake or a permanent body of water, never vested in the state, as has been shown hereinbefore.

In French-Glenn Live Stock Co. v. Springer, supra, it was contended that the land was bought in reliance upon the plats and patent, which showed the meander line of the lake; but it was held that, if there was in fact no lake, the grantee acquired no part of the meandered area.

As to the letters of the department, they were in reply to inquiries made by different parties; they were no decisions, but merely expressions of opinion as to the lands in controversy, based upon the facts as shown by the records of the department. There was no contest before the department as to these lands which called for a decision; there were no parties before it seeking an adjudication; there were no issues to be decided; no one had an opportunity to be heard. For this reason it was held in Chapman & Dewey Land Co. v. Bigelow, 77 Ark. 338, 351, 92 S. W. 534, 539, where similar lands were involved, that such letters are "of no binding force or effect upon any one," and that they were "properly excluded" by the trial court.

But even if these letters are admissible, nothing was said or done by any authorized official of the government which would cause an estoppel. In 1892 Mr. Wilson wrote to the Commissioner of the General Land Office, asking how he could obtain title to the lands situated in lakes and bayous in Mississippi county. The Commissioner of the General Land Office, under date of January 13, 1893, replied:

"Where the lands or lots bordering upon the lakes have been entered or disposed of by the government in accordance with the official plats, they are not subject to survey and disposal by the United States, for the reason that they belong to the adjacent landowner."

This is one of the letters upon which defendant bases its plea of estoppel. On November 30, 1894, the Secretary of the Interior, Mr. Hoke Smith, advised the Commissioner of the General Land Office as follows:

"Assuming that the lands contiguous and surrounding the meandered lakes have long since been disposed of, it would seem, under the authorities cited, that the government has no jurisdiction over the same, and therefore no power to order or direct the survey, and you will so advise the surveyor of the levee board."

This letter was written in reply to an inquiry made by the secretary of the St. Francis levee board, dated June 26, 1894, transmitting a letter from its chief engineer. In that letter the chief engineer stated that these lands were occupied by lakes which were not surveyed, and that by the numerous overflows since then those lakes have been filled, changing the general features of them to such an extent that the areas and depths of the lakes and swamps have been very much reduced, and surrounding the margins forests and large timber now stand on the space then occupied by water; that in order to drain the lands in that basin and locate the levees these lakes must be drained; and he then states that he is informed that "the title to these unsurveyed lands yet remains in the government, and that it donate these lands to the state or to the levee board to be expended in their drainage," and that they will ask Congress at its next session to donate these lands for that purpose; and in order to give an accurate description it will be necessary to survey them, and asked that such a survey be made.

In every one of the letters written by the Secretary of the Interior to the Commissioner of the General Land Office or to individuals inquiring about them, these lands are assumed by him and the Commissioner to have been covered by a permanent lake at the time the original survey was made, and there was no suspicion entertained by any of them that that survey was fraudulent or mistaken, and that these lands were, in fact, not covered by lakes or any other bodies of water of a permanent nature. Secretary Hitchcock, in his letter of November 17, 1902, quotes from another letter of the chief engineer of the St. Francis levee district of September 3, 1901, the following:

"If the general government has no jurisdiction of these unsurveyed lands, and does not claim any, and if a survey of them cannot, therefore, be made by the government, then it is the purpose of our board to have them surveyed, and sell them or quitclaim them, and place them on our levee tax books, so that they may be taxed for levee purposes, and pay their proportion towards the construction of levees and drains by which they have been and are being so greatly improved and benefited. If the general government will survey them, so that we can tax them when parties buy them from the government or homestead them, then our purpose will be equally accomplished."

This clearly shows that at that time the levee district did not consider these lands as belonging to it. The Secretary said:

"Therefore the condition existing at the date of the township surveys is the important fact to be ascertained, in order to determine whether steps should be taken to prevent depredations on these lands. The returns of the township surveys [referring to those made in 1839 and 1840] show upon their face that what are now alleged to be unsurveyed portions of said townships were then actual bodies of water and were properly meandered as such. There is nothing in the report of the special agent, or any of the papers submitted therewith, to impeach these returns as to the physical conditions of land and water at that time. * * * The action of the board of directors of the St. Francis levee district in exercising any control over said lands appears to have been prompted by the disclaimer of jurisdiction and authority over them by the government, as expressed in the letters of your office and of the department above referred to, and such disclaimer was based upon the information furnished by the records of your office, which show that the authority and jurisdiction of the government over said lands was terminated by the approval of the surveys and the sales of the land along the meandered lines. It does not appear from anything in the record whether the body of water that once covered the lands in question was navigable or not, but the result would be the same in either case. * * * It not being shown that said waters were not properly meandered, and the jurisdiction and control of the government over the lands in question having thus been terminated, the action of the department of November 30, 1894 [refusing a survey], is adhered to, and no further or other action will be taken with reference to said lands."

The entire correspondence shows conclusively that what was said or done by the department officers was in ignorance of the true fact that these lands were not covered by a permanent body of water, and that there was no lake there. No official investigation had been made at the time; not until 1908 did the Secretary of the Interior, upon information received, as to these lands, from parties who were anxious to acquire them as homesteads, take any steps to ascertain the true condition of these lands at the time the survey was made. For the purpose of ascertaining the true condition of these lands at that time, he set a day for a public hearing, at which, after notice to the parties in interest, representatives of all the different claimants appeared. After that hearing, on December 12, 1908, he made the findings hereinbefore set out and ordered these lands to be surveyed. The officials of the Land Department had, up to that time, the right to presume that the original survey was correct, and that these were submerged lands, as the field notes made by the surveyor and the plats made therefrom were, as is claimed by the defendant, prima facie evidence that the lands were as described in the field notes.

In the opinion of the court, the evidence fails to establish any authorized acts of any officer of the Department of the Interior which would justify sustaining the plea of estoppel; nor does the evidence justify a finding that the defendant, when it purchased these lands, relied and acted upon the conduct of the Land Department, and that by reason thereof it will be substantially injured if the government should now be permitted to recover these lands from it.

The opinion is more lengthy than is necessary, as the same result might have been reached without passing upon all the issues raised and herein determined. But as this is a test case, on which a number of other actions in this court are depending, and as counsel for both parties ably argued every one of these questions, and asked the court to pass upon all of them, the court did so. In addition to these reasons,

the court felt that as, owing to the magnitude of the interests involved, about 80,000 acres of land in all the actions, this cause will likely be appealed to a higher court, it would be best for all concerned that every material issue raised by the pleadings and insisted on in the argument should be decided by the trial court.

The plaintiff is the owner of the lands in controversy, and a decree in conformity with the prayer of the bill may be prepared and submitted to the court for its approval.

UNITED STATES v. HART et al.

(District Court, N. D. New York. June 16, 1914.)

SEARCHES AND SEIZURES (§ 7*) — PROCUREMENT OF TESTIMONY — OFFICERS — DUTY TO SURRENDER.

Where defendant H., on ascertaining that he was suspected of having conspired to commit a crime against the United States and of using the mails to defraud, voluntarily sought a conference with the United States attorney, and, in the course of conferences presented, without compulsion, certain letters, telegrams, and other papers concerning his connection with the alleged offense and delivered them to the United States attorney without condition as to their use, and defendant was afterwards provided with the facts in the copies for his use, there was no illegal seizure by the officers so as to require the court to direct a surrender of the papers to H. prior to the trial.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. § 5; Dec. Dig. § 7.*]

Max M. Hart and others were indicted for conspiracy to commit a crime against the United States and for misuse of the mails in aid of a scheme to defraud. On an order to show cause why John H. Gleason, United States attorney for the Northern district of New York, should not be required and directed to deliver to defendant Max M. Hart certain documents relating to his transactions with the other defendants, etc., delivered by Hart to Gleason prior to indictment. Denied.

Henry A. Wise, of New York City, and Chas. E. Cooney, of Syracuse, N. Y., for defendant Hart.

John H. Gleason, U. S. Atty., of Albany, N. Y., and Thos. H. Dowd, Asst. U. S. Atty., of Cortland, N. Y.

RAY, District Judge. The defendant Max M. Hart has been jointly indicted with the other defendants by the United States grand jury of the Northern district of New York, for conspiring to commit a crime against the United States, overt acts being charged (see section 37 of the Criminal Code of the United States, Act March 4, 1909, c. 321, 35 Stat. 1096 [U. S. Comp. St. Supp. 1911, p. 1600]), and in the same indictment, in several counts the defendants are indicted for using the mails to execute or aid in executing a scheme to defraud. See section 215 of said Code. All the counts in the indictment relate to offenses alleged to have been committed in executing a general

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

scheme to defraud or obtain money and property by means of false and fraudulent statements and representations, and the offenses charged are closely connected. The Oneida Milling Company is a bankrupt, and while examinations as to its affairs were being conducted before the referee, to whom the matter had been referred, it became apparent, it is claimed, that a crime had been committed, possibly by Max M. Hart and others, punishable under the laws of the United States. The matter was brought to the attention of the United States attorney for the Northern district of New York, who set on foot an investigation before the grand jury of said district at Syracuse, N. Y. The defendant Hart was not subpœnaed before the grand jury or required to produce any books, papers, or documents, or any of the papers, etc., in question here. As to when and the circumstances under which the United States attorney became possessed of such papers, etc., the defendant himself says in the moving papers:

"That prior to the return of said indictment the aforesaid grand jury was in session at the city of Syracuse in the county of Onondaga in the Northern district of New York during a considerable part of the month of April, in the year 1914, and while said grand jury was so in session, deponent was informed that said grand jurors were inquiring into certain acts and things in relation to the affairs of the Oneida Milling Corporation, a corporation owning and operating a mill at the city of Oneida in the county of Madison in the state of New York, as to which deponent was said to have had something to do, and desiring that said grand jurors should not be misled or deceived as to deponent's relation to the affairs of such corporation, deponent proceeded from the city of New York, in the state of New York to the city of Syracuse aforesaid, and on or about the 18th day of April, 1914, was presented and introduced to John H. Gleason, Esq., the attorney of the United States in and for the Northern district of New York, and then and there informed said John H. Gleason that he was ready and willing to fully and freely disclose to said Gleason any and every act on his part in relation to or in any way connected with the affairs of the Oneida Milling Corporation; that thereupon said Gleason made an appointment for a conference with deponent, and on the same day deponent met said Gleason in a private room at the Century Club in the city of Syracuse aforesaid; that for a period of from two to three hours deponent and said Gleason were engaged in such conference, during which time deponent freely disclosed to said Gleason all of deponent's knowledge as to the affairs of said Oneida Milling Corporation, but at that time deponent did not have with him any books, papers, letters, telegrams, checks, or other documents relating to the transactions about which such conference had to do; that said conference terminated with the understanding that deponent and said Gleason were to meet again the day following. The following day deponent met said Gleason in the Federal Building in the city of Syracuse aforesaid, and said Gleason then and there stated to deponent that he desired to see and examine deponent's books, papers, and documents relating to the transactions about which they had conversed the night before. That thereupon, and at the request of said Gleason, deponent proceeded to the city of New York, went to his office and took from his files a large number of original letters, carbon copies of letters, original telegrams, carbon copies of telegrams, canceled checks, vouchers, promissory notes, statements of account, and various other papers and documents relating to his transactions with the defendants Andrew S. Work, Frank W. Fowler, and Adolph E. Wupperman, and to his transactions with the Oneida Milling Corporation and various other companies, corporations, banking institutions and individuals. That according to deponent's best recollection and belief there were about 400 such documents and papers; that deponent took the aforesaid papers and proceeded to the city of Syracuse, where, according to his best recollection, he arrived on the 24th day of April, 1914. That in the evening of

said 24th day of April, deponent, by appointment, met said Gleason at the aforesaid Century Club, and in a private room thereof disclosed to said Gleason the aforesaid papers and documents brought by deponent from New York as aforesaid. That then and there deponent permitted said Gleason to read certain of said documents."

He then proceeds to state, in effect, that Mr. Gleason promised to return said papers and documents but has not, and, on information and belief that the United States attorney intends to use same on the trial of the indictment against him and the other defendants found at the said term of this court. He alleges two grounds on which he claims such papers, etc., should be returned to him, viz.: (1) That he requires same for the preparation of his defense on the trial of such indictment; and (2) that same were illegally seized by said United States attorney in violation of the rights secured to him by fourth and fifth amendments to the Constitution of the United States. The fourth amendment reads as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The fifth, so far as pertinent, reads as follows:

"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

Here, on the statement of Hart himself, there has been no search and no seizure, unless it be that the retention of these papers and documents constitute a "seizure," and an unreasonable seizure within the meaning of the Constitution. There has been no process of law resorted to by the United States attorney to gain possession of these papers.

As to the circumstances under which Mr. Gleason, United States attorney, came into possession of these papers, etc., Mr. Gleason, and his assistant, Thos. H. Dowd, and Mr. Dolson, clerk and stenographer for the United States attorney, say in substance that Hart, hearing of the pendency of the investigation being conducted before the grand jury, came voluntarily from the city of New York to Syracuse, employed counsel, and with such counsel called upon the United States attorney and in the presence of his said counsel, the United States attorney and his assistant and clerk voluntarily made a statement as to his connection with the affairs under investigation, and then, in substance, volunteered to go to New York, and the next day or the day after produce all books, papers, and writings in his possession, or that he could obtain which had to do with or in any wise related to the business of the Oneida Milling Company and the financial relations of Hart to said company and his dealings with the company; that thereafter said Hart again appeared and was invited to the room of Mr. Dowd, assistant United States attorney, where Hart voluntarily produced all the papers and documents in question here, and submitted them to the examination of Mr. Gleason and his assistant, and at a late

hour left them in Mr. Dowd's room, the examination not having been completed. Mr. Gleason, Mr. Dowd, and Mr. Dolson say nothing was said about returning the papers, or any of them; that Hart requested to be called before the grand jury, but his request was not acceded to, and it was only after Hart was informed he would not be called that he requested a return of such papers. Mr. Dowd not only corroborates all this, but says, in reference to said papers and their delivery to Mr. Gleason, "and nothing was said by said defendant Hart about when the same should be returned to him, but he did declare that he freely delivered the said papers to the said United States Attorney Gleason for such use as the United States attorney might see fit to put the same to," and that nothing was said about returning same the next day. As to the delivery of these papers, etc., to Mr. Gleason by defendant Hart, Mr. Dolson says:

"That at said conference the said Max M. Hart agreed to go to New York and bring back all of the written and documentary evidence in his possession, or of which he could obtain possession relating to the Oneida Milling Company transactions and the transactions of the defendants in the above-entitled action for the use of United States Attorney Gleason in bringing the guilty parties in the above-entitled case to justice, and agreed to turn over to United States Attorney Gleason all the written or documentary evidence which he, the said Max M. Hart, could obtain in connection with said matter."

Mr. Wise, who was retained in May as additional counsel for Hart, says:

"That on the 26th day of May, 1914, at the city of Syracuse, state of New York, deponent saw and conversed with John H. Gleason, Esq., the attorney of the United States for the Northern district of New York, and then and there stated to said Gleason that he had been informed by said Hart that said Gleason had in his custody or possession certain papers and documents belonging to said Hart, which said papers and documents deponent considered to be necessary and material to the defense of said Hart to the indictment herein, and that deponent could not proceed to the trial upon the indictment herein without having the opportunity to examine said papers and confer with said Hart in relation thereto, and accordingly deponent requested said Gleason, at the time informing said Gleason that he was attorney for said Hart, to return said papers to him; that said Gleason then and there stated to deponent that he would return said papers, that he would endeavor to do so by Saturday, May 30, 1914, and that if he did not return them on such Saturday, he would certainly do so early in the following week; that up to the date of this affidavit said Gleason has not returned any of said papers to deponent, or to said Hart; that in said conversation said Gleason stated to said deponent that said papers would probably have to be used in evidence upon the trial of the indictment herein; that deponent has informed said Max M. Hart that said Gleason has no right to the possession of said papers and documents, and, having obtained them under the circumstances set forth in the affidavit of said Hart, hereto annexed, to retain the same and offer any of them in evidence on the trial herein would be in violation of said Hart's constitutional rights and privileges."

So far as relates to the possession of these papers by Hart prior to the trial and in preparing his defense, the rights of the defendant have been provided for as fac simile copies have been ordered made and delivered to Mr. Wise. The originals can also be seen and examined at any reasonable time prior to or during the trial.

This court is not necessarily called upon at this time to decide wheth-

er or not these papers, which have not been seen by it, can be properly received in evidence on the trial. It may then appear that they have no relevancy—are immaterial. It may appear that it will infringe the constitutional rights of Hart to use them in evidence against him. They may be competent as against the other defendants, or some of them, alone. The United States attorney says he has not had time to examine all of them, but that some are relevant and material and will be necessary for his use on the trial of the indictment. Such as are not material he will return so soon as his examination is completed. The question is, Has Mr. Gleason, as United States attorney, the right to retain any of the papers until after the trial of the indictment? They were produced and delivered to the United States attorney by Hart voluntarily, and for use by such officer in investigating certain acts and conduct alleged to amount to the commission of a crime or crimes, and in which Hart was an actor to a greater or a lesser extent, "and in bringing the guilty parties in the above-entitled case to justice." Hart was implicated, not necessarily to a criminal degree, and hearing of the proceedings before the grand jury then pending, he appeared voluntarily and told his story to Mr. Gleason, and later voluntarily produced and delivered these papers to be used in the proceeding, the investigation, and prosecution, but hoping, and, undoubtedly, expecting, that his statement and the papers would result in no indictment as against himself. He desired and requested to be called before the grand jury, thereby, if called, it is alleged, seeking to secure immunity. In this he was disappointed, and thereupon he demanded the return of such papers, etc. This court cannot hold that under such circumstances any constitutional right of the defendant Hart is violated by the retention of the papers and documents.

These papers, or some of them, may be admissible in evidence against all the defendants except Hart, and is it possible that the United States must turn them over to Hart before the trial and take the risk of their destruction, or of their being sent out of the jurisdiction of this court? Clearly Hart has not been compelled to furnish incriminating evidence against himself, and there is no purpose to deprive him of the use of the papers, etc., prior to and during the trial. There has been no search or seizure but a mere detention of papers placed by the owner in the hands of Mr. Gleason as United States attorney for use in the investigation and prosecution of an offense committed against the laws of the United States, and which surrender and consent the owner of such papers seeks to rescind on finding that he himself is implicated and indicted.

In United States v. Mills (C. C.) 185 Fed. 318, the defendants were indicted and a bench warrant issued. The marshal, so armed, went to defendants' place of business, and not only arrested them, but searched for, found, and seized a large number of books and papers. This seizure included a large number of books and papers which had nothing whatever to do with the offense or transaction mentioned in the indictment or bench warrant. These were turned over to the United States attorney, and the opinion in the case says:

"Having examined these, the district attorney states that they disclose evidence of further offenses, as to which he is about to advise the grand jury

that further indictments, charging additional offenses than those contained in the indictment already found, could be found."

Says the opinion: There was no warrant of seizure "particularly describing the place to be searched and the * * * things to be seized." See fourth amendment. The United States attorney was directed to return such papers. It was held that this was an unreasonable and illegal search and seizure, and that the desire and purpose of the prosecuting officer to use them in finding other indictments and prosecuting them was no justification of such search and seizure.

In Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. ——, decided by the Supreme Court of the United States February 24, 1914, the defendant was arrested by a police officer. Other police officers at or about the time of such arrest went to the home of defendant, and, learning from neighbors where the key was kept, obtained it and entered the house and made a search without warrant. These officers took possession of and removed certain articles and papers found there. Later they returned and carried away other letters and envelopes. The defendant filed a petition for the return of his papers, etc. The court ordered the return of all letters, etc., not pertinent to the charge against the defendant, but denied the petition as to pertinent papers. On the trial the defendant against urged his petition for the return of the balance of such papers, and when this was denied and the papers were offered in evidence he objected that the papers had been obtained without search warrant and by breaking open his house in his absence, in violation of the fourth and fifth amendments, etc. The objections were overruled, a conviction was had, and on writ of error to the Supreme Court the conviction was reversed. The court, after stating the facts, said:

"What, then, is the present case? Before answering that inquiry specifically, it may be well, by a process of exclusion, to state what it is not. It is not an assertion of the right on the part of the government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. * * * 1 Bishop on Criminal Procedure, § 211; Wharton, Crim. Plead. and Practice (Sth Ed.) § 60; Dillon v. O'Brien and Davis, 16 Cox C. C. 245. Nor is it the case of testimony offered at a trial where the court is asked to stop and consider the illegal means by which proofs, otherwise competent, were obtained—of which we shall have occasion to treat later in this opinion. Nor is it the case of burglar's tools or other proofs of guilt found upon his arrest within the control of the accused. The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal, holding no warrant for his arrest and none for the search of his premises."

The court also referred to Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, and said:

"At the trial certain papers, which had been seized by police officers executing a search warrant for the discovery and seizure of policy slips, and which had been found in addition to the policy slips, were offered in evidence over his objection. The conviction was affirmed by the Court of Appeals of New York ([People v. Adams] 176 N. Y. 351 [68 N. E. 636, 63 L. R. A. 406, 98 Am. St. Rep. 675]), and the case was brought here for alleged violation of the

fourth and fifth amendments to the Constitution of the United States. Pretermitting the question whether these amendments applied to the action of the States, this court proceeded to examine the alleged violations of the fourth and fifth amendments, and put its decision upon the ground that the papers found in the execution of the search warrant, which warrant had a legal purpose in the attempt to find gambling paraphernalia, was competent evidence against the accused, and their offer in testimony did not violate his constitutional privilege against unlawful search or seizure, for it was held that such incriminatory documents thus discovered were not the subject of an unreasonable search and seizure, and in effect that the same were incidentally seized in the lawful execution of a warrant, and not in the wrongful invasion of the home of the citizen and the unwarranted seizure of his papers and property."

In the case at bar there was no necessity for a search warrant or the interposition of the marshal. Here there has been no invasion of the home of the defendant Hart, who voluntarily produced and turned over the incriminating documents.

And the case at bar is not within Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, where it was held:

"It does not require actual entry upon premises and search for and seizure of papers to constitute an unreasonable search and seizure within the meaning of the fourth amendment; a compulsory production of a party's private books and papers to be used against himself or his property in a criminal or penal proceeding, or for a forfeiture, is within the spirit and meaning of the amendment. * * * The seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself, and, in a prosecution for a crime, penalty, or forfeiture, is equally within the prohibition of the fifth amendment."

In Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, it was held:

"The search and seizure clause of the fourth amendment was not intended to interfere with the power of courts to compel the production upon a trial of documentary evidence through a subpœna duces tecum."

In Holt v. United States, 218 U. S. 245, 31 Sup. Ct. 2, 54 L. Ed. 1021, 20 Ann. Cas. 1138, it is held:

"The prohibition of the fifth amendment against compelling a man to give evidence against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, and not an exclusion of his body as evidence when it is material; and so held that testimony of a witness that the accused put on a garment and it fitted him is admissible, whether the accused had put on the garment voluntarily or under duress."

I am of the opinion, conceding Hart could not have been compelled to produce these papers and documents by subpœna duces tecum without gaining immunity for himself, that his voluntary production of them, and his voluntary delivery of them to the United States attorney without promise, threat, or duress, and under the circumstances disclosed by the statements of Dolson, Dowd, and Gleason, which are at variance with that of Hart in but one or two material particulars, to the end that Mr. Gleason should use them for the purpose of investigating the matters of the Oneida Milling Company, etc., and ascertaining whether or not a crime had been committed by any one, and, if so, by whom, and also for the purpose of prosecuting the guilty party or parties in case a crime had been committed, fully justifies the

United States attorney in retaining control thereof until the indictments are disposed of. And I think this court would be remiss in its duty should it direct a return of these papers, thereby placing them beyond the reach, possibly, of the United States, and seriously, it may be, hampering the administration of justice. By their retention no wrong will be done Hart, for the question of their use as evidence will be determined on the trial on the facts disclosed. The question has been timely raised. See Weeks v. United States, supra. Burglar's tools, used by the owner to commit a crime, may be kept from his possession when found on his person or on his premises or elsewhere, and as it is a crime to enter into a conspiracy with others to defraud, etc., and to use the mails to effect the object of the conspiracy, it seems to me that the writings of the defendant, used by them to form the conspiracy and in committing overt acts, and showing its formation or existence and attempted execution, should be treated as tools used in the perpetration or attempted perpetration of crime, and held to be used in evidence, especially when voluntarily surrendered to the authorities by the offenders for the purpose of turning suspicion from themselves, and even under a promise made, in ignorance of the facts, to return same. In any event, I do not think this court should enforce specific performance of such an agreement by summarily directing the United States attorney to surrender such papers.

Motion denied.

In re ANDERSON.

(District Court, W. D. Texas, Austin Division. June 8, 1914.)

ALIENS (§ 68*)—NATURALIZATION—PETITION—FILING—TIME.

Naturalization Act 1906 (Act June 29, 1906, c. 3592, § 4, par. 2, 34 Stat. 596 [U. S. Comp. St. Supp. 1911, p. 529]), provides that not less than two nor more than seven years after an alien has declared his intention he shall file his petition for admission. Paragraph 1, however, contains a proviso that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen, shall be required to renew such declaration, and section 8 declares that the requirement of that section shall not apply to any alien who prior to the passage of the act has declared his intention to become a citizen in conformity with the law in force at the date of the making of his declaration. *Held*, that the words "such declaration of intention," in section 4, par. 2, should be limited to declarations of intention made under the act of 1906, and that, where a declaration of intention was made prior to the adoption of such act, it was available to sustain a petition for naturalization, though not filed until more than seven years after the adoption of the act.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. § 68.*]

Petition by John Anderson for admission to citizenship. Granted.

The petitioner, John Anderson, an alien, filed his declaration of intention on October 15, 1886, and on November 8, 1913, he filed his petition praying the issuance to him of letters of citizenship.

The assistant United States attorney submitted a motion, objecting to the issuance of letters, assigning in opposition the following grounds:

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

"(1) That in the petition and by the declaration of intention filed therewith, it is shown that said declaration of intention was made in the district court of Travis county, Tex., on October 15, 1886, prior to the passage of the present naturalization law.

"(2) That the final petition for naturalization was filed in this court on the 8th day of November, 1913, after the 27th of September, 1906, on which date the present naturalization act of June 29, 1906, became effective.

"(3) That under the terms of said naturalization act, final petitions for naturalization should be filed within not less than two nor more than seven years after filing the declaration.

"(4) That said final petition for naturalization was filed more than seven years after said declaration was made, and more than seven years after the said naturalization act became finally effective.

"Wherefore the United States say that said original declaration of intention has become null and void and not sufficient on which to base a final petition for naturalization. Therefore it prays that said petition be dismissed."

The following portions of sections 4 and 8 of the Act of Naturalization of 1906 are deemed pertinent to the present inquiry and are here inserted:

"Sec. 4. That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise: First. He shall declare on oath before the clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence, and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien: Provided, however, that no alien, who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration. Second. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time of the filing of his petition: Provided, that if he has filed his declaration before the passage of this act he shall not be required to sign the petition in his own handwriting."

"Sec. 8. That no alien shall hereafter be naturalized or admitted as a citizen of the United States who cannot speak the English language: Provided, that this requirement shall not apply to aliens who are physically unable to comply therewith, if they are otherwise qualified to become citizens of the United States: And provided further, that the requirements of this section shall not apply to any alien who has prior to the passage of this act declared his intention to become a citizen of the United States in conformity with the law in force at the date of making such declaration." Act June 29, 1906, c. 3592, 34 Stat. pt. 1, 596, 597, 599 (U. S. Comp. St. Supp. 1911, pp. 529, 533).

C. C. Cresson, Asst. U. S. Atty., of San Antonio, Tex.
M. H. Anthoni, for Bureau of Naturalization.

MAXEY, District Judge (after stating the facts as above). In the present case the applicant, in the year 1886, filed his declaration of intention to become a citizen under the law then in force, and on November 8, 1913, he filed his petition for letters of citizenship, under the present law; the latter statute taking effect September 28, 1906. The question is: Should letters issue on the petition submitted, or should the applicant be required to begin anew by filing another declaration of intention?

The answer to the question involves the construction of portions of the act of Congress set out in the statement of the case. In reference to the construction of statutes, it was said by the Supreme Court in United States v. Landram, 118 U. S. 85, 6 Sup. Ct. 956 (30 L. Ed. 58):

"It is a settled rule of construction that one part of a statute must be so construed by another that the whole may, if possible, stand; ut res magis valeat quam pereat' (1 Bl. Com. 89); or, as otherwise expressed, that every clause in a statute should have effect, and one portion should not be placed in antagonism to another."

And in Rodgers v. United States, 185 U. S. 89, 22 Sup. Ct. 582, 46 L. Ed. 816, the court quoted with approval the following excerpt from Crane v. Reeder, 22 Mich. 322, 334:

"Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous, as the Legislature is not to be presumed to have intended a conflict."

See, also, 26 Am. & Eng. Enc. Law, 618, 619.

In the light of these canons, the question at bar should be considered. The assistant United States attorney relies upon the following provisions of paragraph 2 of section 4 to defeat the application:

"Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which such applicant shall state his full name," etc.

If this provision be held to embrace declarations of intention made under the former law the present petition should be denied, since more than seven years have intervened not only since the date of the declaration but also since the present law became operative. And if that be the correct construction of the statute the declaration of intention made by the applicant under the former law would be thereby rendered useless and ineffective. But it is thought that the statute should not be so construed, since such construction would ignore and eliminate the proviso to the first paragraph of section 4, which is in the following words:

"Provided, however, that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration."

And that it was not the intention of the Congress to invalidate the old declarations may be also inferred from the language employed in

section 8 of the act. After prohibiting the naturalization of aliens who are unable to speak the English language, the second proviso to the section is in words following, to wit:

"And provided further, that the requirements of this section shall not apply to any alien who has prior to the passage of this act declared his intention to become a citizen of the United States in conformity with the law in force at the date of making such declaration."

See, also, proviso to the second paragraph of section 4.

It therefore seems clear that it was the intention of the Congress to permit the old declarations to stand, unaffected by the requirements of the act of 1906, as to the seven years' limitation.

The words, "such declaration of intention," appearing in the second line of the second paragraph of section 4, would then embrace and include only, as the Congress intended, declarations of intention made under existing law. It may be readily admitted that the Congress has power to make a law of this nature retroactive in its operation. But the intention so to do must be clearly manifest from the language of the act. Thus it was said by the court in Union Pacific Railroad v. Laramie Stock Yards, 231 U. S. at page 199, 34 Sup. Ct. at page 102 (58 L. Ed. 179):

"The first rule of construction is that legislation must be considered as addressed to the future, not to the past. The rule is one of obvious justice and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed. The rule has been expressed in varying degrees of strength, but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated, unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the Legislature.'"

In view of the language of the provisos quoted, it assuredly cannot be said that it was the manifest intention of the Congress to nullify and hold for naught declarations of intention made by aliens under former laws.

The court is therefore of the opinion that such declarations—that is, those antedating the passage of the present statute—may be used as a basis of petitions for citizenship under the act of Congress now in force, although more than seven years have elapsed since its passage.

While the question at issue is not free from doubt, it is believed that the construction placed by the court upon the statute will more nearly harmonize its various provisions than that given it in the cases of In re Yunghauss (D. C.) 210 Fed. 545, and In re Goldstein (D. C.) 211 Fed. 163. See, also, In re Wehrli (D. C.) 157 Fed. 938. The foregoing conclusion is in accord with the view of the question entertained by the Bureau of Naturalization and is in harmony with Eichhorst v. Lindsey (D. C.) 209 Fed. 708.

The prayer of the petition should be, and it is hereby, allowed, and letters of citizenship will issue in accordance therewith.

PACIFIC TELEPHONE & TELEGRAPH CO. v. WRIGHT-DICKINSON HOTEL CO. et al.

(District Court, D. Oregon. May 4, 1914.)

No. 6248.

1. TELEGRAPHS AND TELEPHONES (§ 26½, New, vol. 17 Key-No. Series)—POWER TO REGULATE—INTERCHANGE OF BUSINESS.

Sess. Laws Or. 1911, p. 483, authorizes the railroad commission to supervise and regulate "public utilities," defined by section 1 as embracing any plant or equipment for the conveyance of telephone messages. Section 4 provides that "service" is to be taken in its broadest and most inclusive sense and as including equipment and facilities. Section 6 authorizes the commission to supervise and regulate such public utilities and do all things necessary and convenient in the exercise of such power and jurisdiction, and section 8 provides that all public utilities shall afford all reasonable facilities and make all necessary regulations for the interchange of business or traffic when ordered by the commission. Section 43 provides that the commission, if it finds that any regulation, measurement, practice, act, or service is unjust, unreasonable, insufficient, preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of that act, or that any service cannot be obtained or is not afforded, may substitute therefor such other regulations, measurements, etc., and make such orders respecting, and such changes in such regulations, etc., as shall be just and reasonable. *Held*, that the commission is authorized to require physical connection between the lines of different telephone companies so as to facilitate an interchange of business between them.

2. EMINENT DOMAIN (§ 2*)—POWER TO REGULATE—TELEPHONE CONNECTION—INTERCHANGE OF BUSINESS.

Where a telephone company under contract with a hotel company installed in a hotel a limited telephone service, including telephones in the hallways and other semipublic places and a private branch exchange, it was not an exercise of the power of eminent domain or a taking of its property without just compensation, for the railroad commission of the state to require it and another company having a complete system of telephones in such hotel, including telephones in the various rooms, to make a physical connection of their respective systems, so that they might be used interchangeably by the hotel, its guests and patrons; such company to be paid for each call transferred to its system from the system of the other company a sum found by the commission to be reasonable.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 3–12; Dec. Dig. § 2.*]

In Equity. Suit by the Pacific Telephone & Telegraph Company against the Wright-Dickinson Hotel Company and others. On application for an interlocutory injunction. Denied.

The plaintiff, the Pacific Telephone and Telegraph Company, hereinafter to be called the "Pacific Company," owns and operates telephone and telegraph lines in a number of the Pacific Coast states, including California, Oregon, and Washington, and it also owns and operates a telephone system in the city of Portland. It is a common carrier for hire, and transacts its business partly through local exchanges, including Portland, and partly over long distance lines extending through the states designated. Its system of telephones is known as the manual system.

The defendant Home Telephone & Telegraph Company, herein called the "Home Company," is the owner and engaged in the operation of a telephone

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

exchange within the city of Portland. It has no lines of its own extending beyond the city, but in general transacts long distance business over the lines of the Northwestern Long Distance Telephone Company, extending from Corvallis, in Oregon, through Portland, and to Tacoma and Seattle, in Washington. This company has the automatic system of telephones.

The defendant Wright-Dickinson Hotel Company, for several years prior to January 29, 1913, was engaged in conducting and operating what is known as the Oregon Hotel, and at the instance of such company the Pacific Company installed in such hotel its switchboard and telephone instruments, and connected the same by suitable trunk lines with its central station in Portland, and moreover furnished throughout said building a complete system of wiring, connecting the said switchboard with the various rooms and other places in said hotel, convenient for the use of the hotel and the public, and affording adequate telephone service to the hotel and its patrons, both locally and for long distance.

Later S. Benson constructed a hotel adjoining the Oregon, the operation and management of which were also taken over by Wright-Dickinson Hotel Company. The new building was, under contract with the Home Company, provided with wires suitable for operating a complete system of telephones therein, and thereupon the Pacific Company discontinued its use of its wires extending to the rooms in the old building, and sold the same to the Home Company, and the latter company connected the wires in both buildings to form one system of telephones throughout, and has since been furnishing its telephone facilities to the Hotel Company through its own private branch exchange, and by means of its own wires, switchboard, and trunk line.

Notwithstanding this arrangement with the Home Company, however, the Pacific Company, under contract with the Hotel Company, installed in the hotel buildings what is styled a limited telephone service, establishing telephones in the hallways and other semipublic and accessible places, including telephone booths in the lobby of the hotel. This service comprised a private branch exchange, including a switchboard adequately connected by trunk lines with its central station.

About March 20, 1913, the Wright-Dickinson Hotel Company, Charles Wright, and M. C. Dickinson petitioned the Railroad Commission of Oregon to require the Pacific Company and the Home Company to make physical connection of their respective systems with each other, so that they might be used interchangeably by the hotel and its guests and patrons. After due notice and a hearing, the commission granted the prayer of the petition, and thereafter the Home Company made the physical connection by means of a keyboard adjusted between the switchboards of the respective companies.

The commission found, among other things, that "It is entirely feasible from mechanical and technical standpoints to connect the two switchboards of the Pacific and Home Companies in Hotel Oregon at a nominal expense so that telephonic traffic can be interchanged between the Pacific Company's system and the various telephones of the Home Company's system located in such hotel, without impairing the efficiency of service of either the Pacific Company or Home Company, or any part thereof, and without the necessity for additional investment by any of the parties to this proceeding, and without involving a duplication of equipment and facilities, and without in any way interfering with the competition between such companies."

It was further ordered that the expenses of making the connection should be borne by the Hotel Company, and the expense of maintenance equally by the telephone companies. The commission further found that a reasonable compensation to be paid the Pacific Company by the Hotel Company, and a reasonable toll and charge to be made by the Pacific Company for the service to be performed by it through such physical connection, is the sum of 3⅓ cents for each call going out from such hotel and transferred from the switchboard of the Home Company to that of the Pacific Company, in addition to the sums now reserved by the existing contract between the Pacific and Hotel Companies for private branch exchange service.

The Pacific Company resists the order of the Railroad Commission, and seeks by the present suit to have the commission enjoined from enforcing compliance with the same.

Subsequently the complainant filed a supplemental bill, by which it is shown that the Wright-Dickinson Hotel Company has surrendered to S. Benson the new hotel, and has ceased to operate the same, and that the same is now being conducted by the Benson Hotel Company as a separate hotel from the Oregon, which latter is still under the management of the Wright-Dickinson Hotel Company. The wiring in both buildings remains as before, and the switchboards remain the same, excepting that a connection has been made between them by Wright-Dickinson Company and the Home Company under the order of the Railroad Commission. The Benson Hotel Company is operating the private exchange switchboards described in the original bill, in the new building, in like manner as they were operated by the Oregon Hotel prior to the time the hotels were placed under separate management.

In pursuance of the prayer of the supplemental bill and the stipulation of the parties, the Benson Hotel Company is made a party to the suit, but the relief sought is the same as under the original bill, except that the Benson Hotel Company is brought within its scope.

H. D. Pillsbury, of San Francisco, Cal., and Carey & Kerr, of Portland, Or., for plaintiff.

Wood, Montague & Hunt, of Portland, Or. (Clyde B. Aitchison, of Portland, Or., of counsel), for defendants Home Telephone & Telegraph Co. and Railroad Commission of Oregon.

Joseph & Haney, of Portland, Or., for defendants Wright-Dickinson Hotel Co., Charles Wright, and M. C. Dickinson.

E. E. Coovert, of Portland, Or., for defendant Benson Hotel Co.

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

WOLVERTON, District Judge (after stating the facts as above). [1] Two questions of vital concern are presented by the controversy. The first is whether the Oregon Railroad Commission is authorized and empowered to impose regulation upon telephone and telegraph utilities in the way of requiring physical connection between two or more competing lines, and an exchange of service over such lines; and the second, whether such requirement is the exercise of eminent domain and the taking of property without just compensation, or the taking of property without due process of law, contrary to the inhibition of the federal Constitution.

The first question is adequately answered by the provisions of the Public Utilities Act, passed by the Legislative Assembly of the state of Oregon and afterwards ratified by a referendum to the electorate. Sess. Laws 1911, p. 483. This act has for its purpose the regulation of the public utilities of the state, and the conferring of power and jurisdiction upon the Railroad Commission of the State to supervise and regulate such utilities. The first section defines the term "public utility," which definition embraces, among others:

"Any plant or equipment or part of a plant or equipment in this state for the conveyance of telegraph or telephone messages, with or without wires, * * * whether said plant or equipment or part thereof is wholly within any town or city, or not."

By the fourth section the term "service" is taken to be used "in its broadest and most inclusive sense, and includes equipment and facilities." By section 6:

"The Railroad Commission of Oregon is vested with power and jurisdiction to supervise and regulate every public utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction"—a power and jurisdiction very broad and very comprehensive.

The eighth section, which, among other things, relates to common user of facilities, contains this explicit and pertinent provision:

"All public utilities shall afford all reasonable facilities and make all necessary regulations for the interchange of business, or traffic carried or their product between them, when ordered by the Commission so to do."

Sections 41, 42, and 43 provide the mode or manner by which the commission acquires jurisdiction to act in the premises, and by the latter clause of section 43 the commission is specifically empowered, if upon investigation it shall be found that any regulation, measurement, practice, act, or service complained of is unjust, unreasonable, insufficient, preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of the act, or if it be found that any service cannot be obtained or is not afforded, to substitute therefor such other regulations, measurements, practices, service, or acts, and to make such order respecting, and such changes in such regulations, measurements, practices, service, or acts as shall be just and reasonable.

Considering the explicit purpose of the act, and these ample provisions, it would seem that nothing further is needed or requisite for conferring upon the commission adequate power and authority for the regulation of interchange of business between telegraph and telephone companies, which, by the very nature of things, comprises and includes the power to require physical connection between competing utilities for facilitating such interchange of business. In other words, the power to regulate within the purpose and spirit of the act includes the power to require physical connection; otherwise regulation would prove largely ineffectual in practical application.

We are not impressed with the suggestion that this power of regulation must be specifically conferred by constitutional authority.

This disposes of the first question.

[2] As to the second question, we are impressed that it is controlled by the authority of Wisconsin, M. & P. Railroad v. Jacobson, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194, and afterwards reaffirmed in Grand Trunk Ry. v. Michigan Ry. Comm., 231 U. S. 457, 34 Sup. Ct. 152, 58 L. Ed. 310. See, also, Jacobson v. W. M. & P. R. R. Co., 71 Minn. 519, 74 N. W. 893, 40 L. R. A. 389, 70 Am. St. Rep. 358. In the first case it is said that:

"If power were granted by the Legislature, and it amounted in the particular case simply to a fair, reasonable, and appropriate regulation of the business of the corporation, when considered with regard to the interests both of the company and of the public, the legislation would be valid, and would furnish, therefore, ample authority for the courts to enforce it."

These cases, it is true, relate to a physical connection required by a local commission to be made between railroads, but the analogy to a case where a physical connection is required to be made between telegraph and telephone utilities is patent and obvious. The Pacific

Company is required to accept the messages from the hotels and transmit them, for which service the commission awards it a compensation of 3⅓ cents for each call going out from the hotels and transferred from the switchboard of the Home Company to that of the Pacific Company. For any transmission of messages it may make over its long distance lines it receives its own charges, and for local messages its tolls for instruments installed, in addition to the compensation allowed for the call, and the compensation stipulated for under its contract with the Hotel Company for putting in and maintaining trunk lines, switchboards, and booths is not interfered with.

The commission has said that the charge of 3⅓ cents is reasonable for each call going out of the hotels, and with this we are not now concerned.

Now can it be said that the requirement that the Pacific Company shall accept the messages from the hotels and transmit them, it receiving a reasonable consideration for each call, is an exercise of eminent domain and a taking of the plaintiff's property without just compensation?

It is not a new or different use or burden that is required by the service, nor does another or different person, corporation, or entity occupy or utilize the lines or system of the plaintiff company. It is still left in the full and unrestricted occupancy and operation of its own lines or system, except that it is required to observe and comply with a regulation that the commission has deemed proper to impose upon it, namely, that it transmit also the messages coming from the hotels which originate on the wires of the Home Company. This is not a taking of the plaintiff's property in any sense. It is but a reasonable regulation which is properly referable to the police power of the state. See Pioneer Telephone & T. Co. v. Grant County Rural T. Co., 119 Pac. 968; Pioneer Telephone & Telegraph Co. v. State, 38 Okl. 554, 134 Pac. 398.

The opposite view is entertained in an exhaustive and ably considered case from California (Pacific Telephone & Telegraph Co. v. Eshleman, 137 Pac. 1119) but we are unable to give assent thereto.

We come all the more readily to our conclusion in view of the decree recently rendered in the District Court in the case of United States v. American Telephone & Telegraph Co. et al. (no opinion filed), and in which the plaintiff herein was a party defendant, whereby, upon assent of the parties defendant, various telephone and telegraph companies were ordered and directed to make physical connection of their systems and accept interchange of business and communication. Thus the plaintiff has in effect conceded the principle we announce.

It follows furthermore that there has been no taking of property without due process of law; nor has there been a violation of the interstate commerce clause of the Constitution. See Jacobson v. W. M. & P. R. R. Co., supra.

These considerations lead to a denial of an interlocutory injunction, and such will be the order of the court.

In re DE NOMME.

(District Court, D. Rhode Island. May 27, 1914.)

No. 1234.

BANKRUPTCY (§ 407*)—DISCHARGE—OBJECTIONS—TRANSFER TO DEFRAUD CREDITORS—BULK SALES LAW.

Where a bankrupt, within four months prior to the filing of a petition in bankruptcy, transferred a stock of merchandise within the Bulk Sales Act (Pub. Laws R. I. 1909, c. 387), without complying with the provisions of such act, requiring five days' previous notice to every creditor disclosed in a required list, and to avoid making such list he made an affidavit that he had no creditors in connection with his dry goods business, which was false, as well known by him when made, such facts were sufficient to sustain an objection to his discharge on the ground that within four months he had transferred his property with intent to defraud creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729–731, 737, 738, 740–751, 758, 760, 761; Dec. Dig. § 407.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Henry De Nomme. Petition for discharge denied.

Quinn & Kernan, of Providence, R. I., for petitioners.

Alfred S. & Arthur P. Johnson, of Providence, R. I., for objecting creditor.

Mendell W. Crane, of Providence, R. I., for bankrupt.

BROWN, District Judge. The bankrupt's discharge is opposed on the ground that within four months preceding the filing of the petition the bankrupt, on February 17, 1913, transferred a stock of merchandise with intent to hinder, delay, and defraud his creditors. The transfer is proved by a bill of sale. As this was a sale in bulk, the provisions of the Bulk Sales Act of April 14, 1909 (Public Laws of Rhode Island, c. 387), were applicable.

Contemporaneously with the execution of the bill of sale, the bankrupt made affidavit that he had no creditors in connection with his dry goods business. The bankrupt was then insolvent and had a large number of creditors, and the oath was false, as the bankrupt well knew.

The purpose of this oath was manifestly to avoid giving to the transferee a written list of the names and addresses of the creditors of the transferror, and to obviate the requirement of the statute that:

"The transferee shall, at least five days before such transfer, notify personally, or by registered mail, every creditor whose name and address are stated in said list of the proposed transfer."

A similar statute was before the Supreme Court of Massachusetts in J. P. Squire & Co. v. Tellier, 185 Mass. 18, 69 N. E. 312, 102 Am. St. Rep. 322. The opinion by Knowlton, C. J., says that:

"The purpose of the Legislature evidently was to provide for creditors protection against a class of sales which are frequently fraudulent, and which leave creditors with no means of collecting that which they ought to receive.

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

> * * * In substance, it declares that a sale of this kind shall not be made without first giving to creditors an opportunity to collect their debts, so far as the property to be sold might enable them to collect, or subsequently making satisfactory provision for the payment of these debts. * * * If he [the vendor] is unable or unwilling to pay his debts, it puts a substantial obstacle in his way when he wants to dispose of his stock of merchandise in bulk and to receive payment for himself. But, under such circumstances, the property in most cases ought not to be sold in bulk without first giving creditors an opportunity to consider what ought to be done with it."

The Rhode Island statute, therefore, gives to creditors the right to a reasonable notice of sales of this class, and an opportunity to secure their debts by attachment or by a petition in bankruptcy. The failure of the bankrupt to comply with the provisions of this act was fraudulent as to creditors, even though it might be held that the title of the vendee, under the special circumstances, was not assailable.

It is urged for the bankrupt that a mere constructive fraud is not sufficient to prevent a discharge; but the case before me is of actual fraud, and not of constructive fraud. The false oath defrauded the creditors of notice and of the opportunity to protect their rights afforded by the statute.

Without a violation of the statute the bankrupt could not have secured the funds to make preferential payments. While a preferential payment, in the absence of such a statute, is not a fraud, yet, where the creditors are deprived by the false oath of the bankrupt of the notice which will enable them to prevent a preference, they are, in my opinion, actually defrauded by a preferential payment from funds procured by the bankrupt through a sale in violation of the statute.

In view of the new rights given to creditors under the act, he has, in my opinion, not only hindered and delayed his creditors by preventing their exercise of legal rights (see In re Hughes, 25 Am. Bankr. Rep. 556, 183 Fed. 872), but has defrauded them of the amount to which they would have been entitled upon a distribution of the estate without preferential payments.

It was the purpose of the statute to prevent a familiar method of defrauding creditors, which usually included, not only a sale in bulk, but a claim that the proceeds had been applied to pay the notes of relatives or other preferred creditors. We cannot permit a bankrupt to repeal this act by a false oath that he has no creditors.

Furthermore, the bankrupt admits that of the proceeds of the sale he appropriated the sum of $200 for his own use. He contends that the balance was used in the payment of preferred creditors. Upon the evidence, however, I am not satisfied that the entire balance was applied to the payment of bona fide creditors.

The specification of objection is, in my opinion, sustained, and the discharge is denied.

DIBERT v. WERNICKE.

(Circuit Court of Appeals, Sixth Circuit. June 16, 1914.)

No. 2266.

1. PLEDGES (§ 56*)—FORECLOSURE—SALE.

Under Voorhies' Rev. Civ. Code La. art. 3165 (3132), p. 558, providing for the foreclosure of pledges, the pledgee of certain bonds was authorized to sell the same on the New Orleans Stock Exchange without appraisement, advertisement, or notice, and to purchase the bonds itself at a fair price.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 152–183; Dec. Dig. § 56.*]

2. PLEDGES (§ 56*)—PLEDGEE—SALE OF SECURITIES—TRUSTEE TO SELL.

Though a pledgee of securities was authorized to sell them without appraisement, advertisement, or notice, and to purchase itself at a fair price, it nevertheless occupied a fiduciary relation to the pledgor as a trustee to sell, with the duty to exercise its right of sale for the benefit of both the pledgor and itself.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 152–183; Dec. Dig. § 56.*]

3. PLEDGES (§ 56*)—FORECLOSUE—SALE.

In selling certain bonds on foreclosure of a pledge, the pledgee was required to conduct the sale fairly, in good faith, and with due regard to the rights of the pledgor, exercising reasonable diligence to secure a just price and conserve the interests of the pledgor in so far as consistent with its own protection, especially when at the same time it exercised its right of purchasing at its own sale.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 152–183; Dec. Dig. § 56.*]

4. PLEDGES (§ 56*)—FORECLOSURE—INVALID SALE—EFFECT—ACTION TO RECOVER DEBT—EQUITABLE SET-OFF.

Where a pledgee of bonds to secure a note sold the bonds as pledgee, with the intention of exercising the privilege of purchasing at its own sale and for the avowed purpose of acquiring ownership, and carried out such purpose through the co-operation of its selling and purchasing brokers, and with such a lack of publicity and failure to give information as to enable it to acquire the bonds under color of such sale at 2 per cent. of their face value and about 4 per cent. of the amount of its debt, though willing, if necessary, to bid the full amount of the debt in order to acquire them, it was liable to account for the full value of the bonds at the time of the sale by way of equitable set-off in a suit subsequently brought to recover the balance of the debt for which the bonds were pledged, which set-off was available to a surety on the note as against a purchaser thereof with notice after maturity.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 152–183; Dec. Dig. § 56.*]

5. PLEDGES (§ 31*)—PRINCIPAL AND SURETY (§ 114*)—FORECLOSURE—WRONGFUL SALE—CONVERSION—LIABILITY OF SURETY.

Where a pledgee of bonds transferred to secure a note wrongfully sold the same to foreclose the pledge for a small per cent. of their value, purchasing them at its own sale, and thereafter transferred the note and the bonds to a syndicate, using the bonds to purchase the property by which they were secured on foreclosure of the mortgage, there was a conversion of the bonds, and no action could be maintained by the purchaser of the note secured by the bonds against a surety thereon; it appearing that

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

the real value of the bonds exceeded the debt for which they were pledged.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 86–88; Dec. Dig. § 31;* Principal and Surety, Cent. Dig. § 63; Dec. Dig. § 114.*]

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio; John E. Sater, Judge.

Suit by O. H. L. Wernicke against John Dibert. Decree for complainant, and defendant appeals. Affirmed.

Edward Colston, of Cincinnati, Ohio, for appellant.

Murray Seasongood and R. L. Black, both of Cincinnati, Ohio, for appellee.

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

SANFORD, District Judge. This is an appeal by Dibert, a citizen of Louisiana, the defendant below, from a decree in equity perpetually enjoining him from prosecuting an action which he had brought on the law side of the court against Wernicke, a citizen of Ohio, the complainant below, upon a promissory note.

The material facts are these: In 1902 and 1903 the Interstate Trust & Banking Co., of New Orleans, hereinafter called the Trust Co., loaned the Hardwood Export Co., of St. Louis, hereinafter called the Hardwood Co., $50,000 upon its various notes, with the pledge, as collateral, of $100,000, par value, of the Hardwood Co.'s bonds. Those bonds were part of an issue of $147,000, secured by deed of trust on about thirty thousand acres of lands, timber interests and leasehold estates in Alabama, on which there were three mills, one of which was then in operation. The Trust Co. then believed that these bonds were reasonably worth fifty cents on the dollar.

This loan was several times renewed. In October, 1903, the renewal not being paid, the Trust Co. gave notice that it would take legal action. Thereupon the complainant Wernicke, who was president of the Wernicke Timber Land Co., a corporation which had in the meantime agreed, conditionally, to purchase a majority of the capital stock of the Hardwood Co. and to liquidate two-thirds of its indebtedness, and who was interested in maintaining its credit pending this contemplated purchase, went to New Orleans with one Smith, the president of the Hardwood Co., who was also the president of the F. H. Smith Lumber Co., hereinafter called the Smith Co., and urged the Trust Co. to again renew the Hardwood Co.'s loan, representing its property to be valuable.

As a result of these conferences the Trust Co. finally, on October 16th, surrendered the $50,000 Hardwood Co. notes which it then held and accepted in lieu thereof its four new notes for the same aggregate amount. Three of these new notes were for $5,000 each. They matured at intervals on and prior to December 15th, and were endorsed by the Smith Co. The other, being the note now in question, was for $35,000. It matured on December 15th, was payable at the

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

banking house of the Trust Co., and was signed on the back by both the Smith Co. and Wernicke as anomalous endorsers. The $100,000 Hardwood Co. bonds previously pledged were retained by the Trust Co. as collateral security for all of these new notes. This $35,000 note recited the pledging of the bonds as security for all of the notes, and provided that on default in payment of any of them at maturity, the Trust Co. might call for additional security or collateral. It also contained the following provision: "The undersigned hereby gives said trust company * * * full and irrevocable power * * * upon failure to promptly pay at maturity said note or other liabilities * * * to sell such * * * collateral without further notice, demand for payment, or putting in default, and without the intervention of any court of justice and without appraisement or advertisement or other notice, at public or private sale or sales or at any broker's board or stock exchange. If said sale or sales shall be public or at any broker's board or stock exchange * * * said trust company * * * may purchase said property * * * at such sale or sales, without any right of redemption on the part of the undersigned."

The $5,000 note which first matured was paid shortly after it fell due; and the Trust Co., with Wernicke's consent, thereupon released $10,000 of the collateral bonds. Neither of the other notes were paid at maturity; and all were protested. Both the Hardwood Co. and the Smith Co. executed deeds of assignment shortly before the maturity of the last note; and each proved to be insolvent. The Trust Co. did not, however, at any time make a demand for additional collateral under the terms of the pledge.

On December 31st, the Trust Co. telegraphed Wernicke: "Hardwood note protested. Must take immediate action. Advise at once by wire." To this Wernicke replied, by telegram: "Exhaust your resources on the makers and collateral before looking to me as endorser. Am unable to pay without shifting claim, which is made impossible by recent action of principals." On January 4, 1904, the Trust Co. telegraphed Wernicke: "We look to you for payment Hardwood bearing your endorsement. Must take immediate action." To this Wernicke replied, by letter: "I am not able at present to take it up, and if you feel that you must commence action to protect yourself, you must proceed against the makers, as well as endorsers, and also exhaust your collateral;" adding that he was satisfied that the Trust Co. would recover the amount due more speedily, and at less expense, by proceeding leniently than by "adopting more stringent methods"; that he understood the Hardwood Co. and the Smith Co. were solvent, but needed time to realize upon their assets, so as to pay everybody in full; and that he himself could do more if allowed a free hand than if the Trust Co. were immediately to begin suit.

On January 7th, Wernicke wrote the Trust Co. that it might be necessary to ask for a receiver of the Hardwood Co. to protect its property for the bondholders; that on account of his interest as indorser he would like to be informed as to the Trust Co.'s views and intentions; and that it seemed to him the bondholders and parties interested in the bonds as collateral should get together and decide

upon some course of action, if this had not been already done. No reply was sent by the Trust Co. to this letter.

On January 16th, the Trust Co. wrote Wernicke that it was holding the bonds as collateral and not as an investment, and at the price it held them, in addition to the endorsers, it seemed that it should have no loss, but that its directors wished the matter closed as soon as possible and had decided to take action against the endorsers; and suggested that it would be better if he should take up the notes, with the collateral, so that he could protect himself against the endorsement in case the concern did not work out as expected, and that by taking such course he would be "absolutely protected." In reply Wernicke wrote, on January 19th, that he expected to visit St. Louis shortly and would look into the situation, and might also visit New Orleans with a view of arranging a plan to protect his contingent interest as endorser in the bonds; that he thought he could interest some acquaintances to assist him in acquiring control of a majority of the bonds; and that if the Trust Co. should commence suit at once it might prevent him from carrying out the plan he had in mind. This letter should have reached New Orleans, in due course of mail, on the night of the 20th.

In the meantime, however, the Trust Co. had sent its attorney to St. Louis in an effort to collect the notes or to sell the notes and collateral bonds. And this effort having been unsuccessful, it had, as testified by its president, at some time prior to January 20th, not precisely shown, turned over the Hardwood Co.'s notes and bonds to its attorney "to take ownership of the pledge which had been held as collateral," that is, "to become owner of the bonds which it had heretofore held as collateral, in the proper legal manner," or, "in other words to foreclose the pledge." His purpose in foreclosing the pledge was, as testified by him, "so as to have ownership" of the collateral; and in turning over the notes and bonds to the attorney he told him that what he wanted done was to "take possession and ownership of the collateral," what "he wanted to accomplish" was to "secure the ownership of that collateral."

In pursuance of these instructions the Trust Co.'s attorney employed a broker to sell the bonds for the Trust Co. on the New Orleans Stock Exchange. He gave this broker no information as to the character or value of the bonds, other than what appeared on their face; and instructed him to employ another broker to buy in the bonds for the Trust Co. at the sale, commencing with a bid of $1,800, and, if necessary, bidding the full amount of the debt. And although the rules of the Exchange required that the selling broker should charge for selling one-fourth of one per cent. of the par value of the bonds, irrespective of the price brought, which would have been $225, he agreed in advance with this selling broker that his compensation should be only $50, out of which he should also pay the compensation of the broker whom he should employ to do the buying.

In accordance with the instructions thus given by the attorney, the selling broker instructed the broker whom he employed to do the buying, that he was to make the first bid for the bonds at $1,800, that

is, at the rate of two cents on the dollar, and that if any one raised his bid, he should go higher and remain the highest bidder up to the full amount of the debt due the Trust Co.

In carrying out these instructions the bonds were sold on the New Orleans Stock Exchange, at the afternoon session, on January 20, 1914. No notice of this sale had been given to either the Hardwood Co., the Smith Co. or Wernicke. Nor had the sale of the bonds been previously advertised in any newspaper or posted on the Exchange; neither such advertisement nor posting being, however, customary in the sale of securities on the Exchange. At the time of the sale the usual number of brokers, about forty or fifty, were present, with perhaps some "visiting members," that is, business men who had the privilege of visiting the Exchange. In making the sale the selling broker merely announced that he had $90,000 of Hardwood Export Co.'s bonds for sale, which he exhibited and offered for sale, and on which he asked for bids; but, although these bonds were not listed on the Exchange, he gave no information as to the character of the bonds, or the purposes of the sale, except that, in answer to an inquiry from a bystander, he stated that the sale was being made to secure a pledge, and showed one of the bonds, without comment, to some of the bystanders, who wanted to look at them to see what they looked like. He did not, however, state the amount for which the bonds were pledged, nor mention the Trust Co. as pledgee, nor offer the bonds for sale in any lots less than the full amount. Except, however, in the matter of the broker's commission, above mentioned, this manner of conducting the sale was, it appears, in accordance with the rules and regulations of the Exchange.

When the bonds were thus offered for sale, the broker employed to buy for the Trust Co., made, in accordance with the previous arrangement, a bid of $1,800, or two cents on the dollar of their par value; and no higher bid having been made, the selling broker, in like accordance with such arrangement, sold the bonds for the Trust Co., at this price, to the broker buying them for the Trust Co. Thereupon, the next day, January 21st, the Trust Co., through a circuitous series of check transactions, with the two brokers as a conduit, paid, as purchaser of the bonds, $1,800, which was repaid to it as holder of the notes. This sum was credited by it ratably on the three notes, that is, $1,400 on the $35,000 note and $200 on each of the $5,000 notes, the broker's fee being apparently overlooked as an expense item; and the $90,000 bonds were re-delivered to it as purchaser.

After such purchase by the Trust Co. there was some further correspondence, in which the fact that the Trust Co. had purchased these bonds was not specifically stated or made clear to Wernicke. Finally, in answer to a telegram from the Trust Co. stating that it was "taking legal action against all parties interested" and advised his coming there, he went to New Orleans on February 9th and there had various conversations with the president of the Trust Co. and one of its directors, in which he was advised of the Trust Co.'s purchase of the bonds; the validity of which he disputed. In these conversations it was stated that the Trust Co. did not wish to speculate or make a profit

out of the bonds, certain of its officers being opposed to that course, and simply desired the return of the money loaned with interest, and that it was willing that Wernicke should either take up the entire loan of $45,000 and all the bonds, or the $35,000 note and $70,000 of the bonds; but Wernicke made no agreement or tender to this effect, being then not in a financial position so to do. It was further stated in one of these conversations by the director of the Trust Co. that a large profit could be made out of the property; and he proposed that if Wernicke would raise $25,000 others should raise a like amount, the sum of $50,000 being estimated as the sum necessary to take up the bonds and pay the cost of foreclosing the mortgage. Wernicke made an effort to secure this $25,000 by interesting another person, but failed.

Subsequently a syndicate was formed, consisting of the president of the Trust Co.; Dibert, a lumber manufacturer and stockholder in the Trust Co.; another stockholder in the Trust Co.; and a firm of which the above-mentioned director of the Trust Co. was a member. This syndicate purchased from the Trust Co. the three Hardwood Co. notes, which it then held and the $90,000 bonds which it had purchased at the stock exchange sale, paying the Trust Co. therefor the full amount of its debt against the Hardwood Co., with interest, and all expenses, that is, something over $57,000; and the three notes and the bonds were thereupon transferred by the Trust Co. to Dibert as holder for the syndicate. It further appears from the testimony of the above-mentioned director that the bonds were not transferred to the syndicate as an incident to a transfer of the notes, but were sold separately, as "separate obligations" held by the Trust Co., the proportionate amount paid for each not, however, appearing.

In March, 1904, Dibert, as assignee of the $35,000 note of the Hardwood Co., brought an action at law in the court below against Wernicke, as signer on the back thereof, alleging that said note was entitled to no other credit than the $1,400 endorsed thereon as of January 21, 1904 (being the pro rata credit from the sale of the bonds on the exchange), and seeking judgment for the balance due, with interest.

On April 1, 1904, the Hardwood Co. made default in the payment of interest on its bonds, and this default having continued for more than ninety days, Dibert, as the holder of more than one-third of the outstanding bonds, in the exercise of an option contained in the deed of trust securing the bonds, declared the whole of the bonded indebtedness to be due and payable, and requested the trustee to enforce the deed of trust. Thereupon, on July 26, 1904, the trustee filed its bill in a chancery court in Alabama for the purpose of foreclosing the deed of trust, both the Hardwood Co. and Dibert being made defendants to this suit, with other bondholders.

On the next day, July 27th, Wernicke filed on the equity side of the court below a bill to enjoin Dibert's action at law against him on the $35,000 note.

On November 19th a decree was entered in the foreclosure suit in Alabama adjudging Dibert to be the owner of $90,000 of the bonds secured by the deed of trust, and providing that if within thirty days

the Hardwood Co. should not pay these bonds with interest and file a stipulation to pay off the remainder of the bonds, the entire mortgaged property should be sold.

On December 5th Dibert entered into an agreement with the representative of the holder of $37,000 of the Hardwood Co. bonds (the two together representing $127,000 bonds out of the total issue of $147,000), in which it was agreed that Dibert, as trustee, owned $90,000 of the bonds, and that he should bid at the foreclosure sale such sum, not exceeding $75,000, as might be necessary to buy in the property for the joint benefit of himself, as trustee, and such other holder, in the proportion of 90/127ths and 37/127ths, respectively; with the right, however, in Dibert to bid more than $75,000 for his own account as trustee alone. In accordance with this agreement Dibert bid at the foreclosure sale $25,000; and this being the only bid made, the mortgaged property was sold to him at that price; the syndicate thereby acquiring a 90/127ths in the mortgaged property. He also filed the $90,000 of bonds in the cause, made proof of his ownership thereof, and surrendered them for cancellation; and was allowed the sum of $13,919.36, the distributive share of such $90,000 bonds, as a credit upon the $25,000 bid by him for the mortgaged property.

The purchasers of this mortgaged property, including the Dibert syndicate, thereafter made unsuccessful efforts to sell it for $100,000, at which price they seem to have held it, the above-mentioned director of the Trust Co. writing in June, 1905, that they would not be willing to sell for $80,000 and then had the price of $100,000 in view. They finally transferred all of the mortgaged property thus purchased to a new company capitalized at $250,000, which took over this and other timber property, receiving in consideration for the Hardwood Co. property $100,000 of the paid-up capital stock of the new company.

There is furthermore affirmative evidence in the record as to the value of the Hardwood Co. properties covered by the deed of trust securing its issue of bonds, consisting in part of the testimony of experienced timber estimators; and in the light of this evidence, which need not be set forth in detail, and all the circumstances in the case, we are entirely satisfied that the fair value of these properties was such that at the time the Trust Co. sold the $90,000 collateral bonds on the Exchange, these bonds were reasonably worth a sum considerably in excess of the debt of $45,000 and interest, for which the Trust Co. then held them as collateral security. We cannot, on this question, regard as conclusive the fact that at the subsequent foreclosure sale these bonds realized only $13,919.36, and think it entirely clear that, under the circumstances under which this sale was made and in view of the previous agreement between the holders of more than six-sevenths of the bonds in reference to bidding in the property for their joint benefit, the fact that they succeeded as the sole bidders in acquiring the property at $25,000, being only one-third of the sum that they were both ready and willing to pay, is of little, if any, evidential weight in determining the real value of the property.

Furthermore, even on the basis on which they were both ready to then bid, the $90,000 of bonds would have been worth about $43,000;

and it is a fair inference that Dibert, who had in the meantime caused a careful examination of the property to be made, contemplated bidding more than this sum for the benefit of the syndicate if the property could not be acquired for a smaller sum.

On May 3, 1906, Dibert filed his answer to Wernicke's bill in the court below, in which he alleged the validity of the sale and purchase of the $90,000 bonds on the New Orleans Stock Exchange and the assignment and delivery of the note and bonds to himself as the owner thereof, and prayed that the bill of complaint be dismissed. Thereafter, the bill being heard on pleadings and proof, the court below entered a decree perpetually enjoining Dibert from the further prosecution of his action at law or any action whatever on said $35,000 note, or from assigning, selling or negotiating the same; from which decree Dibert has appealed to this court.

[1] Under the law of Louisiana, by which the validity of the pledge of the Hardwood Co. bonds is to be governed (Hiscock v. Varick Bank, 206 U. S. 28, 38, 27 Sup. Ct. 681, 51 L. Ed. 945), the provisions authorizing the Trust Co. to sell the bonds without appraisement, advertisement or notice, and to purchase them itself if sold at a stock exchange, were, it is conceded, valid. (Voorhies' Rev. Civ. Code of La. art. 3165 [3132], p. 558; Barry v. American Works, 107 La. 236, 31 South. 733; Denis' Contract of Pledge, sec. 307). And when so authorized by the terms of the pledge, the pledgee may purchase the collateral himself, at a fair price. Barry Bros. v. American Works (La.) supra, at page 240.

[2, 3] However, a mere literal compliance by the Trust Co. with the terms of the pledge, was not sufficient to render valid its sale and purchase of the bonds. As pledgee the Trust Co. occupied a fiduciary relation to the Hardwood Co., the pledgor, as a "trustee to sell," with the duty of exercising its right of sale as the trustee or agent of the pledgor and for the pledgor's benefit as well as its own. Easton v. German-American Bank, 127 U. S. 532, 537, 8 Sup. Ct. 1297, 32 L. Ed. 210; Richardson v. Mann, 30 La. Ann. 1061, 1064. In selling the bonds as pledgee it was required to conduct the sale fairly, in good faith, with due regard to the Hardwood Co., the pledgor, and to exercise reasonable care and diligence in order to secure a just price and conserve the interests of the pledgor, in so far as consistent with its own protection, especially when it at the same time exercised its right of purchasing at the sale; and it could not lawfully conduct the sale, although in technical compliance with the terms of the pledge, in such manner as to enable it to purchase the bonds itself at a wholly inadequate price and at the wanton sacrifice of the interests of the Hardwood Co. Hagan v. Bank, 182 Mo. 319, 331, 81 S. W. 171; Perkins v. Applegate, 85 S. W. 723, 27 Ky. Law Rep. 522, 525; Guinzburg v. Downs Co., 165 Mass. 467, 470, 43 N. E. 195, 52 Am. St. Rep. 525; Jennings v. Moore, 189 Mass. 197, 206, 75 N. E. 214; In re Mertens (2nd Cir.) 144 Fed. 818, 822, 75 C. C. A. 548; Hiscock v. Varick Bank, 206 U. S. 28, 38, 27 Sup. Ct. 681, 51 L. Ed. 945; 31 Cyc. 877; 22 Am. & Eng. Enc. Law (2d Ed.) 885. And see Laclede Bank v. Richardson, 156 Mo. 270, 56 S. W. 1117, 79 Am. St. Rep. 528; Dykers v.

Allen, 7 Hill (N. Y.) 497, 499, 42 Am. Dec. 87; Glidden v. Mechanics' Bank, 53 Ohio St. 588, 599, 42 N. E. 995, 43 L. R. A. 737; and, as to analogous sales by mortgagees, Montague v. Dawes, 14 Allen (Mass.) 369, 373; Foote v. Utah Bank, 17 Utah, 283, 294, 54 Pac. 104; Clark v. Simmons, 150 Mass. 357, 359, 23 N. E. 108; New England Co. v. Wing, 191 Mass. 192, 195, 77 N. E. 376; Bon v. Graves, 216 Mass. 440, 103 N. E. 1023, 1026; Phares v. Barbour, 49 Ill. 370, 373; and Nichols v. Burch, 128 Ind. 324, 327, 27 N. E. 737. In other words, it was the duty of the Trust Co., in selling the bonds as pledgee, to conduct the sale in a fair and diligent manner, tending to secure a reasonable price for the bonds for the benefit of all concerned, and not in such manner as to enable it, under color of a sale, to purchase the bonds at a sacrifice; it was a "trustee to sell," not to buy, though with the privilege of buying, if fairly sold. In Montague v. Dawes (Mass.) supra, at page 373, quoted with approval in Foote v. Utah Bank, supra, 17 Utah, at page 295, 54 Pac. at page 106, the court said:

"One who undertakes to execute a power of sale is bound to the observance of good faith, and a suitable regard for the interests of his principal. He cannot shelter himself under a bare literal compliance with the conditions imposed by the terms of the power. He must use a reasonable degree of effort and diligence to secure and protect the interests of the party who intrusts him with the power. * * * When a party who is intrusted with a power to sell attempts also to become the purchaser, he will be held to the strictest good faith and the utmost diligence for the protection of the rights of his principal. If he fail in either, he ought not to be permitted thereby to acquire any irrevocable rights which he can set up against the party whose interests he has sacrificed."

[4] The Trust Co., however, sold the bonds as pledgee with the intention of exercising the privilege of purchasing at its own sale and for the avowed purpose of acquiring ownership. In carrying out this purpose it conducted the sale and purchase in such manner, through the co-operation of its selling and purchasing brokers, and with such lack of publicity and failure to give information in reference to the bonds, as to enable it to acquire them, under color of this sale, at two per cent. of their face value and about four per cent. of the amount of its debt, although willing, if necessary, to bid the full amount of its debt in order to acquire them. And while none of the circumstances surrounding this sale might be sufficient, if taken separately, to render it invalid, we are constrained to hold, under all the circumstances, and in the light of the foregoing authorities, some of which are closely analogous on their facts to the instant case, that this sale was not fairly conducted; that due care and diligence was not exercised by the Trust Co. in securing a fair price for the bonds and in protecting the interests of the Hardwood Co., but that on the contrary, it was intentionally conducted in such manner as to carry out the Trust Co.'s dominant purpose of securing the bonds at the lowest possible price, without regard to the interests of the pledgor; and that, while the sale was technically conducted in the exercise of the power vested under the contract of pledge, nevertheless, by reason of the unfair manner by which this power was exercised and the sale conducted, resulting in the purchase of the bonds by the Trust Co. itself at a grossly inade-

quate price and in wanton sacrifice of their real value, the sale was in derogation of the rights of the Hardwood Co. and invalid, and the purchase of the bonds by the Trust Co. colorable merely. And the fact that such sale in respect to the withholding of information as to the pledged property appears to have been conducted in accordance with the custom of the New Orleans Stock Exchange, is not sufficient to render the sale valid; such custom, when applied to a sale made by a pledgee, being in conflict with the rule of law as to the measure of care and diligence imposed upon a trustee in selling pledged property, especially when he himself becomes the purchaser. See Thompson v. Riggs, 5 Wall. 663, 680, 18 L. Ed. 704; National Bank v. Burkhardt, 100 U. S. 686, 692, 25 L. Ed. 766; Dykers v. Allen, 7 Hill (N. Y.) supra, at page 499, 42 Am. Dec. 87; and 22 Am. & Eng. Enc. Law (2d Ed.) 886, note 1.

The Trust Co., having thus sold the bonds in violation of its obligations as pledgee and at a grossly inadequate price, became liable, in the event it subsequently brought suit against the Hardwood Co. on the note, to account to the Hardwood Co. for the full value of the bonds at the time of the sale, by way of equitable set-off. Phares v. Barbour (Ill.) supra. This liability likewise attaches to Dibert, who purchased the note, after maturity, and with full notice of the equities against it. And the right to such equitable set-off exists in favor of Wernicke as surety. Phares v. Barbour (Ill.) supra, at page 375; Nicholas v. Burch, 128 Ind. 324, 327, 328, 27 N. E. 737 (mortgage). Whether Wernicke, by reason of the form of his endorsement, became a joint maker of the note or an endorser in the strict commercial sense, is clearly immaterial, since he was, both in fact and in law, a surety, having, as the Trust Co. knew, endorsed the note upon the strength of the pledged securities; and the precise form of his endorsement cannot, it is manifest, affect his actual relationship as surety and his right of subrogation incident thereto. Union Bank v. Grant, 48 La. Ann. 18, 21, 18 South. 705; Skud v. Tillinghast (6th Cir.) 195 Fed. 1, 115 C. C. A. 83; Harnsberger v. Yancey, 33 Grat. (Va.) 527. And it appearing from the proof that at the time of such sale the value of the bonds exceeded the amount due upon the note, it results that Wernicke was entitled to an equitable set-off against the note, entirely discharging his liability thereon, and was hence, all other considerations aside, entitled to maintain his bill in the court below, perpetually enjoining the further prosecution of the suit at law upon the note.

[5] The same result likewise follows, in our opinion, upon another ground. So long as the Trust Co., after its invalid sale and purchase of the bonds, retained both the note and bonds in its own possession, and was in a position to have surrendered the bonds to the Hardwood Co. or its sureties, upon tender of payment of the note, although claiming to hold the bonds as purchaser, there was, under the authorities, no wrongful appropriation of the bonds which could have been treated by the Hardwood Co. as a conversion. Glidden v. Mechanics' Bank, supra, 53 Ohio St. 600, 42 N. E. 995; Bank v. Wood, 125 Tenn. 6, 14, 140 S. W. 31. And see Rush v. First Nat. Bank (8th Cir.) 71 Fed. 102, 104, 17 C. C. A. 627; and First Nat. Bank v. Rush (8th Cir.) 85

Fed. 539, 544, 29 C. C. A. 333. However, where the pledgee by an unauthorized disposition of pledged securities places them beyond his reach and puts it out of his power to restore them, this amounts to a conversion; and in such case the pledgor may maintain an action against him for such conversion without an antecedent tender or demand for their return. Rush v. First Nat. Bank (8th Cir.) supra, at page 105; Glidden v. Mechanics' Bank (Ohio) supra, at page 602. Or, if sued by the pledgee upon the debt, he may, without such antecedent tender, set off or recoup the full value of the securities thus converted, the debt, being to such extent discharged. Skud v. Tillinghast (6th Cir.) supra, at pages 4, 8; Rush v. First Nat. Bank (8th Cir.) supra, at page 105. And see Phares v. Barbour (Ill.) supra. And this defense is likewise available to an accommodation maker, endorser or surety, when sued upon the debt. Skud v. Tillinghast (6th Cir.) supra; Sitgreaves v. Bank, 49 Pa. 359, 364.

In the present case the Trust Co., after buying the bonds under the invalid sale upon the Stock Exchange, thereafter claimed to own the bonds absolutely, as purchaser, and to hold them no longer as pledgee. It subsequently sold the bonds, as such absolute owner, to the syndicate, thereby placing it beyond its own power to return the bonds upon tender of the debt. And while it also sold the syndicate the note, it did not transfer the bonds as collateral security, incidental to the transfer of the note, but sold and transferred them separate and distinct from the note, and under its claim of absolute ownership. The syndicate thereafter, through Dibert, likewise asserted complete ownership and exercised actual dominion over the bonds in a manner inconsistent with any holding of them merely as collateral security incident to its purchase of the note. Dibert first brought suit against Wernicke on the note, in which he claimed there was no other credit on the note than the $1,400 credit of January 21, 1904, which had been realized from the sale of the bonds on the stock exchange, thereby necessarily asserting the validity of the sale. He subsequently filed the bonds, with claim of ownership, in the foreclosure suit, and was adjudged to be the owner thereof. He received the pro rata share of the bonds from the proceeds of the foreclosure sale and surrendered the bonds for cancellation. He not only did not credit such proceeds on the note, but, on the contrary, subsequently filed his answer in the court below in which he explicitly asserted the validity of the sale upon the stock exchange and impliedly, at least, insisted that the note was entitled to no other credit than the $1,400 received for the bonds at such sale.

After careful consideration we are of opinion that the sale of the bonds by the Trust Co. to the syndicate, separate and apart from the note, under a claim of actual ownership and in the exercise of complete dominion over the disposition of the bonds, constituted a wrongful appropriation and conversion of the bonds, inconsistent with the pledge (McPheters v. Page, 83 Me. 234, 235, 22 Atl. 101, 23 Am. St. Rep. 772), and that such conversion by the Trust Co. in the sale of the bonds to the syndicate, supplemented and emphasized by the subsequent conduct of Dibert, as the representative of the syndicate, in

his assertion of complete and absolute dominion over the bonds under the claim of ownership, entitled Wernicke, as surety on the note, under the authorities above cited, to set off, by reason of such conversion, the full value of the bonds against the amount otherwise due upon the note; and that hence, such value being in excess of the amount due upon the note, he was, for this reason, without antecedent tender of the balance due upon the note, entitled to maintain his bill to enjoin the further prosecution of the suit upon the note.

We cannot regard the case of Easton v. German-American Bank (U. S.) supra, upon which Dibert places his chief reliance, as applicable to the facts in this case. There a creditor, who held as collateral security for the payment of his debt, certain bonds secured by a deed of trust, because one of the purchasers of the property at a foreclosure sale made by the trustee, under the deed of trust, the fairness of which was not questioned, and promptly credited the debt with the full amount of the proceeds of the bonds realized at such foreclosure sale. The holding that under such circumstances his purchase of the property at the foreclosure sale made by the trustee, was valid and did not enure to the benefit of the debtor, is clearly distinguishable from the instant case, in which Dibert did not receive the proceeds of the bonds at the foreclosure sale as the proceeds of property held as collateral security and credit such proceeds on the note, but, on the contrary, claimed such proceeds as his own property, as the absolute owner of the bonds, and thereafter, in his answer to the bill in the court below, in effect, asserted the right to collect from Wernicke the full balance claimed upon the note without any credit whatsoever by reason of the sum which he had received as the proceeds of the bonds at the foreclosure sale.

For analogous reasons we are of opinion that the conduct of the Trust Co. and of the syndicate in the matter of the sale of the bonds upon the Stock Exchange, the sale to the syndicate and the subsequent dealings of the syndicate in reference thereto, constituted such an incumbrance upon Wernicke's right of immediate subrogation, as to discharge him as surety upon the note, under Art. 3061 of the Louisiana Code, providing that: "The surety is discharged when the act of the creditor, the subrogation to his rights, mortgages and privileges can no longer be operated in favor of the surety." Voorhies' Rev. Civ. Code of La. (Saunders' Ed. 1889) p. 543. And see New England Co. v. Randall, 42 La. Ann. 261, 7 South. 679.

We are likewise of opinion that Dibert is not now entitled to collect the remainder of the note, after crediting thereon the $13,919.36 received as the proceeds of the bonds in the foreclosure sale. This cannot, we think, be allowed upon the theory upon which he now insists, that, even if the Stock Exchange sale was invalid, the syndicate is to be regarded as being, after its purchase, the owner of the note, holding the bonds as collateral security therefor, and that he is therefore to be treated as having lawfully collected as pledgee the proceeds of the bonds arising from the foreclosure sale, under the doctrine of Easton v. German-American Bank (U. S.) supra. Dibert did not, however, in fact, after his purchase of the bonds, hold them as collateral to the

note, but held them under a distinct claim of absolute ownership; and he did not in fact collect the proceeds as pledgee and apply the same as a credit on the note; but, on the contrary, he collected the proceeds under his claim of ownership, without giving any credit upon the note, and, in effect, asserted in his answer in the court below the right to collect the full amount claimed on the note, without any credit of the character. It is now too late to insist in this court, on appeal from an adverse decree, upon an entirely different and inconsistent theory, and to obtain here a benefit in the recognition and enforcement of a pledge, which he in fact distinctly repudiated, and upon a theory which is directly inconsistent both with his conduct and the theory of his pleadings in the court below, and supported by no appropriate pleadings whatever.

We find no error in the decree below. The same will accordingly be in all things affirmed, and the appeal dismissed, with costs.

MITCHELL et al. v. HITCHMAN COAL & COKE CO.

(Circuit Court of Appeals, Fourth Circuit. May 28, 1914.)

No. 1220.

1. TRADE UNIONS (§ 1*) — LABOR ORGANIZATIONS — LEGALITY — COMMON-LAW RULE.

The ancient English rule that labor unions were unlawful does not prevail in the United States in view of the changed conditions existing; the rule being now settled that labor may organize for its own protection and to further the interests of the laboring classes, and may strike and persuade and induce others to join them by peaceable means, being only subject to legal restraint by injunction when they resort to unlawful means to cause injury to others to whom they have no relation, contractual or otherwise.

[Ed. Note.—For other cases, see Trade Unions, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. ALIENS (§ 4*)—CONSTITUTIONAL LAW (§ 210*)—DISABILITIES—EQUAL PROTECTION OF THE LAWS.

So long as the United States permits aliens to immigrate, a large majority of whom are uneducated laborers, it is the duty of the government to afford them equal protection under our Constitution and the laws pursuant thereto, including the right to combine to improve their condition.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 4; Dec. Dig. § 4;* Constitutional Law, Cent. Dig. §§ 679, 680; Dec. Dig. § 210.*]

3. TRADE UNIONS (§ 1*)—UNITED MINE WORKERS—LEGALITY OF ORGANIZATION.

Code W. Va. 1906, § 413 (Code 1913, c. 15H, § 28 [sec. 487]), provides that no persons or combination of persons, by force, threats, menaces, or intimidation of any kind, shall prevent or attempt to prevent from working in or about any mine any person or persons who have the lawful right to work about the same and who desire to so work, but this provision shall not be so construed as to prevent persons from associating for any lawful purpose or for using moral suasion or lawful argument to induce any one not to work in or about any mine, and section 2859 (Code 1913, c. 62E, § 1 [sec. 3578]) regulates the use of union labels and prohibits the use thereof on merchandise not the product of union labor. *Held*, that

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

the trade union known as the United Mine Workers of America, organized to secure reasonable wages and better working conditions among the mine workers of the United States and by concentrated effort to compel by peaceable means the improvement of mining conditions in the United States, is not an unlawful organization or combination, either under the statute or at common law.

[Ed. Note.—For other cases, see Trade Unions, Cent. Dig. § 1; Dec. Dig. § 1.*]

4. CONSPIRACY (§ 3*)—ELEMENTS — EMPLOYÉS — UNIONIZATION — INCREASE OF WAGES.

Since members of a trade union have a lawful right to induce persons employed in the same general business to join the union in order to secure as high wages as possible, compatible with the successful operation of the business, a combination to accomplish such purposes by peaceable and lawful methods, so long as they refrain from resorting to unlawful measures to effectuate the same, does not constitute a conspiracy.

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

5. CONSPIRACY (§ 1*)—WHAT CONSTITUTES.

A "conspiracy" is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose or some purpose not in itself criminal or unlawful, by criminal or unlawful means.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 1–5; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 2, pp. 1454–1461; vol. 8, p. 7613.]

6. CONSPIRACY (§ 19*)—EVIDENCE—THREATS.

Threats of an organizer employed to induce mine workers to form a local of the United Mine Workers of America, to unionize the employés of complainant's mine or shut it down, he having no authority to carry the threats into execution, were insufficient to show a conspiracy to compel the unionization of the mine by unlawful means.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.*]

7. CONSPIRACY (§ 19*)—INTERFERENCE WITH COMPLAINANT'S BUSINESS—UNIONIZATION OF MINE EMPLOYÉS.

Evidence reviewed, and *held* insufficient to establish a conspiracy on the part of officers and representatives of a labor union to unionize the employés of complainant's mine by unlawful means.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.*]

8. CONSPIRACY (§ 19*)—EMPLOYÉS—UNIONIZATION—EVIDENCE.

Where complainant after a strike had severed all business dealings with the United Mine Workers of America and had established a nonunion mine, after which attempts were made to induce complainant's employés to rejoin the union, evidence that, prior to complainant's adoption of the nonunion policy, defendants were engaged in a combination or conspiracy and by intimidation, violence, and coercion were trying to prevent complainant from operating its mine, was inadmissible to show the existence of an unlawful conspiracy for the same purpose after the open policy was adopted.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.*]

9. EQUITY (§ 427*)—RESTRAINT OF TRADE—ANTI-TRUST LAW—VIOLATION—CONFORMITY TO PLEADINGS.

A decree determining that a labor union was an unlawful combination or conspiracy in restraint of trade in violation of the Sherman Anti-Trust

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

Law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), could not be sustained where there was no allegation of defendant's violation of such law in the pleadings.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1001-1014; Dec. Dig. § 427.*]

10. MONOPOLIES (§ 24*)—CONSPIRACY IN RESTRAINT OF TRADE—INJUNCTION—RIGHTS OF PRIVATE PERSONS.

A private person cannot obtain an injunction restraining the continuance of an alleged conspiracy or combination in restraint of interstate commerce under the Sherman Anti-Trust Law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]); the injunctive remedy covered by such act being available to the government only, and the individual being only authorized to sue for and recover threefold damages.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. § 24.*]

11. MASTER AND SERVANT (§ 339*)—CONTRACT OF EMPLOYMENT—INTERFERENCE BY THIRD PERSON.

Complainant, on employing miners, required them to sign a contract declaring that they were not members of the United Mine Workers of America and would not become so while employés of complainant, which agreed to run its works nonunion, and that if at any time during the employment an employé should become connected with the United Mine Workers of America or any affiliated organization he agreed to withdraw from the employment of the company, etc. *Held*, that such contract did not bind the employés not to join the union, but only provided for termination of the contract in case they did so; and hence solicitation of such employés and inducements held out to them to join the union, by lawful and persuasive methods not coercive nor intimidating, did not constitute an unlawful interference with such contract of employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1283; Dec. Dig. § 339.*]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Philippi; Alston G. Dayton, Judge.

Suit by the Hitchman Coal & Coke Company against John Mitchell and others individually to restrain them from attempting to organize complainant's mine workers and to induce them to join a union known as the United Mine Workers of America. From a decree in favor of complainant granting a permanent injunction (202 Fed. 512), defendants appeal. Reversed, with instructions to dismiss.

See, also, 172 Fed. 963; 176 Fed. 549, 100 C. C. A. 137.

Charles E. Hogg, of Point Pleasant, W. Va. (Charles J. Hogg, of Point Pleasant, W. Va., on the brief), for appellants.

Geo. R. E. Gilchrist, of Wheeling, W. Va., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The plaintiff corporation presented its bill for injunction October 24, 1907, to the Honorable Alston G. Dayton, United States District Judge, in the Circuit Court for the Northern District of West Virginia, against John Mitchell and nine others, alleging itself to be a corporation under the laws of West Virginia, and the defendants to be citizens and residents of several different states other than West Virginia; that nine of said defendants first named are presidents, vice presidents, and secretary-treasurers,

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

respectively, of the United Mine Workers of America, and of the International Union United Mine Workers of America, of District No. 6, United Mine Workers of America, and of subdistrict 5 of District No. 6, United Mine Workers of America, and the defendant Thomas Hughes, an organizing agent of said organization; that plaintiff is the owner of about 5,000 acres of coal, has a mine and mining plant on the Baltimore & Ohio Railroad, that is mining and shipping a daily output of about 1,400 tons of coal, largely under contracts, between 500 and 600 tons to the railroad for its daily engine fuel, has large contracts for future delivery; that prior to April 1, 1906, it operated its mine by employment of men affiliated with the United Mine Workers of America, but on that day a strike was ordered by the officers of the union, and on April 16, 1906, the men so employed, in obedience to the demands and orders of defendants, went out and ceased to work. It is charged that this strike was ordered because certain other operators refused to sign the scale demanded by the union, and so far as plaintiff was concerned it was wholly without justification or excuse because it distinctly agreed to pay the scale price and any increased price fixed thereby from April 1, 1906, the date of the strike order, whenever it might be fixed and agreed upon, with which proposition the miners themselves, whose labor was involved, were entirely satisfied; that notwithstanding this, at the instance of defendants, its mine was shut down from April 16 to June 12, 1906, to its great financial loss and embarrassment by reason of its inability to comply with its existing contracts. The bill then sets forth in detail in effect that on the last-named date in order to be able to run said mine it entered into a contract with its men whereby it agreed with them to run its mining operation wholly upon nonunion basis, refusing absolutely to employ any union men, and whereby the men on their part agreed not to join or become members of this union and to work for plaintiff as nonunion men; that plaintiff has since that time been running its mine under this contract with its men to the entire satisfaction of both, paying its men as high wages as paid in any of the union mines. It then charges the officers and agents of the union, with full knowledge of the existence of this contract, to have repeatedly sought to have plaintiff violate it and agree to reunionize its mine, which plaintiff has refused to do, whereupon such union officers and agents are seeking by inducements, threats, and intimidation, to induce plaintiff's employés, bound by said contract with it, to leave its service, break their contract, join the union, and also to prevent other men from engaging in its employ, and this, it is charged, with the unlawful purpose to prevent any but union men to work in its mine, compel it to employ none but union men and to submit its business and its property to the jurisdiction and control of said union and its officers. The bill then proceeds to charge the United Mine Workers of America and its subordinate organizations to be unincorporated organizations, having unlawful purposes and designs to create a monopoly and trust in coal mining labor, and in support of these allegations sets forth in extenso what purports to be excerpts from the constitutions and by-laws of the supreme and subordinate unions, together with the obligation required to be taken by its members and ex-

tracts from the proceedings of its national conventions. A distinct conspiracy on the part of defendants as individuals is charged to secure, by reason of their positions as officers of this union, the abandonment by the men of their contract with plaintiff, their joining the union, the inability of plaintiff to employ others, and the entire shutting down of its mine to its irreparable loss and injury.

The answer contains a general denial, which is substantially as fol lows:

That the United Mine Workers of America and its subordinate associations or branches, by its officers, agents, employés, and servants, have sought, and are seeking, by inducements, threats, and intimidation, but without physical force, "to cause plaintiff's employés to leave its service and to cause others who have engaged to enter its service to break their engagements of service and not to work for plaintiff, and to prevent others from working for plaintiff, and all with the avowed and actual purpose of compelling plaintiff to recognize said organization, and to force plaintiff to employ none but persons who are members of the United Mine Workers of America."

They deny that any of the expressed objects of the United Mine Workers of America are unlawful.

They deny that the appellants have entered into a combination or conspiracy under the name of the United Mine Workers of America, unlawfully to persuade, entice, and procure appellee's employés to break, violate, and disregard their several contracts with the appellee, with the avowed purpose of compelling appellee to reunionize its plant without its consent, and deny that they have formed a conspiracy to compel, by threats and intimidation, appellee's employés to join said union.

They deny that Zelenka reported, and caused this report to be circulated among appellee's employés, that Zelenka, Green, and Watkins (appellants), after a conference with appellee's general manager, had agreed with such general manager that appellee's employés were allowed to join the United Mine Workers of America, and deny that they caused the further statement to be circulated among said employés that they must join the union, or else they would be out of a job at an early day; and deny that they caused to be circulated a statement that only union men would be permitted to work at appellee's mine, and that those of appellee's employés who did not join the union would not be permitted to get a job any place else.

And they deny that the appellants are endeavoring to unionize the appellee's mine, and that they threaten to close down appellee's mine and keep it closed until appellee agrees to sign the scale and employ none but union labor; and they deny that the national organization of the United Mine Workers of America and its district and subdistrict organizations are under their constitutions violating either the common or statutory law of the state of West Virginia.

And they deny that the appellants will, unless enjoined, by enticement, persuasion, or coercion, bring about the shutting down of appellee's mine and the ultimate destruction of its business; and deny that they will compel the appellee to recognize the appellants as members of

said labor organization, and will compel appellee to contract with its employés through appellants as officers of said organization; and they deny that they are about to indulge in any of the methods of accomplishing their purpose by the use of threats, intimidation, and other unlawful means alleged in said bill.

Presented with this bill were some 28 affidavits in support of its allegations. A temporary restraining order was granted until the next regular term of court to be held at Parkersburg, January 14, 1908, for which date plaintiff's motion for a temporary injunction was set down for hearing. This hearing, on motion of defendants, was continued until May 26, 1908, when plaintiff presented more than 20 additional affidavits and argued its motion for temporary injunction; counsel for defense stating they "did not desire to be heard in opposition to said motion so far as the granting of a temporary injunction at the time was concerned and not consenting but objecting thereto." The temporary injunction was on that day granted in exact accord with the terms of the restraining order.

Answers were filed, exceptions entered thereto, motions as to certain unserved defendants to have said bill dismissed as to them were made, and a motion by defendants, disclaiming "any intention of conceding the truth of the allegations of the plaintiff's bill whereby fraud, coercion, and intimidation or violence in any form whatsoever is imputed to them," was made to dissolve the injunction, "on the face of the bill and exhibits," in so far as said injunction restrained said defendants or any of them from the use of argument, reason, and persuasion, to induce the employés of the plaintiff or any of them to become members of the United Mine Workers of America or any of its subordinate branches; so far as it restrained them from interfering or talking to any person or persons in the employment of the plaintiff, or about to enter the employment of the plaintiff, for the purpose of inducing such persons to become members of the United Mine Workers of America or any of its subordinate branches, in a peaceable and law-abiding manner and unaccompanied by intimidation, force, fraud, violence, or coercion; also in so far as it restrained defendants from visiting the homes of plaintiff's employés for the purpose of inducing them by reason, persuasion, and argument, unaccompanied by force, fraud, intimidation, violence, or coercion, to become members of the United Mine Workers of America or any of its subordinate branches; in so far as it restrained defendants from going near the premises of plaintiff for the purpose of talking with or inducing the employés of plaintiff to become members of the United Mine Workers of America; in so far as it restrained from unionizing or attempting to do so plaintiff's mine, if by "unionizing" is meant action on the part of defendants to induce the employés of plaintiff to become members of the United Mine Workers of America by the use of argument, persuasion, and reason unaccompanied by force, violence, coercion, or intimidation; and also in so far as it restrained defendants from interfering with plaintiff's employés if by the term "interfering" is meant that defendants shall be precluded from interviewing and visiting plaintiff's em-

ployés for the purpose of inducing them to become members of the union.

This motion was deferred until further orders from the court, and on the 21st day of September, 1909, the court filed an opinion in which it held, among other things, that the defendants were not entitled to have the injunction modified, and a decree in pursuance thereof was entered on the 6th day of October, 1909, from which an appeal was taken to this court, and same was dismissed for want of jurisdiction. 176 Fed. 549, 100 C. C. A. 137.

On the 23d day of December, 1912, the court filed another opinion, and in pursuance thereof entered a final decree perpetuating the injunction theretofore granted, from which defendants took an appeal to this court.

The final decree entered herein was based upon the assumption that there was a conspiracy on the part of the defendants to unionize the plaintiff's mine without its consent, and to bring about the breaking of the contracts existing between the plaintiff and its employés, as well as to secure the breaking of the contract between appellee and its employés which had thereafter been entered into; also, to induce the employés to leave its service. These acts are inhibited by the injunction.

The injunction inhibits the defendants from combining, conspiring, or attempting to interfere with appellee's employés, so as willfully to bring about the breaking of their contracts of service with the appellee which appellee now has with its employés; from hindering or obstructing any of the business of appellee, its agents, servants, or employés in the discharge of their duties, or in any manner obstructing appellee's business, with the purpose of compelling or inducing, by threats, intimidation, violence, violent or abusive language, or persuasion, any of the employés of the appellee to refuse or fail to perform their duties as such employés; from compelling or inducing or attempting to compel or induce, by threats, intimidation, force, or violence, or abusive or violent language, any of the employés of plaintiff to leave its service, or refuse to perform their duties as such employés; or in such manner to prevent others seeking employment from accepting employment with the appellee; from entering or establishing a picket or pickets of men on, or patrolling the railroad or street cars passing through or adjacent to, appellee's property, for the purpose of inducing or compelling, by threats, intimidation, violence, violent or abusive language, or persuasion, any employé of plaintiff to fail or refuse to perform his duties, or for the purpose of interfering or talking to any person or persons on said railroad or street cars going to appellee's mine to accept employment with appellee, for the purpose and with the intention of inducing or compelling them, by threats, violence, intimidation, violent or abusive language, or in any manner whatsoever, to refuse or fail to accept service with appellee, from congregating at or near the premises of the appellee, and from picketing or patrolling said premises for the purpose of intimidating appellee's employés, or coercing them by threats, intimidation, violence, abusive or violent language, or preventing them from rendering their service to appellee, and in like manner from inducing or coercing them to leave the employment

of appellee, and from in any manner so interfering with appellee in carrying on its business in its usual and ordinary way, and from interfering by threats, intimidation, or violence, or violent and abusive language, with any person or persons who may be employed or seeking employment by appellee, in appellee's mine and works; from either singly, or in combination with others, congregating in and about the approaches to appellee's mine and works for the purpose of picketing or patrolling or guarding the streets or approaches to appellee's mine, for the purpose of intimidating, threatening, or coercing any of appellee's employés from working in its mine or works, or any person seeking employment there from entering into such employment, and from so interfering with said employés in going to and from their daily work in and about the mine and works of appellee; and, finally, from either singly or collectively going to the houses or boarding houses of appellee's employés, or any of them, for the purpose of intimidating or coercing any or all of them to leave the appellee's employment.

It will be observed that the injunction was based upon the finding that the defendants had resorted to the use of force, violence, intimidation, abusive and violent language, and coercion as a means of obtaining membership in the United Mine Workers of America, from the appellee's employés, and also for the purpose of having these employés quit the service of the appellee, or by such means preventing others seeking employment with it from accepting its service as employés.

The appellee will hereinafter be referred to as "plaintiff," and the appellants as "defendants"; such being the relative positions the parties occupied in the court below.

The facts are substantially as follows:

The Hitchman Coal & Coke Company was organized under the laws of the state of West Virginia, in the year 1901, and began operations at Benwood, Ohio county, W. Va., in the early summer of that year. The opening up of the mine consumed some time, and the actual mining of coal did not commence until in the winter of 1902. At that time, however, the company did not ship any coal. The company began its operations upon a nonunion basis; that is, it employed its labor independently of and without relation to the organization known as the United Mine Workers of America.

It appears from the testimony of E. T. Hitchman that, previous to its entering upon the operation of mining coal at Benwood, the Hitchman Company entered into a contract with the Baltimore & Ohio Railroad Company; and during the early part of its operations all the coal mined by the company was delivered upon the engines of the railroad company; the amount mined at first was very small; it practically commenced at nothing and gradually increased, until now this mine is a regular coaling station for the railroad company, and is its only coaling station in the vicinity of Benwood.

The coal company continued to operate its mine upon a nonunion basis until the month of April, 1903, when it entered into a contract with its employés through the officers of the United Mine Workers of America, adopting the scale of wages demanded by the members of

that organization, and agreeing to observe the rules and conditions of employment.

The company operated its mine upon what is known as a "union basis," for three years, or until some time in April, 1906. The first contract or agreement expired in 1904, and was renewed for a period of two years, or until April, 1906. At that time the men refused to work longer because no agreement could be made between the employés and the company as to the rate of wages and conditions of employment.

About June 21, 1906, after the mine had been shut down and operations suspended for a period of about 50 days, the company resumed operations upon a nonunion basis, with the understanding between the officials of the company and its employés that the company would deal with each one of them individually from that time on, and that the men who had formerly been in the employ of the company were informed by its president that each man would have to seek employment for himself, and that the company would have no further relations with the organization known as the United Mine Workers of America.

After resuming operations in June, 1906, it was agreed between the company and its employés that the company's mine would be operated upon a nonunion basis. Its board of directors passed a resolution whereby a fixed policy was adopted by the company to employ none but nonunion laborers. The agreement of employment between the company and its men was verbal up to January, 1908, but about that time and since the institution of this suit the company issued employment cards, the exact language of which will be hereinafter quoted and referred to.

Thereafter, each and every man who entered the company's employment was required to sign one of the cards in question before being accepted as an employé; and any applicant for employment who refused to sign the card was denied employment.

It appears from the testimony of R. J. Cotts, an employé of the Hitchman Coal & Coke Company, that from and after June, 1906, up to and including the date of the taking of the testimony herein, the Hitchman Coal & Coke Company continued to operate its mine upon a nonunion basis, with an understanding or agreement between it and its employés that the company would employ none but men who were not members of the United Mine Workers of America; and from January 1, 1908, the men on their part agreed that they would not become members of the United Mine Workers of America so long as they continued in the employment of that company.

During all this time, from the early part of 1902 up to the time of the taking of testimony on behalf of the plaintiff in this case, the business of the Hitchman Coal & Coke Company has increased naturally and gradually, from a production and sale of about 17,000 tons of coal in 1902, to a production and sale of more than 281,000 tons for the first eleven months of the year 1910.

In the year 1902, all but about 800 tons of the coal produced by the Hitchman Company was sold to the Baltimore & Ohio Railroad Company, and delivered upon its engines at Benwood, W. Va..; while in

1910 more than half of the coal produced was sold in the open market and was designated upon the books of the coal company as "commercial coal" as distinguished from "engine coal"; and nearly all of this "commercial coal" was shipped to ports on the Great Lakes for transportation by vessel to the northwest country, for delivery at ports on Lake Superior.

Witness Cotts further testified that during all these years the prices received by the coal company for both "commercial coal" and "engine coal" would average from 95 cents to $1 a ton; but, during the time of the strike in the anthracite fields during the year 1903, the price for "commercial coal," prior to April 1 of that year, was about $3 a ton, and also during this time, at the average price of from 95 cents to $1 a ton, the average profit derived by the coal company from the mining and shipping and selling of coal was 25 cents a ton.

It also appears from the testimony of W. H. Koch, manager of the Hitchman Coal & Coke Company, that during the summer of 1907 the officials at that time in charge of the affairs of the United Mine Workers of America for the district in which the Hitchman Company's mine is located called upon the officers of the coal company, and discussed with them the renewal of the relations which had theretofore existed between that company and the miner's organization. At each of these meetings, at least one of which was held in the company's office, the officers of the company refused to consider the renewal of their former relations to the union, and the representatives of the United Mine Workers were informed that it was the fixed and determined policy of that company to employ none but miners who were not members of the union, and in September, 1907, about six weeks after the visit of the officials as above stated, Thomas Hughes, a representative of the United Mine Workers, visited Benwood and its vicinity in an attempt to induce the miners employed by the Hitchman and other coal companies operating in that community to become members of the United Mine Workers.

Witness Koch further testified that in his work as organizer, of soliciting and securing miners to become members of the union, Hughes talked to the employés of the Hitchman and other companies upon the streets of Benwood, and, according to Wesley Corns' testimony, visited the men at their homes, and it is shown by E. C. Pickett's testimony that Hughes addressed the men in open meetings, and talked with one or more of the officers of the coal company as to the reason why that company refused to employ any but nonunion labor.

E. C. Pickett also testified that in an open air meeting, which was attended by the superintendent of the coal company, Hughes simply argued to the men the advantages to be derived from the membership in the United Mine Workers of America.

It further appears from E. C. Pickett's testimony that, as a result of the efforts of Hughes, about 20 or 25 men employed by the Glendale Coal Company, a separate corporation, but managed from the same office and by the same men in charge of the operations of the Hitchman Company, were induced to become members of the United Mine Workers, and the next morning they were discharged by the su-

perintendent of the Hitchman Company. This was in the latter part of September or the first of October, 1907.

We fully appreciate the important bearing the questions here presented have upon the welfare of the mine owners, as well as the laboring men, and are not unmindful of the delicate issues raised by the pleadings and proof in this cause.

That it is advisable to secure a just and fair solution of the labor problem by which equal protection to capital and labor may be secured is undoubtedly the wish of every patriotic citizen regardless of his station in life. That one who toils for his living is justified in employing all lawful methods for the preservation of his right as an American citizen to secure fair remuneration for his services is established by the federal and the state courts. That such a person also has the right to join with others similarly situated, in order to promote their welfare as a class, is also established as the law of this country. But while this is so, it is equally well settled that the mine owner is entitled to the full protection of the law in the conduct of his business and the enjoyment of his property.

It is insisted by counsel that the defendants as members of the organization known as the United Mine Workers of America have been within their rights as to the transactions referred to in the bill, and that they have not resorted to intimidation, violence, or other unlawful methods, but, on the other hand, have been actuated solely by a desire to promote the general welfare of those who are employed as laborers in the various coal mines of the country, and that they have not at any time attempted to unionize plaintiff's mine as alleged in the bill.

The plaintiff insists that it has the right to employ only nonunion labor, and that the conduct of the defendants in attempting to unionize this class of labor in the state of West Virginia is unlawful in that it is a violation of the Constitution, the common law, and the statute law of that state.

The defendants insist that the policy adopted by the plaintiff is calculated to place those who seek employment of this kind at a great disadvantage; that it will prevent them from accomplishing by united effort that which is essential to the welfare of those whose only asset is their ability to earn a living by manual labor; and that the action of the plaintiff in this instance in making an indirect attack upon their organization is such as to justify this class of laboring men in employing all lawful methods for the purpose of maintaining their organization, the only means by which they can protect their rights and promote their welfare.

It has heretofore been conceded, as a general rule, that a labor union may employ peaceable and persuasive methods for the purpose of keeping its organization intact, and thus enable it to care for those in distress, secure as high wages as possible, and, by united effort, secure the enactment of laws requiring the proper equipment of mines so as to render them safe and sanitary, and to do other things calculated to improve the conditions under which they labor, but the decree in this instance somewhat modifies this rule:

The most important and far-reaching question is raised by the assignment of error wherein it is insisted that the court below erred in holding that the United Mine Workers of America and its subordinate branches constitute an unlawful organization under the Constitution, the common law, and the statutory law of the state of West Virginia.

The learned judge who granted the injunction in this instance filed a very able and exhaustive opinion ([D. C.] 202 Fed. 512), in which it is held, among other things, that the United Mine Workers of America is an unlawful combination at common law, which he insists is still in full force in that state, and in support thereof cites many English cases.

In disposing of this case the court, among others things, said:

"For common-law conspiracy a number of the members of the trades unions were prosecuted for combining to raise wages and for other of their declared purposes, and convictions were had."

The court further said:

"Such parts of the common law and of the laws of the state of Virginia as are in force within the boundaries of the state of West Virginia when this Constitution (referring to the first Constitution adopted by the state prior to its admission into the Union) goes into operation, and are not repugnant thereto, shall be and continue the law of this state until altered or repealed by the Legislature."

Taking this as a basis, the learned judge insists that the common law under which labor organizations have been declared unlawful in England is still in force in West Virginia, and that therefore this organization is unlawful, unless by statutory enactment the common law has been modified or abrogated to such an extent as to allow an organization of this kind to exist in that state.

[1] We do not deem it profitable to enter into an extended discussion of this phase of the question, believing as we do that, while there are decisions at common law by the courts of England in support of the contention that labor unions are unlawful, yet such rule has not prevailed in this country, except in a few of the earlier decisions of our courts. Even in England combinations of this character were only proceeded against, as a general rule, when they were criminal or prohibited by statutory law.

1 Eddy on Combinations, §§ 404, 405, in referring to this question, says:

"There seems to have been no rule of the common law against combinations of workingmen, except where such combinations were either of a criminal character or directly against some statutory provision.

"There are some dicta to the effect that such combinations would be unlawful, and 'some traces may be found in the ancient books of a doctrine that it is criminal for one man, independently of a combination, to oblige another, by bond or otherwise, to abstain from the exercise of his proper craft or employment.' But even such bond has no direct relation to a combination; its legality or illegality rests upon considerations entirely foreign to those which control the validity of a combination.

"It is stated by an eminent authority that no case was ever cited prior to the year 1825, in which any person was convicted for a conspiracy in restraint of trade at common law for having combined with others for the raising of wages."

The following from Wright's Criminal Conspiracy is a note to the text under section 404:

"The text-books, down to at least 1800, appear to be silent as to the existence of any doctrine of the criminality at common law of combinations of masters of workmen. Neither in the earlier editions of Hawkins nor in East does the doctrine in question appear to be stated. So in the edition of Burn's Justice of 1810, it is not mentioned under the title 'conspiracy,' and under the title 'servants' there are several statements of the statutes against combinations, but there is no reference to common law. The various acts against combinations for controlling masters or workmen which were passed in the eighteenth century (1725, 12 Geo. I, c. 34, extended by 1729, 22 Geo. II, c. 27, § 12; 1799, 39 Geo. III, c. 81; [1800] 39 & 40 Geo. III, c. 106, etc.), commence by declaring or enacting agreements for such purposes theretofore made to be 'illegal, null and void,' which would not have been necessary if they had been thought to be criminal at common law; and they then proceeded by independent enactment to make it punishable in the future to engage in them.

"The result of the whole appears to be that there is not sufficient authority for concluding that before the close of the eighteenth century there was supposed to be any rule of common law that combinations for controlling masters or workmen were criminal, except where the combination was for some purpose punishable under a statute expressly directed against such combinations, or was for conduct punishable independently of combination."

However, assuming it to be true that at the time the common law was incorporated as a part of the law of West Virginia, labor unions formed for the purpose of securing a higher rate of wages were held at common law by the English courts to be a criminal conspiracy, yet we do not consider the same as now binding upon our courts, in view of the changed conditions in this, as well as other, countries, incident to industrial development.

In the case of Everett Waddey Co. v. Typographical Union, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792, 8 Ann. Cas. 798, the Supreme Court of that state said:

"It is now well settled by the decisions of the courts of the United States and of the highest courts of a majority of the states in the Union that labor may organize as capital does for its own protection and to further the interest of the laboring class. They may 'strike' and persuade and induce others to join them, but when they resort to unlawful means to cause injury to others, to whom they have no relation, contractual or otherwise, the limit permitted by law is passed and they may be restrained. Gray v. Trades Council, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477, 1 Ann. Cas. 172, and cases there cited; Murdock v. Walker, 152 Pa. 595, 25 Atl. 492, 34 Am. St. Rep. 678; Otis Steel Co. v. Local Union No. 218, 110 Fed. [C. C.] 700; Consol. S. & W. Co. v. Murray [C. C.] 80 Fed. 811; Union Pac. R. Co. v. Reuf [C. C.] 120 Fed. 102; Allis-Chalmers Co. v. Lodge [C. C.] 111 Fed. 264; Beck v. Railway Union, 118 Mich. 487, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421; Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; Eddy on Comb. vol. 2, §§ 1031, 1035; Beach on Mono. & Indus. Trusts, §§ 98, 100, 102; Tiedeman on St. & Fed. Control of Persons & Property, vol. 1, § 114.

"In many of the states of the Union there are statutes which provide for the incorporation of trades unions and other labor organizations, and in all of them one of the permissible objects of incorporation is declared to be the securement of better terms of employment; while at common law, as interpreted by the English decisions and a few of the earliest decisions of the courts in this country, labor combinations formed for the purpose of controlling the rate of wages were regarded as a criminal conspiracy. But these early decisions of the courts of this country were soon departed from by other cases, notably in Massachusetts, New York, and Pennsylvania, which

placed labor combinations upon a plane of legal equality with capitalistic combinations, by holding that it was not a criminal conspiracy for workmen to combine for the purpose of enhancing the rate of wages, or for improving, in any other way, their relations with employers."

Also in the case of Carew v. Rutherford, 106 Mass. 14, 8 Am. Rep. 287, the court in discussing this question said:

"* * * And it is no crime for any number of persons, without an unlawful object in view, to associate themselves together and agree that they will not work for or deal with certain men or classes of men, or work under a certain price, or without certain conditions. Commonwealth v. Hunt, 4 Metc. 111 [38 Am. Dec. 346]; Boston Glass Manufactory v. Binney, 4 Pick. 425; Bowen v. Matheson, 14 Allen, 499.

"This freedom of labor and business has not always existed. When our ancestors came here, many branches of labor and business were hampered by legal restrictions created by English statutes; and it was a long time before the community fully understood the importance of freedom in this respect. Some of our early legislation is of this character. One of the colonial acts, entitled 'An act against oppression,' punished by fine and imprisonment such indisposed persons as may take the liberty to oppress and wrong their neighbors by taking excessive wages for their work, or unreasonable prices for merchandises or other necessary commodity as may pass from man to man. Anc. Chart. 172. Another required artificers, or handcraftmen meet to labor, to work by the day for their neighbors, in mowing, reaping of corn, and the inning thereof. Id. 210. Another act regulated the price of bread. Id. 752. Some of our town records show that, under the power to make by-laws, the towns fixed the prices of labor, provisions, and several articles of merchandise, as late as the time of the Revolutionary War. But experience and increasing intelligence led to the abolition of all such restrictions, and to the establishment of freedom for all branches of labor and business; and all persons who have been born and educated here, and are obliged to begin life without property, know that freedom to choose their own occupation and to make their own contracts not only elevates their condition, but secures to skill and industry and economy their appropriate advantages."

The growth and development of the common law occurred when property rights were recognized as paramount to personal rights. At that time there was little, if any, concert of action on the part of the laboring people, owing to their helpless condition, due in the main to their ignorance. Their domination by the landowner and capitalist was absolute in most respects, and as a result they were as helpless as those held in slavery before our great war. Under such circumstances, it is no wonder that we have many decisions in the past at common law, as well as the enactment of statutory laws, by virtue of which it was almost a physical impossibility for those who earned their living by honest toil to accomplish, by organized effort, those things necessary to elevate them to a plane where they could assert those rights so essential to their welfare.

The industrial development of the world within the last half century has been such as to render it necessary for the courts to take a broader and more comprehensive view than formerly of questions pertaining to the relation that capital sustains to labor.

The first syllabus in the case of Powell v. Sims, 5 W. Va. 1, 13 Am. Rep. 629, is in the following language:

"The common law of England is in force in this state only so far as it is in harmony with its institutions, and its principles applicable to the state of the country and the condition of society."

The following cases are to the same effect: Baylor v. Baltimore & Ohio Railroad Co., 9 W. Va., 270; Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; Tunstall v. Christian, 80 Va. 1, 56 Am. Rep. 581.

In view of the industrial changes indicated, many great problems are now presented to the courts that were wholly unknown at the time when many of the cases relied upon by plaintiff were decided. It is now recognized by all civilized countries that labor is the basis of all wealth, and without which it is utterly impossible to accomplish anything in the industrial world, and, such being the case, the laboring man is entitled to the fullest protection in the assertion of his right to demand adequate pay for any labor that he may perform.

[2] Foreign immigration is increasing rapidly. Statistics show that over a million foreigners land on our shores annually, a majority of whom, owing to their former environments, are not capable of understanding and appreciating what it means to be an American citizen. A large percentage of this class of workmen are employed as miners. While we have no comment to make as to the advisability of restricting immigration (that being a matter which rests solely with the legislative branch of our government), yet we cannot shut our eyes to the conditions that exist as a result of this policy. That this class of labor, a vast number of whom are unable to read and write or understand our language, can secure a more substantial recognition of their rights as members of a labor union is undoubtedly true, and so long as these people are among us for the purpose of earning a living and thereby improving their condition, and at the same time adding to the wealth of our country, it is the duty of this government to afford them equal protection under our Constitution and the laws passed in pursuance thereof. That there is at this time a well-defined struggle between capital and labor, each trying to protect its rights from its own point of view, is a condition and not a theory.

In this connection it is pertinent to consider the purposes of the United Mine Workers of America, which is composed of three branches, to wit, National, District, and Subdistrict, all of which were declared to be unlawful by the lower court. In the preamble of the National Constitution of the organization is to be found a declaration of the purposes for which it was established, which is as follows:

"There is no fact more generally known, or more widely believed, than that without coal there would not have been any such grand achievements, privileges and blessings as those which characterize the twentieth century civilization, and believing as we do, that those whose lot it is to daily toil in the recesses of the earth, mining and putting out coal which makes these blessings possible, are entitled to a fair and equitable share of the same; therefore we have formed 'The United Mine Workers of America,' for the purpose of the more readily securing the object sought by educating all mine workers in America to realize the necessity of union of action and purpose, in demanding and securing by lawful means the just fruits of our toil. And we hereby declare to the world that our objects are:

"First—To secure an earning fully compatible with the dangers of our calling and the labor performed.

"Second—To establish as speedily as possible, and forever, our right to receive pay, for labor performed, in lawful money, and to rid ourselves of the

iniquitous system of spending our money wherever our employers see fit to designate.

"Third—To secure the introduction of any and all well defined and established appliances for the preservation of life, health and limbs of all mine employés.

"Fourth—To reduce to the lowest possible minimum the awful catastrophes which have been sweeping our fellow-craftmen to untimely graves by the thousands; by securing legislation looking to the most perfect system of ventilation, drainage, etc.

"Fifth—To enforce existing laws; and where none exist, enact and enforce them; calling for a plentiful supply of suitable timber for supporting the roof, pillars, etc., and to have all working places rendered as free from water and impure air and poisonous gases as possible.

"Sixth—To uncompromisingly demand that eight hours shall constitute a day's work, and that not more than eight hours shall be worked in any one day by any mine worker. The very nature of our employment, shut out from the sunlight and impure air, working by the aid of artificial light (in no instance to exceed one candle power), would in itself, strongly indicate that, of all men, a coal miner has the most righteous claim to an eight-hour day.

"Seventh—To provide for the education of our children by laws prohibiting their employment until they have attained a reasonably satisfactory education, and in every case until they have attained fourteen years of age.

"Eighth—To abrogate all laws which enable coal operators to cheat the miners, and to substitute laws which will enable the miner, under the protection and majesty of the state, to have his coal properly weighed or measured, as the case may be.

"Ninth—To secure by legislation, weekly payments in lawful money.

"Tenth—To render it impossible, by legislative enactment in every state, for coal operators or corporations to employ Pinkerton detectives or guards, or other forces (except the ordinary forces of the state) to take armed possession of the mines in case of strikes or lockouts.

"Eleventh—To use all honorable means to maintain peace between ourselves and employers; adjusting all differences, so far as possible by arbitration and conciliation, that strikes may become unnecessary."

The constitution of District 6 contains the same declarations of purposes, with the following added:

"Twelfth—And to use all honorable means to elect members of our organization to legislate and enforce laws in state and national legislative assemblies that will bear equally upon all citizens of the United States, its territories and other dominions.

"And we further declare it to be the purpose of District 6, United Mine Workers of America, to give moral and material aid to all its members in good standing and to those who may be dependent upon them, and to render such assistance as may be possible to all our members socially and financially, and to create a relief fund for members in distress, subject to the discretion of the officers and executive board of District 6, United Mine Workers of America, as hereinafter provided."

The court below in its opinion referred to a number of provisions contained in the constitution and rules of this organization which in its judgment rendered the same unlawful; the first being that a member is required to promise that he will cease to work whenever called upon to do so by the organization.

A careful examination of this provision fails to show on its face anything unlawful, while on the other hand common experience teaches us that a rule of this character is essential for the preservation of labor organizations. Without a provision of this kind, there would be no power of securing concert of action; no means by which united effort

could be secured for the accomplishment of the aims and purposes of the organization. In the absence of proof to the contrary, it must be assumed that this power would be exercised wisely, and only when necessary to promote the interest of the organization in a legitimate manner. It would be inconsistent with reason to assume that this power would be exercised so as to prevent the operation of a mine, which would necessarily defeat the very object for which this organization was established, to wit, the procurement of steady employment at remunerative wages.

The court below was also of the opinion that under the rules of the organization a member could be held as a slave, and thus prevented from exercising his own free will. We fail to find any provision preventing one from ceasing to work at any time he may desire, and, if he should do so, he would no longer be a member of the organization. One could also cease to be a member of the union by failing to pay his dues. Under these circumstances there is no possibility of one's being held as a member of the union contrary to his wishes.

The court below was further of the opinion that the union has the power to cause miners to become members thereof. We fail to find anything in the rules to justify the assumption that the union has an arbitrary power, by violence, intimidation or otherwise, to compel one to become a member of the organization. While it is alleged in the bill that the United Mine Workers of America is a secret, voluntary organization, this allegation is not only denied by the answer, but is shown to be incorrect by at least three witnesses, who testified that they were familiar with the organization and its workings, that it is not a secret organization in the ordinary acceptation of the term.

Witness Savage, secretary-treasurer of District No. 6, United Mine Workers of America, among other things, testified that:

"The United Mine Workers of America was established and organized in 1890, at Indianapolis, Indiana, but the first ground work was laid at Columbus, Ohio; it is an open organization."

Witness Lewis, president of the United Mine Workers of America since 1908, and from April 1, 1900, until March 31, 1908, vice president of the United Mine Workers of America, testified, among other things, that:

"There is nothing secret about the United Mine Workers, as was stated by Mr. McKinley. The only thing as to which there is any secret is what is called a joint meeting, when there is a joint scale committee meeting; then the operators request that the representatives of the press be kept out. That is for the purpose of keeping the representatives of the press from knowing their inside business. A stenographer takes the proceedings of the district and national conventions, and they are published; records of the meetings of the local unions are kept by the secretary; and any person who is interested who desires may go and examine the records of a local union."

Witness Sullivan, who was serving his second year as president of District 6, United Mine Workers of America, testified as follows:

"The United Mine Workers has always been an open organization; any one is at liberty to enter the conventions or local meetings who desires; its literature is for the public as well as for the members; there is nothing connected with it that is sought to be withheld from the public."

The court below was also of the opinion that the rules of the organization undertake to "control or rather abrogate and destroy the right of the employer to contract with the men independent of the organization." If it is meant by this statement that under the rules it is possible by peaceable, persuasive, and other lawful methods to induce a majority, if not all, of the miners of any particular locality to join the union and thereby place the mine owner in a position where it may be necessary for him to negotiate with union labor in order to operate his mines, then the conclusion reached by the court below is entirely correct. However, the fact that such a result would be possible under this rule could not in any way affect the legality of the organization, because it has been repeatedly held by the courts that a labor union may use all lawful methods for the purpose of inducing others to join its order, and, until the contrary is shown, it must be assumed that only lawful methods are to be employed for the accomplishment of such purpose.

In the case of My Maryland Lodge v. Adt, 100 Md. 238, 249, 59 Atl. 721, 723, 68 L. R. A. 752–757, the court said:

"* * * They may even use persuasion to have others join their organization. They have an unquestionable right to present their cause to the public in newspapers or circulars in a peaceable way, but with no attempt at coercion. If ruin to the employer results from their peaceable assertion of these rights, it is a damage without remedy."

To the same effect is the case of Beck v. Railway, etc., Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421.

Another ground relied upon by the court below is that the organization assumes the right through its officers, (1) to control the employer's business, (2) to shut down his mine by calling out men in obedience to their obligation whenever it is deemed to be to the interest of the union, regardless of the employer's interest, or the effect that such act may have upon him as regards loss, damage, or necessary violation, on account thereof, of his existing contracts with others.

Relative to this question the witness McKinley, a member of the plaintiff organization, testified, among other things, that it was the desire of the union, as he understood it, to have every employé in and about the bituminous coal mines of the United States and Canada, as well as the anthracite mines, a member of the United Mine Workers of America. It is admitted to be the purpose of this organization to induce all miners to join the union, and, until the contrary is shown, it must be inferred that only lawful methods are to be employed by it for that purpose.

Witness Lewis also testified that:

"It is not now, and never has been, the policy of the United Mine Workers' organization to use force or coercion or any unlawful methods to promote its jurisdiction or the growth of the organization, and the moment they attempt to extend their power or usefulness by that means instantly they will go out of existence."

The witness further testifying says:

"As to the statement of the witness J. C. McKinley that he thinks probably the first method of promoting the growth of the United Mine Workers is to ask the operators to compel the men to join the union," says he, "never heard

of that before; that its policy is to go into a community where there is a mine and get acquainted with some of the men who work there, and talk to them about the organization, and get them interested in joining; and after a sufficient number could be gotten together to agree that it was a good thing to join the union, a meeting would be called to organize those men, just the same as any other fraternal society."

In this connection it should be borne in mind that the defendants as members of this organization cannot secure employment in any mine without first entering into an agreement with operators as to the terms upon which they are to work. In other words, it is optional with the operators as to whether they shall operate their mines, and further as to whether they shall employ union labor.

It is also insisted by the court below that under these rules the operator has no right to employ nonunion men even if he should desire to do so.

If the United Mine Workers of America in pursuance of this rule should resort to coercion, threats, intimidation, or violence for the purpose of preventing the mineowner from employing nonunion men, such conduct would be unlawful, and the courts would promptly restrain any one who might be a party to such transaction. Indeed, it would be unlawful for an individual to undertake, by coercion, intimidation, or threats to prevent a mineowner from exercising his own free will as to the employment of nonunion laborers, or as to any other thing which he might deem necessary to be done in order to protect his property rights.

However, in this instance, the plaintiff has adopted a policy by which only nonunion men may be employed. If the plaintiff may for the purpose of protecting its interests adopt a policy by which only nonunion men can secure employment at its mines, and such conduct be sanctioned by the law, by what process of reasoning can it be held that the defendants may not adopt the same method in order to protect their interests? If the plaintiff is to be protected in the use of such methods, and the defendants are to be restrained from using lawful methods for the purpose of successfully meeting the issue thus raised by the plaintiff, then indeed it may be truthfully said that capital receives greater protection at the hands of the courts than those through whose efforts capital in the first instance was created. But such is not the law, and when we consider the testimony as respects the conduct of the defendants, at and before the institution of this suit, we are of the opinion that the plaintiff has not by a preponderance of the evidence shown that these defendants employed unlawful methods as alleged in the bill.

At one time this identical mine employed union labor, and in all probability would have continued to do so, had it not been for a controversy which arose as to certain adjustments and the parties failing to reach an agreement the plaintiff decided to employ only nonunion labor.

It further appears that the plaintiff is paying the nonunion men the same wages that are being paid union men. Therefore, under these circumstances, is it not as reasonable to infer that the plaintiff is endeavoring to place the laborers of that section in a position where it

would be master of the situation, as it is to infer that the defendants are seeking to destroy the business of the plaintiff? While it is true that the plaintiff has a perfect right to refuse to employ union labor, is it not equally true that union labor, as we have stated, may by the employment of legitimate means do that which is necessary to keep its forces together?

Surely we have not reached the point when capital with its strong arm may adopt a plan like this for protecting its interests, while on the other hand the laboring classes are to be denied the protection of the law when they are attempting to assert rights that are just as important to their well-being as are the rights of those who have been more fortunate in accumulating wealth. He who "seeks equity must do equity." In other words, he "must come into court with clean hands." If the courts of this country should by injunctive relief protect the mineowner in the enjoyment of his property rights, and restrain the laboring people from organizing their forces by declaring such organization unlawful, would not the mineowner then be in a position to control the situation so that he who has to toil for his daily bread would be placed in a position where if he exists at all, he must do so at such wages, and upon such terms as organized capital may see fit to dictate? However, we do not wish to be understood as intimating that the plaintiff or a majority of those who employ labor in this country would take advantage of a situation of this kind for the purpose of oppressing those who are at their mercy. The instances where such a course is pursued are exceptional. Thousands of manufacturing plants all over the country, as well as railroad companies and mining companies, are to-day of their own accord employing union labor, realizing as they do that such a policy on their part is to the advantage of the employer as well as the employé. In fact, under our Constitution and laws, no undue advantages are given to either capital or labor, nor will the courts ever permit individuals or labor organizations by force, fraud, or intimidation to prevent the mineowner from lawfully protecting his rights; but, while this is true, equal protection should be guaranteed to labor and capital.

It was further held by the court below that under the rules of the organization the power is given to limit the right of the employer in the absence of contract to discharge whom he pleases, when he pleases, and for what he pleases. A careful examination of the constitution of the National, District, and Subdistrict organizations fails to disclose anything to justify this conclusion.

We have carefully examined the constitution to ascertain whether there can be found therein a rule or provision which authorizes the control of the employer's business by the organization, but find nothing to sustain this view, unless it be based on certain incidents in connection with the Hitchman Coal & Coke Company while it ran its mines union.

The witness McKinley, in speaking of the United Mine Workers, said:

"The term, a union mine, is one over which they have absolute control, and, a non union mine, one which is worked open shop, or in which the United Mine Workers are not recognized."

This statement as respects the extent to which the union assumes control over a union mine is flatly contradicted by the witness Savage, as well as by the testimony of Lewis and Sullivan. The witness Sullivan said:

"If the mine of the Hitchman Company had become unionized, the men would obey the management of the mine and not the orders of the union; they could not remain in the union and disobey the directions and orders of the operators, against the wishes of the union. There are no rules of the organization whereby a unionized mine must submit its men to the paramount control of the union, and I have never known any such rules to be adopted by the organization."

He further testified that one of the many purposes of the organization is to fix a fair scale of wages that should be uniform, so far as possible, taking into consideration the varied conditions existing in the different sections of the coal mining territory. It should be borne in mind that the scale of wages is fixed by agreement between operators and miners. Experience teaches us that the complaint of an individual is treated with indifference as compared to the complaint that is made by an organized body of men. When an individual makes a complaint, and it is refused, he must either quit work or submit to any terms that may be imposed upon him.

As a general rule employés of this kind possess but little property, owing to the fact that it requires the entire wages they earn to support their families from day to day. Under these circumstances they are unable to move from place to place to secure employment, and as a result they must accept such wages as may be offered.

Shutting down a mine by calling out men in obedience to their obligation is what is known as a "strike." Rule No. 10, which relates to strikes, is in the following language:

"No strikes shall take place at any time under the jurisdiction of subdistrict 5 of District 6, except for specific violation of agreement. That is, screens irregular; failure to pay on pay day without explanation; violation of mining laws by operators, or reductions from scale wages until the grievance of the mine affected has been thoroughly investigated by the officers of District 6, U. M. W. A. and operators interested. Any man or men that cause a stoppage of work at any mine in violation of this rule, shall be subject to dismissal at the will of the company."

This very clearly sets forth the causes wherein strikes are justifiable. The evidence in this case fails to show that these defendants have at any time tried by violence, intimidation, or fraud to induce the union men to quit working for the plaintiff.

A consideration of the purposes of this organization as set forth in its constitution impels us to the conclusion that there is nothing contained therein to justify the contention that its purposes are unlawful.

[3] As we have already stated, we are of the opinion that even if at common law, as originally adopted by the state of West Virginia, this organization was unlawful, it does not follow that that part of the common law is now applicable in that state, owing to the changed conditions to which we have referred. Nor do we find anything in the statute law of West Virginia to sustain the contention that this organization is illegal. The Code of 1906, enacted in 1890 (Acts 1890, c. 9, § 1) Code 1906, c. 15H, § 14, serial section 413, as amended in 1907

(Acts 1907, c. 78, § 19 [Code 1913, c. 15H, § 28 (sec. 487)]), among other things provides:

"Nor shall any person or persons, or combination of persons, by force, threats, menaces, or intimidation of any kind, prevent or attempt to prevent from working in or about any mine, any person or persons who have the lawful right to work in or about the same, and who desires to so work; but this provision shall not be so construed as to prevent any two or more persons from associating together under the name of knights of labor, or any other name they may desire, for any lawful purpose, or for using moral suasion or lawful argument to induce any one not to work in or about any mine."

This statute provides a penalty for its violation. Code W. Va. Supp. 1909, § 413a1.

As amended it went into effect May 22, 1907, prior to the beginning of the institution of this suit, and this statute was enacted in 1890, the year in which the United Mine Workers of America were organized.

To say nothing of the legislative intent, the words of the foregoing statute by implication at least recognized labor unions. Referring to the use of labels or trade-marks by labor unions, etc., there appears in the Code of 1906, as section 1, c. 62e, serial section 2859 (Code 1913, c. 62E, § 1 [sec. 2859]), the following language:

"Whenever any person, firm or corporation, or any association or union of working men, has heretofore adopted or used, or shall hereafter adopt or use any label, trade-mark, term, design, or device or form of advertisement for the purpose of designating, making known, or distinguishing any goods, wares, merchandise, or other product of labor, as having been made, manufactured, * * * such person, firm, corporation or association or union of working men, or by a member or members of such association or union, and shall register the same as provided in section three of this act, it shall be unlawful to knowingly counterfeit or imitate such label, trade-mark, term, design, device or form of advertisement, or to knowingly use, sell, offer for sale, or in any way utter or circulate any counterfeit or imitation of any such label, trade-mark, term, design, device or form of advertisement."

The fact that the Legislature of that state enacted this statute, which has for its purpose the protection of labor unions in the use of what is known as a trade-mark, clearly indicates that the Legislature recognized labor unions as lawful.

In the case of Tracy v. Banker, 170 Mass. 270, 49 N. E. 308, 39 L. R. A. 508, the Supreme Court of that state uses the following language in regard to the effect of legislation of this kind:

"The label is part of the well-known machinery of trades unions, and the use of it is found, if a finding be necessary, to be of value to the union and its members. It would not be traveling too far from the record, perhaps, if we should assume that the use of the label is in fact, as certainly it might be, of far more economic importance to the union than are many or most of the trade-marks, strictly so-called, which are protected by the courts. * * *

"It is impossible to believe that when the statute mentions unincorporated unions it does not refer to trade unions. It authorizes such unions to adopt, as well as to record, a label. Therefore it creates a right, if the court is unable to recognize one without its aid. If it applies to trade unions, it must be taken to apply to them as they ordinarily are; that is, as associations of workmen, not as manufacturers or venders of goods. It contemplates that the labels would be applied to merchandise, as of course they must be, and as these labels are. * * *

"If, as we think, the statute expressly creates or recognizes the right of trade unions to be protected in the use of labels for trade union purposes, the

suggestion that the association represented by the plaintiff is an unlawful association falls of itself. It is too late to make such a contention as to trade unions generally, even apart from the statute under which this suit is brought. But the general purposes of this union are similar, so far as we know, to the general purposes of other unions."

In view of what we have said as to the status of these organizations at common law, and the further fact that there is an implied, if not direct, recognition of labor unions by statute in West Virginia, and there being no enactment declaring the same to be unlawful, we are of the opinion that the court below erred in declaring these organizations to be unlawful at common law.

At the final hearing the plaintiff introduced certain documentary evidence bearing upon the question as to whether the defendants had entered into a combination with operators and coal producers in Ohio, Western Pennsylvania, Illinois, and Indiana, competitive fields, to compel the plaintiff to submit to contractual relations with the United Mine Workers of America relating to the employment of labor and production, contrary to the wishes of plaintiff.

This evidence was offered in support of plaintiff's oral testimony, and consisted of the proceedings of the various joint conferences of coal operators and coal miners of the states in question, held during the years 1906, 1907, 1908, 1910, and 1911. Also, book entitled "Official Mining Scale of Association of Pittsburg Vein Operators of Ohio for their Mines in Belmont, Harrison and Jefferson Counties, Ohio, and the United Mine Workers of America." Also, book entitled "United Mine Workers of America, District No. 6, Ohio, Issued by the Authority of the Executive Board of District No. 6 (Ohio Members), United Mine Workers of America. G. W. Savage, Secretary-Treasurer. For scale year April 1, 1908, to March 31, 1910." Also, book entitled "Detailed Mining Scale for Subdistrict 5 of District 6, U. M. W. of A. Effective from April 1, 1910, to March 31, 1912." Also, "Excerpts from President T. L. Lewis' Report to the Twentieth Annual Convention of the United Mine Workers of America, held at Indianapolis, Indiana, in January, 1911, as published in the United Mine Workers Journal in its issue of January 19, 1911." Also, "Expenditures of the United Mine Workers of America for the year 1910." Also, "Income of the United Mine Workers for the year 1910."

Thirteen exhibits of this kind were introduced over the objections of counsel for defendants.

The court in referring to this phase of the question said:

"I further conclude that this Union, in pursuit of its unlawful purposes to secure control and the monopoly of mine labor, and to restrain, suppress, if not destroy, the coal mining industry of West Virginia in the interest of the co-conspirators, rival operators, and producers in Ohio, Western Pennsylvania, Illinois, and Indiana, competitive fields, have sought and still seek to compel the plaintiff, the Hitchman Coal & Coke Company, to submit to contractual relations with it as an organization, relating to the employment of labor and production contrary to the will and wish of said company; that its officers, in pursuance of such unlawful efforts to monopolize labor and restrain trade, and with knowledge of the express contracts existing between this plaintiff and its employés, have unlawfully sought to cause the breach of the said contracts on the part of its said employés."

[4] The documentary evidence consisted of the declarations of a small percentage of the miners and operators who were present at these conferences. It was not shown that either before or after these declarations were made that those participating in the conference had entered into a conspiracy for an unlawful purpose. Indeed, these declarations were brought out in response to a proposition on the part of the miners for an increase of wages. A fair interpretation of the evidence shows that it was the purpose of the defendants to induce the miners of West Virginia to become members of the organization, and thereby secure as high wages as possible, compatible with the successful operation of the mines of that state by the respective owners. They had a perfect right to form a combination to accomplish such purposes by peaceable and lawful methods, and so long as they refrained from resorting to unlawful measures to effectuate the same they could not be said to be engaged in a conspiracy to unionize plaintiff's mine.

As we have already stated, the evidence fails to show that any unlawful methods were resorted to by these defendants in this instance. Therefore the court erred in holding the organization to be unlawful upon the theory that it was guilty of a conspiracy.

The opinion of the court below is based upon the ground that the defendants, and those associated with them prior to and at the time of the institution of this suit, had formed themselves into a conspiracy for the purpose of unionizing the plaintiff's mines without its consent, and for violation of the constitution, common and statutory law of West Virginia.

[5] Chief Justice Fuller, in Pettibone v. United States, 148 U. S. 197, 13 Sup. Ct. 542, 37 L. Ed. 419, defined "conspiracy" as follows:

"A 'conspiracy' is * * * a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means."

Being of the opinion that this is a lawful organization, it necessarily follows that, in order to entitle the plaintiff to the relief which it seeks, it must be made to appear that at, and before the institution of, this suit, the United Mine Workers of America were attempting to carry out the purposes of their organization by the use of unlawful means.

[6] Considerable evidence was introduced by the plaintiff as to what occurred in the vicinity of the plaintiff's mine.

Paul Leonard, superintendent of the Richland mine, was introduced, and among other things testified that he had met a man by the name of Thomas Hughes on the Richland Coal Company's property, and had had a talk with him in regard to the organization; that Hughes told him that it was his purpose to organize the Panhandle District of West Virginia. Among other things, the counsel put the following question to him:

"Q. What did you understand him to say his meaning was when he said that he was there to organize the Panhandle District? A. Why, that he would make them join the United Mine Workers or tie them up, were the words he used to me."

Counsel also asked him the following question:

"Q. Did he (meaning Hughes) make any explanation as to what he meant by tying up the Panhandle? A. That they would organize us and we would recognize the union."

The witness further says:

"My understanding of it was that if the company did not recognize this union that the mines would be shut down."

This was a threat by one who was without power to execute same. Nowhere do we find any evidence tending to show that Hughes was authorized to shut down any of the mines of that vicinity. It should also be remembered that Leonard further testified that Hughes said nothing about the plaintiff's mine.

[7] Austin, another witness for plaintiff, testified that he saw Hughes around there several times in the store and on the streets, and he also identified a card which was in the following language:

"Notice. To the Miners of the Hitchman mine: There will be a mass meeting Friday evening at 6:30 p. m., at Nick Heil's Baseball Grounds for the purpose of discussing the principles of organization. President Green will be present. All miners are cordially invited to attend."

These people, the defendants assert, had a right to hold a meeting at the baseball grounds for the purpose of discussing in an orderly manner the matters that related to their organization, and that this is especially true, inasmuch as the meeting was called for a lawful purpose, and the public generally invited to attend.

Witness Knapp also testified that he had taken down and carried away one of the notices that had been posted on a telephone pole; that Hughes had stopped him in the street, just as he was entering a private driveway, and said things to him that he did not suppose should be repeated in the presence of the court; that he attacked him very maliciously and vigorously, and was very mad.

We fail to understand upon what grounds the plaintiff or its agents claimed the right to prevent the defendants from holding meetings for the purpose of discussing matters relating to their organization.

Robert Myers was also introduced as a witness by the plaintiff, and, among other things, testified as follows:

"Q. Did you have any talk with a man by the name of Thomas Hughes? A. I remember him; yes, sir.

"Q. You remember a man by that name? A. Yes, sir.

"Q. What was he doing there—if he was about the Hitchman Mine—if you recall? A. Well, he explained to me that he was trying to organize the place again.

"Q. What is that? A. To organize the Hitchman coal miners again.

"Q. What do you mean by organizing? A. To get us organized—organized back into the United Mine Workers of America.

"Q. What did he say to you? A. Well, he said it would be very nice thing if we would go back again; and so he said if I would put my name down and give him 50 cents on a book (he did not show me the book, but said it had lots of names down on it of the Hitchman coal miners); he said if I would give him 50 cents I would be entitled to a union card to go any place and get a job, if the Hitchman company would fire me, and he would put my name down on his book.

"Q. Did you give him the 50 cents? A. No, sir.

"Q. What did you say to him on that subject? A. Well, I said I would

not do anything like this; he might be a stranger and I did not know that he was the man that he said he was, and, anyhow, I was awful careful in putting my name down to anything. He told me that he was a good friend of Mr. Koch, and that Mr. Koch had nothing against having the place organized again. He said he was a friend of his and I made the remark that I would ask Mr. Koch and see if it was so; and he said, no; that was of no use, because he was telling me the truth.

"Q. Did he show you any book? A. No, sir; I was trying to see the names on the book, but he would not show me anything. He told me he had it and I asked him how many names was on it, and he said he had about enough to 'crack off.'

"Q. What is that? A. That is what I didn't understand.

"Q. Did you ask him what he meant by 'crack off'? A. The time was too short; no, sir. I was waiting for my street car to go home on and I went on the car.

"Q. Did you say anything to Hughes about the job that you then had at the Hitchman mine? A. Yes, sir.

"Q. Well, what did you say, if you can recollect? A. Well, I told him that I didn't care much about being organized again, because I had too much experience already how it goes. I told him I was in several strikes and there wasn't anybody that helped me out, and I had to beg the company to get my job back again after I lost my job.

"Q. Did you say anything to him about having any property? A. Yes, sir; I told him it was impossible for me to go any place else, because I could not walk around with my property on my back and hunt another job. I says, 'I have work where I am now, and, as long as the company treats me as they are treating me, I will not do anything against them that they didn't like to have."

Mike Papage, another witness for the plaintiff, testified as follows:

"Q. What did he talk to you about? A. Oh, he tried to get me along with him to help him out so he could get the Hitchman mine organized again.

"Q. In what way did he ask you to help him? A. To help him to get the people together, and everything, and he was to pay me for it.

"Q. Were there at that time many men employed at the Hitchman mine who were foreigners? A. Yes, sir.

"Q. Did you speak their language? A. Yes, sir.

"Q. Could he speak their language? A. No, sir.

"Q. Did he want you to interpret—you understand what interpret means? A. Yes, sir.

"Q. Did he want you to interpret what he said to those men? A. Yes, sir.

"Q. Did you do it? A. No; I would tell him I won't do it.

"Q. Then what did he say? A. He got mad and went away.

"Q. After that did you see him any more? A. Yes, sir.

"Q. How did he treat you after that? I mean how did he treat you when you did not agree to interpret for him? A. Why, he came to my house—the second time he came to my house.

"Q. You mean he came to your house a second time? A. Yes, sir.

"Q. Then he had been there before? A. No; not before.

"Q. The second time you talked to him he came to your house. Is that the idea? A. Yes, sir.

"Q. Well, what did he say then? A. He tried to get me to interpret again, and promised me a good job and everything else.

"Q. Did that appeal to you then? Did you agree to do it then or not? A. No, sir; I would tell him I had nothing to do with him any more.

"Q. Why did you tell him that? A. They blamed me for not getting the men organized; they said it was my fault that the people kept on working.

"Q. And that Hughes could not organize the mine? A. Yes, sir.

"Q. Did Hughes tell you that? A. Yes, sir; he said that is what he heard off of the people.

"Q. That is, you mean, the men that were working in the mine. A. Yes, sir.

"Q. Did he tell you at any time how he was getting along? A. No.
"Q. Did he succeed in organizing the men there? Did he organize the men at the Hitchman mine? A. No.
"Q. Did the mine continue working while he was there? A. Yes, sir."

James Stewart, another witness for the plaintiff, testified as follows:

"Q. Were you about the Hitchman mine working there in the fall of 1907, when Thomas Hughes was there? A. Yes, sir.
"Q. Did you see Thomas Hughes there? A. Yes, sir; I saw him there several times.
"Q. Did you have any talk with him? A. Yes, sir; I talked with him several times.
"Q. Did you hear him talk with any other persons? A. He was around there all the time and he was talking to everybody he would come to.
"Q. To men employed at the Hitchman mine? A. Yes, sir.
"Q. Did he tell you what he was there for? A. Yes, sir.
"Q. What was it? A. He told me he was there to try to organize the mine.
"Q. Did he say what his business was? A. Yes, sir.
"Q. What was it? A. He said he was an organizer.
"Q. For what? A. For the United Mine Workers, and that he was there for that purpose. But I knew him before he came around there.
"Q. You did know him before that? A. Yes, sir.
"Q. What did he say to you, if anything, with relation to organizing the mine? A. I do not remember all that he did say, but I remember one certain thing that he said. He told me during one night that he was going to have a meeting called up there. I do not know what the date of it was, but it was in the latter part of August or first of September. He told me he had a couple of meetings there, but he did not seem to think it was any good; but he told me he was forming a kind of secret order among the men. He said he had a few men—he did not state the number of them—and he said each man was supposed to give him so much dues to keep it going; and then he said after he got the majority he would organize the place. He asked me what I had to say about it, and I told him my job at the present time was satisfactory and the men had agreed with the company not to organize and not to have anything to do with the organization, and I told him I did not want to have any trouble and nothing to say, anyway; and I think that was the last time I saw Hughes around there. I saw him after that across the river, but I didn't have any talk with him.
"Q. Did he say anything to you about quitting work at the Hitchman and going to a union mine? A. Yes, sir; he told me about it. He said he would get me a job, and I told him that might be all right about that, but I told him I did not think he could place me in any job any better than the one I had at the present time; and that is about as far as that went.
"Q. You say you remember of some meeting being held? A. Yes, sir.
"Q. What kind of a notice did he put out for the meetings? A. Well, I could not just say about the notices.
"Q. Did he mark on the pavements, or anything of that kind? A. Well, there was names around there, about meetings, but I do not know whether he wrote them, or who wrote them. I could not state just what was on them, but we miners claimed that that was what the purpose was.
"Q. Were there calls for meetings marked on the pavements? A. Yes, sir.
"Q. In chalk or some substance like that? A. It was in chalk.
"Q. White chalk? A. Yes, sir.
"Q. Was that done anywhere near the Hitchman mine? A. Well, the one I saw was right in front of Wilhelm's saloon, on the sidewalk.
"Q. Where is Wilhelm's saloon, with reference to the mine? A. It was about 150 yards north of the mine.
"Q. Did you attend any of the meetings that he held? A. No.
"Q. Did he say anything to you along the line of thought that unless you joined the union at that time, if the mine were unionized you would not get a job? A. Yes, sir; he stated to me that if we did not go in the local, or stay away from there and work where mines were organized, that we would

not ever be able to get a job in a union mine, but I have worked in two union mines since that, and had two union cards, and then came back to the Hitchman.

"Q. Did you hear him talk with others along the same line? A. Yes, sir; he talked with them all about the same, that I ever heard him talk to.

"Q. Did you hear him tell them that unless they joined then, that if the mine was organized they would be out of a job and they could not get any? A. He was talking to me and there was five or six or seven sitting there in a bunch, and they all heard just the same as I did about it.

"Q. Did he say what he was going to do with the men when he got enough to organize? A. Yes, sir.

"Q. What did he say he was going to do? A. He stated when he got a majority he was going to organize the mine. I expect the meaning of it was that he was going to organize whether it was against the company or not.

"Q. Did he say anything about shutting the mine down if they did not unionize it? A. He stated it that way—that whenever he got a majority he was going to organize or they would close the place down.

"Q. In point of fact, did he get a majority and unionize the mine or not? A. No, sir; I think he failed."

On cross-examination, this witness further said:

"Q. Well, then, while he was there he was trying to get men to join the union? A. Yes, sir.

"Q. And he invited you to join the union? A. Yes, sir.

"Q. And told you he thought it would be better for you to join, didn't he? A. Yes, sir; that is what he said.

"Q. And he said if you worked there and happened to be discharged, you could not get into a union mine? A. That is what he said.

"Q. His idea was that there were a great many more union mines across over in Ohio than there were nonunion, wasn't it? A. I expect that was what he meant.

"Q. Well, did he give you any further reasons why he thought it would be better for you to join the union? A. No; not just exactly."

The foregoing was substantially all the evidence that was introduced as to what occurred in the vicinity of plaintiff's mine prior to the institution of this suit, to show that the defendants had entered into a conspiracy as alleged.

While it is not denied by the defendants that they sought by peaceable methods to induce those employed by the plaintiff to join the union, yet they stoutly contend that at no time since the mine has been operated as a nonunion mine have they employed unlawful methods. We fail to find that there is sufficient legal evidence to show that the defendants entered into a conspiracy or combination for the purpose of unionizing the plaintiff's mine. While there was evidence admitted by the court below as to statements made by certain officials of the United Mine Workers of America, and the coal operators of Pennsylvania and other states, bearing upon this question, yet there is no evidence to show that the United Mine Workers of America combined, or formed themselves into a conspiracy for the purpose of unionizing plaintiff's mines after it started to run its mine nonunion in June, 1906.

The declarations of Hughes and Rankin are incompetent as against the organization, its officers and members, inasmuch as there is not sufficient legal evidence to establish the fact that the defendants as members of the United Mine Workers of America prior to and at the time of the institution of this suit formed a conspiracy; nor is there sufficient evidence to show that Rankin and Hughes were parties to such alleged conspiracy.

While Hughes was a representative of the organization, his authority only permitted him to use argument and persuasion to induce the employés to become members of the organization. This was shown by the evidence of the witness Savage.

A considerable portion of the evidence bearing upon the alleged unlawful conduct of the union in connection with the operation of the plaintiff's mine relates to the time that it was running its mine union, and the period intervening between the time it ceased operations at its mine until it resumed on a nonunion basis in June, 1906. For instance, the plaintiff complains of what happened during the strike which occurred when the mine employed union labor. Evidence was also introduced to show why the plaintiff did not continue to operate its mine on a union basis. This evidence shows that the real difference at that time was as to the price or scale to be paid for run of mine coal. While this evidence tends to show why the plaintiff declined to operate its mine on a union basis, it cannot have any material bearing upon the issues raised by the pleadings in this cause, and is therefore, as to matters now in controversy, a closed incident.

[8] Each party was at arm's length from that time on, and the refusal on the part of the plaintiff to continue the employment of union labor had the effect of severing the relations that had theretofore existed between the plaintiff and the defendants. Therefore evidence tending to show that prior to that date the defendants were engaged in a combination or conspiracy, and by intimidation, violence, and coercion were trying to prevent the plaintiff from operating its mine, would be incompetent. In other words, even though it appears from the evidence in question that the conduct of the defendants was reprehensible in the highest degree at the time that the mine was being run on a union basis, we conceive of no possible theory upon which such evidence would be competent as affecting the conduct of the defendants in this instance, inasmuch as the evidence fails to show that after the mine began to be operated on a nonunion basis that they united and conspired to use violence, intimidation, and coercion to prevent the plaintiff from operating its mine. In other words, this record clearly shows that the plaintiff for the avowed purpose of protecting its interests adopted a policy by which its mines were to be operated on a nonunion basis. At the time of the adoption of this policy by the plaintiff, the negotiations between plaintiff and defendants ceased, therefore the question now presented is: Have not the defendants the right as an organization to use all means within their power to organize miners into unions, provided that in so doing no unlawful methods are employed?

[9] The court below, among other things, expressed the view that the United Mine Workers of America constituted a combination or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, under what is known as the Sherman Anti-Trust Law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]).

[10] We do not deem it necessary to discuss this proposition at any great length. In the first place, there is nothing in the pleadings to raise the question as to whether the United Mine Workers of America

are liable under the statute in question, and any evidence that may have been introduced bearing upon this point was therefore immaterial and should have been rejected. There is another reason why we think that this question cannot under any view of the case arise in this controversy, to wit, we do not understand that a private person can question the validity of a combination or conspiracy under the Sherman Anti-Trust Law for the purpose of having the same declared to be unlawful. The scope of this act is disclosed in the case of National Fire Proof Company v. Mason Builders' Association, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148, in which the court said:

"But the complainant asserts that the agreement in this case is positively unlawful and not merely negatively invalid—that it contravenes both national and state statutes against combinations, and thus does give rights of action to injured persons. With respect to the federal statute, it is not obvious in what way a trade agreement between builders and bricklayers, relating to their work in the state of New York, can be said to directly affect interstate commerce; but the consideration of this question is not necessary because a person injured by a violation of the federal act cannot sue for an injunction under it. The injunctive remedy is available to the government only. An individual can only sue for threefold damages." Greer v. Stoller (C. C.) 77 Fed. 2.

Also, the case of Minnesota v. Northern Securities Co., 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870, is to the same effect.

[11] The court below also reached the conclusion that the defendants have caused and are attempting to cause the nonunion members employed by the plaintiff to break a contract which it has with the nonunion operators. The contract in question is in the following language:

"I am employed by and work for the Hitchman Coal & Coke Company with the express understanding that I am not a member of the United Mine Workers of America, and will not become so while an employé of the Hitchman Coal & Coke Company; that the Hitchman Coal & Coke Company is run nonunion and agrees with me that it will run nonunion while I am in its employ. If at any time while I am employed by the Hitchman Coal & Coke Company I want to become connected with the United Mine Workers of America, or any affiliated organization, I agree to withdraw from the employment of said company, and agree that while I am in the employ of that company that I will not make any efforts amongst its employés to bring about the unionizing of that mine against the company's wish. I have either read the above or heard the same read."

It will be observed that by the terms of the contract that either of the parties thereto may at will terminate the same, and while it is provided that so long as the employé continues to work for the plaintiff he shall not join this organization, nevertheless there is nothing in the contract which requires such employés to work for any fixed or definite period. If at any time after employment any of them should decide to join the defendant organization, the plaintiff could not under the contract recover damages for a breach of the same. In other words, the employés under this contract, if they deem proper may, at any moment join a labor union, and the only penalty provided therefor is that they cannot secure further employment from the plaintiff. Therefore, under this contract, if the nonunion men, or any of them, should see fit to join the United Mine Workers of America on account

of lawful and persuasive methods on the part of the defendants, and as a result of such action on their part were to be discharged by the plaintiff, it could not maintain an action against them on account of such conduct on their part. Such being the case, it would be unreasonable to hold that the action of the defendants would render the United Mine Workers of America liable in damages to the plaintiff because they had employed lawful methods to induce the nonunion miners to become members of their organization.

Under these circumstances, we fail to see how this contract can be taken as a basis for restraining the defendants from using lawful methods for the purpose of inducing the parties to the contract to join the organization.

This is an age of co-operation through organization. In fact, organization is the only means by which united effort can be secured in any branch of human endeavor. The doctors, dentists, school teachers, wholesale and retail merchants, bankers, and manufacturers, and in fact every branch of industry in this country, are organized for the purpose of the mutual protection of the respective parties interested. Such being the case, it is just as essential, and perhaps more important, that the laboring people should organize for their advancement and protection, than it is for any of the vocations we have mentioned.

While labor and capital are vitally interested in the proper solution of these questions, it should be remembered that the public is likewise interested, and in some instances affected to a greater extent than either labor or capital on account of the disputes and lawsuits growing out of these matters. Therefore it may be properly said that these questions have a bearing upon the welfare of a large percentage of our people, and this is especially true as respects the coal industry. For instance, the suspension of the operation of coal mining in this country would in all probability result in a coal famine, which would, in a large measure, embarrass the manufacturers, to say nothing of the effect it would have upon the individual consumer, and all reasonable means should be employed to avert such a disaster. Therefore we deem it our duty to define the rights of the parties to this controversy, in so far as we may under the facts of this case, so as to set at rest as many as possible of the vexatious questions that are a source of irritation, as well as productive of much litigation.

In the first place, it should be understood once and for all that, so long as capital employs legitimate means for the protection of property rights, it is to be accorded the protection of the law; but this does not mean that capital may, by improper methods, form combinations for the purpose of preventing labor from organizing for mutual protection. Likewise, it should be definitely understood that the laboring men have the right to use peaceable and lawful methods to unite their forces in order to improve their condition as respects their ability to earn a decent living; give their children moral and intellectual training; and secure the enactment of legislation requiring mineowners to adopt such methods as may be necessary to keep their mines in a sanitary condition, and, above all, to adopt methods to minimize, as much as possible, the occurrence of the awful catastrophes by which so many human lives have been lost. It should be understood that when a con-

troversy arises between labor and capital that the use of dynamite or any other unlawful methods on the part of the representatives of labor, whereby property and human lives are destroyed, is not to be tolerated by the courts.

The relative rights of the parties are entitled to equal consideration, and we feel sure that when such controversies arise that they will be dealt with in the same spirit that actuates the courts in adjusting the differences between individuals, wherein questions are involved affecting the ordinary transactions of life.

Until it is provided by state and national legislation that labor disputes shall be settled by arbitration, it will be the duty of the courts to determine questions of this character, when a proper case is presented. Under the law as it now exists, when property or personal rights are involved, the courts alone can furnish adequate relief. However, while this is true, we think that care and caution should be exercised in the issuance of injunctions of this character.

We are inclined to the belief that in some instances a reasonable delay in the issuance of the writ would have a tendency to bring about a settlement between the parties by which the rights of both could be amply protected, and thus avoid the expense incident to litigation, to say nothing about the injury sustained by the employer as well as the employé, occasioned by the suspension of operations.

In no instance should a union be restrained from using lawful and peaceable methods for the purpose of maintaining its organization; but, while this is true, the court should restrain those who by violence, coercion, and intimidation seek to deprive the mineowner of the right to use his property as he may see fit.

We have carefully considered the cases relied upon by the plaintiff, but are of opinion that they do not apply to the case at bar. For the reasons stated, the decree of the court below is reversed, and the cause remanded, with instructions to dismiss the bill at plaintiff's costs.

Reversed.

BITTNER et al. v. WEST VIRGINIA-PITTSBURGH COAL CO.

(Circuit Court of Appeals, Fourth Circuit. May 28, 1914.)

No. 1240.

INJUNCTION (§ 101*)—STRIKERS—AID TO STRIKERS.

An injunction may be properly granted restraining members of a trade union from using violence, intimidation, and coercion to induce employés to join the union and to strike, but they may not be lawfully restrained from using persuasion and other peaceable methods to that end, or from aiding striking employés by furnishing them money from a relief fund.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175; Dec. Dig. § 101.*

Restraining boycotts, strikes, and other combinations by employés interfering with commerce or business, see note to Shine v. Fox Bros. Mfg. Co., 86 C. C. A. 313.]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Wheeling; Alston G. Dayton, Judge.

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

Suit by the West Virginia-Pittsburgh Coal Company against Van Bittner and others to restrain defendants from interfering with complainant's nonunion employés. From an order granting complainant a preliminary injunction, defendants appeal. Modified and affirmed.

John C. Palmer, Jr., of Wheeling, W. Va., and A. M. Belcher, of Charleston, W. Va. (Erskine, Palmer & Curl, of Wheeling, W. Va., on the brief), for appellants.

John A. Howard, of Wheeling, W. Va., and J. F. Cree, of Wellsburg, W. Va., for appellee.

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

PRITCHARD, Circuit Judge. This is an appeal by the defendants below from a preliminary injunction granted by the District Court of the United States for the Northern District of West Virginia, on the 2d day of December, 1913, in the above-entitled cause.

The questions of law involved in this suit were passed upon by this court in the case of John Mitchell, T. L. Lewis, et al. v. Hitchman Coal & Coke Co., 214 Fed. 685, 131 C. C. A. 425, at the present term of this court. The decree of the lower court in that suit was reversed at the cost of the plaintiff for the reasons stated in the opinion filed therein. However, the facts in this controversy are different from those of the former suit, in that it appears from the evidence that violence, intimidation, and coercion were resorted to by the defendants in this instance.

The court below granted a preliminary injunction restraining the defendants from committing acts of violence, intimidation, and coercion, and also from the use of persuasion and other peaceable methods, and from aiding the striking miners by furnishing them money from what was known as a relief fund, etc. The defendants made a motion to modify the decree in so far as it restrained them from resorting to persuasive and peaceable methods, and from aiding the striking miners by furnishing them money. This motion was disallowed, and the case comes here on appeal.

We think the decree of the lower court in so far as it restrains the defendants from any acts of violence, intimidation, and coercion is proper in view of the evidence. While this is true, nevertheless we are of opinion, for the reasons stated in the case of John Mitchell, T. L. Lewis, et al. v. Hitchman Coal & Coke Co., supra, that the court below erred in entering that portion of the decree whereby it is provided that these defendants shall be restrained from resorting to peaceable and lawful methods for the purpose of organizing the miners of that section.

It follows that the decree of the lower court should be modified by adding thereto the following proviso:

Provided, however, that this restraining order is not intended to prevent any of said employés of the plaintiff company from quitting work for said plaintiff and from severing the relations of master and servant existing between the plaintiff and said employés at the time

this order is entered, or from striking or persuading his fellow employés to quit work and strike for their mutual protection and benefit.

Provided, further, that this injunction is not intended to prevent any employé of the plaintiff who had ceased to work for said plaintiff to use persuasion, but not violence, to prevent other men from accepting employment with the plaintiff in his place.

Provided, further, that this injunction is not intended to prevent the employés of plaintiff from joining any lawful labor union and from receiving the nonemployment benefits paid by such union.

Provided, further, that this injunction is not intended to prevent the defendants, their associates, agents, and fellow members of the United Mine Workers from supporting any of plaintiff's former employés who have ceased to work for said plaintiff, nor is this injunction intended to prevent any member of the labor union to which such employés ceasing to work for the plaintiff belong from legally assisting said employé in securing better terms of employment and in endeavoring to persuade, without violence, any other laborer from taking the place of said striking employé.

The decree of the lower court as thus modified is affirmed.

Modified and affirmed.

ALASKA TREADWELL GOLD MINING CO. et al. v. ALASKA GASTINEAU MINING CO.†

(Circuit Court of Appeals, Ninth Circuit. May 18, 1914.)

No. 2311.

1. CONTRACTS (§ 169*) — CONSTRUCTION OF WRITTEN CONTRACT — EXTRINSIC CIRCUMSTANCES.

In construing the written contract of parties, it is proper for the court to consider the character of the property embraced by it and the situation of the parties at the time of making it, but that is permissible solely for the purpose of aiding in the true construction of the written instrument and not for the purpose of adding to or taking from any of its provisions.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 752; Dec. Dig. § 169.*]

2. ELECTRICITY (§ 11*)—CONTRACT TO FURNISH ELECTRIC CURRENT—CONSTRUCTION.

A written contract by the owner of an electric power plant to furnish at its power house "a current of not to exceed 300 electric horse power" for a consideration received cannot be construed to require the furnishing of three or more times such current when necessary to start a certain type of motor, although such motors were in use by the other party when the contract was made, and it was known that the current was to be used for their operation, but the necessity of a large additional current for starting purposes was not anticipated or thought of by either party.

[Ed. Note.—For other cases, see Electricity, Dec. Dig. § 11.*]

Gilbert, Circuit Judge, dissenting.

Appeal from the District Court of the United States for Division No. 1 of the District of Alaska; Peter D. Overfield, Judge.

Suit in equity by the Alaska Gastineau Mining Company against the Alaska Treadwell Gold Mining Company, the Alaska United Gold

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

† Rehearing denied October 13, 1914.

Mining Company, the Alaska Mexican Gold Mining Company, and Robert A. Kinzie. Decree for plaintiff, and defendants appeal. Reversed.

Hellenthal & Hellenthal, of Juneau, Alaska, and Curtis H. Lindley, of San Francisco, Cal., for appellants.

Shackleford & Bayless and Z. R. Cheney, all of Juneau, Alaska, and Albert Fink, of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The appellee was complainant in the court below, and by its bill sought the specific performance of a written contract entered into between its predecessor in interest, Oxford Mining Company, and the appellants here, who, together with their superintendent, Robert A. Kinzie, were made defendants to the bill. The contract and the decree appealed from are in words and figures as follows:

"This indenture and agreement made and entered into this 14th day of October, 1909, by and between Oxford Mining Company hereinafter called the lessor and the Alaska Treadwell Gold Mining Company, the Alaska Mexican Gold Mining Company and the Alaska United Gold Mining Company hereinafter called the lessees.

"Witnesseth, first, the lessor has this date and does by these presents lease unto the lessees all of the following described real property situated on and near Sheep creek in the Harris mining district, district of Alaska, to wit:

"The Mexico Millsite U. S. Mineral Entry No. 25, lot 71B. The Belvedere Millsite U. S. Mineral Entry No. 25, lot 72B. The Jumbo Millsite U. S. Mineral Entry No. 60, Lot No. 260. Also that certain piece or parcel of land beginning at a stake identical with Post No. 2 Jumbo Millsite U. S. Survey No. 260 on the meander line of Gastineau Channel; thence first course along the meander line of Gastineau Channel at ordinary high-water mark N. 52° 00′ W. 54 feet to stake No. 2; thence second course N. 48° 15′ E. 200 feet to stake No. 3; then S. 52° 00′ E. 54 feet to the N. W. side line of Jumbo Millsite U. S. Survey No. 260, 200 feet to stake No. 1, the place of beginning containing an area of one quarter of an acre more or less, courses expressed from the true meridian, Mag. Var. 29° 30′; and also that certain water right known as the Sheep creek water right and located on Sheep creek about three-quarters of a mile from its mouth, together with the flume and pipe line connecting the same with the beach near the mill at the mouth of the said Sheep creek, also the sawmill, boarding house, lumber sheds, wharf landing, milldam, flumes, penstocks, water wheels, and all other machinery and appliances used in connection with said sawmill, situated near the mouth of said Sheep creek, together with all machinery, tools, equipment, plants of every kind and description now upon said property for a term of ten (10) years from the date hereof at a monthly rental of one hundred and twenty-five ($125.00) dollars per month; payable in gold coin of the United States on the first day of each month during the term of said lease at the office of the lessees at Treadwell, Alaska; and it is hereby agreed, that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, that it shall be lawful for the lessor to re-enter said premises and remove all persons therefrom, and the lessees do hereby covenant, promise and agree to pay the lessor the said rent in the manner hereinbefore specified, and not to let or underlet the whole or any part of said premises without a written consent of the lessor, nor to assign this lease or any part thereof without said written consent, and at the expiration of said term the party of the second part will quit and surrender said premises in as good state and condition as the same now are.

"It is the intention of the lessees to erect, equip and maintain upon said premises a water power plant of substantial size and efficiency for the gen-

eration of electric power, and if at any time after two (2) years from the date hereof the lessor or its assigns shall elect to take a current of not to exceed three hundred (300) electric horse power which shall be taken from and at the generating plant to be installed upon the leased premises hereinbefore described, the lessees undertake, covenant and agree to deliver said current to the lessor or its assigns upon the execution and delivery by the lessor or its assigns to the lessee of a deed or deeds conveying said leased property herein described to the parties of the second part. If prior to the expiration of nine years from the date hereof the lessor does not elect to convey to lessees or their assigns the property herein leased and accept in full consideration therefor the right to use the three-hundred (300) electric horse power hereinbefore mentioned, the lessees may at their option prior to the expiration of the ten (10) years provided in this lease purchase the property herein leased absolutely from the lessor by paying to the lessor the sum of twenty-five thousand dollars ($25,000) in gold coin of the United States; and the lessor covenants and agrees upon tender of said sum of twenty-five thousand dollars ($25,000) to execute and deliver such deeds of conveyance to the property herein leased as hereinbefore specified, excepting only as to the title to (1) the one-quarter acre tract hereinbefore described and (2) the premises occupied and used by the existing wharf of the lessor to both of which the lessor now asserts only possessory titles. The lessees may at their own cost and expense undertake to perfect the said titles and should lessee wish so to do the lessor shall lend all proper assistance in its power including the using of its name, and should the said titles be so perfected to the said premises or either of them, they shall become the property of the lessor and remain covered by this lease and subject to all the terms and conditions thereof.

"The covenants herein contained shall be construed as running with the land and as a charge thereon, so that any successor or successors in interest to the lessor or lessees who may acquire any interest in and to the titles to the said land shall be bound by this conveyance in the same manner as if they had executed this agreement; and the lessees hereof may require at their option that the property herein described be conveyed by the lessor to a responsible trustee for the purpose of carrying out the terms of this agreement, or that deeds and conveyances covering the property herein leased be placed in escrow so as to insure delivery of the same if required under the provisions of any of the covenants of this lease.

"If neither of the options herein provided for are accepted by either the lessor or the lessees then the property and rights herein described with all the improvements that are or that may be hereafter placed on the said premises shall be and become the property of the lessor.

"The provisions herein as to the delivery of three hundred (300) horse power at the generating plant to be installed on the premises herein described contemplates the delivery of an uninterrupted current, but the lessees shall not be liable for damages that may arise from operating and physical causes beyond its control.

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

"Oxford Mining Company,
"Wallace Hackett, President,
"And Henry Endicott, Treasurer.
"Alaska Treadwell Gold Mining Company,
"By H. H. Taylor, President,
"F. A. Hammersmith, Secretary.
"Alaska Mexican Gold Mining Co.,
"By H. H. Taylor, President,
"F. A. Hammersmith, Secretary.
"Alaska United Gold Mining Co.,
"By H. H. Taylor, President,
"F. A. Hammersmith, Secretary."

"Witness:
"Harold Lawrence.
"Walter W. Black.

"Decree.

"This matter having come on heretofore for hearing, and the testimony of the plaintiff and the defendants having been submitted herein taken under advisement, and the court having made and entered its findings of fact and conclusions of law herein, the parties having at all times appeared by their respective attorneys, Messrs. Shackleford & Bayless and Z. R. Cheney for the plaintiff, and Messrs. Hellenthal & Hellenthal for the defendants, and the court being fully advised in the premises, it is ordered, adjudged, and decreed:

"(1) That the plaintiff is entitled to have and receive of and from the defendants, under and by virtue of the contract set forth in the plaintiff's complaint, the uninterrupted and beneficial use of 300 real or actual horse power to be supplied by electric current.

"(2) That the plaintiff is entitled to have and receive of the defendants all reasonable starting surges used in connection with the ordinary machinery used in mining for the application of 300 horse power or less and necessary to the starting of such machinery and to the beneficial use of an uninterrupted current of 300 horse power.

"(3) That the plaintiff is entitled to the use of real and not apparent power, the same to be measured by wattmeter, and that the plaintiff is entitled to use upon the circuit connecting it with the power house of the defendants any ordinary motors used in mining operations (whether of the induction type or otherwise) commonly and ordinarily used in mining operations consuming 300 horse power or less.

"It is ordered, adjudged, and decreed that the defendants herein so set and maintain their connections, circuit breakers, and other appliances with the plaintiff company that the actual, uninterrupted, and beneficial use of the before-mentioned rights of the plaintiff shall not in any way be interfered with, and the defendants are enjoined from using any appliances which will deprive the plaintiff of the enjoyment of the rights above decreed to the plaintiff; and defendants are perpetually enjoined from maintaining any circuit breaker or other appliance which will deprive the plaintiff of 300 actual horse power, or any part thereof, to be measured by wattmeters or which will deprive plaintiff of any reasonable starting surges to the enjoyment of the uninterrupted use of the said 300 actual horse power.

"The court further decrees that the plaintiff be allowed to install upon the switchboard connecting the plaintiff's power line with the defendants' power house a wattmeter, voltameter, and ammeter, and that the same be installed in such a way that the plaintiff may have the same under lock and key for its information and inspection to check the wattmeter, voltameter, and ammeter readings of the defendant companies at said point.

"It is further ordered, adjudged, and decreed in accordance with the foregoing that the contract of October 14, 1909, be specifically performed by the defendants.

"It is further ordered, adjudged, and decreed that the defendants and each of them are hereby enjoined from doing any act or thing which will interfere with the enjoyment of the rights herein decreed to the plaintiff and against the defendants.

"It is further ordered, adjudged, and decreed that the defendants maintain and install upon the connection of the plaintiff's power line with the power house of the defendants at the switchboard at the power house at Sheep creek an inverse thirty-second time relay circuit breaker in such a manner as to provide reasonable starting surges in connection with the operation of the machinery of the plaintiff company upon said power line, which said circuit breaker shall be set at all times so as to give an uninterrupted current of 300 real horse power as distinguished from apparent power, to be set and maintained in addition to the thirty-second resistance in the said circuit breaker which is decreed for the purpose of providing to the plaintiff reasonable and adequate means of obtaining starting surges without interruption in their operations, and that the plaintiff have and recover of and from the defendants its costs and disbursements herein laid out and expended.

"Done in open court this 12th day of June, 1913.

"Peter D. Overfield, Judge."

Passing the question as to whether a court of equity should undertake the enforcement of the requirements of the above decree, we inquire whether its provisions are justified by the contract of the parties. A corporation styled the International Trust Company was the predecessor in interest of the Oxford Mining Company, of which International Company Mr. L. P. Shackleford was the attorney and representative at Juneau, Alaska, in 1909, and for several years theretofore. At the same time Mr. F. W. Bradley was the consulting engineer of the appellant companies, and Mr. H. H. Taylor was their president. The evidence shows without conflict that for several years the property mentioned in the contract in question had remained idle, the water right therein referred to being as a matter of course liable to be appropriated by any third party for beneficial purposes, since the water pertained to land of the government; that under such circumstances Bradley and Taylor made a proposition to Mr. Shackleford as the representative of the International Trust Company, which resulted in the preparation of a tentative agreement, which, with a modification afterwards to be mentioned, became the contract which is the basis of the present suit. Mr. Shackleford's testimony in respect to the tentative agreement is, omitting immaterial matter, substantially as follows:

"In the early part of August, 1909, Mr. Bradley came to my office and stated that they would like to acquire what is known as the lower water right and power plant and millsites on Sheep creek. That plant was in a state where it could be used, but it hadn't been in use for two or three years, the title to the Sheep creek mines having been in dispute, and after some discussion I informed him that I didn't think he was prepared, from his offers, to pay a price that would be attractive to the owners of the property, and he finally outlined an agreement which he called a—I have forgotten the exact term. It is a flood-water agreement, and it was practically in the form that it is now. So within two or three days, some time prior to the 10th of August, his representation at that time was that he was willing to insure to the International Trust Company and the parties interested in that property or in the Sheep creek mines sufficient power to operate the Sheep creek mines, and I told him that I thought a contract along that line giving adequate power for the operation of the mine might meet with the approval of the Boston bondholders and of the trust company. He estimated that we would need at least 150 horse power to operate the mines with; that was not to start the machinery but to operate the mines with, and he said that he thought 200 horse power would be a liberal estimate for the power continuously required in the operation of the mine. The contract was a draft of our ideas about the matter, so far as we had gotten, involving a lease during the period of the construction and an option to take the horse power, and an option in the case we didn't at the end of ten years take the horse power, was drawn up and various alterations in it were made. I drew a skeleton of the option, and after that time the option was either drawn or dictated by Mr. Bradley or Mr. Taylor. The option probably will be—the original draft is probably—in my handwriting very largely. As both the gentlemen suggested alterations and changes I would note them. The option, or the contract I should say, wasn't signed by either of the parties at that time. It was simply a draft for submission in Boston, drawn up here in Juneau and at Treadwell. After it was completed, I will say that the last clause in the option defining an uninterrupted current was drawn by me. I originally used the word 'continuous' instead of 'uninterrupted,' and it stood in the contract, I think, until we got on a boat. We went down below together. At that time it was changed to the word 'uninterrupted' at Mr. Taylor's suggestion because he said continuous had a meaning in electricity which might require them to deliver a direct—at any rate, that word was changed. However, when the contract was

completed, Mr. Bradley wrote a letter to Mr. Henry Endicott, who was the most influential bondholder in the—under the mortgage deed of trust, held by the International Trust Company, and who represented most of the other bondholders, and I took that letter with me and a draft of the contract. The original of that letter is in Boston. I have a copy, however, which I have examined, and which I know to be a correct copy, and I will present the letter in connection with my testimony. Upon my arrival in Boston I presented to them the draft of the contract, and the matter was discussed between the three principal bondholders and myself, Mr. Henry Endicott, Mr. William Endicott, and Mr. Wallace Hackett; and they asked me if I considered 200 horse power adequate, and I told them that was a subject upon which I declined to advise them because I had no technical knowledge of the requirements of the plant. I could tell them there was a 30-stamp mill there and about the machinery that was there. At that time Mr. Thane (an electrical engineer as the record shows) was in Boston, and they took the matter up with him and asked him. After consulting with Mr. Thane, he advised them that they would require 300 horse power in continuous use to operate that mine. Thereupon Mr. Henry Endicott sent a wire to Mr. Bradley at Wardner, Idaho, a copy of which I present for identification and ask to be offered."

The letter from Bradley to Mr. Henry Endicott which was taken by Mr. Shackleford with the draft of the tentative agreement to Boston and the telegram just referred to are as follows:

"Treadwell, Alaska, August 10, 1909.

"Henry Endicott, Esq., 101 Tremont Street, Boston, Mass.—Dear Sir: We have been talking to Mr. L. P. Shackleford about your water right on Sheep creek this district and both he and ourselves have agreed upon what we consider an extremely fair proposition our concession have been drawn up in the shape of a document which Mr. Shackleford will present to you as it is now this Sheep creek water power is in jeopardy and can be taken at any time by adverse interests our proposed arrangement will preserve your rights while at the same time developing them and making the most use of them. I presume you are holding this water right for the value that it has had and may have in the future for working the Sheep creek mines and thirty stamp mill connected therewith estimating conservatively 150 HP. is all the power these mines and mills ever required for their past operations. The mill is amply large enough for the mine and surely two hundred H. P. will more than take care of future requirements if the proposition is at all acceptable to you we would begin immediate work thereby preserving your rights and returning you some monthly income the proposition provides amply time in which you could decide either to sell the property outright or take two hundred H. P. for the operation of the mines and mill, your very truly,

"F. W. Bradley."

"Boston, August 23, 1909.

"F. W. Bradley, Wardner, Idaho: Will lease power on terms proposed subject to consent trust company if three hundred horse power is substituted for two hundred. Henry Endicott."

Bradley replied to that telegram as follows:

"Henry Endicott: You may substitute three hundred for two hundred horse power may I cable Sup't Kinzie to begin immediate protection measure.

"F. W. Bradley."

Mr. Shackleford proceeds to state in his testimony, concerning which there is no dispute, that shortly after the receipt of the last-mentioned telegram:

"Mr. Hackett and I proceeded with the organization of the Oxford Mining Company, and the property theretofore held in trust by the International Trust Company was deeded to the Oxford Mining Company as soon as the

president of the trust company returned from Europe and as soon as this was done the contract, as drafted or submitted by Mr. Bradley with his letter in August, was signed exactly as drafted and submitted except wherever the words two hundred horse power had appeared in the contract originally the words three hundred horse power were substituted."

And the record shows without conflict that with that modification the contract already set out in full, and which forms the basis of this suit, was the tentative contract prepared by Bradley, Taylor, and Shackleford in August, 1909. Manifestly, in entering into that contract the parties were dealing at arm's length; there being no valid ground for saying that the International Company acted upon the suggestion of Bradley that 200 horse power would be sufficient for the operation of its properties. On the contrary, it is undisputed that that company took the advice of Mr. Thane in respect to the matter and acted in accordance with his recommendation in making the contract in question.

It also appears without dispute that the appellant corporations thereupon proceeded to erect a power plant upon the leased property generating from 2,600 to 3,000 horse power, and that the Oxford Company, the successor in interest of the International Company, and by it caused to be organized as already indicated, on the 31st of October, 1910—within a little over one year from the time of the execution of the contract—elected to take under the terms of the contract the electric current therein mentioned and stipulated for in lieu of the monthly rentals therein specified, and to convey all of the said property to the appellant corporations, which it did in April, 1911.

The record further shows that on the 1st of June, 1912, the appellee corporation, complainant below, succeeded to the interest of the Oxford Company, and on November 8th of the same year applied to the appellant corporations for such connection with their lines as would give to the appellee what was required by the contract; and, in compliance with such request, the appellant companies furnished the appellee an uninterrupted current capable, with proper appliances, according to the evidence, of yielding 300 horse power, and installed at their power house on the premises mentioned an instantaneous circuit breaker which broke the current whenever the latter exceeded that amount.

The provisions of the decree appealed from, hereinbefore set out at large, were the result of these views of the court below as expressed in its opinion:

"The contract is to be construed, if possible, in the light of the intention of the parties to the instrument as it appears, not only in the contract, but also from the evidence before the court in so far as it shows the surrounding circumstances of the subject of the contract, the relationship of the parties as it existed at the time of the execution of the same; the object to be accomplished under the agreement; the use of the subject-matter when discussed and known by both parties, and the manner in which it was to be used.

"First and most naturally we scan the language of the contract, and if its terms are unequivocal and no ambiguity exists, either in the words employed or in inconsistencies between different paragraphs with reference to the same subject-matter, then the contract speaks for itself.

"It is claimed that the failure to mention in the contract surges or peaks results that it was not contemplated at the time of the agreement, nor its

use anticipated. The evidence leaves little doubt that the necessity of starting surges or peaks was not anticipated or thought of, at least at the time of the execution of the contract. It therefore follows that the first question under the issues must be decided upon the fact that neither party to the contract thought of or anticipated the necessity or use of the surge or peak, now acknowledged to be necessary to start the kinds of motors then in use at Sheep creek, and which both parties would naturally expect would be employed to entitle and permit the plaintiff to utilize the current contracted for.

"That means the use of induction motors employed when a current of about 300 horse power is being utilized for general mining purposes. Form K General Electric motors had been generally used in Alaska, and was naturally in the minds of the contracting parties at the date of the contract. At the time the contract was executed, the machinery operated by the power at the Sheep creek mines was not in operation, the Sheep creek mines not being then worked and had not been for some time, yet it is apparent that both parties to the contract had in mind at that time the reservation of sufficient horse power electric current on the part of the plaintiff's predecessor in interest to successfully operate the said property as a mine.

"At that time there was still located on the Sheep creek properties, and formerly operated there, a 30-stamp mill, two rock crushers, two air compressors, two hoists, and about 100 electric lights.

"While the situation of the plaintiff's predecessor in interest was that of one embarrassed about maintaining the title to the water power in question, in that the law demanded the plaintiff's predecessor to continue to put to beneficial use the water at the Sheep creek power plant, which might be at any time relocated by other interests, it was also a valuable asset to the defendants to obtain additional power there to generate electricity, to be utilized by them in their adjacent large mining operations in the vicinity where the water power had been already largely developed and utilized.

"No doubt under the testimony plaintiff's predecessor did not at the time of the contract so much intend to operate the Sheep creek mines with the electric current reserved under the contract, as they hoped it would prove an asset and inducement in offering for sale their Sheep creek property as a whole.

"At any rate, there is no question but that the reservation of the 300 horse power electric current was to enable the Sheep creek properties as a mine to be successfully operated.

"The parties first began the negotiations which resulted in the contract, Shackleford, Bradley, and Taylor, at Juneau and Treadwell, Alaska, in August, 1909, L. P. Shackleford at that time representing the International Trust Company and afterwards the Oxford Mining Company, its successor in interest, F. W. Bradley, consulting engineer of the defendant companies, in charge of their operations, construction, and development in Alaska, and H. H. Taylor, the then president of the defendant companies.

"At that time these gentlemen were familiar with the machinery then situated on the Sheep creek property, as well as the power necessary to operate the same and the purposes for which the machinery would be employed.

"There is testimony that they estimated the power necessary to be reserved for the purposes of the plaintiff's successor in interest, to be not over 150 horse power, and they added 50 horse power for good measure, estimating the amount of power to be reserved by the plaintiffs at 200 electric horse power. However, Shackleford reserved the right to submit the amount of power to be reserved under the contemplated contract to his clients, and with the tentative draft of the contract and the letter from Bradley to Endicott about the same in his possession, he submitted the same to the officers of his corporations he then represented, in Boston, and the amount of 200 horse power was not found by them sufficient or at least not satisfactory, and the telegram was sent to Bradley, in Idaho, that the tentative contract would be acceptable if 300 horse power were inserted where the figures 200 horse power then appeared.

"At this point there was a meeting of the minds of the contracting parties on the subject-matter now before the court, and the only alterations made in

the original draft of the contract prepared by Shackleford, Bradley, and Taylor were the necessary changes of the term '200' to '300' wherever the former had been employed in the original.

"To further follow the evidence, in order to ascertain the intention of the parties contracting for the electric current reserved under the contract, we revert to the following:

"Bishop, formerly employed at the Sheep creek mines and power plant, testifies that the power necessary to run the machinery situated on the Sheep creek property when it was last operated prior to the contract shows that there was employed in the operation and development of the mines: 1 straight line air compressor, 14-inch cylinder, 16 or 18 inch stroke; 1 duplex air compressor, 16-inch cylinder, 16-inch stroke; 1 80 horse power Westinghouse 500-volt electric generator, direct current; 1 25 horse power Sprague 500-volt direct current generator; and a 75 horse power Sprague generator.

"At the mill was installed a 50 horse power C. & C. motor, a 50 horse power Sprague motor, also a 25 horse power motor, which ran the rock crushers.

"These motors were employed to run a 30-stamp mill, rock crushers, air compressors, hoists and about 100 lights installed in and about the buildings and mine.

"At the conference held by Shackleford with his clients in Boston at the time was one B. L. Thane, who was called into consultation by the plaintiff's predecessor and being familiar with the properties at Sheep creek and the machinery situated thereon and its use, advised that 300 horse power was necessary for its successful operation. Wallenberg, an electrical engineer employed by the plaintiff company, testifies that the amount of power required to run the machinery situated on the Sheep creek properties in 1909 was as follows:

"Running a mill of 30 stamps, 50 to 60 horse power; 2 rock crushers 25 horse power; 100 lights 10 horse power; 2 hoists 15 horse power; 2 pumps 10 horse power; the air compressors 75 horse power. That the power necessary to operate the equipment at the mines was as follows: For the use of the 2 air compressors 165 horse power; one generator 80 horse power; 1 25 horse power generator—or 370 horse power.

"Kinzie, manager for the defendant companies in Alaska, at Juneau, testified that he was acquainted with the machinery on the Sheep creek properties in 1909; that it could have been operated with a 200 horse power current if proper machinery had been installed.

"This leaves but one conclusion, and that is irresistible, that the parties to the contract knew at the time of the execution of the contract that the machinery then on the Sheep creek property could not be successfully run on a 200 horse power electric current, without the aid of other machinery; that is, a different equipment than had been employed.

"Mr. Kinzie's testimony, and he is corroborated by all the other witnesses called on the point, is that the General Electric Form K motor requires at least three or four times the starting surge it requires to operate its load; many of the witnesses testifying that it requires nine times the electric current to start such a motor that it does to operate it under its normal load.

"It seems apparent that the parties to the contract had in mind, when contracting for the current in 1909, the use of the usual machinery employed at Sheep creek and similar means for the mining and development of such a property and the power necessary to operate the plant then at Sheep creek and generally used in similar ventures.

"There can be no doubt but that with the amount of power to be utilized and the purpose for which it was to be used a General Electric Form K motor was anticipated; it being the most popular and practical motor of the size to be employed in connection with the power or current and the motor requiring the least care and experience in operating it.

"It is therefore to be concluded from the situation of the parties to the contract that it was their intention that the power to be reserved under the contract was for the purpose of operating the Sheep creek properties, employing at least such power in its future operations as had been employed in

the past, and that the usual induction motors used in similar operations would also be employed here; that at least over 200 horse power had been so employed and without the right under the surrounding circumstances to a starting surge the plant could not have been operated. The development in electrical starting appliances since 1909 must be taken into consideration when looking at the intention of the parties as portrayed in the contract of 1909."

[1, 2] It is quite true that in construing the written contract of parties it is proper for the court to consider the character of the property embraced by it and the situation of the parties at the time of making it; but that is permissible solely for the purpose of aiding in the true construction of the written instrument, and not for the purpose of adding to nor taking from any of its provisions—the latter never being permissible. But that is exactly what has been done by the decree in this case. Turning to the written contract, it is seen that what the appellee's predecessor in interest agreed to take and what the appellant companies agreed to deliver to it and its successors in interest was "a current of not to exceed three hundred (300) electric horse power, which shall be taken from and at the generating plant to be installed upon the leased premises" by the appellant companies. There is nothing in the written contract requiring the latter to deliver power. Indeed, that is expressly conceded in the brief of the appellee's counsel, where it is said:

"Certainly no one contends that anything was to be delivered other than current, but [they add] the question still remains open as to the quantity or volume of that current."

The difficulty in the way of the latter suggestion is that the written contract does not leave open the question as to the quantity or volume of the current, for it expressly declares it to be "a current of not to exceed three hundred (300) electric horse power." And yet by the decision of the court below there is in effect read into the written contract a provision requiring the appellant companies to furnish such additional current as may be necessary to start a certain kind of motor called the "General Electric Form K," which, the court below finds, all of the testimony shows "requires at least three or four times the starting surge it requires to operate its load," and that many of the witnesses testified "that it requires nine times the electric current to start such a motor that it does to operate it under its normal load." It is manifest that whether the starting surge is needed 10 seconds or 30 seconds or only 1 second, if the contract requires the appellants to furnish it, they are obliged to have it constantly available for the appellee's use and therefore cannot divert it to other uses without liability for damages. To read by construction into the written contract of the parties such a requirement is therefore to read into it a most important provision not there found. It is expressly stated by the court below in its opinion "that the necessity of starting surges or peaks was not anticipated or thought of" at the time of the execution of the contract; and the evidence in the case justifies that statement. How, then, can a court by its decree read into the contract a provision requiring one of the parties to furnish something that neither of the

parties to it ever thought of or contemplated? To state the question is to answer it in the negative.

The appellant companies by the written contract agreed to furnish a certain specified quantity of uninterrupted electric current, which the evidence shows they have done; the development of power from that current was and is a matter for the appellee company over which the appellant companies have under the contract no control or concern. And we can see no just or legal ground upon which any court can read into the contract between these parties a requirement that in addition to a current of not exceeding 300 horse power the appellant companies shall also furnish such additional current as may be needed to start the old motors that had been used by the predecessor in interest of the appellee several years before the making of the contract, or any other specific kind of motor.

It results from what has been said that the judgment must be and hereby is reversed, with directions to the court below to dismiss the suit at the cost of the complainant; appellants to recover their costs in this court.

GILBERT, Circuit Judge (dissenting). The facts in the case as found by the court below are, in substance, the following: In August, 1909, a representative of the appellants approached the attorney for the International Trust Company, the predecessor in interest of the appellee, and stated that it was the desire of appellants to secure possession and control of the Sheep creek power plant, then owned by the trust company, and construct upon the millsites, upon which said power plant was situated, a water power plant of substantial size and efficiency of a capacity to produce 3,000 horse power, and in exchange for said property to provide for the International Trust Company sufficient power to operate its mines known as the Sheep creek mines; and he represented that an uninterrupted current of 200 horse power continuously at the disposition of the said trust company would be sufficient for that purpose, said representation referring only to the ordinary electric load necessary to the operation of the mines and the mining machinery, and not including any estimate of the power momentarily necessary to start machinery that would consume such power. Thereafter the parties agreed upon a contract substituting 300 horse power instead of 200 horse power, of which the trust company had ascertained that it would need the continuous use. The matter of surges momentarily necessary to start machines was not discussed between the contracting parties, and no reference was made thereto in the contract; but from the surrounding circumstances it appeared that it was the intention of the parties to provide for the beneficial and uninterrupted use of 300 actual horse power to the trust company, including starting surges, which would insure the right to use such horse power in connection with the ordinary machinery used in mining and the ordinary forms of induction motors in common use in mining for loads of 300 horse power or less.

The court found that, for loads of 300 horse power or less, induction motors having an inherent phase of displacement and power factor

less than unity were in ordinary and practical use and were contemplated by the parties at the time of the execution of the contract, and that the power contracted for was 300 actual horse power as distinguished from 300 apparent horse power. The court further found that in making the contract the predecessor in interest of the appellee had a right to rely upon the representations made by the appellants to the effect that it was their purpose to furnish the amount of power stipulated in the contract in real, actual, and practical working efficiency, together with such momentary surges, as were necessary to start the machinery. And the court found that arrangements for the development of the appellee's mining property were made in reliance upon the contract of the appellants that they would furnish an uninterrupted current of 300 electric horse power for its actual and practical use, and that, relying upon said contract, a large force of men was engaged for underground development, and a large sum of money was expended upon said mining property; and that from November 8, 1912, to December 2, 1912, power was furnished the appellee under such understanding, but that from and after December 24, 1912, when the mine was shut down for Christmas day, the appellee has been unable to start the machinery with the current provided by the appellants except under the orders of the court, and that after said date the appellants refused to supply the surges necessary to start the appellee's machinery. The court found, also, that the starting of machinery which will consume a given amount of power often requires what is known as a starting surge, which lasts from 10 to 30 seconds, which from a practical standpoint is not taken into account or charged for in electrical connections; that in the Juneau mining district it is not customary for the appellants to charge any other customer for the necessary starting surges for machinery connected with their power plant, but the power is measured upon the amount taken after the machinery is started and in operation; and that it is the common practice, where a certain amount of horse power is normally used, for the producing company to allow a reasonable surge to the consumer sufficient to start and put in operation machinery which will normally consume the current provided for.

The court further found that, irrespective of the representations of the parties, it was the intention of the parties to the contract to provide for the actual and beneficial use by the appellee's grantor of a current of 300 real horse power, and that from the surrounding circumstances a starting surge was naturally to be implied or presumed, and that without a starting surge (in connection with K induction motors which the court found is the ordinary type of motor in mining use for loads of 300 horse power or less) the practical and beneficial use of more than 100 horse power could not have been obtained, and that under the conditions existing aforesaid at the time when the contract was executed the parties could not have contemplated the uninterrupted delivery of 300 horse power provided for in the contract unless a starting surge was implied in the said contract.

These findings of the court are amply sustained by the evidence in the case. Expert witnesses were called, who testified that, where the

use of a named amount of electrical horse power is provided for without further definition in a power contract, it is the practice and common usage of power companies to permit a surge whenever necessary so that the use may be enjoyed approximately to its full extent, and so that machinery of the ordinary inductive type may be put in operation at approximately the amount of horse power provided for in the contract; that a starting surge not to exceed half a minute is not construed as power in excess of that contracted for, provided that standard motors or apparatus are used.

The general superintendent of the appellants' plant, who was an electrical engineer, testified that the appellants furnished power also to the Alaska-Juneau Company with starting surges, and made no charge for starting surges and did not include the starting surges in its records.

Turning to the language of the contract, we find that it gives the appellee the right "to take a current not to exceed three hundred (300) electric horse power," that the appellants "undertake, covenant and agree to deliver said current," that the consideration for the contract is "the right to use the three hundred (300) electric horse power," and that the contract "contemplates the delivery of an uninterrupted current." It is not disputed that Form K General Electric motors had been universally used in Alaska at the time when this contract was made; and we are justified in assuming that it was in the minds of the contracting parties at the time of making the contract that such motors would be used in the mines to be operated by the appellee, and that the reservation of 300 horse power was for the purpose of effecting the successful operation of those mines. The evidence shows that said amount of current was necessary for that purpose. It was known that the K General Electric motor required at least three or four times, and possibly more, electric current to start than it did to operate it under its normal load, and that not more than 100 horse power could be used by the appellee without the starting surge. It is clear, also, that at the beginning of the appellee's operation under the contract the appellants so understood their obligation and gave that construction to the agreement. The causes which led them to change their view of their obligation are not disclosed.

It is a cardinal rule that in construing a contract the court must give effect to the intention of the parties. Language in the instrument which narrows the general purpose of the contract, and defeats a reasonable and just result, must be construed with reference to the known facts. In Western Lumber Co. v. Willis, 160 Fed. 27, 87 C. C. A. 183, this court, applying the rule announced in Chicago, Rock Island & Pac. Ry. Co. v. Denver & Rio Grande Ry. Co., 143 U. S. 596, 609, 12 Sup. Ct. 479, 36 L. Ed. 277, said:

"In the interpretation of a contract, the court may consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was made."

In Horgan v. Mayor of New York, 160 N. Y. 516, 55 N. E. 204, it was said:

"It is well settled law that the meaning of a contract is to be gathered from a consideration of all its provisions, and the inferences naturally derivable

therefrom, as to the intent and object of the parties in making it, and the result which they intended to accomplish by its performance."

When the contract here under consideration is viewed in the light of these rules for its construction, I can see no escape from the conclusion that the court below properly interpreted its terms.

That court correctly held, also, that the obligation to furnish a starting surge was implied in the contract which was made. The contract clearly contemplated that the appellee was to have the beneficial use of a current of 300 horse power. It contains a covenant that the appellants shall deliver that power. If to the use or the delivery of the specified power a starting surge was necessary, the promise to furnish it should be implied.

"A contract, it may be truly said, includes not only what the parties actually wrote down or said, but all those things which the law implies as part of it, and likewise all matters which both the parties intended to express, but did not." 9 Cyc. 252.

"Although a party does not in express terms undertake to do a particular act, a covenant to do it will be read into an instrument if from the text of the agreement, or the surrounding circumstances, it is manifest that the parties so intended." Patterson v. Guardian Trust Co., 144 App. Div. 863, 129 N. Y. Supp. 807; Booth v. Cleveland Mill Co., 74 N. Y. 15; Tuttle v. Woolworth, 74 N. J. Eq. 310, 77 Atl. 684; Creamer v. Metropolitan Securities Co., 120 App. Div. 422, 105 N. Y. Supp. 28.

The decision of the court below may be sustained, also, on the ground of the proven custom of companies which furnish electric current to permit a surge whenever necessary, under a contract to furnish a named amount of electrical horse power.

"Parties, who contract on a subject-matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary." Robinson v. United States, 13 Wall. 363, 20 L. Ed. 653.

The construction given to the contract by the majority of this court brings about a result that was not contemplated by either party to the contract at the time when it was made and upon which their minds never met. By that construction the appellants receive judicial sanction to say, in effect, to the appellee:

"It is true that for a valuable consideration we covenanted with your grantor to furnish it a current of 300 horse power; and it is true that you cannot get what we promised unless we deliver it to you by an initial surge, but you are helpless and you can never use that which we agreed that you should have, for the reason that there is no express stipulation in the contract that we should furnish the surge. It is not so nominated in the bond."

The plain answer to that is that the parties contracted with reference to the known conditions and with knowledge of the fact that a surge was necessary in order to carry out the express provisions of the contract in accordance with the intention of the parties, and that a promise to furnish it was necessarily implied.

Where a contract is susceptible of a construction in accordance with justice and fair dealing, the court should adopt it. As was said in Noonan v. Bradley, 9 Wall. 394, 19 L. Ed. 757:

"When an instrument is susceptible of two constructions—the one working injustice and the other consistent with the right of the case—that one should be favored which standeth with the right."

MEDINA VALLEY IRR. CO. v. ESPINO.

(Circuit Court of Appeals, Fifth Circuit. April 7, 1914. Rehearing Denied May 18, 1914.)

No. 2487.

1. MASTER AND SERVANT (§§ 205, 217*)—LIABILITY FOR INJURIES—RELIANCE ON MASTER.

An employé is not obliged to examine into his employer's methods of transacting business, and, in the absence of notice to the contrary, may assume that reasonable care will be used in furnishing appliances necessary to carry on the business.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 547–549, 574–600; Dec. Dig. §§ 205, 217.*]

2. MASTER AND SERVANT (§ 107*)—LIABILITY FOR INJURIES—PLACE RENDERED UNSAFE BY WORK.

A master is not liable for injuries resulting from a place becoming unsafe through the negligence of the workmen in the manner of carrying on the work, where he has discharged his primary duty of providing a reasonably safe place.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199–202, 212, 254, 255; Dec. Dig. § 107.*]

3. MASTER AND SERVANT (§§ 101, 102*)—LIABILITY FOR INJURIES—DUTY TO FURNISH SAFE PLACE.

The duty of providing a reasonably safe place to work is a continuing one, discharged only when the master furnishes and maintains a place of that character.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178–184, 192; Dec. Dig. §§ 101, 102.*]

4. MASTER AND SERVANT (§§ 101, 102*)—LIABILITY FOR INJURIES—DUTY TO FURNISH SAFE PLACE.

Where workmen are engaged in a business more or less hazardous, it is the master's duty to exercise reasonable care not to expose them to danger from an unsafe place, where the place may be made safe by due skill and care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178–184, 192; Dec. Dig. §§ 101, 102.*]

5. MASTER AND SERVANT (§ 219*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

A servant, entering into and continuing in a hazardous employment, assumes the risks of the service and those apparent to ordinary observation.

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

6. MASTER AND SERVANT (§ 226*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

A servant does not assume the risk of negligence of the master in performing his duty of providing a safe place.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659–667; Dec. Dig. § 226.*]

7. MASTER AND SERVANT (§ 217*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.

An employé who enters into the employment or continues therein with knowledge of the methods employed in the business, and the manner of inspection, and with knowledge that such inspection is inadequate, as-

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

sumes the risk of dangers arising from such methods of business, and such inadequate manner of inspection.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574–600; Dec. Dig. § 217.*]

8. MASTER AND SERVANT (§ 217*) — LIABILITY FOR INJURIES — ASSUMPTION OF RISK.

Where an employé, engaged in drilling holes for blasting purposes, and injured when his drill struck an unexploded charge in another hole, or so close thereto as to explode it, had been engaged in mining for seven years, and in his employer's service for almost a year, knew that shots were liable not to be exploded, was present when the so-called inspection of the ground where he was ordered to drill was made, knew that it was the only kind of inspection ever made, and that it was inadequate to discover unexploded holes, and knew that unexploded holes were dangerous and would be set off by drilling in or near them, he assumed the risk of injury from the employer's failure to make a proper inspection to discover the unexploded holes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574–600; Dec. Dig. § 217.*

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

Shelby, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Western District of Texas; Thos. S. Maxey, Judge.

Action by Hermerejildo Espino against the Medina Valley Irrigation Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions.

Claude V. Birkhead, John H. Cunningham, and Wm. Aubrey, all of San Antonio, Tex., for plaintiff in error.

Thos. O. Murphy, of San Antonio, Tex., for defendant in error.

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

CALL, District Judge. Defendant in error, plaintiff below, sued the plaintiff in error, defendant below, alleging, among other things, that he was employed by defendant below to drill holes for blasting purposes; that he was ordered to drill a slanting hole at a spot in an excavation that was being made for a dam; that the slat of the hole was pointed out by defendant below, and was in the direction of a hole that had been previously drilled and charged by defendant below, and that, while drilling said hole as directed, his drill struck the charge of said explosive in such other hole, or his drill struck so close to the said hole that the charge was exploded and he was injured. He also alleges that on the day previous a number of holes had been drilled and charged, among them the particular hole in which the charge was exploded and injured plaintiff below; that the work was dangerous on account of the blasting that was being done daily in the excavation on account of the fact that charges of explosives frequently failed to explode, and were liable to explode afterward if a hole was drilled near them; that it was the duty of defendant below to carefully inspect the ground where it had been drilled before ordering plaintiff below to drill near the same, and that had it done so, it would

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

have discovered the unexploded charge; that it knew, or ought to have known, that drilling near the unexploded charge, as he was directed to do, would explode the same. And charges that the defendant below was negligent in failing to properly inspect the ground where it ordered him to drill, in ordering him to drill the hole slanting so that it would strike or go so near to the hole as to explode the unexploded charge, and not furnishing plaintiff below with a safe place in which to work. All of which was the proximate and direct cause of the injuries. The defendant below answered by a general denial and specially set up its business of building dams, etc., and in pursuance of its said business it was necessary to excavate earth and quarry rock and remove the same; that this was done by blasting and in process of construction and the place of work was constantly changing, and was work of a dangerous nature; that such dangers were open and obvious and easily perceived, and were well known to said plaintiff below, and that he assumed the risk; also that the injury occurred through the negligence of the fellow servants of plaintiff below in not properly charging the holes and in selecting the points at which to drill. On these issues the case was submitted to a jury, and a verdict rendered for plaintiff below, and judgment accordingly.

The plaintiff in error assigns as error in its first six assignments the refusal of the court to charge the jury peremptorily to find for the defendant.

The seventh assignment of error was abandoned, leaving 32 other errors assigned on refusals of the court to give certain charges asked, and excepting to language used in the court's general charge, and other matters that need not be set out in detail here.

We have examined the assignments of error from No. 8 to No. 39, inclusive, and find no reversible error, and therefore confine our consideration to the first six assignments of error, and these six may properly be said to be one assignment, with six reasons why the case should be reversed, on the first assignment, which was the refusal of the court to give a peremptory instruction to the jury to find for the defendant below.

Before discussing the question "whether the plaintiff below assumed the risk of the danger of the place of his employment," it might be well to formulate the law, as we understand it, governing the decision of the question.

In the case of Gardner v. Michigan Central Railroad Co., 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107, it is laid down as the rule governing, before the court is justified in charging peremptorily in a case of negligence, as follows:

"The question of negligence [in such a case] is one of law for the court only when the facts are such that all reasonable men must draw the same conclusion from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

And we assume the same rule would apply in a case of "assumption of risk."

[1] The employé is not obliged to examine into employer's methods of transacting business, and he may assume, in the *absence of notice to the contrary,* that reasonable care will be used in furnishing appliances necessary to carrying on the business.

[2, 3] But while this duty is imposed on the master, and he cannot delegate it to another and escape liability on his part, nevertheless the master is not held responsible for injuries resulting from the place becoming unsafe, through the negligence of the workmen in the manner of carrying on the work, where the master has discharged his primary duty of providing a reasonably safe place for his employés to carry on the work; nor is he obliged to keep the place safe at every moment, so far as such safety depends on the due performance of the work by the servant and his fellow workmen. This duty of providing a reasonably safe place to carry on the work is a continuing one, and is discharged only when a master furnishes and maintains a place of that character. In fact it is continuing and must be exercised whenever circumstances demand it.

[4, 5] And where workmen are engaged in a business more or less dangerous, it is the duty of the master to exercise reasonable care for the safety of all his employés, and not to expose them to the danger of being injured by the use of an unsafe place to work, where it is only a matter of using dué skill and care to make the place safe; that it is the rule of law that a servant, entering into an employment which is hazardous assumes the usual risks of the service, and those which are apparent to ordinary observation, and when he accepts employment and continues in the service with the knowledge of the dangers of the place which injuries may be apprehended, he also assumes those dangers of which he has knowledge or that are apparent, i. e., open to observation. Kreigh v. Westinghouse & Co., 214 U. S. 255, 29 Sup. Ct. 619, 53 L. Ed. 984, and cases cited.

[6, 7] A servant does not assume the risk of the negligence of the master in performing his duty of providing a safe place; but if he enters into the employment, or continues therein, with the knowledge of the methods employed in the business and the manner of inspection, and further knows that such inspection is inadequate, then he does assume the risk of the dangers arising from said methods of business and inadequate manner of inspection.

[8] In this case the only question is whether the servant knew of the method of inspection, and was aware of the dangers to be apprehended from the imperfect inspection, and with this knowledge continued in the employment of the company and was injured from one of those dangers incident to this imperfect inspection. The proofs in this case without contradiction show: That the servant was a man of 26 years of age, had been engaged in the service of mining for 7 years, had been employed for almost a year in this service by the plaintiff in error in this case, knew that the shots were liable not to be exploded, was present at the time of the so-called inspection, saw what was going on, and that this kind of inspection was the only kind that had ever been used in this particular work, and from the dirt and débris left on the ground that the inspection was inadequate to

discover unexploded holes, and that any unexploded holes were sources of danger to the drillers. That said unexploded holes would be set off by the concussion of drilling in or near them. He thereupon entered upon the discharge of the duties, and, while performing them, was injured. That the pit in which these parties worked was about 6 feet one way, by 10 feet the other.

Under this state of facts, will the servant be adjudged to have assumed the risks of the danger incident to his employment in this pit from unexploded holes? and, these facts being undisputed in the testimony, must be the guide for the decision of this question in this case. It seems to us that the statement of the question necessarily answers itself. Here was a man skilled evidently, having had seven years' experience, at least, in this paritcular kind of work, knew the dangers of some of the shots not being exploded, observing the method of inspection on the particular day, and, knowing that that inspection was not such as would discover the unexploded shots, knew that that inspection was the usual inspection made by the master in this case, and with all this knowledge goes into the pit and proceeds to labor and is injured. It seems to us that there can be but one answer to the question, and that is that he did assume the risk, and is not entitled to recover in this case, and that the court should have given the peremptory instruction asked.

We have examined the authorities referred to by the defendant in error, and we think the statement of the principles of the law which govern in this matter, and above stated, are properly and reasonably deducible from those authorities; all recognize the principle in the assumption of risk; that the servant assumes the risks or dangers of which he has knowledge, and if he is injured by reason of the same, he cannot recover.

It is well settled, as above noted, that the servant does not assume the risk of the master's negligence, but this rule is qualified by the further rule that if the servant knows that the place is dangerous through negligent inspection of the master or otherwise, then he assumes those dangers of which he knows. He cannot shut his eyes to the facts known to him, and say, "I rely upon the rule of law that requires my master to furnish me a safe place." He knows the place is not safe; he knows the inspection made by the master is such that the dangers of the place are not lessened; stands by and sees the abortive inspection; has worked for the same people under the same circumstances, and takes all the chances with all this knowledge, and yet claims he has assumed none of the risks of the dangers surrounding him. This, we think, he cannot do.

The judgment of the District Court is reversed, and the cause is remanded, with instructions to award a new trial, and thereafter proceed in accordance with the views herein expressed.

SHELBY, Circuit Judge, dissents.

SMITH v. ST. LOUIS, I. M. & S. R CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 2, 1914.)

No. 2325.

1. RAILROADS (§ 270*)—DEFECTIVE RAILROAD BRIDGES—INJURIES TO EMPLOYÉS OF OTHER RAILROADS—CAUSE OF ACTION—ELEMENTS—OWNERSHIP.
In an action against a railroad company and a bridge company for injuries to an employé of another railroad company, operating trains over the bridge, for injuries resulting in his death due to an alleged defect in the bridge, the burden was on plaintiff to show that such defendants owned or controlled the bridge.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 865; Dec. Dig. § 270.*]

2. RAILROADS (§ 268*) — DEFECTIVE BRIDGES — INJURIES — PLEADING — NOT GUILTY.
In an action for death of a brakeman by being struck by a low timber on a bridge as he was passing over it, the ownership of the bridge by certain of the defendants, other than the railroad company by which decedent was employed, was properly put in issue by their plea of not guilty.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 861–864; Dec. Dig. § 268.*]

3. MASTER AND SERVANT (§ 113*)—INJURIES TO SERVANT—OPERATION OF RAILROAD—TELLTALES.
Where it was claimed that decedent, a freight brakeman, was struck by a low timber on a bridge as his train had nearly crossed the bridge, the absence of telltales to warn him of his approach to the bridge did not, under the facts of this case, constitute actionable negligence.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 213, 224–227; Dec. Dig. § 113.*]

4. TRIAL (§ 193*)—INSTRUCTIONS—QUESTIONS OF FACT.
Expressions of opinion concerning the tendency of certain portions of the evidence by the trial judge was not error, where he admonished the jury that all questions of fact were to be determined by it, independently of anything said by the court.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 436–438; Dec. Dig. § 193.*]

5. NEW TRIAL (§ 98*)—GROUNDS—CREDIBILITY OF WITNESS.
Denial of a new trial on an affidavit that a witness had been unduly influenced as to a portion of his testimony was not error, where the exclusion of the witness' entire testimony would not have affected the result.
[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 199, 200; Dec. Dig. § 98.*]

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

Action by Gilmer P. Smith, as administrator of the estate of James Mason, deceased, against the St. Louis, Iron Mountain & Southern Railroad Company and others. From a judgment in favor of defendants, plaintiff brings error. Affirmed.

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

Jere Horne, of Memphis, Tenn., for plaintiff in error.

A. W. Biggs and J. W. Canada, both of Memphis, Tenn., for defendants in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This was an action brought by Smith, as administrator, to recover damages for the death of his intestate, James Mason, alleged to have been caused by the joint negligence of five defendant railroad companies. These railroad companies are classified in the declaration into two groups, the first comprising the St. Louis, Iron Mountain & Southern Railroad Company, the Iron Mountain Railroad Company of Memphis, and the Missouri Pacific Railroad Company, which in terms are alleged to be owned and operated by and under the management and control of what is known as the Missouri Pacific System, and the other comprising the St. Louis & San Francisco Railroad Company and the Kansas City & Memphis Railway & Bridge Company, which likewise are alleged to be owned and operated by and under the management and control of what is known as the Frisco System; that the defendants owned and operated various interstate lines of railroad; and that, at the time of the wrongs and injuries complained of, the railroads composing the Frisco System owned and operated "the bridge and the lines over the bridge across the Mississippi river," at Memphis, Tenn.

The cause of action, as stated in the declaration, is in substance this: Mason, while in the employ of the St. Louis, Iron Mountain & Southern Railroad Company as head brakeman, and on the night of May 28, 1910, left Memphis on a west-bound freight train of that company, and in crossing the bridge into Arkansas was knocked from the top of one of the cars by a low beam spanning the track at the Arkansas end of the bridge, receiving injuries which resulted in his death, and while so at his post of duty met his death through the negligence of the defendants. Further that this beam was too low to permit a man standing upon a large freight car to pass it in safety; that this was due to negligent construction and maintenance on the part of the St. Louis & San Francisco Railroad Company and the Kansas City & Memphis Railway & Bridge Company, because these two companies then owned and operated the bridge; that these companies by contract permitted their codefendants to use the bridge in crossing the Mississippi river; that the defendants either knew, or by the exercise of ordinary care could have known, that the beam was too low, but that the intestate could not; that all the defendants undertook jointly to operate over the bridge the train on which Mason was riding and injured; and that they failed to provide and maintain the usual telltales at the approaches of the bridge, and so failed and neglected to give to Mason this necessary warning of the presence of the low beam. Also that the companies composing the Missouri Pacific System, which included Mason's employer, failed to furnish Mason with a safe place to work, and that they were negligent in contracting for and using a

bridge dangerous, as this one was, in construction and maintenance in the particulars stated.

The declaration was met and denied by the several defendants under pleas of not guilty; and special pleas of contributory negligence were also interposed. At the close of plaintiff's evidence, directed verdicts were returned in favor of three of the companies, namely, the Kansas City & Memphis Railway & Bridge Company on motion of its counsel, and the Missouri Pacific Railroad Company, and the St. Louis & San Francisco Railroad Company, on the court's own motion. On plaintiff's motion at the close of all the evidence, a nonsuit was granted in favor of the Iron Mountain Railway Company of Memphis. Thus the case was at last reduced to a controversy between the plaintiff and the company employing Mason. The verdict was in favor of that company, and on the overruling of a motion for a new trial the plaintiff prosecuted error.

[1] No complaint is made touching the direction of a verdict in favor of the Missouri Pacific Railroad Company; but error is assigned respecting like action as to the other two companies. It is stated in the assignment concerning the ruling in favor of the Kansas City & Memphis Railway & Bridge Company that it was based upon the grounds: (1) "There was no proof of ownership;" and (2) "there was no evidence going to show circumstances under which the bridge was being used." Reasons like these were stated by counsel in support of the motion to direct, and it may be that they were accepted by the court as satisfactory, but this does not appear. These reasons, however, serve in part to indicate the difficulty with plaintiff's case at the close of his evidence. Apart from some language used by one of the counsel for this railroad company in his opening statement to the jury, which apparently was neither meant by him nor understood by the court to be an admission of ownership in that company of the bridge, nothing tending to show such ownership appears in plaintiff's evidence. True, one of plaintiff's witnesses stated in effect that the bridge belonged to this company; but it appeared that he possessed no knowledge upon the subject and his statement was excluded. Plaintiff's counsel maintains, however, that the plea of not guilty is not a denial of the allegation of ownership; that consequently ownership in the Kansas City & Memphis Railway & Bridge Company of the bridge and the tracks thereon must be treated as an admitted fact; and that a legal presumption of operation by that company follows. This ignores the averment of the declaration that the bridge and the railroad tracks upon it were owned and operated by both companies comprised in the Frisco System, to wit, the company just named and the St. Louis & San Francisco Railroad Company. However, if we pass by this, the theory of admitted ownership is thus made the sole basis, not alone of the presumption of operation, but, in view of plaintiff's lack of evidence, also of the further averment of the declaration that these two companies were negligent in the construction and maintenance of the bridge. Such ownership, therefore, became vital to plaintiff's right of recovery against either of these companies, for otherwise neither owed any duty nor bore any legal relation to Mason. This is more

clearly seen through the practically admitted facts that Mason was not in the employ of either of those companies, but was in that of another and distinct company which owned and was operating the freight train on which he was riding, at the time he received his injuries.

[2] It follows that the most essential issue so tendered to the Kansas City & Memphis Railway & Bridge Company, as well as the St. Louis & San Francisco Railroad Company, was whether they or either at the time of the accident owned the bridge, which, as alleged, had been negligently constructed and at the date of the injury was, with its tracks, negligently maintained and operated; and the question is: Did the plea of not guilty put the plaintiff to his proofs in support of this important and specific averment of title? It would have so operated under the rule at common law. 1 Chitty on Pl. (11th Am. Ed.) 500; Caruthers' History of a Lawsuit (3d Ed.) § 106, p. 196; Stephen on Pl. (3d Am. Ed.) p. 174; City of Champaign v. McMurray, 76 Ill. 353, 354. And see, independently of the common-law rule, Frisby v. Transit Co., 214 Mo. 567, 577, 113 S. W. 1059. Further, in Cumberland Telephone & Telegraph Co. v. Floyd, 112 Tenn. 304, 306, 79 S. W. 795, the effect of this plea was determined in connection with the Code of Tennessee, and we regard the ruling in principle as decisive of the present question. The court was considering a judgment recovered below for alleged negligent death of plaintiff's intestate. The death was caused during a storm by an electric current diverted from wires then maintained by the company over a tollhouse, on the porch of which decedent was at the time standing. In the course of the opinion Chief Justice Beard said:

"* * * The averment in the declaration is that this company 'negligently constructed and negligently maintained' these wires. That this averment was an essential element of the plaintiff's action is clear, and, being so, it was necessary to prove it, unless, as is now insisted, it was impliedly admitted by the plea of 'not guilty.'"

After discussing the common-law rule touching the effect of this plea, and following the rule laid down by Addison that, "if the defendant is charged with acts of omission, nonfeasance, and neglect of duty, the facts creating the duty must be proved, and the defendant's neglect established." (1 Addison on Torts [4th English Ed.] § 290, at page 254), the Chief Justice continued (112 Tenn. 307, 79 S. W. 796):

"So far as we can see, there was not any exception to this rule at common law, and no reason has been suggested why the plea should have a narrower scope under our Code practice. In fact, Shannon's Code, § 4634, provides that 'the defendant may enter a general denial of the plaintiff's cause of action, equivalent to the general issue heretofore in use.' It certainly would be a curious anomaly in practice should it be held that the plea of not guilty raised the general issue in the present case, yet that its effect was to admit the averment of negligence upon which the plaintiff rests his right to recover. No such result follows. The burden was on plaintiff to make out his case, and, failing in the particular indicated, the judgment is reversed."

We ought perhaps to say, by way of precaution, that it is not meant to pass upon the scope of denial that should be accorded to this form of plea, where ownership is not an essential element of the plaintiff's action, or is not so treated at the trial. See, for example, Chicago

Union Trac. Co. v. Jerka, 227 Ill. 95, 99, 100, 81 N. E. 7. It is to be observed, moreover, that the instant case was not aided prior to the time when the court was called upon to act on the questions of directed verdicts through evidence tending to show occupation and control of the bridge by either of the defendants so charged with owning it; nor had evidence been offered in support of the further averment that these companies by contract permitted their codefendants to use the bridge in crossing the Mississippi river. Whatever the relations of these companies to the bridge in truth were, the court below was at that period of the trial left to surmise; and, since the proofs were thus lacking upon which alone the alleged negligent acts and omissions of these two companies could be founded, we do not see how the trial court could have done otherwise than to direct verdicts in their favor. Patton v. Texas & Pacific Railway Co., 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361. We are the more content with this conclusion because of the ultimate verdict of the jury and the refusal of the court below to set it aside, after hearing the merits of the case in the trial between plaintiff and the company in whose employment intestate was engaged. In saying this we do not overlook the evidence, which was offered by the only remaining defendant after it had opened its defense, tending to show that the companies composing the Frisco System controlled the operation of the bridge; but plaintiff thereupon failed to take any steps to have the directed verdicts set aside or his case reopened, and so in practical effect acquiesced in these verdicts.

Furthermore, the case made against the company employing Mason embraced issues before pointed out that were, when once determined, practically decisive of the question whether the other companies were guilty of the negligent acts and omissions charged against them. The employing company was charged with negligence involving the alleged low beam of the bridge and the absence of telltales at its approaches; and these were of the essence of the charges against the other companies. The most that can be claimed in behalf of plaintiff is that the proofs offered, respectively, by him and the defendant employing Mason were in conflict concerning (1) the clearance between the low beam complained of (or any of the other beams touching which measurements are claimed to have been made) and the tops of the highest cars shown to have been in the train and on any of which Mason could have been standing, and (2) Mason's own height; and, when the place on the bridge at which plaintiff's witnesses evidently made measurements as to heights of beams is considered in connection with the place where Mason was last seen on top of the train (no one having witnessed the accident), the jury might well have found that the weight of the evidence was against the theory either of the existence of a low beam or of Mason's injury by a beam at all.

[3] And it is safe to say that upon plaintiff's own evidence the presence of telltales was not necessary to advise Mason of his approach to the bridge, because the bridge was near the beginning of his trip and he was accustomed to riding over it on tops of freight cars as a brakeman; moreover, he was nearly across when the place was reached where it is claimed that the injury happened, and so must

throughout have known of the presence of the bridge through the sound produced by the train moving upon it. These considerations alone are enough to distinguish this case from that of Cincinnati, N. O. & T. P. Ry. Co. v. Jones, 192 Fed. 769, 113 C. C. A. 55, 47 L. R. A. (N. S.) 483 (C. C. A. 6th Cir.).

The charge of the court was such as fully and fairly to instruct the jury of its province in considering the issues made, including its duties concerning the evidence offered by both sides. The charge included the substance of every request, both oral and written, that was made on behalf of plaintiff, except the written request to charge that all the beams between the middle of the bridge and its Arkansas end were to be treated as being at that end, and we think, in view of the number of the beams, this was rightly denied; the steel structural portion of the bridge being 2,250 feet in length and comprising 44 beams.

[4] The trial judge's expressions of opinion touching the tendency of certain portions of the evidence amounted only to suggestions, because of their language and the explanations accompanying them. The evident effect was to admonish the jury that all questions of fact were to be determined by its judgment, independently of anything said by the court, and this severance of questions of fact and of law relieved the charge of any material objection in this respect. Simmons v. United States, 142 U. S. 148, 155, 12 Sup. Ct. 171, 35 L. Ed. 968; Graham v. United States, 231 U. S. 474, 480, 34 Sup. Ct. 148, 58 L. Ed. 319; Young v. Corrigan, 210 Fed. 442, 443, 127 C. C. A. 174 (C. C. A. 6th Cir.); Yazoo & M. V. R. Co. v. Long, 201 Fed. 881, 885, 120 C. C. A. 219 (C. C. A. 6th Cir.); United States v. Foster (D. C.) 183 Fed. 626, 628, 629; Sandals and Griffin v. United States, 213 Fed. 569, 130 C. C. A. 149, decided by this court May 5, 1914, and citations.

[5] Error is assigned to the action of the court in denying plaintiff's counsel the right to make statements in the presence of the jury, in addition to statements theretofore made, in reference to the application of defendants' counsel to have the jury view the bridge; this, like the refusal to permit the jury to make such view, was clearly within the discretion of the court. Error is also assigned to the refusal to grant a new trial upon an affidavit of J. H. McKinney, in which it was stated that a witness for defendant had been unduly influenced as to a portion of his testimony. Exclusion of his entire testimony would not affect the result. In the absence, as here, of a showing to the contrary, it must be presumed that the matter was investigated and passed upon below; and the court's action thereon, being within its discretion, is not subject to review. Van Stone v. Stillwell & Bierce Mfg. Co., 142 U. S. 128, 134, 12 Sup. Ct. 181, 35 L. Ed. 961; Big Brushy Coal & Coke Co. v. Williams, 176 Fed. 529, 532, 533, 99 C. C. A. 102 (C. C. A. 6th Cir.); Worthington v. Elmer, 207 Fed. 306, 125 C. C. A. 50 (C. C. A. 6th Cir.).

Upon the whole we are convinced that no reversible error intervened; and the judgment is accordingly affirmed, with costs.

THE ARROW.

THE McALLISTER.

(Circuit Court of Appeals, Second Circuit. April 28, 1914.)

No. 220.

1. COLLISION (§ 90*)—MEETING VESSELS—VESSELS COMING AROUND BENDS IN CHANNEL.

Vessels bound respectively in and out of Harlem river when rounding Horn's Hook cannot be assumed to be on crossing courses, but should follow the meeting rules unless an intention on the part of the down-bound vessel to cross over to the eastern channel has been determined by signals.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 181–186, 196; Dec. Dig. § 90.*

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

2. COLLISION (§ 95*)—STEAM VESSELS MEETING—VESSELS PASSING AROUND BENDS IN CHANNEL.

Two tugs meeting when passing around Horn's Hook with tows alongside both *held* in fault for a collision between their tows, the up-bound tug being in fault for insisting on passing starboard to starboard, although she was further off shore than the other, and the latter, which had been delayed by a vessel in front, for not waiting in the bight of the Hook, as she might have done on the flood tide, until passing signals had been agreed upon, and for not sounding a bend signal at the proper time.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. § 95.*]

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

This cause comes here on appeal from a decree of the District Court, Southern District of New York, holding the tugs Arrow and McAllister both in fault for a collision between a car float in tow of the McAllister and a coal barge in tow of the Arrow. Judge Holt's opinion was delivered orally at the close of the trial and is not reported.

J. T. Kilbreth, of New York City, for the McAllister.

W. J. Martin, of New York City, for the Arrow.

Herbert Green, of New York City, for libelants.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The McAllister with a car float on each side was coming down the Harlem river from 102d street, Manhattan, bound for Pier 50, East River. The tide was strong flood. She kept well on the Manhattan side heading into the bight at Horn's Hook. Behind her came the Transfer No. 5 also with two car floats; her course was further out in the stream, and she had overtaken and passed the McAllister before Horn's Hook was reached. Transfer No. 21 also with two car floats came through between Mill Rock and Ward's Island behind the other vessels, but passed them both and reached Horn's Hook first; from there, heading to buck the tide, she proceeded to the east channel of Blackwell's Island. As she reached Horn's Hook, Transfer No. 5 did the same, following No. 21. The

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

Sound steamer Pequonnock bound from New Bedford to New York came through Hell Gate, crossed ahead of the other three vessels, and went down the west channel of Blackwell's Island; apparently her crossing somewhat delayed the movement of the others. At Horn's Hook there is a high bluff, and a vessel which has been in the bight above it and undertakes to pass it cannot see (or be seen by) a vessel coming up along the Manhattan shore until either or both have proceeded far enough to see around the front of the bluff.

The master of the McAllister testifies that he sounded a bend whistle for Horn's Hook when about off 93d street. He alone testifies to this whistle; he did not refer to it in his report to the inspectors. When he reached 92d street he got into difficulty with the tug Moran towing two dump scows bound for 96th street, signals were given, the McAllister had to stop and back while the Moran crossed her bows and went into the Astoria Ferry slip to get out of her way. This delayed the McAllister, and further down she was again delayed, having to stop astern of the No. 5, which had herself stopped to let the Sound steamer pass. She was then in the bight, and when No. 5 had moved ahead so as to make good clearance, the McAllister herself proceeded to pass the Hook. Her master then first saw the Arrow, the latter being between 86th street and the Hook (89th street). He knew, however, that there was a vessel coming up because he had heard her bend whistle—blown by the Arrow when off 82d street—and also an exchange of two-blast signals between her and No. 5.

The Arrow was coming up with a coal barge alongside through the westerly channel of Blackwell's Island about 200 to 250 feet off the Manhattan shore. She sounded her bend whistle for Horn's Hook when about off 82d street. She passed the Sound steamer which was coming down about midchannel, starboard to starboard. She saw No. 21 making its way over towards Blackwell's Island. As she proceeded further up river and had about reached 86th street, she saw No. 5 coming out by the Hook, they exchanged two blast whistles, and passed starboard to starboard. She heard no bend signal from the McAllister, nor any other from her and, of course, did not know of her presence until she saw her (or the bows of her car floats), when both had got so far along that the bluff no longer hid each from the other. The Arrow's master expressly states that at that time the McAllister was closer to the New York shore than the Arrow was.

As to the facts above recited there is substantially no dispute. As to the signals exchanged there is a conflict on the testimony. The master of the McAllister says that he blew first—a single blast so as "to give the boat coming up a chance to go in the Gate or into Harlem river, whichever way she was going." That the Arrow answered with two blasts, whereupon he blew an alarm which the Arrow again answered with two blasts, after which the McAllister blew a three-blast signal and stopped and backed. It is not disputed that she did stop and back; indeed, she is criticized by the Arrow for doing so.

In his statement to the inspectors the master of the Arrow says that he blew first—a two-blast signal—which was answered by one, whereupon he blew an alarm to which he received no answer. On his direct

examination he testified that he blew a two-blast signal, received no answer, blew a similar blast, received no answer to it, and then blew an alarm, after which he received a single whistle when the vessels were close together. On cross-examination, however, he admitted that his statement to the inspectors, made while the facts were more fresh in his recollection, was probably the correct one. The weight of testimony—especially that of independent witnesses from the Pequonnock—seems to support the master of the McAllister as to the sequence of whistles. But the sequence is not specially important; all the signals from the McAllister called for navigation port to port, all those from the Arrow for navigation starboard to starboard. The vessels came into collision off the Hook; the witnesses vary in their estimates of the distance from 60 to 100 or 200 feet.

[1] We do not think that the navigation of the vessels when encountering each other at Horn's Hook was to be controlled by the starboard hand rule for vessels on crossing courses, although at some time their respective headings were such that their courses if prolonged would cross. The Supreme Court, in The Victory and The Plymothian, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519, held that the starboard hand rule is ordinarily inapplicable to vessels coming around bends in channels, which may at times bring one vessel on the starboard of the other. That vessels must be known to follow the courses of the river bank. That, although vessels navigating in a river may sometimes be on crossing courses under the rule, that depends on their presumable courses; that the question always turns on the reasonable inference to be drawn as to a vessel's future course from her position at a particular moment, and this greatly depends on the nature of the locality where she is at that moment. We are not satisfied that it is a safe and proper presumption that a vessel bound down the Harlem river which has reached the bight above Horn's Hook, keeping along the New York shore on her way down, is going to take the easterly rather than the westerly channel to pass Blackwell's Island. Either course is open to her. A vessel coming up the river in that locality is "meeting" a vessel coming down, and if she wishes to navigate on the theory that the vessel she is meeting is going to cross over at that point, she should ascertain if that be the intention by exchange of signals. Until such intention be thus developed, the safe course for both vessels is to follow the "meeting" rule.

It seems to be thought that this court has held that the starboard hand rule applies to vessels encountering each other in the vicinity of Horn's Hook. The case then before us was that of The Waterman (D. C.) 82 Fed. 478, and Transfer No. 8, 96 Fed. 253. The Waterman was going up the westerly channel of Blackwell's with a heavy hawser tow in midchannel. The statement of facts does not show where she was bound, but the circumstance that with a hawser tow in a strong flood tide she was in midchannel seems to indicate that she was bound through the Gate. Transfer No. 8 came out of the bight above Horn's Hook and headed diagonally across the channel to cross the bows of the Waterman and get into the easterly channel of Blackwell's Island. Judge Brown (The R. H. Waterman [D. C.] 82 Fed. 478) held both

vessels in fault for various reasons. He pointed out the divergence of the lines of traffic above Blackwell's Island one to the Gate, the other up Harlem river, and that a vessel, which comes down Harlem river on the line of Avenue B and undertakes to go over to the easterly channel of Blackwell's Island, crosses the Gate line of traffic and the course of a vessel bound up on that line. In the course of his discussion of the contention that the vessel bound up should give a bend signal when below Horn's Hook, even though it be her intention to go into the Gate and not into the Harlem river, he said:

"If such signals are omitted by vessels ascending with the flood tide, the situation of vessels coming out of the Harlem river becomes specially difficult and dangerous. For the duty of 'keeping out of the way' is cast by law upon them both because they have the other vessels on the starboard hand and because the latter are going with the tide and the former against it."

Upon appeal to this court (The Transfer No. 8, 96 Fed. 253, 37 C. C. A. 462), we held the Waterman solely at fault because the whole trouble was caused by her failure, through a bend whistle, to inform the down-coming vessel which, while above the Hook, could not see her, that she was to be found in the river as soon as such vessel cleared the bluff. Our opinion contains this clause:

"We fully concur with the finding of the District Judge that at this part of the river, 'on a strong flood tide, there is not reasonable and sufficient time and space for the * * * maneuvers necessary to avoid collision with any certainty, if signals are not exchanged before the vessels themselves are seen.' The responsibility for this collision rests upon the vessel which, by failure to give notice of her own approach, deprived the other of the 'reasonable and sufficient time and space' which it needed properly to carry out the obligations laid upon it by the starboard hand rule."

This should not be taken as a ruling that vessels bound respectively in and out of Harlem river when rounding Horn's Hook are on crossing instead of meeting courses. The opinion quoted refers only to the facts of the case under consideration—whether the vessels were on crossing courses or were on meeting courses with the up-bound one in midchannel and the down-bound close to the Manhattan shore. The Transfer No. 8 would have had no right without agreement by exchange of signals to try to cross the bows of the Waterman, if she had known The Waterman was there in time to maneuver to avoid her.

[2] In the case now before us, whether the two vessels be considered to be on meeting courses, or whether the special circumstance rule applies, the Arrow, further out in the channel than the other when they saw each other, was in fault for insisting by signals and by navigation on going in between the McAllister and the shore in order to pass starboard to starboard. We find nothing in the excuse she offers that she might otherwise have been swept over on Mill Rock; her tow was not on a hawser, and after the collision she found no difficulty in taking the course she should have taken in the first place.

The McAllister is also in fault for two reasons. While she lay in the bight she knew there was a vessel coming up somewhere from below the Hook, for she heard her bend whistle. She knew also that this vessel was passing No. 5 starboard to starboard, for she heard the exchange of two-blast whistles between those vessels, before she

saw the Arrow. Knowing an invisible vessel was approaching through the waters she was about herself to enter into, she should not have moved out of the bight (with a flood tide she could lie there) until by exchange of signals she had arranged with the unseen vessel how they would navigate when they encountered each other. She is also in fault for not sounding a proper bend whistle herself. Conceding that her master is correct in stating that he did sound one at 93d street, which was a proper distance from the Hook, that signal became valueless because, by reason of his difficulty with the Moran and the delay occasioned by No. 5, so much time elapsed before he reached the Hook that it was not to be expected that any up-going vessel then near the Hook could possibly have heard his signal which was sounded when such vessel was far below. The Zouave (D. C.) 90 Fed. 440. The great importance of giving careful attention to these bend whistles has been repeatedly pointed out; in Transfer No. 8, supra, and in our recent opinion in Lehigh Valley Co. v. The Catawissa, 213 Fed. 14, 129 C. C. A. — (February 10, 1914).

The decree is sustained, with interest and costs.

MIDDLESEX & B. ST. RY. CO. v. EGAN.

(Circuit Court of Appeals, First Circuit. June 12, 1914.)

No. 1056.

1. STREET RAILROADS (§ 117*)—INJURIES TO TRAVELERS—PERSONS ON TRACK—NEGLIGENCE.

In an action by an administrator to recover for conscious suffering by his intestate by reason of his being struck and injured by a street car while intestate was lying unconscious on the track, evidence *held* to require submission to the jury of the negligence of defendant's motorman in failing to discover decedent in a dangerous position on the track and of decedent's contributory negligence in being there.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239–257; Dec. Dig. § 117.*

Care required of motormen, see note to Stelk v. McNulta, 40 C. C. A. 361.]

2. STREET RAILROADS (§ 118*)—PERSONS ON TRACK—INJURIES—INTOXICATED PERSON—INSTRUCTIONS.

Where intestate, while intoxicated, fell on one of defendant's street railroad tracks and, being unable to move, was subsequently struck by a car and injured, an instruction that he was guilty of contributory negligence, which would bar a recovery if he voluntarily became drunk, and his presence on the track was due to that cause, that his conduct must be tested by the standard of the reasonably careful sober man without regard to whether his intoxication was such as to render him incapable of avoiding the danger or not, and that while his drunken condition would not, as a matter of law, bar his right to recover, provided he was rendered unconscious by the fall he sustained, and was thus unable to move to a place of safety, still they might find that his going about in a drunken condition contributed to produce his injury, and if they so

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

found, he could not recover, was improper as imposing too great a burden on plaintiff.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258–269; Dec. Dig. § 118.*]

3. STREET RAILROADS (§ 103*)—PERSONS ON TRACK—INJURIES—CONTRIBUTORY NEGLIGENCE.

Where intestate, while intoxicated, fell on defendant's street railroad track and was thereafter struck by a car and injured, the jury should have been charged that if intestate, at the time of the accident, was capable of extricating himself from the danger of being run over there could be no recovery, but if just before and up to the time of the accident he was incapable of extricating himself from the danger, whether by reason of his intoxication or because of unconsciousness due to the fall, and defendant's motorman was negligent in running over him, his presence on the track would be a mere condition and not a contributing cause of his injury and would not therefore prevent recovery.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219; Dec. Dig. § 103,*]

4. WITNESSES (§ 247*)—EXAMINATION—ANSWERS.

Statement of a witness that a street lamp at a corner where an accident happened was "supposed to be lighted" until 1 o'clock in the morning amounted to a mere statement that the light customarily burned until that hour, and, as so construed, was not objectionable.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 822, 858–860; Dec. Dig. § 247.*]

5. DAMAGES (§ 178*)—PERSONAL INJURIES—PAIN—ANGUISH—SOLICITUDE—INABILITY TO LABOR—APPREHENSION.

In an action by an administrator for conscious suffering which his intestate sustained by reason of an injury, evidence of pain, anguish, and solicitude occasioned intestate by the injury, including apprehension of his inability to labor due to the probable loss of his limb, was competent as the natural result reasonably to be apprehended from such an injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 472; Dec. Dig. § 178.*]

In Error to the District Court of the United States for the District of Massachusetts; Jas. M. Morton, Jr., Judge.

Action by John J. Egan, as administrator of the estate of Thomas P. Sweeney, deceased, against the Middlesex & Boston Street Railway Company. Judgment for plaintiff (212 Fed. 562), and defendant brings error. Affirmed.

Pitt F. Drew, of Boston, Mass., for plaintiff in error.

Joseph L. Keogh, of Boston, Mass. (John J. O'Hare, of Boston, Mass., on the brief), for defendant in error.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

BINGHAM, Circuit Judge. This is an action of tort brought by the administrator of the estate of Thomas P. Sweeney to recover for the conscious suffering which Sweeney sustained by reason of an injury received on the night of November 8, 1907, due to the alleged negligence of the defendant's motorman while operating an electric car on its street railway in Waltham, Mass. In the District Court there was a trial by jury and a verdict for the plaintiff. The case is now here on the defendant's bill of exceptions, and the errors assigned are: (1) To

the refusal of the District Court to direct a verdict for the defendant; (2) to the instructions given the jury on the question of contributory negligence; and (3) to the admission of certain evidence.

The evidence tended to prove that on the evening of November 8, 1907, Sweeney, while in an intoxicated condition, boarded a street car at Brighton and rode to the corner of Main and Newton streets in Waltham; that on leaving the car at this place he was still greatly under the influence of liquor, and was assisted by an acquaintance from the car to the sidewalk on Newton street, where he was left leaning against a fence, near a white post, and distant about 66 feet from the corner of Newton and Main streets. Sweeney lived on Newton street, but just before being left refused to go to his home. It was then about 20 minutes of 12. Newton street ends at Main street, and the defendant's car line passes up Newton street and into Main street. In the neighborhood of five minutes after Sweeney was left by the white post, he started to cross Newton street, and in doing so tripped and fell across the defendant's car track, where he lay motionless. After he lay there motionless for about three minutes, a street car was seen to come along, but no one testified to seeing it run over Sweeney. Newton street, in the direction from which the car came, was straight and level for about 200 yards, and the cars on this line stop at the white post. Shortly after the car came along, Sweeney was picked up beside the car track and taken to a hospital by the police, reaching there at 12:30. He had two wounds in his scalp, his chin had a gash in it about an inch and a half long, his left arm was lacerated below the middle of the radius and the ulna, and his left foot, below the ankle, was crushed. There was an arc light at the corner of Newton and Main streets which was lighted the night of the accident. It cast a light down Newton street so that one could see, and be seen, for a distance of about 100 or 150 feet from the corner. The place where the accident happened was in the thickly-settled part of the city, and near its center.

[1] From this evidence reasonable men might conclude that Sweeney was run over by the defendant's electric car on Newton street. His presence upon the track in front of the oncoming car, his apparently helpless condition, due to drink or to his being rendered unconscious by the fall, the nature of the injuries he sustained, and the time within which these occurrences took place, all fairly tend to this conclusion. Odell Manufacturing Co. v. Tibbetts, 212 Fed. 652, 129 C. C. A. ——, decided by this court March 12, 1914. It could also be found that the motorman on the car should have anticipated that people might be crossing Newton street in the vicinity of the white post and the junction of the two streets, and in doing so would be upon the defendant's car track; that the motorman should have been on the lookout for people at that point, and, in the exercise of reasonable care, would have seen Sweeney and avoided injuring him. Nashua, etc., Co. v. Railroad, 62 N. H. 159, 162; Myers v. Railroad, 72 N. H. 175, 55 Atl. 892; Shea v. Railroad, 69 N. H. 361, 363, 41 Atl. 774; Mitchell v. Railroad, 68 N. H. 96, 34 Atl. 674.

Although the evidence is meager, and not as complete as might be

desired, we are of the opinion that it was sufficient to justify the court below in submitting the case to the jury, not only on the question of the defendant's fault, but, as we shall hereafter point out, on the question of contributory negligence.

[2] It is contended in behalf of the defendant that the charge of the court to the jury upon the question of contributory negligence was erroneous and prejudicial. But it has not been satisfactorily pointed out to us, and we are unable to see wherein it was prejudicial to the defendant. On the contrary, it seems to have been more favorable to the defendant than the law and the evidence in the case warranted. The jury were told in substance that Sweeney was guilty of contributory negligence which would bar a recovery if he voluntarily became drunk, and his presence upon the defendant's car track was due to that cause; that his conduct was to be tested by the standard of the reasonably careful sober man; that this was so without regard to whether his state of intoxication at the time of the accident was such as to render him incapable of avoiding the danger or not; that while Sweeney's drunken condition would not, as a matter of law, bar his right to recover, provided he was rendered unconscious by the fall he sustained, and thus unable to remove to a place of safety, still they might find that his going about in a drunken condition contributed to produce his injury, and, if they so found, he could not recover.

[3] If the charge was not technically correct, the defendant suffered no injury therefrom, for it placed too great a burden upon the plaintiff. The jury should have been told in substance that while, as a general rule, a person who is injured by the negligence of another cannot recover if he was himself guilty of negligence which contributed to his injury, and that such would be true in this case if Sweeney at the time of the accident was capable of extricating himself from the danger of being run over, yet if, just before and up to the time of the accident, he was incapable of extricating himself from the danger, whether by reason of his intoxication or because of unconsciousness due to the fall, and the defendant's motorman was negligent in running upon him, his presence upon the track would be a mere condition, and not a contributing cause, and would not prevent a recovery. Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 429, 12 Sup. Ct. 679, 36 L. Ed. 485; Bisaillon v. Blood, 64 N. H. 565, 15 Atl. 147; State v. Railroad, 52 N. H. 528, 552–558; Edgerly v. Railroad, 67 N. H. 312, 36 Atl. 558; Cavanaugh v. Railroad, 76 N. H. 68, 79 Atl. 694, and cases above cited.

The charge not having been prejudicial to the defendant, it takes nothing by this exception. Wheeler v. Railroad, 70 N. H. 607, 617, 50 Atl. 103, 54 L. R. A. 955.

[4] As tending to show that the arc light at the corner of Newton and Main streets was lighted at the time of the accident, a witness was permitted to testify, subject to the defendant's exception, that the lamp at that corner was supposed to be lighted until 1 o'clock in the morning. This was apparently the witness' method of stating that the light customarily burned until that hour. If this was not the meaning to be attributed to the statement, the defendant could have shown

the fact on cross-examination, and had the testimony stricken from the record. As the evidence stands it was competent.

[5] The evidence as to pain, anguish, and solicitude, occasioned Sweeney by the injury to his leg, including apprehension of his inability to labor due to its probable loss, was competent. His mental distress as to the effect of the accident upon his person was proximately caused by the alleged negligence of the defendant, and was a natural result reasonably to be apprehended under the circumstances. Prescott v. Robinson, 74 N. H. 460, 69 Atl. 522, 17 L. R. A. (N. S.) 594, 124 Am. St. Rep. 987; Godeau v. Blood, 52 Vt. 251, 36 Am. Rep. 751; Sullivan v. Old Colony St. Ry., 197 Mass. 512, 83 N. E. 1091, 125 Am. St. Rep. 378; McDermott v. Severe, 202 U. S. 600, 611, 26 Sup. Ct. 709, 50 L. Ed. 1162.

The judgment of the District Court is affirmed, with costs.

CHICAGO & E. R. CO. v. OHIO CITY LUMBER CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 12, 1914.)

No. 2473.

1. RAILROADS (§ 484*)—FIRES—ENGINES—EQUIPMENT—NEGLIGENCE—QUESTION FOR JURY.

Where, in an action for fire alleged to have been set out by one of defendant's engines, there was evidence that the engine while passing the property threw out live sparks and embers much larger than any which could pass through a proper spark arrester of the kind described by defendant's witnesses who testified that the engine was properly equipped with a spark arresting apparatus in perfect condition and of the most approved and effectual kind, whether the engine was so equipped in fact was for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740–1746; Dec. Dig. § 484.*]

2. EVIDENCE (§ 474*)—EXPERT WITNESSES—QUALIFICATIONS—MARKET VALUE.

Where a witness had been connected with the lumber business in various capacities for nearly 20 years and for 4½ years had been a director, secretary and treasurer, and manager of plaintiff lumber company, during which time he had sole charge of the business, making all purchases and sales, keeping the books, checking and inspecting goods received, and making daily records and weekly reports of goods sold, and knew the value of the lumber company's stock and buildings destroyed, he was competent to testify as to their value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196–2219; Dec. Dig. § 474.*]

3. EVIDENCE (§ 474*)—PROPERTY DESTROYED—NONEXPERTS.

Where more accurate evidence is not available or obtainable, any person, whether owner, active manager, or employé, who is familiar with the property destroyed and for which action is brought, though not an expert, may testify as to the value thereof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196–2219; Dec. Dig. § 474.*]

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

4. EVIDENCE (§ 500*) — PROPERTY DESTROYED — VALUE — SINGLE OR GROSS AMOUNTS.

A nonexpert testifying as to the value of destroyed property may give his estimate in single or gross amounts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2290, 2291; Dec. Dig. § 500.*]

5. DAMAGES (§ 111*)—DESTRUCTION OF REAL PROPERTY—BUILDINGS—MARKET VALUE.

Where buildings destroyed by fire alleged to have been set out by a railroad company were located in a small village and had little if any market value, and the use to which they were put in connection with the other property destroyed materially affected their value, the measure of damages was not limited to their fair market value, but was properly extended to their fair and reasonable value immediately before the fire considering their age, depreciation, cost of reconstruction, and their use with the other property destroyed by the same fire.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 274–278; Dec. Dig. § 111.*]

6. WITNESSES (§ 255*)—REFRESHING MEMORY—INVENTORY.

Where the stock and buildings of a lumber company were destroyed by fire alleged to have been set out by a railroad engine July 15, 1908, and on January 1st of that year a witness had made a complete and detailed inventory of the lumber company's property in the ordinary course of business, having carefully and accurately counted the lumber and other articles of merchandise therein set forth and included therein a complete list of every item on hand at the time it was made with the cost price of each, which the witness stated was its true value, and he further testified as to purchases and sales made subsequent to the taking of the inventory and that the amount of stock on hand varied but little between the taking of the inventory and the time of the fire, the witness was properly permitted to use it to refresh his memory, and it was properly admitted in evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 874–890; Dec. Dig. § 255.*]

7. APPEAL AND ERROR (§ 882*)—RULINGS ON EVIDENCE—RIGHT TO COMPLAIN ON APPEAL.

Where the court was about to strike out certain documents and cross-examination, but at defendant's suggestion they were retained and the jury at defendant's request was instructed not to consider the documents on the question of prices or values of the property sued for, defendant could not complain on appeal of their admission.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591–3610; Dec. Dig. § 882.*]

8. TRIAL (§ 307*)—PLEADINGS—SUBMISSION TO JURY.

Whether pleadings shall go to the jury in any case is within the sound discretion of the trial court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 732–737; Dec. Dig. § 307.*]

9. RAILROADS (§ 454*)—FIRES—SPARK ARRESTERS—STATUTES.

Rev. St. Ohio 1908, 3365–1, requiring railroad companies operating railroads within the state to equip their engines with "some device or contrivance that will most effectually guard against the emission of fire and sparks which would otherwise be thrown out by such engines," imposes a higher degree of care in the prevention of the escape of fire than that required by common law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1668–1671; Dec. Dig. § 454.*]

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

10. RAILROADS (§ 485*)—FIRES—SPARK ARRESTERS—STATUTES—INSTRUCTIONS. Rev. St. Ohio 1908, § 3365–1, requires railroad companies to equip locomotives with "some device or contrivance that will most effectually guard against the emission of fire and sparks which would otherwise be thrown out by such engines." In an action for a fire alleged to have been set out by sparks, the court instructed that it was the duty of the defendant to "equip its engines with the most effective apparatus," to "use the most effectual method known to the business at the time," to adopt "the most effective method known to the railroad business at the time," to provide the engines "with the most effectual apparatus in use," to construct the engine "with the most effectual appliances," and to equip each engine "with the most efficient spark arrester then known," to guard against the escape of fire or sparks. *Held*, that the language used in each instance was strictly synonymous with the provisions of the statute and was therefore not objectionable as imposing on the railroad company a higher duty than that required by the statute.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1747–1756; Dec. Dig. § 485.*]

In Error to the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Action by the Ohio City Lumber Company and others against the Chicago & Erie Railroad Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. B. Foraker, of Cincinnati, Ohio, for plaintiff in error.

J. W. Mooney, of Columbus, Ohio and H. L. Conn, of Van Wert, Ohio, for defendant in error.

Before WARRINGTON and DENISON, Circuit Judges, and SESSIONS, District Judge.

SESSIONS, District Judge. This action was brought by the Ohio City Lumber Company and certain insurance companies (plaintiffs) to recover damages for the destruction of the plant of the lumber company by a fire alleged to have been started upon its premises by sparks from a passing engine of the railroad company (defendant). At the time of the fire each of the plaintiff insurance companies carried insurance on some of the property which was destroyed. After the fire and before the commencement of this action the insurance companies adjusted the loss with the lumber company and paid the amounts thus found to be owing under their respective policies. Issues relating to the origin of the fire, the negligence of the defendant, and the value of the property destroyed were raised by the pleadings, presented by the proofs, and submitted to and determined by the jury. There were verdict and judgment for the plaintiff, and the defendant brings this writ of error, assigning error upon the refusal of the trial court to direct a verdict in its favor, the admission of evidence, and the charge to the jury.

[1] Counsel for defendant insist that it was entitled to a verdict by direction. This insistence is based upon the claim that the undisputed evidence in the case shows that the engines concerning which complaint is made were properly constructed and equipped and properly operated. It is true that several of defendant's employés, including inspectors, mechanics, enginemen, and trainmen, testified in posi-

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

tive terms and apparently from knowledge that each of the engines, which could have set the fire, was equipped with spark-arresting apparatus in perfect condition and of the most approved and effectual kind. The enginemen and trainmen also testified that each of the engines, while passing the lumber company's plant, was carefully and skillfully handled and operated. On the other hand, several of plaintiffs' witnesses, including workmen in the lumber yard and others in that immediate vicinity at the time, testified that at least one of these engines, while passing the lumber plant, threw out live sparks and embers much larger than any which could pass through a spark arrester of the kind described by defendant's witnesses and required by the Ohio statute unless the arrester was defective or the engine improperly operated. The question thus presented was one of fact and for the jury to determine. L. & N. R. R. Co. v. Bell, 206 Fed. 395, 124 C. C. A. 277.

[2] The property destroyed by the fire consisted of a dwelling house, a stable, nine sheds, a stock of lumber, glass, builder's hardware, and hay tools. The errors assigned upon the admission of evidence all relate to the testimony and proofs concerning the value of the burned property. Plaintiffs' principal witness as to values was Joseph B. Kuntz, who, for about 4½ years before the fire, had been the manager of the lumber company's business at Ohio City. In response to specific questions and over objection, Mr. Kuntz was permitted to state what, in his opinion, was the "fair and reasonable" value of each of the burned buildings just prior to the fire. Over like objection, he was permitted to place lump sum values upon the lumber, glass, builders' hardware, and the tools. Defendants contend that this testimony was incompetent and therefore inadmissible: First, because the witness was not shown to be qualified to testify as to values; second, because the values were stated in gross sums and not in detail; and, third, because the true measure of the value of the buildings was their "fair market" value and not their "fair and reasonable" value. These contentions are without merit. This record shows that Mr. Kuntz had been connected with the lumber business in various capacities for about 20 years. For 4½ years he had been a director, secretary and treasurer, and manager of the Ohio City Lumber Company. During that time he had had sole charge of the business of that company, making all purchases and sales, keeping the books, checking and inspecting all goods received, and making daily records and weekly reports of all goods sold. In so doing he must have become thoroughly familiar with the quantities, qualities, prices, and values of the goods in which he was dealing. He lived in the dwelling house and used the other buildings which were burned. He knew their age, location, use, and condition. He was acquainted with the value of building material. He had frequently sold such materials to builders and contractors and was familiar with their estimates of the cost of construction. With such experience and such knowledge, he was well qualified to testify on the subject of values.

[3, 4] Where more accurate evidence is not available or obtainable, any person, whether owner, active manager, or employé, who is fa-

miliar with the property and goods connected with and used in a business, although not an expert, may testify as to the value of such property when destroyed by fire, and his estimates of value may be given in single or gross amounts. Union Pacific R. Co. v. Lucas, 136 Fed. 374, 377, 69 C. C. A. 218; Walker v. Collins, 50 Fed. 737, 740, 1 C. C. A. 642; Jensen v. Palatine Ins. Co., 81 Neb. 523, 116 N. W. 286; Thomason v. Capital Ins. Co., 92 Iowa, 72, 61 N. W. 843; Bolte & Jansen v. Equitable Fire Ins. Ass'n, 23 S. D. 240, 121 N. W. 773; Farley v. Spring Garden Ins. Co., 148 Wis. 622, 134 N. W. 1054, 1056; 17 Cyc. 113, 115.

[5] No hard and fast rule, applicable to all cases, can be laid down as to the measure of the loss suffered by the destruction of buildings by fire. In some instances it may be their value detached from the land and separated from the use made of them. In others, where an active market is shown to exist, the market value may be the fair measure of loss. In still others, the cost of reconstruction, after deducting depreciation from age and other causes, may fairly recompense the owner. Usually, however, the real or ordinary value of a building, based upon and determined from its cost, age, condition, location, and the uses to which it has been put, furnishes a fair measure of the loss occasioned by its destruction. In this case it appears that these buildings were located in a small village and had little, if any, market value. The use made of them in connection with the other property destroyed materially affected their value. Under such circumstances, it cannot be said that their market value, detached from the land and separated from the use to which they had been put, fairly represented the loss suffered by plaintiffs in their destruction. No error was committed in permitting the witness to testify as to the fair and reasonable value of these buildings, taking into consideration their age, depreciation, the cost of reconstruction, and their use in connection with the other property destroyed by the same fire. Close v. Ann Arbor R. Co., 169 Mich. 392, 135 N. W. 346; Matthews v. Mo. Pac. Ry. Co., 142 Mo. 645, 44 S. W. 802; McMahon v. City of Dubuque, 107 Iowa, 62, 77 N. W. 517, 70 Am. St. Rep. 143; Chicago & N. W. Ry. Co. v. Kendall, 186 Fed. 139, 141, 108 C. C. A. 251.

[6] This fire occurred July 15, 1908. About January 1st of that year, the witness Joseph B. Kuntz made a complete and detailed inventory of the lumber company's property. This inventory was offered and received in evidence and Mr. Kuntz was permitted to refresh his recollection therefrom while testifying. The witness testified that he personally made the inventory in the due course of business, that he carefully and accurately counted the lumber and other articles of merchandise therein set forth, and that it showed "a complete list of every item on hand at the time it was made" with the cost price of each item which he said was the true value thereof. He further testified as to the purchases and sales made subsequent to the taking of the inventory, and also that the amount of stock on hand varied but little between the taking of the inventory and the time of the fire. No error was committed in receiving the inventory or in permitting the witness to use it and the jury to consider it. Wells Whip Co. v.

Tanners' Mut. Fire Ins. Co., 209 Pa. 488, 58 Atl. 894; Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855; Coleman v. Retail Lumbermen's Ins. Ass'n, 77 Minn. 31, 79 N. W. 588; German Ins. Co. v. Amsbaugh, 8 Kan. App. 197, 55 Pac. 481; West Branch Lumberman's Exchange v. American Central Ins. Co., 183 Pa. 366, 38 Atl. 1081; Insurance Co. v. Weide, 9 Wall. 677, 19 L. Ed. 810; Insurance Companies v. Weide, 14 Wall. 375, 20 L. Ed. 894.

[7] After the fire Joseph B. Kuntz and his brother, John Kuntz, who was also a witness, prepared proofs of loss which were delivered to the insurance companies. These proofs of loss purported to be statements in detail of the lumber, glass, hardware, and other property which was burned. In the preparation of these statements, the two men worked about ten days and had before them and used the January inventory, all of the sales slips or records between January 1st and July 15th, and the original invoices of all goods purchased between those dates. The quantity of goods destroyed was determined by adding the subsequent purchases to and subtracting the subsequent sales from the inventory. After the fire loss was adjusted with the insurance companies, the sales slips and invoices of purchases were believed to be of no further use and were destroyed. The values contained in the proofs of loss were as a whole considerably higher than those contained in the inventory and were quite thoroughly discredited. Complaint is made because these statements or proofs of loss were admitted in evidence and permitted to go to the jury. Whether or not these statements were competent evidence need not be determined. The record shows that, after they had been introduced and after the witnesses had been cross-examined concerning them, both the documents and the cross-examination with relation to the items contained therein were about to be stricken out by the court, when, at the suggestion of the defendant, they were retained. Also, at the request of the defendant, the jury was instructed not to consider them on the question of prices or values. Defendant is not now in a position to complain of this action.

The defendant offered no evidence as to the value of any of the property destroyed. If its counsel believed that the estimates of value given by plaintiffs' witnesses were incorrect and too high, it would not have been difficult for them to show the true and correct value of staple articles of merchandise like lumber, glass, and hardware. Having made no effort to disprove or contradict plaintiffs' proofs in that regard, it is fair to assume that they had small confidence in their ability so to do.

[8] Complaint is also made concerning the action of the court in permitting plaintiffs' amended petition to go to the jury. Whether the pleadings shall go to the jury in any case is within the sound discretion of the trial judge. In this instance that discretion was not abused. Moreover, during the charge to the jury, there was a colloquy between the court and counsel upon this particular subject and counsel for defendant not only did not object to the pleadings being submitted to the jury but requested certain instructions concerning them which were given.

[9, 10] A statute of Ohio (3365–1) requires every railroad company operating a railroad within the state of Ohio to equip its locomotive engines with "some device or contrivance that will most effectually guard against the emission of fire and sparks which would otherwise be thrown out by such engines." By this statute a much higher degree of care in the prevention of the escape of fire from locomotive engines than that required by the common law is imposed upon all railroad companies operating within the state. Instead of following the exact language of the statute, the trial judge, in his charge upon the question of negligence, instructed the jury that it was the duty of the company to "equip its engines with the most effective apparatus," to "use the most effectual method known to the business at the time," to adopt "the most effective method known to the railroad business at the time," to provide the engines "with the most effectual apparatus in use," to construct the engine "with the most effectual appliances," and to equip each engine "with the most efficient spark arrester then known," to guard against the escape of fire or sparks. The terms and language used are strictly synonymous with those contained in the statute and correctly state the statutory rule. Defendant's criticism thereof is unwarranted. Besides, its request upon this subject was given in substance.

The judgment will be affirmed, with costs.

MAMAUX v. CAPE MAY REAL ESTATE CO.

(Circuit Court of Appeals, Third Circuit. May 26, 1914.)

No. 1824.

1. CONTRACTS (§ 94*)—VALIDITY—FRAUD.

In order that promissory representations, made as an inducement to a contract, shall invalidate such contract and entitle the other party to its cancellation, there must be an element of bad faith, an intention to deceive, or a recklessness or extravagance of statement, that is scarcely to be distinguished from bad faith.

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

2. CONTRACTS (§ 94*)—VALIDITY—FRAUD.

Defendant corporation was organized by men of standing and means to promote the building of a commercial harbor and summer resort on the New Jersey coast. It bought land, laid out and improved streets, and projected the making of a harbor for ocean vessels with docks connected with railroad terminals, and the building of a large hotel. Upon representations that such improvements were to be made, complainant contracted for the purchase of a lot in the plan. The representations were made in good faith, and defendant expended several million dollars in carrying them out, and they had not been abandoned. The harbor was partially dredged, the hotel built, and the government constructed jetties. *Held*, that the fact that the project had not been as completely or rapidly developed as expected or represented did not entitle complainant to a cancellation of his contract, and to recover the money paid thereon.

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

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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 Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by Albert L. Mamaux against the Cape May Real Estate Company. Decree for defendant, and complainant appeals. Affirmed.

Harvey A. Miller, of Pittsburgh, Pa., for appellant.

John S. Weller, of Pittsburgh, Pa., for appellee.

Before BUFFINGTON and McPHERSON, Circuit Judges, and WITMER, District Judge.

J. B. McPHERSON, Circuit Judge. In September, 1904, the plaintiff entered into a written agreement with the Real Estate Company to buy No. 2083 on a plan of lots situated near Cape May, in the state of New Jersey. The price was $3,050, and the first payment of $305 was made when the agreement was signed. Nothing more having been paid, the company brought suit in January, 1909, to recover the balance of the purchase money. More than two years after that date the plaintiff filed the present bill, asking that the further prosecution of the suit be enjoined, that the contract be canceled, and that he recover the money already paid. The ground of the bill is misrepresentation of material facts, and the charges made in that behalf will appear by paragraphs 5 and 6:

"(5) Your orator further alleges that, as a special inducement to get your orator to sign the agreement, Exhibit A, and make payment of the sum of $305 at the time and before the signing thereof, defendant represented to your orator that it was about to erect a large and valuable hotel close by lot No. 2083 in said plan, at a cost of $1,000,000, or thereabouts, which was to have been completed by defendants within one year from the date of the execution of the contract Exhibit A; that the 'channel,' as marked on the plan of lots herewith filed as a part of this bill of complaint, was to have been dredged by defendant to a depth of at least 40 feet and to a width of 700 feet, protected by jetties extending 5,000 feet into the ocean; and the 'harbor,' covering about 500 acres, as marked on said plan, was to be dredged by defendant so that vessels drawing about 25 feet of water could enter said channel at any stage of the tide and find safe anchorage in the harbor; that the harbor and channel were to connect with the seven railway switches as indicated on said plan, on the inner portion of said harbor—all of which together with the putting in of railroad switches and accommodations, defendant represented it would have complete within two years from the date of the signing of the said contract and the making payment of $305 by your orator; that your orator, relying upon said representations, and believing the defendant would carry out said representations, was led to believe said lot No. 2083 was of much greater value than it in fact was, or now is, and that said lot is now of much less value than if defendant had made good the special inducements which led your orator to sign said contract, without which said inducement your orator would not have entered into said agreement and paid said $305. Your orator alleges that defendant failed to carry out the said representations which especially induced him to sign the said contract, in that said hotel was not constructed at all, costing the sum of $1,000,000 or thereabouts within one year from date of Exhibit A, and no hotel was built at all until the year of 1907, and then at a cost of about $400,000; that said channel, as shown on said plan, was not dredged within two years, nor has it yet been dredged or widened; that the jetties as represented by defendant were not put in and are not in at the present time, nor has the said harbor and channel been put in condition as alleged and represented would be done; and

defendant completely failed to put in the railway switches connecting with said harbor and channel, as represented.

"(6) That by reason of the defendant not constructing the said hotel, not dredging and widening the said channel, and not putting in the jetties, and not putting the harbor in the condition so that vessels drawing 25 feet of water could enter with safety, etc., and not connecting with the railroad as hereinbefore alleged, within the time as provided for, or not even at the present time, your orator alleges there is a failure of consideration of said contract on the part of defendant, and said contract void and fraudulent as to your orator; that your orator is entitled to recover the amount of money paid by him under said contract, namely, the sum of $305, with interest from the 19th day of September, 1904, and have said contract declared void."

In a brief opinion the District Court dismissed the bill, saying:

"Plaintiff, in substance, alleges in his bill that he was deceived as to the value of the lot at the time of making the contract by reason of representations to him that the corporation intended to make various improvements in the plan. The proofs show that the representations, so called, were not statements of existing facts, but in the nature of promises, with the single exception of the representation as to the extent of the corporation. There is no doubt from the evidence that the defendant corporation at the time had the intention to fulfill the promises, and has since attempted to carry them out with some measure of success. It is not necessary to consider these various promises in detail, or to comment on the evidence as to their fulfillment. There is no evidence at all that the defendant, or any of its agents, had any intention of deceiving the plaintiff. The plaintiff was not deceived. He saw the property. The proposed improvements were disclosed to him. He then entered into the agreement. His disappointment alone is not enough to move a chancellor in his relief."

As will be observed, the finding of facts is scanty, and needs to be supplemented from the evidence taken at the trial. The facts are as follows:

In 1904 the company undertook a development project on a large scale. The central idea of the scheme was the construction of a land-locked harbor on the Atlantic Ocean not far from Delaware Bay, the object being to furnish a safe and convenient place where sea-going and coasting vessels alike might load and discharge their cargoes, and thus avoid the delays and dangers of the river navigation between the ocean and the city of Philadelphia. An area of 500 acres was to be dredged to a depth sufficient to accommodate vessels of at least 25 feet draft; jetties to protect the inlet or channel to the harbor were to extend 4,000 or 5,000 feet into the ocean, docks and piers were to be provided, and railroad branches and sidings were to be brought into close connection therewith. A tract of meadow and beach land—afterwards divided into 7,500 lots—was to be reclaimed and filled, a large and fine hotel was to be built, streets and other improvements were to be made, and a summer resort, as well as a commercial enterprise, was to be promoted. Men of means and influence controlled the company, and for a while the enterprise occupied a good deal of public attention. The promoters expected—and the sequel proved that they were justified in expecting—that the government would be induced to build the jetties; and they expected, also, that the Pennsylvania Railroad and the Reading Railroad would build the necessary railroad connections and sidings. The scheme was attractive, and was prosecuted with vigor for two or three years; a great deal of work was done; much

dredging was done in the harbor; the government made an appropriation and built the jetties; two sidings were put down, and other railroad preparations were made; a hotel was built and equipped, and has been operated as a summer resort for several years; streets were opened, sidewalks and curbing were laid down, and grading was done; and in these and other ways a large sum of money was spent. The secretary of the company testified that $4,500,000 were put into the improvements, and that the work was still going on, although it has not been prosecuted recently with as much vigor or enthusiasm as at first. Cottages have also been built and occupied, although we are not informed as to the exact number. No one, we think, can read the testimony in full without sharing the conviction of the trial judge that the scheme was begun and has been prosecuted in good faith, with no purpose to deceive intending investors. No doubt the enterprise was speculative, but it was not fraudulent; and indeed, the charge of fraud, if made at all, is so slightly touched upon that we shall leave it out of account. Most of the representations charged in the bill were made by the company, either by agents or in a printed handbill, and most of them have been substantially fulfilled. The completion of the improvements was not promised within two years, or any other definite period, but within a reasonable time, and in view of all the evidence we find it difficult to say now that a "reasonable time" has elapsed.

[1, 2] The plaintiff's contention is that, although the representations complained of were clearly promissory, they were nevertheless material, and as they have not been completely fulfilled, he is entitled to set up their nonfulfillment as a defense to the contract. We do not think this extreme position is in accord with the great weight of authority. Here and there a decision may be found that appears to support it, but the rule is the other way. There must be an element of bad faith, an intention to deceive, or a recklessness or extravagance of statement that is scarcely to be distinguished from bad faith, before a promissory representation is to be condemned. And especially is this true where both parties have at least some common sources of knowledge, and where the purchaser does not rely wholly upon the superior information of the seller. A certain amount of confidence in the future, even if it turn out to be ill-founded, is to be expected in the promoters of any scheme that is honestly conceived and honestly carried on; and the expression of such confidence is not unlawful, even if it employ superlatives and indulge somewhat in rhetorical phrases. Custom allows a seller to praise his wares, if he does not deceive or take an unfair advantage of his better knowledge; and this is true, also, where the future course of events is the subject in question, and where the things that may happen must be more or less conjectural. We regard the scheme now under consideration as an enterprise obviously speculative, but honestly conceived and honestly prosecuted, and we do not think it discloses any intention to deceive or mislead. It is true that the sanguine anticipations of the promoters have not yet been realized, and that some of their promises have not yet been fully carried out. But much has already been done, the work is still going on, the project has not yet been given up; and, while success is apparently not

yet in sight, it is perhaps not unlikely that the time of prosperity may be nearer than is now indicated.

The subject of promissory representations is very fully discussed in the note to Fargo, etc., Co. v. Gas Co., 37 L. R. A. 593. See, also, 20 Cyc. 20. We may add that the cases referred to in the appellant's brief have all been considered; most of them seem to be clearly distinguishable, as they involved either false representations concerning existing facts, or intentional deception.

The decree dismissing the bill is affirmed.

WOLF v. AMERICAN TRUST & SAVINGS BANK et al.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1914.)

No. 2050.

1. CORPORATIONS (§ 149*)—PLEDGE OF STOCK—BONA FIDE PURCHASER.
   A broker having in his possession certain stock certificates pledged to him by complainant, with a restrictive indorsement showing that they had been pledged as collateral for moneys advanced to the owner, offered the certificates to a bank as security for loans to the broker. The certificates were refused because of the restrictive indorsement. Whereupon the broker obtained from plaintiff an assignment of the stock in blank together with an irrevocable appointment of the trustee as attorney to execute all necessary acts of transfer, and on the stock so assigned the bank made loans to the broker. *Held* that, though the bank knew of the first restrictive indorsement, yet, when the certificates were again offered to it without any restrictive indorsement, it was entitled to assume that the same was valid and expressed the intention of the parties, and hence it was a bona fide purchaser of the stock.
   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 539-546; Dec. Dig. § 149.*]

2. BILLS AND NOTES (§ 280*) — CERTIFICATE OF DEPOSIT — INDORSEMENT TO NAMED INDORSEE.
   The indorsement of a negotiable instrument to a named indorsee is a contingent contract of debt, and is also a conveyance to the indorsee of the legal title of the instrument considered as a species of property.
   [Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 622, 627; Dec. Dig. § 280.*]

3. BILLS AND NOTES (§ 365*) — CERTIFICATE OF DEPOSIT — TRANSFER — BONA FIDE PURCHASER.
   Where complainant transferred a certificate of deposit, payable to him, to his broker by indorsement as collateral security for advances in certain speculative transactions, and the broker after maturity indorsed the certificate to a bank as security for loans to him, the bank, in so far as it relied on complainant's indorsement only as a transfer of title to the certificate, was entitled to occupy the position of a bona fide purchaser for value and to claim the right to enforce the certificate to the extent of the broker's debt, regardless of equities existing between him and complainant.
   [Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 944, 958, 959; Dec. Dig. § 365.*]

4. PLEDGES (§ 29*)—REPLEDGE—BONA FIDE PURCHASER—REDEMPTION.
   Where a broker to whom complainant had pledged certain securities repledged them to a bank for his own debt and became a bankrupt, and

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

his trustee instituted suit against the bank to recover alleged preferences, the bank was not entitled to charge complainant with the expenses reasonably incurred in defending such suit as a part of the amount complainant was required to pay to redeem the securities on the theory that the expenses were reasonably incurred in the care and preservation of the property for complainant.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 64, 74; Dec. Dig. § 29.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Suit by Charles C. Wolf against the American Trust & Savings Bank and others to redeem certain collaterals. From a decree denying complainant's right to redeem said collaterals on paying the amount of the pledged indebtedness to defendants, plaintiff appeals. Modified and affirmed.

Morris M. Townley and Frank H. Scott, both of Chicago, Ill., for appellant.

Horace Kent Tenney, of Chicago, Ill., for appellees.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

BAKER, Circuit Judge. Appellant, cashier of a bank in Iowa, was dealing on the Chicago Board of Trade through Prince, a Chicago broker. Prince, unable or unwilling to furnish the cash required for appellant's speculations, demanded securities. Appellant placed a certificate of deposit for $24,000 and three certificates evidencing his ownership of 46 shares of the capital of his bank in the hands of Prince with authority to repledge them to the extent of his indebtedness to Prince. Appellee bank, having no actual notice of any limitations on Prince's authority, loaned Prince about $40,000 on the faith of the certificates as collateral. When Prince went into bankruptcy appellant owed him $4,911.14. This amount appellant tendered to appellee and demanded the surrender of the certificates. In this suit to redeem, the chancellor held that appellant could not take up the certificates without paying the amount of Prince's indebtedness to appellee.

I. When Prince first offered the stock certificates to appellee, they bore the following restricted indorsement: "Pay to E. H. Prince as collateral for moneys advanced from time to time. C. C. Wolf." Appellee made no loans to Prince on the bank stock in this shape. Before Prince obtained the assignment of the bank stock, to be mentioned presently, appellee inquired of another Chicago bank concerning the standing of appellant and the Iowa bank; and appellee also knew that Prince was engaged in buying and selling stocks, etc., for his customers. Then Prince wrote appellant:

"You appreciate that at times I have to make call loans in our active market, and in receiving a lot of cash grain it takes a lot of money. * * * The statement that they (the bank stock certificates) are up (with me) as collateral is a restricted statement and makes them almost useless for call loan purposes. * * * Therefore please sign the inclosed power of attorney giving me authority to transfer it (the bank stock)."

Thereupon appellant delivered to Prince an assignment of the stock in blank together with an irrevocable appointment of Prince as attorney "to execute all necessary acts of transfer thereof." On the stock so assigned appellee made loans to Prince.

[1] Under these circumstances, appellee exercised all the diligence required by the laws of banking. True, when the stock was first offered, appellee knew that appellant was the actual owner, was retaining the legal title, and was restricting Prince's authority to pledge. But when appellant afterwards assigned the stock as stated, in contemplation of law he joined Prince in assuring appellee that Prince was then authorized to pledge the stock as his own; and appellee was no more bound to inquire into the state of the account between Prince and appellant than to question a genuine and unrestricted indorsement of commercial paper. Our judgment of the law on this point is sufficiently elaborated in National City Bank v. Wagner, 216 Fed. 473, 132 C. C. A. 533, at this session. See, also, Elliott v. Miller Co. (C. C.) 158 Fed. 868; Nelson v. Owen, 113 Ala. 372, 21 South. 75; Krouse v. Woodward, 110 Cal. 638, 42 Pac. 1084; Brittan v. Oakland Bank, 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58; Skiff v. Stoddard, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102; Otis v. Gardner, 105 Ill. 436; McCarthy v. Crawford, 238 Ill. 38, 86 N. E. 750, 29 L. R. A. (N. S.) 252, 128 Am. St. Rep. 95; Saloy v. National Bank, 39 La. Ann. 90, 1 South. 657; Furber v. Dane, 203 Mass. 108, 89 N. E. 227; Gass v. Hampton, 16 Nev. 185; Mt. Holly v. Ferree, 17 N. J. Eq. 117; McNeil v. Tenth Nat. Bank, 46 N. Y. 325, 7 Am. Rep. 341; Fairbanks v. Sargent, 104 N. Y. 108, 9 N. E. 870, 6 L. R. A. 475, 58 Am. Rep. 490; Smith v. Savin, 141 N. Y. 315, 36 N. E. 338; Shattuck v. Cement Co., 205 Pa. 197, 54 Atl. 785, 97 Am. St. Rep. 735; King v. Mellon Nat. Bank, 227 Pa. 22, 75 Atl. 832.

II. A certificate of deposit, payable to appellant and signed by him as cashier, was first offered to appellee. The force of such a certificate was questioned. Prince then wrote appellant, "Send a certificate made direct to me." Thereupon appellant delivered to Prince the certificate in suit, saying: "The reason I do not make it to you direct is that our directors would get onto it and possibly the bank examiner." By this instrument the Iowa bank through its vice president certified that appellant had deposited therein $24,000 payable to the order of himself on the return of the certificate and proper identification, 12 months from date, with interest at 5 per cent. Appellant made the following indorsement: "Pay to E. H. Prince or order. C. C. Wolf. Payment guaranteed, demand, notice and protest waived. C. C. Wolf." Prince held this certificate, so indorsed, until after the 12 months had elapsed, and then, by a collateral note and blank indorsement, transferred it to appellee as security for a new loan.

Appellant urges that the fact that the certificate was "overdue" when taken by appellee and the additional circumstances of appellee's knowledge that Prince was a broker, that appellant was one of his customers, and that appellant was the original owner of the certificate, put appellee on inquiry respecting the scope of Prince's authority to pledge. Here, even less than with the bank stock, have the extraneous facts any

weight; the only question is the effect of appellee's accepting the certificate after its maturity.

Valid reasons may exist for giving a banker's certificate of deposit a higher standing in the financial world than a merchant's past-due promissory note. To maintain his credit a merchant, the moment he has a right to pay, hunts up his creditor or has the money at the designated place and cancels his debt, whether it be evidenced by an account or a bill or a note. To hold a high place in banking circles a banker, the moment he has a right to pay, does not hunt up his depositors and insist that they withdraw their deposits. A merchant borrows money to use in his business for a definite time. A banker accepts deposits (this excludes, of course, money received from discounts of customers' or the banker's own strictly commercial paper) from a selected clientele, somewhat like a lawyer's or doctor's, on the assumption that, though the relationship includes that of debtor and creditor, the banker is receiving the money for the convenience and protection of the depositor, that the banker through his knowledge of banking experience respecting reserves will have enough cash on hand to meet his depositor's needs, and that the depositor will not draw down the fund except for his needs and by means of presentment and demand at the bank. (Even in those jurisdictions where a depositor by certificate may sue his banker without previous demand, the depositor who did so would likely find himself cut off the list of clients.) If the deposit is evidenced by an entry in a passbook, the banker expects that he will not be sued without previous demand at the bank and refusal or failure to pay. If the deposit is evidenced by a certificate payable "on the return of this certificate and proper identification (or properly indorsed)," the banker has the same expectation in fact. If for a payment of interest or other consideration the depositor agrees in the certificate to postpone his right of presentment, the banker expects that at the end of the stipulated period the certificate will stand as a deposit payable on demand. (And the time element also enters into passbook entries of saving deposits.) It may be that the differences between the customs of merchants and of bankers are within judicial notice; and, if so, they might sustain a holding that a banker's certificate of deposit, though ripe for presentment, is not subject to the dishonor that attaches to a merchant's overdue commercial paper.[1]

[1] Schinotti v. Whitney (C. C.) 130 Fed. 780; Starr v. Stiles, 2 Ariz. 436, 19 Pac. 225; Zuck v. Culp, 59 Cal. 142; Bates v. Capital State Bank, 18 Idaho, 429, 110 Pac. 277; Brown v. McElroy, 52 Ind. 404; Elliott v. Capital City State Bank, 128 Iowa, 275, 103 N. W. 777, 1 L. R. A. (N. S.) 1130, 111 Am. St. Rep. 198; Corbin Banking Co. v. Bryant, 151 Ky. 194, 151 S. W. 393; Brown v. Pike, 34 La. Ann. 576; Planters' Bank v. Farmers' and Mechanics' Bank, 8 Gill & J. (Md.) 449; Fells Point Sav. Inst. v. Weedon, 18 Md. 320, 81 Am. Dec. 603; Branch v. Dawson, 33 Minn. 399, 23 N. W. 552; Missouri Pac. Ry. Co. v. Cont. Nat. Bank of St. Louis, 212 Mo. 505, 111 S. W. 574, 17 L. R. A. (N. S.) 994; Hodgson v. Cheever, 8 Mo. App. 318; Citizens' Bank of Humphrey v. Fromholz, 64 Neb. 284, 89 N. W. 775; Sharp v. Citizens' Bank of Stanton, 70 Neb. 758, 98 N. W. 50; Bank of Commerce v. Harrison, 11 N. M. 50, 66 Pac. 460; Downes v. Phœnix Bank, 6 Hill (N. Y.) 297; Ft. Edward Nat. Bank v. Washington County Nat. Bank, 5 Hun (N. Y.) 605; In re Waldron, 28 Hun (N. Y.) 481; Payne v. Gardiner, 29 N. Y. 146; Pardee v. Fish, 60 N. Y. 265 19 Am. Rep. 176; Howell v. Adams, 68 N. Y. 314;

But, particularly as Iowa is in the doubtful list, we refrain from counting this as any part of the ground of decision, and limit ourselves to holding that appellant has no rights even if the certificate of deposit is entitled to no greater credit than a merchant's dishonored promissory note.

Many of the cases that deny relief to a defrauded owner of commercial paper under circumstances like the present, ground the decision either on equitable estoppel or on the principle that where one of two must suffer the creator of the situation shall bear the burden. National Bank of Washington v. Texas, 20 Wall. 72, 22 L. Ed. 295; Baker v. Wood, 157 U. S. 212, 15 Sup. Ct. 577, 39 L. Ed. 677; Mitchell v. Roberts (C. C.) 17 Fed. 776; Bank v. Smith, 119 Ala. 57, 24 South. 589; Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237; Gilman v. Curtis, 66 Cal. 116, 4 Pac. 1094; Mohr v. Byrne, 135 Cal. 87, 67 Pac. 11; Silverman v. Bullock, 98 Ill. 11; Y. M. C. A. Gymnasium v. Bank, 179 Ill. 599, 54 N. E. 297, 46 L. R. A. 753, 70 Am. St. Rep. 135; Moore v. Moore, 112 Ind. 149, 13 N. E. 673, 2 Am. St. Rep. 170; Jefferson v. Bank, 143 Iowa, 83, 120 N. W. 308; Fox v. Bank, 6 Kan. App. 682, 50 Pac. 458; Mendelsohn v. Blaise, 52 La. Ann. 1104, 27 South. 707; Connell v. Bliss, 52 Me. 476; Eversole v. Maull, 50 Md. 95; Dickey v. Bank, 89 Md. 280, 43 Atl. 33; Gardner v. Beacon Trust Co., 190 Mass. 27, 76 N. E. 455, 2 L. R. A. (N. S.) 767, 112 Am. St. Rep. 303, 5 Ann. Cas. 581; Baker v. Burkett, 75 Miss. 89, 21 South. 970; Hill v. Shields, 81 N. C. 251, 31 Am. Rep. 499; Parker v. Stallings, 61 N. C. 590, 98 Am. Dec. 84; Wilson v. Little, 2 N. Y. 443, 51 Am. Dec. 307; Proctor v. M'Call, 2 Bailey (S. C.) 298, 23 Am. Dec. 135; Kempner v. Huddleston, 90 Tex. 182, 37 S. W. 1066; Reardan v. Cockrell, 54 Wash. 400, 103 Pac. 457.

[2, 3] But we believe that the true ground is this: An indorsement of a negotiable instrument to a named indorsee has two aspects. In one, it is a contingent contract of debt as complete and definite as if the terms thereof were written out in full above the indorser's signature; and in the other, it is a conveyance to the indorsee of the legal title to the instrument considered as a species of property—as perfect a conveyance as is the ordinary bill of sale of the ordinary

Boughton v. Flint, 74 N. Y. 476; Thomson v. Bank of British North America, 82 N. Y. 1; Munger v. Albany City Nat. Bank, 85 N. Y. 580; Smiley v. Fry, 100 N. Y. 262, 3 N. E. 186; In re Cook, 86 App. Div. 586, 83 N. Y. Supp. 1009; Girard Bank v. Penn Township Bank, 39 Pa. 92, 80 Am. Dec. 507; Finkbone's Appeal, 86 Pa. 368; McGough v. Jamison, 107 Pa. 336; Humphrey v. Nat. Bank of Clearfield, 113 Pa. 417, 6 Atl. 155; In re Gardiner Estate, 228 Pa. 282, 77 Atl. 509, 29 L. R. A. (N. S.) 685; Smith v. Steen, 38 S. C. 361, 16 S. E. 1003; Tobin v. McKinney, 15 S. D. 257, 88 N. W. 572, 91 Am. St. Rep. 694; First State Bank of Seminole v. Shannon (Tex. Civ. App.) 159 S. W. 398; Bellows Falls Bank v. Rutland County Bank, 40 Vt. 377; Koelzer v. First Nat. Bank, 125 Wis. 595, 104 N. W. 838, 2 L. R. A. (N. S.) 571, 110 Am. St. Rep. 890, 4 Ann. Cas. 1144. Contra: Wright v. Paine, 62 Ala. 340, 34 Am. Dec. 24; Brummagin v. Tallant, 29 Cal. 503, 89 Am. Dec. 61; Rentchler v. Kunkelman, 17 Ill. App. 343; Hunt v. Devine, 37 Ill. 137; Mereness v. First Nat. Bank, 112 Iowa, 11, 83 N. W. 711, 51 L. R. A. 410, 84 Am. St. Rep. 318; Thompson v. Farmers' State Bank (Iowa) 140 N. W. 877, 44 L. R. A. (N. S.) 550; Mitchell v. Easton, 37 Minn. 335, 33 N. W. 910; Baker v. Leland, 9 App. Div. 365, 41 N. Y. Supp. 399; Curran v. Witter, 68 Wis. 16, 31 N. W. 705, 60 Am. Rep. 827.

chattel. Concerning the indorser's liability on his contingent contract of debt, the maturity of the instrument may or may not be important. As to the validity of the indorser's conveyance of the legal title, the maturity of the instrument is inconsequential. And so in this case, inasmuch as appellee is not counting on appellant's contingent contract of debt but is only asking him to respect his conveyance of the legal title, the principle applies, which is common to the law of all kinds of property, that the innocent purchaser of the legal title is protected against secret equities respecting the title.

III. In addition to denying appellant relief under his bill, the court included in the amount to be paid by appellant in order to entitle him to redeem $2,913.44 expended by appellee for attorneys' fees and costs in defending itself against a suit by the trustee in bankruptcy of Prince's estate to recover an alleged unlawful preference given by Prince to appellee.

[4] That defense was not undertaken at appellant's instance. The allowance is sought to be justified under the rule that a pledgee may charge against the property the expenses reasonably incurred in its care and preservation. But the pledged property was safe in appellee's vaults, and the trustee in bankruptcy was not asserting any adverse right with respect to the pledge. It is true that, if the trustees had succeeded, the amount of appellee's claim against Prince, secured by the collaterals, would have been enlarged, and so appellant incidentally profited by the trustee's defeat; but the collaterals cannot properly be made to pay the expense of appellee's litigation, for its own purposes, over the state of its account with Prince. Willard v. White, 56 Hun, 581, 10 N. Y. Supp. 170; Work v. Tibbits, 87 Hun, 352, 34 N. Y. Supp. 308; Story on Bailments, sec. 306a.

The decree is modified by striking therefrom the aforesaid item of expense, and as modified is

Affirmed.

KINNEY v. PLYMOUTH ROCK SQUAB CO.

(Circuit Court of Appeals, First Circuit. June 12, 1914.)

No. 1057.

1. COURTS (§ 354*)—RULES OF COURT—ISSUANCE OF WRITS.

Under Circuit Court rule 2, providing that actions by writ shall be entered within the first two days of the return term, and not afterwards, unless by agreement of the parties or by order of court on such notice as the court may direct, enacted pursuant to Rev. St. § 918 (U. S. Comp. St. 1901, p. 685), authorizing the Circuit Court to make rules directing the returning of writs and processes, a plaintiff, causing the issuance of a writ of attachment on October 14th made returnable on December 6th following, while the court had under statute two terms commencing on the last Tuesday of February and on the third Tuesday of October, is not entitled as a matter of right to have his writ entered while the October term is in session; and, in the absence of an agreement of the parties or order of the court authorizing its entry at that term, the clerk may refuse

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

to enter it on the records of the court and to enter judgment for plaintiff.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 934; Dec. Dig. § 354.*]

2. COURTS (§ 354*)—RULES OF COURT—ENTRY OF WRITS.

A plaintiff, to obtain a default judgment, must comply with the statute and the rules of court, and until a writ is duly entered in court and the time has elapsed within which defendant should appear, no default or judgment by default can lawfully be entered against him.

[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 Massachusetts; Clarence Hale, Judge.

Action by Robert D. Kinney against the Plymouth Rock Squab Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

See, also, 213 Fed. 449.

John S. Patton, of Boston, Mass., for defendant in error.

Robert D. Kinney, of Philadelphia, Pa., pro se.

Argued before BINGHAM, Circuit Judge, and ALDRICH and MORTON, District Judges.

BINGHAM, Circuit Judge. This is an action on an alleged judgment said to have been recovered by Robert D. Kinney against the Plymouth Rock Squab Company, in the Circuit Court of the United States for the District of Massachusetts, December 27, 1909, for the sum of $19,026.98, with interest, and costs taxed at $55.24. In the District Court judgment was entered for the defendant, and the case is now here on the plaintiff's bill of exceptions. The issue tried in the court below was whether the plaintiff had obtained a judgment against the defendant as set out in his declaration; and the errors assigned are to the finding and ruling of the court that he had not, and to its refusal to rule in accordance with certain requests of the plaintiff.

It appears from the evidence that on October 14, 1909, Kinney caused a writ of attachment to issue against the defendant, in which the ad damnum was placed at $18,309.84, returnable before the Circuit Court of the United States for the District of Massachusetts on the first Monday of December following, to wit, December 6, 1909; that on October 26, 1909, the writ was served upon the defendant, together with a declaration, in which it was alleged that the plaintiff had been damaged by the defendant's fraudulent conduct in the sum of $18,309.84; that on or before December 6, 1909, the plaintiff left, or caused to be left, with the clerk of the court the writ, the declaration, and an order directing the entry of the action and the entry of his appearance; that on December 20, 1909, the defendant not having entered its appearance, the plaintiff instructed the clerk to record the defendant's default; and that on December 27, 1909, he sent to the clerk a written motion for entry of judgment, with directions to assess the plaintiff's damages at $19,026.98, as per an inclosed statement.

The clerk declined to enter the action, record a default, assess the damages, or enter judgment, on the ground that the writ was made returnable on a day other than the first day of some statutory term of the court, as required by its rule.

On the first day of the February term of the court, which was the next term after the service of the writ, the clerk caused the writ to be entered, and the following day the defendant appeared and filed a demurrer and answer. The question, therefore, is whether the District Court erred in finding and ruling that on the evidence as presented by this record the plaintiff had not obtained a judgment, and that the present action could not be maintained.

[1] In 1909, when the writ in question was issued and the judgment is alleged to have been obtained, a statute of the United States, approved May 14, 1902, provided that the two terms of the Circuit Court, holden at Boston, in the District of Massachusetts, should commence on the last Tuesday of February and the third Tuesday of October. Act May 14, 1902, c. 790, 32 Stat. 199. From the year 1812 down to that time, the regular terms of the Circuit Court for the Massachusetts District had been fixed by statute to commence on the 15th day of May and the 15th day of October, except when either of said dates should fall on Sunday, in which case the term was to commence on the following day. U. S. Rev. Stat., chap. 8, § 658 (U. S. Comp. St. 1901, p. 530).

By section 918 of the Revised Statutes, it is provided that the several Circuit and District Courts may from time to time—

"make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings."

By rule 7, par. 2, of the Circuit Court, which conforms to the practice in this circuit since the organization of the federal courts, it is provided that:

"All actions by writ shall be entered within the first two days of the return term, and not afterwards unless by agreement of the parties or by special order of the court or judge, and, in the latter case, on such additional notice to the defendant or defendants as the court or judge may order, to be served by the marshal or his deputy and due return made thereon."

In the case of In re Kinney, 202 Fed. 137, 120 C. C. A. 315, decided by this court January 13, 1913, it was pointed out that the provisions of this rule and the practice since the organization of the court were in conformity with the early practice in the state court; and, following the decision in Boston & Maine Railroad Co. v. Gokey, 210 U. S. 155, 28 Sup. Ct. 657, 52 L. Ed. 1002, it was held that, the Circuit Court having, under section 918 of the Revised Statutes (U. S. Comp. St. 1901, p. 685), adopted such a rule conforming to the early state practice, it was not bound to alter the rule so as to conform to subsequent alterations made in the state practice; that "in the framing of original writs with reference to return days, the return day must be on the opening day of some term of the District Court fixed by the statute"; and that a writ of mandamus could not be maintained to compel the

judge of the District Court to direct his clerk to issue and seal a writ made returnable at some other day than a regular return day.

[2] Now, as it appears that the writ in question was not made returnable to the October term of the Circuit Court (and in view of the date of service could not have been), and was not in fact returned to court until on or about December 6th, it is manifest that the plaintiff was not entitled as matter of right to have his writ entered while that term was in session; and, there being no agreement of the parties or special order of the court authorizing its entry at that term, that the clerk was justified in declining to enter it upon the records of the court. To obtain a judgment by default a plaintiff must comply with statutory requirements and rules of court, and until a writ is duly entered in court the defendant is in no way remiss in refraining from entering an appearance; and until a writ is duly entered, and the time has elapsed within which a defendant should appear, no default or judgment by default can lawfully be entered against him. It is unnecessary to consider the matter further. It is evident that the plaintiff in this case has not obtained a judgment against the defendant, as alleged in his declaration, and that the action cannot be maintained. We have carefully examined the exceptions taken by the plaintiff to the rulings of the District Court, and to its refusal to rule in accordance with the plaintiff's requests, and are satisfied that they cannot be sustained.

The judgment of the District Court is affirmed, and the defendant in error recovers its costs in this court.

MARTIN v. CHAMBERS.

(Circuit Court of Appeals, Fifth Circuit. April 18, 1914. Rehearing Denied May 18, 1914.)

No. 2472.

1. CORPORATIONS (§ 309*)—RIGHTS OF OFFICERS—PURCHASE OF OBLIGATIONS OF CORPORATION.

An officer of a corporation has the right to purchase outstanding obligations of the corporation and to enforce payment of the same, unless the circumstances surrounding the transaction make it inequitable for him to do so.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1366–1373; Dec. Dig. § 309.*]

2. PAYMENT (§ 50*)—MERGER—PURCHASE OF OBLIGATION BY DEBTOR.

One whose duty it is to pay an obligation cannot purchase it, have it assigned to himself, and keep the obligation alive.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 130, 132; Dec. Dig. § 50.*]

3. CORPORATIONS (§ 325*)—LIABILITIES OF OFFICERS—CORPORATE DEBTS.

An organizer, officer, and stockholder of an insolvent corporation is not, in the absence of a special statute, obliged to pay the debts of a corporation; his only obligation being to administer the assets for the benefit of all the creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1442, 1457, 1458; Dec. Dig. § 325.*]

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

4. CORPORATIONS (§ 545*)—OFFICERS—PURCHASE OF ASSETS OF INSOLVENT CORPORATION.

An officer of an insolvent corporation cannot buy outstanding obligations of the company at a discount and thus acquire a preference right to the prejudice of other creditors.

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

Preferences by insolvent corporations to officers and stockholders, see note to Ellsworth v. Lyons, 104 C. C. A. 8.]

5. CORPORATIONS (§ 545*)—OFFICERS—PURCHASE OF ASSETS OF INSOLVENT CORPORATION.

A purchase by an officer of an insolvent corporation, at full value of notes of the company, which were a lien upon its property, for the purpose of conserving the property, it appearing that, except for such purchase, the lien would have been foreclosed, is not a fraud upon the other creditors or junior lienors, and raises no equity in their favor which prevents the purchaser from enforcing the lien.

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

Appeal from the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge.

Suit by William B. Chambers, administrator, against Myra B. Martin, executrix, who filed a cross-bill. From a decree denying the relief prayed for in the cross-bill, cross-complainant appeals. Reversed, with instructions.

George Denegre, of New Orleans, La., J. P. Blair, of New York City, Victor Leovy, of New Orleans, La., and George D. Anderson, of Beaumont, Tex., for appellant.

Charles C. Le Forgee, of Decatur, Ill., and Wm. C. Dufour and H. Generes Dufour, both of New Orleans, La., for appellee.

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

CALL, District Judge. The controlling question in this case is: Did Logan have the right to purchase the Catron notes? If he did, the decree of the lower court should be reversed, and a decree entered under the cross-bill filed by the appellant. If he did not, the decree of the lower court should be affirmed.

[1] It is a well settled proposition of law that an officer of a corporation has the right to purchase outstanding obligations of the corporation and enforce payment of the same, unless the circumstances surrounding the transaction makes it inequitable for him to do so.

[2] It is also well settled that one whose duty it is to pay an obligation cannot purchase it, have it assigned to himself, and keep such obligation alive.

[3] Was Logan obligated to pay the Catron notes? We think not. The only way the obligation is attempted to be worked out by appellee is through his (Logan's) connection with the several corporations mentioned in the bill of complaint. That connection, so far as disclosed by this record, was as organizer, officer, and stockholder.

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

Do these relations impose under the West Virginia law the obligation to pay the debts of the corporation? There is no such claim made in the briefs, and no statute of West Virginia cited to such effect. We may conclude, therefore, that no such statute exists.

[4] The question must then be answered under the general law. The law is well settled that an officer of an insolvent corporation cannot buy up outstanding obligations at a discount and thus work a preference in his behalf to the prejudice of other creditors. But it is the duty of such officer to administer the assets of the corporation for the benefit of all the creditors. Therefore the only duty and obligation of an officer, even of an insolvent corporation (in so far as the duty to pay the debts of the corporation), is to administer the assets of the corporation for the benefit of all the creditors, not to pay the debts himself, except special statutes may place this burden upon stockholders and officers. On the facts in this case, we can find no personal obligation on Logan to pay off these notes with his personal funds.

[5] Are the circumstances surrounding the purchase of the notes such that it would be inequitable for Logan to enforce the notes against the corporations and persons obligating themselves to pay the same? The proofs show without contradiction that Logan purchased these notes with his personal funds at their full value and had them, together with lien reserved, assigned and transferred to himself, and did this presumably to conserve the corpus of the property of the corporation. Had he not purchased them, undoubtedly Mrs. Catron would have foreclosed the lien reserved thereby and the property been sold.

There is nowhere in the evidence a suggestion that the corporation assuming to pay these notes had the funds to do so, either at the time of the purchase or since. If the corporation had had the funds to meet the notes, and Logan, an officer of such corporation, had, instead of paying said notes from the corporation funds, bought them, we can conceive that a junior lienor could complain. Such a proceeding would to a certain extent be a fraud on him, thereby diminishing his security. But this is not the case at bar. Nowhere in the evidence have we found a suggestion that the Forward Oil Producing Company, which assumed to pay these notes, and of which Logan was an officer, at any time had the funds to meet these notes as they fell due.

Does an officer of a corporation who, from his personal funds, buys an obligation of his company and has it transferred to himself, when said company is not able to meet it at maturity, and when foreclosure of the lien is threatened, and thus prevents the foreclosure, which foreclosure might absorb most, if not all, of the assets of the company, perpetrate a fraud on the other creditors and junior lienors? We apprehend no one will maintain the affirmative of the question thus stated. Especially in view of the fact that the junior lienor had it in his power to redeem and protect his security.

Had the land increased in value there would have been no complaint. The fact that the land has decreased in value cannot make

the purchase of the notes a fraud upon the rights of Barnes. There is no act of Logan shown in the testimony that would work an estoppel at law or in equity against him from enforcing the first lien of these notes.

The decree of the lower court is reversed, and the cause remanded, with instructions to enter a decree in favor of the cross-complainant as holding the first lien for the purchase price of said notes, and a decree for complainant for the amount of his two notes, with interest, as holding second lien.

BUTTERWORTH v. DEGNON CONTRACTING CO.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 245.

1. RECEIVERS (§ 90*)—ASSUMPTION OF PERFORMANCE OF OBLIGATIONS.
Where the receiver of a corporation, when appointed, found a contract for the transportation of large quantities of stone partly performed, it was his duty to proceed with the contract if beneficial to the estate, and to abandon it if not beneficial.
[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 164–166; Dec. Dig. § 90.*]

2. RECEIVERS (§ 90*)—ASSUMPTION OF PERFORMANCE OF OBLIGATIONS.
Where the receiver of a corporation, when appointed, found a contract for the transportation of quantities of stone partly performed, but was unable to determine whether it would be beneficial to the estate to proceed therewith, he properly proceeded to transport some of the stone, until it was ascertained that it would not be beneficial to proceed with the contract, and he was entitled to recover on a quantum meruit for the services performed before abandoning the contract.
[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 164–166; Dec. Dig. § 90.*]

3. RECEIVERS (§ 171*)—ASSUMPTION OF PERFORMANCE OF OBLIGATIONS.
Where the receiver of a corporation proceeded under a contract partly performed by the corporation prior to his appointment, until it was ascertained that performance would not be beneficial to the estate, the damages from the corporation's failure to complete the contract could not be set off against the receiver's claim for compensation for the work performed by him.
[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 325; Dec. Dig. § 171.*]

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

On writ of error to the District Court for the Southern District of New York to review a judgment entered upon a verdict directed by the court in favor of the defendant. 208 Fed. 381. Both parties moved for the direction of a verdict. Reversed.

The parties will be referred to as they appear on the record of the District Court, as plaintiff and defendant.

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

Culver & Whittlesey and Walter Gordon Merritt, all of New York City, for plaintiff in error.

Parker & Aaron and Herman Aaron, all of New York City, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The plaintiff is the receiver of the Gilbert Transportation Company, a Connecticut corporation with its principal office at Mystic in that state. Its business at all times was carrying freight by water and it owned and operated a large number of vessels for that purpose. The plaintiff, by virtue of his appointment dated October 5, 1909, was authorized to take possession of and manage all the company's vessels and property and to continue the conduct of its business. Between October 5, 1909, and December 30, 1909, the plaintiff, as such receiver, transported on the company's vessels a large quantity of stone from Maine and discharged the same at places designated by the defendant, which was engaged in constructing the Cape Cod Canal at Barnstable Bay, Mass.

[1, 2] These services were, it is alleged, reasonably worth $8,797.70, for which sum judgment is demanded. The contract under which this stone was delivered and these services were rendered was not made by the plaintiff. When he was appointed receiver he found the contract with the defendant company partly executed and the question immediately arose whether, as receiver, it was his duty to assume or disaffirm it. It was impossible to reach a conclusion upon this question from the data then on hand. Consequently the receiver, upon the advice of counsel, made 15 deliveries of stone between October 5 and December 30, 1909, when, being convinced that the contract was not a profitable one, he wrote on January 25, 1910, notifying the defendant that he, as receiver, did not regard the contract as a desirable asset and gave formal notice that he would not assume or become responsible for it. It seems to us that he pursued the proper course. On taking possession as receiver he found a contract which might develop into an exceedingly valuable asset. Had he repudiated it, without investigation, he would have been guilty of a clear dereliction of duty. He was in duty bound to proceed with the contract if it were beneficial to the estate administered by him and to abandon it if not beneficial. He had a reasonable time to investigate before deciding this problem. He concluded to try the experiment of transporting some of the stone and soon found that he could not continue without loss to the estate. This being so, it was his duty to discontinue. He had no right to go on with a contract which was certain to subject the creditors whose interest he was bound to protect, to additional loss. How could the question whether or not the contract was a valuable asset be determined more satisfactorily than by trying the experiment of proceeding under the contract long enough to ascertain whether it was of any value to the creditors? If the receiver had a right to make this experiment, and of this we think there can be no doubt, he is entitled to be paid on a quantum meruit for the value of the material furnished. The service

was not rendered by the Transportation Company but by Butterworth, as receiver, and *as receiver* he is entitled to be paid.

[3] The defendant received services worth over $8,000; if these had been furnished by a new contractor the defendant would have had to pay for them in full. Why should it not pay the receiver? Why should the claim for damages against the Transportation Company be set off against the Degnon Company's debt to the receiver for stone transported by him after the failure of the company?

Regarding the first four items as set out in paragraph VIII of the complaint the plaintiff can recover only for such part thereof as was rendered by him. The work of discharging the stone as to all but the first two items was probably performed by him and this is true also as to a part of the transportation. Such part of the transportation and discharge as was done by the Transportation Company before the appointment of the receiver should be deducted from the amount demanded in the complaint.

The judgment is reversed with costs.

BOUKER CONTRACTING CO. v. FOX et al.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 148.

NAVIGABLE WATERS (§ 20*)—OBSTRUCTIONS IN STREAM—INJURIES TO PASSING VESSEL.

Respondent, who as a contractor was removing an old bridge, *held* liable for an injury to libelant's scow, which, while being towed through the bridge, struck on a stone or piece of cement which respondent had blasted from an abutment and had not removed from the channel.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 73–99; Dec. Dig. § 20.*]

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

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, holding respondent liable for damages sustained by a scow which, when being towed through Pelham Bridge, struck on an obstruction in the channel. Respondent was at and prior to the time of the accident engaged in removing an old bridge and its abutments at the place in question. The contention of libelant is that some of the material which Fox had blasted off from one of the abutments fell into the channel and was not removed by him.

L. A. Sullivan, of New York City, for appellant.

W. J. Martin, of New York City, for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. The cause was tried in court, and the only substantial question is one of fact. There was testimony—abundant testimony—which, if credited, would establish the proposition that the

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

scow struck, not on the old riprap, which was in the channel before Fox began his work, but on a fragment of stone or concrete which he had blasted off the pier and had not removed from the channel into which it fell. There was also testimony to the contrary. Judge Hand has discussed the testimony very fully and carefully, he saw and heard the witnesses, and his finding on the controverted questions of fact should not be set aside. Indeed, upon the printed record of the testimony we think his conclusion is in accord with the fair preponderance of proof.

Decree affirmed, with interest and costs.

THE THODE FAGELUND. THE FRED B. DALZELL. THE LEWIS PULVER.

(Circuit Court of Appeals, Second Circuit. April 28, 1914.)

No. 223.

COLLISION (§ 71*)—VESSEL LYING AT WHARF—BERTHING OF STEAMSHIP.

The crushing of a barge lying at a wharf in Atlantic Basin by a steamship when entering a slip between such wharf and a pier *held* due solely to the fault of one of two tugs engaged in berthing the steamship, which was employed to hold her against the wind by means of a line to her quarter, but which, without orders or notice, stopped pulling when the ship turned to enter the slip, permitting her to swing against the barge.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.*]

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

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, holding the steamship Thode Fagelund solely responsible for damages sustained by libelant's barge L. H. Pflug, through being crushed by the steamship as the latter entered the slip between Pier 36 and Commercial (or Commerce) Wharf, Atlantic Basin, Brooklyn.

C. S. Haight, of New York City, for appellant.
Herbert Green, of New York City, for the Lewis Pulver.
C. C. Burlingham, of New York City, for the Fred B. Dalzell.
De Lagnel Berier, of New York City, for libelant.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The tide in the river was flood (though there was no tide in the basin) and a wind of from 25 to 30 miles an hour was blowing practically straight into the gap which leads from the river into the basin. Commerce Wharf runs along the further side of the basin, and Commerce street runs down to it at a place directly opposite the gap. From the sides of the basin, right and left there run out six piers, three on each side; between these and between the inner pair of piers and Commerce Wharf are slips for the accommodation of vessels. Between the heads of the piers is the waterway

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

from the gap to the entrances of the several slips. The slip for which the steamship was bound was the innermost one on the right-hand side going in, lying between Pier 36 and Commerce Wharf. As she entered the gap those who had charge of her berthing at first indicated she was to enter the left-hand slip, but before she had proceeded far advised her she was to enter the right-hand one. She proceeded in, made her turn around the end of Pier 36 and as she straightened out to proceed up the slip her stern swung down towards Commerce Wharf and she struck the outermost of four barges berthed against the wharf; the two outer ones and the one next the wharf were uninjured, but libelant's, the third barge, was crushed.

The owner of the barge libeled the steamship; the latter by petition brought in two steamtugs, the Fred Dalzell and the Lewis Pulver, which were assisting the steamship to make her berth.

The tug Dalzell had a line to the steamship's bow and was towing her in; the latter using her steam from time to time to check headway, when her pilot, who was on the bridge, thought they were moving too fast. We have no doubt from the testimony that he was in general charge of the operation, although he gave no particular orders to the Dalzell as to her maneuvers, because, as he says, "she was doing the proper thing." He admits that he did give an order to the Pulver which was fast to the steamship's starboard quarters with a line which led from the Pulver's stern; the object of course being to hold the steamship up against the wind. We do not find that there was fault in undertaking to make the particular berth, which had been assigned to the Fagelund in the basin, although, as frequently happens, there were many other vessels in the basin. Some of these were moved while she lay still waiting for this to be done, in order to facilitate the maneuver, and if carefully carried out the docking would have been successfully accomplished. Evidently some negligence brought the steamship into contact with the barges, and for the damages sustained therefrom she must respond to libelant.

The steamship brought in both tugs, alleging that the collision resulted from their negligence. No fault is shown on the part of the Dalzell; as the pilot in charge of the Fagelund says, "he did the proper thing." To determine as to the alleged fault of the Pulver it is necessary first to settle two disputed questions of fact. There is a conflict of testimony as to the exact location of the four barges on the front of Commerce Wharf; some witnesses locate them well to the right-hand, in the slip, and somewhat further in than the end of Pier 36. If so located, since Pier 36 was shedded, they might not have been seen from an incoming vessel until about to make the turn into the slip. We concur, however, with the District Judge in the finding that they lay off Commerce street or even to the left of it towards Pier 35. There they would not be obscured by the shed on Pier 36. No doubt when the steamship passed through the gap into the basin there were two barges lying at the end of Pier 36, but before she began to maneuver to enter the slip these were removed. The District Judge so finds and the testimony supports his finding. We do not, however, concur with his conclusion that the wind was so strong that, as the steamship

turned in for the slip presenting her quarter to the wind, the Pulver was pulled over with the steamship. Undoubtedly the wind did set the steamship over, but that was not because the wind was too strong for the Pulver but because the Pulver suddenly and unexpectedly ceased pulling against it at the critical moment when her power was most needed. That she did cease pulling just at this time is the testimony not only of other witnesses but also of her own master. So long as she kept on pulling she held the steamship up. She did not cease pulling because the pilot ordered her to do so or even because she thought he gave such order. Her master says he did it on his own initiative, and without giving any notice that he was going to let go. This being so, we do not see how the pilot or the steamship can be held in fault because, without any order, the Pulver ceased doing what she was hired to do, what she had been told to do, what she had been doing, and what it was to be expected she would continue to do until otherwise directed.

The fact being, as we have found, that there were no longer two barges at the end of Pier 36, and that the four barges lay at the foot of Commerce street (or further even to the left), it seems physically impossible that the condition of affairs was such that she could no longer keep pulling the stern up against the wind, which is her only excuse for stopping such pull without being ordered so to do.

It seems to us that she was clearly in fault and that, even if the pilot was in charge, he was not in fault for undertaking to carry out a maneuver which, so far as we can see, would have been safely accomplished if one of the tugs he was using for the purpose had not failed to do what he had every reason to suppose she would do, without any orders from him to cease doing it.

The decree should be modified so as to be primarily against the tug Pulver, and for any deficiency only against the steamer, with costs of this appeal to the Fagelund against the Pulver.

FITCHBURG DUCK MILLS v. BARRELL.

(Circuit Court of Appeals, First Circuit. May 20, 1914.)

No. 1042.

1. PATENTS (§ 26*)—INVENTION—ADAPTATION OF DEVICE TO NEW ART.

The introduction into a patented fabric, intended for a special use, of devices previously used in nonanalogous arts may involve invention, especially if, in the new field, they perform a new function or accomplish a new and useful result.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. § 26.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DRIER-FELT FOR PAPER MACHINES.

The Barrell patent, No. 636,482, for a drier-felt for paper machines, *held* not anticipated, valid, and infringed.

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

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

Suit in equity by William L. Barrell against the Fitchburg Duck Mills. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 207 Fed. 371.

William K. Richardson, of Boston, Mass., for appellant.

Livingston Gifford, of New York City (William Quinby, of Boston, Mass., on the brief), for appellee.

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

BINGHAM, Circuit Judge. This case involves the validity of a patent for an invention relating to an improvement in drier-felts for paper machines. The patent is numbered 636,482, and was granted to William L. Barrell November 7, 1899. It contains two claims, which read as follows:

"(1) A drier-felt for paper machines, consisting of two superposed plies of double-face woven fabric, having large face-warp, said plies being united by smaller binder-warps adjacent the under or inner sides of the face-warps, and buried under the said face-warps of the plies, substantially as described.

"(2) A drier-felt for paper machines, consisting of two superposed plies of close-woven double-face fabric having large face-warps, said plies being united by smaller binder-warps adjacent the under or inner sides of the face-warps, the binder-warps passing from one to the other ply and buried under the said face-warps, successive binder-warps crossing each other as they pass from one to the other ply, substantially as described."

In the early period of the art to which the patent relates, a drier-felt was made of woolen, but for many years prior to the patent in suit it was made of cotton, and was a strong, single-ply fabric. Its strands were unbleached and firmly twisted to render it substantially nonabsorbent. Its weave was sufficiently close to avoid shrinking, stretching, or wrinkling, when in use, and sufficiently porous to permit the passage of steam and heat through it. These qualities were necessary to enable it to perform its function. It was used as an "apron or carrier" on a paper machine "to support the damp, new web of paper as it comes * * * from the wet woolen felt," and to hold "the paper web firmly and smoothly against the heated metal drier-cylinders, around and over which the web passes until dried and ready for the calender-rolls. In this operation, only one side of the drier-felt comes in contact with the damp web of paper and the heated cylinders." The steam generated by the moist paper and the heated cylinders passes through the felt, and in a very short time the warp-threads become burned and loosen, leaving an irregular depression or hole in the surface of the felt, into which the soft paper may press, causing bunches on the finished web, which spoil or greatly reduce the value of the paper. And as the same face of the drier-felt is always brought into contact with the damp paper "the rotting action of the dampness and the heat acts upon the face next the paper, so that when in the ordinary felt a warp-thread is started" a hole may be made, which soon enlarges, and the use of the fabric is at an end.

It was also shown that when any part of a felt becomes burned, so as to break, and permit the draft upon its two sides to be uneven, it is apt to run in a wrinkle, and spoil the paper; that felts are made of

great length, and at times exceed 12 feet in width, and weigh in the vicinity of 1,500 pounds.

Prior to the plaintiff's invention, in order to enable these long and wide felts to carry the wet web evenly and smoothly over the drier cylinders and prevent wrinkling, it was necessary to make the twisted yarn so large as to form a rough surface, which was liable to cause felt marks in the damp paper that could not be removed by calendering, thus rendering it unsalable.

To remedy the difficulties encountered in the use of single-ply drier-felts, the patentee declares in his patent that in his efforts to improve the construction and increase the life of drier-felts he has discovered "that a double-ply fabric composed of two plies of woven fabric, each complete in itself, superposed one upon the other and connected by binder-warps smaller than the face-warps of the plies, will accomplish the desired objects; the binder-warps being so buried by and between the face-warps" as to be protected thereby.

In describing the construction of his novel drier-felt, the patentee states that it consists of two superposed plies, composed of warp and filling-threads made preferably of cotton, each ply being in itself a complete double-faced woven fabric, the two plies being woven in the usual manner, meaning, undoubtedly, the manner known to those skilled in the art of making drier-felts of the single-ply type; that in the process of weaving, smaller binder-warps are introduced, passing around every other filling-thread in each ply; that a number of binder-warps are employed, successive binder-warps crossing each other so that the two plies are firmly bound together; that the smaller binder-warps pass between and adjacent the under sides of the face-warps which spread laterally and bury or cover the binder-warps, which are subjected to a greater tension in weaving.

The particular feature of the double-ply felt is the introduction of numerous binder-warps of a size smaller than the face-warps of the plies which they unite and bind together, the binder-warps being so situated with reference to the face-warps of the plies that their real service begins after the ply which comes in contact with the driers has become burned or partially destroyed; that, while the binder-warps serve to hold the plies together when the felt is new, this is but incidental to their main purpose or function, which is to hold the warp-threads of the inner ply after they have thus become partially destroyed, the broken ends of the warp-threads then presenting a smooth, plush-like surface to the moist paper, and serving to protect the outer ply from the heat and steam. By adopting these means, it was shown that the life of a drier-felt was increased from 60 to 90 per cent., its cost per ton of output of paper was reduced about one-half from what it was when a single drier-felt was used; that damage to the paper, caused by holes in the surface of the felt and from wrinkling, was largely removed; and that the two-ply felt hugged the drier more closely and gave the paper a more even finish.

The appellant contends that the patent is anticipated by the prior art, and in support of its contention relies upon certain patented and unpatented devices of the two-ply construction, some of which are

carpets and some belts for the transmission of power. As to the two-ply carpet fabrics little need be said. They plainly belong to an art in no way analogous to that to which the drier-felt of the patent in suit belongs, and were not intended and could not be used to perform the functions of a drier-felt.

The patent to Cooke, numbered 22,528, issued January 4, 1859, is the one largely relied upon to show anticipation. This patent was for a "new and improved manufacture of webbing for machine belting, cordage, mule harnesses, or other useful purposes." It is urged that it appears from the drawings of this patent that the binder-warps employed to hold the two-plies of the fabric together are smaller than the face-warps of the plies, and are buried by and between them. The specification, however, nowhere alludes to these features, nor to anything showing that they were necessary to the invention. Mosler v. Lurie, 209 Fed. 364, 126 C. C. A. 290. Furthermore, at the time this patent was issued, drier-felts of either the single or double ply type were not known, and it is not to be wondered at that the essential characteristics of a drier-felt were not set forth in the patent. The purpose of the binder-warps of the Cook patent was "to bind together the cloths made by the body-warps and form them with no straight or continuous parallel ridges," and to bring this about the evidence discloses that large binder-warps were employed in the fabrics manufactured under this patent. Under these circumstances, it is probable that the difference in size between the binder and face-warps, as they appear in the drawings of the patent, was employed by the draftsman to meet his fancy in indicating the presence of the two warp-threads in the fabric. The evidence fails to persuade us that the plies of the Cook patent were so constructed as to perform the functions of a drier-felt, or that they were so united by smaller binder-warps as to perform the functions disclosed by the patent in suit. We are therefore of the opinion that anticipation has not been proved by any of the patented or unpatented structures introduced in evidence by the appellant.

[1, 2] The appellant also contends that the appellee's double-ply drier-felt does not involve patentable invention. This contention likewise fails to meet our approval. In the first place, the evidence discloses that prior to the plaintiff's invention the art of making drier-felts for paper machines contained no fabric of the double-ply structure, either of the construction claimed by the appellee or otherwise. Then, again, if we start with the proposition that drier-felts of the single-ply construction were old, that to superpose one such drier-felt upon another did not involve invention, and that binder-warps smaller than the face-warps of the plies were employed to unite two plies of fabric in the art of carpet-making, and perhaps in some other non-analogous arts, long prior to their introduction by the appellee into the drier-felt art, it does not follow that their introduction into this new field of action does not involve invention, especially if in this new field they perform a new function or accomplish a new and useful result. Western Electric Co. v. La Rue, 139 U. S. 601, 606, 11 Sup. Ct. 670, 35 L. Ed. 294; Watson v. Stevens, 51 Fed. 757, 2 C. C. A. 500; Forsyth v. Garlock, 142 Fed. 461, 73 C. C. A. 577. In the fabric of the carpet

art, and the two-ply fabrics of the other arts relied upon by the appellant to show want of novelty, the devices or structures were not subjected to the deteriorating influences of steam and heat, and the binder-warps were not employed to perform any function with reference to such influences, while in the patent in suit the chief and almost sole purpose of their use, as we have heretofore pointed out, was to provide means whereby these influences would be checked, and in a large degree overcome. It was this problem to which the patentee directed his attention, and which the patented article, in the judgment of a large portion of those who have used it in the manufacture of paper, say that it solved. For these reasons, we fully agree with the opinion of the District Court that it cannot properly be said "that the patentee has taken any fabric of the prior art and merely put it into use as a drier-felt." Indeed, it seems to us that there was invention sufficient to sustain the patent in the fact that the patentee introduced the smaller binder-warps into the art of making drier-felts and adapted them to perform a new function, without relying upon the secondary proofs leading to the same conclusion.

In the spring and summer of 1910, the appellant manufactured and sold drier-felts of the two-ply construction, in which the binder-warps were smaller than the face-warps of the plies, and were covered up by the face-warps in the finished article. The treasurer of the appellant company admitted this to be true in his testimony. Moreover, all the evidence leads to the conclusion that, when the appellant's drier-felt is in use, the smaller binder-warps are so covered and buried by the face-warps of the plies as to be protected against the action of the heat and steam from the drier-cylinders and the moist web of paper, and that it is reasonably certain that the article manufactured and sold by the appellant fulfills the requirements set forth in the claims of the patent in suit, and infringes thereon.

The decree of the District Court is affirmed, and the appellee recovers his costs of appeal.

GENERAL ELECTRIC CO. et al. v. STEINBERGER.

(Circuit Court of Appeals, Second Circuit. April 7, 1914.)

No. 243.

PATENTS (§ 328*)—PERSON ENTITLED TO PATENT—DISK STRAIN INSULATOR.

The disk strain-insulator having rain-shedding annular corrugations, covered by the claims put in interference in the Patent Office between Hewlett and Steinberger, previous to which patent No. 904,370 was issued to Steinberger, *held* to have been independently invented by Hewlett, who, as the inventor first reducing the invention to practice by filing his application, is entitled to the patent therefor.

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. The suit was brought under

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

section 4915, Rev. Stat. U. S. (U. S. Comp. St. 1901, p. 3992), praying that a patent be issued to complainant for the device covered by claims 9, 10 and 11 of United States letters patent No. 904,370 for a disk strain-insulator, granted November 17, 1908, to defendant, Steinberger. The District Court decreed that Hewlett was the first inventor and entitled to a patent. The General Electric Company is the assignee of Hewlett. The opinions of the District Judge will be found in 208 Fed. 699. Affirmed.

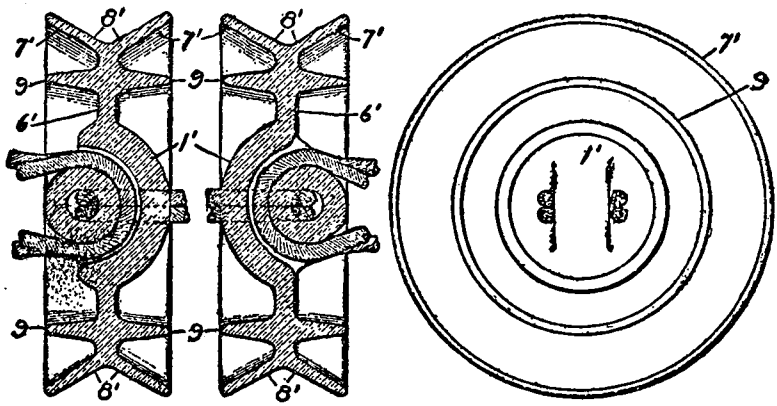
C. H. Wilson, of New York City, for appellant.
Charles Neave, of New York City, for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The facts are very fully set forth in Judge Chatfield's opinion, which may be referred to for any not here recited. A disk strain-insulator, as its name implies, is a disk of insulating material, mounted so that the line of its axis is substantially horizontal. To it from one side comes a current-carrying wire; a similar one leads from it on the other side. These two wires are insulated from each other by a mass of insulating material in the body of the disk; in service the current is carried around the insulator by a shunt wire. The current is powerful, the wires heavy, and the device must be strong; it is thickened about the axis. Generally a plurality of these insulators are coupled together in a series. The general appearance of the disk suggests a pulley with bosses at the axis and various projections from it, which will be referred to later on.

A good idea of the structures may be formed from inspection of Figures 4, 5, and 6 of Hewlett's application, here reproduced. Figures from the drawings of Steinberger's patent will appear later on.

Fig. 4 Fig. 5 Fig. 6.



The three claims of Steinberger read as follows:

"9. A disk strain-insulator, comprising suspension members, a mass of insulating material partially enveloping the same, said mass being provided cen-

trally with a disk integral therewith and lying substantially in the general equatorial plane of said mass, and further provided with flanges extending in opposite directions from said equatorial plane.

"10. A disk strain-insulator, comprising suspension members, a mass of insulating material partially enveloping the same and having a disk portion, said disk portion being provided with annular collars extending in opposite directions and in the general direction of said suspension members.

"11. A disk strain-insulator, comprising strain members, a body of insulating material partially enveloping the same and having a comparatively large disk, said disk being provided with collars integral therewith and extending in opposite directions."

There is a constant tendency of the current to leave the main wire where it runs into insulation and to creep around the outside and over the edge of the disk till it reaches the wire on the other side. It is the object of the invention to control this tendency. One way to do this is to lengthen the path along which the current undertakes to creep. This may be done by enlarging the diameter of the disk. It may also be accomplished by corrugating the surface of the disk, for the creeping current always moves on the surface of the disk, and if it has a succession of protuberances to march over its journey may be materially lengthened. When the disk is wet—these insulators, of course, are exposed on the line to atmospheric conditions—it is much easier for the current to creep along it. To meet that difficulty the device is arranged so that the protuberances from the disk will not only increase the length of the pathway, but will serve as hoods or covers to parts of the surface, so that whether rain falls perpendicularly, or is blown in against the disk from one side or the other, there will always be some part of the surface kept free from moisture; the protuberances act as baffle boards, and, with the disk form channels through which the water runs to the edge of the disk and falls off.

It seems not to be controverted that the application of Hewlett and the patent of Steinberger cover the same invention. Hewlett was first in the Patent Office, filing application on April 20, 1907. Steinberger's application was filed January 20, 1908. Since it illustrated and described the invention disclosed in Hewlett's application, an interference should have been declared. But the office overlooked Hewlett, and by inadvertence issued the Steinberger patent on November 17, 1908. Having subsequently discovered its error, the office declared interference between Hewlett and the three above-quoted claims of Steinberger's patent. Upon the hearing of the interference Steinberger took testimony to show that he conceived the invention and made sketches about March or April, 1904. He did not, however, reduce his invention to practice until he filed his application. We think this did not disclose such reasonable diligence as would entitle him to priority over Hewlett, whose application was filed nine months earlier. As we understand the record all the tribunals which have considered the question reached the same conclusion.

Steinberger further showed that in October, 1905, he wrote to an engineer named Buck disclosing an insulator and inclosing a sketch of the same. This he alleged embodied the invention in interference, and he contended that Buck had communicated it to Hewlett. Hewlett's

attorney, being of the opinion that Steinberger's letter and sketch did not embody the invention, took no testimony on behalf of Hewlett. The Examiner of Interferences held that the letter and sketch were not a disclosure of the invention and awarded priority to Hewlett. On appeal the Board of Examiners in Chief affirmed this decision. The next appeal was to the Commissioner of Patents, who held that there had been a disclosure to Buck, and that upon the record as it stood it was to be inferred that Buck had communicated such disclosure to Hewlett. The latter then appealed to the Court of Appeals for the District of Columbia, which affirmed the Commissioner of Patents. Thereupon this suit was begun, with the result above set forth.

This suit is in no sense an appeal from the Court of Appeals of the District of Columbia; there is testimony in this record which was not before that tribunal. Nevertheless its decision on a question of fact is entitled to great consideration. As the Supreme Court said in Morgan v. Daniels, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657, it will be accepted "unless the contrary is established by testimony which in character and amount carries thorough conviction." Before discussing the question whether or not there is such testimony in this case, a preliminary matter may be first disposed of.

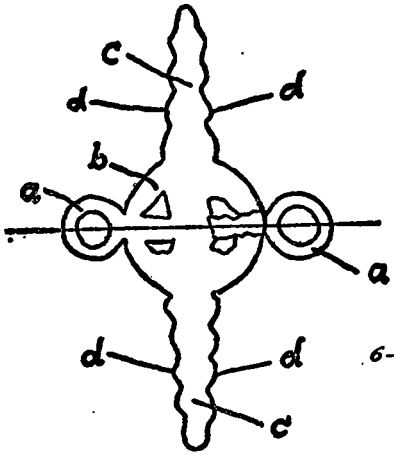
In 1905 and 1906 Buck & Hewlett were working together to devise a *system* of suspension for high tension wires for which they filed a joint application on February 15, 1906. It covered not only the system, but also this insulator. Since each of the two had contributed something to the invention of this system, there seems to us nothing mysterious or suspicious about the filing of this joint application. Shortly thereafter, when the attorney's attention was called to the fact that the insulator might have a broader application than in that particular system, and that Hewlett believed himself to be the sole inventor of the disk insulator, and that Buck did not dispute this, the claims for insulator were canceled out of the joint application, and a sole application for them was filed by Hewlett. In this we find no reason sufficient for denying the relief prayed for. It is unnecessary to discuss Hewlett's narrative of the various steps in his invention, or the testimony as to his alleged knowledge of Steinberger's 1905 disclosure. Both Buck and Hewlett testify that the contents of the letter and sketch were never communicated to the latter. In our opinion it would make no difference if Steinberger had sent them to Hewlett, instead of to Buck. The only real question in the case is whether the sketch disclosed the subject-matter of the invention in interference.

The letter of Steinberger of October 7, 1905, is in answer to one of Buck in reference to the manufacture of a disk of the particular insulating material (electrose) which Steinberger was handling. It tells of making a disk of 14 inches diameter and incloses a sketch marked No. 2 of which it says:

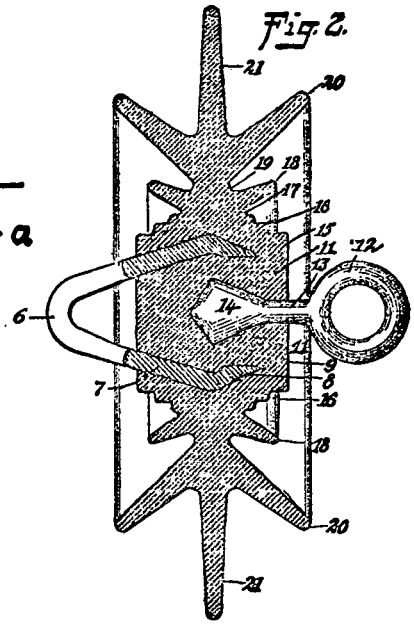
"Please note that we have indicated the surface of the disk as being corrugated. Our object for corrugating the planes of the disk is to provide additional surface, without increasing the diameter of the disk, thereby providing for surface leakage (of electricity) and enabling you to impress a greater voltage than you could do on a disk with plane surfaces."

We here reproduce, side by side, the drawing of the disk in Steinberger's patent—hereinafter referred to as Type B—and the sketch of October, 1905, enlarged as in defendant's brief and hereinafter referred to as Type A.

Type A.
Steinberger Sketch.



Type B.
Steinberger Patent.



As was pointed out above, there are two methods for preventing the disastrous effects of creeping. The first is merely to lengthen the path to be crept over, the second is to make that lengthened path more difficult to travel by keeping parts of it substantially dry in all weather conditions. Inspection of the drawing of Type B shows that the projections which lengthen the path are so arranged as to secure this latter advantage. It is equally apparent that the projections—or "corrugations" as the latter calls them—of Type A will not do so; there are no channels formed by corrugation and disk surface to drain off the falling water, which will flow over the whole disk, whether it is two inches or two feet wide.

We do not understand that the Court of Appeals of the District of Columbia held as matter of fact that a disk 14 inches in diameter of Type A would have the hoods or covers which would prevent the surface from getting wet. If they did, we should not hesitate to reach

a different conclusion; the structure being so simple and its functions under rainfall so manifest that no expert's testimony could clarify or obscure the situation. In its opinion the court says:

"We think that Steinberger at the time of this disclosure *had in mind* the idea of *so constructing* his device that it would divert moisture."

Also:

"The corrugations of Steinberger, *being properly positioned,* perform and were intended to perform substantially the same function as the so-called 'flanges' and 'collars' of the issue."

If the words last above italicized are intended to mean that as positioned in the sketch Type A they will perform that function, inspection of the sketch shows that the statement is incorrect. If, however, as is more probable, they were intended to mean that the corrugations shown in Type A, *when properly positioned,* might be made to perform that function, the statement is correct, but in our opinion unimportant. The question is, What did the sketch disclose? not what Steinberger had in mind he might do with it, nor what might be accomplished by effecting a radical change in the contour and position of the corrugations.

We think the error of the Court of Appeals consisted in giving too broad an interpretation to the claims in interference and then concluding that the exhibition of any type of device which would infringe them was a disclosure of any other type of device which would also infringe them. Turning back to the three claims, it is evident that their language is very broad, broad enough to cover, not only the "flanges" and "collars" shown in Type B, which undoubtedly afford protection against moisture, but also other collars and flanges, which like the corrugations of Type A will not afford any such protection. But, without any reference at all to the prior art, which undoubtedly is such as to require a narrower construction, the patent itself precludes so broad an interpretation. If anything is well settled in patent law, it is that claims must be read in the light of the specifications. Referring to the specifications of the Steinberger patent we find the following:

The patentee states that his invention relates to strain-insulators, particularly those of the disk type; the special object being to improve their structure and to render them as near as practicable "proof against the evil effects of moisture." Referring to the drawings he says that Fig. 1 shows "the various annular hoods used for enabling the insulator to shed moisture." Referring to Fig. 2 he calls attention to "steps *16* of annular conformity," "an annular flange *18* separated from the steps by an annular groove *17*. A larger flange *20*, also of annular form, disposed adjacent to the flange *18* and separated therefrom by an annular groove *19*—and a disk *21* extending directly outward." He then says:

"With an insulator made as above described and mounted so that its general axis of suspension is horizontal, the pairs of flanges and of grooves separating the same serve to prevent the effective entrance of moisture in such

manner as to destroy the dielectric qualities of the insulator. As may be seen from Fig. 2, it is impossible for rain to so thoroughly wet all parts of the insulator as to invite undue leakage of the electric current. If the rain flows into the insulator from the right-hand side, some part of the annular flanges will remain dry. Similarly, if the rain beats in from the left-hand side, according to Fig. 2, some parts of the flanges will likewise remain dry. Unless the rain assumes unusual violence, it is difficult, if not impossible, for the moisture due either to the spattering of raindrops, the lateral effect of the wind upon the rain, or the creeping of rainwater from any cause, to totally destroy, or even seriously impair, the insulating qualities of the device."

Other parts of the specifications refer to another feature of the structure, viz., the method of connecting the current wires with the insulating disk, strengthening it against strains. But these do not figure in claims 9, 10, and 11, the only ones in issue in the interference, which deal with the flanges or collars. Certainly in the light of the specifications these three claims cannot be construed to cover flanges, collars, corrugations, or protuberances of any kind, which are *not* adapted to perform the function, the performance of which Steinberger announced as *his* particular contribution to the art.

We are not concerned in this case with any exhaustive examination into the state of the art, in order to determine whether or not there was patentable invention in so modifying nonrain-shedding corrugations that they will perform a new function. For the purpose of this suit it must be assumed that rain-shedding flanges were patentable at the date of the application; both sides, of course, contend that the claims to that extent are valid. But if it were an inventive step to advance from Type A to Type B, surely there can be no force in the contention that a disclosure of Type A was a disclosure of Type B.

The decree is affirmed, with costs.

MOTION PICTURE PATENTS CO. v. LAEMMLE et al.

SAME v. IMP FILMS CO. et al.

(District Court, S. D. New York. May 4, 1914.)

In Equity. Nos. 9–82, 9–83.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—KINETOSCOPE.

The Edison reissue patent No. 13329 (reissue of reissue No. 12,037, original No. 589,168), for a kinetoscope or motion picture camera, as to claims 1, 2, 3, and 5 was not anticipated and discloses patentable invention. Said claims also *held* infringed, and claim 4, if valid, not infringed.

2. PATENTS (§ 136*)—REISSUES—"INADVERTENCE, ACCIDENT, OR MISTAKE."

Where a claim of a patent was adjudged invalid as functional, and there was no fraud or deceptive intention, the error was one arising from in-

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

advertence, accident or mistake within the meaning of Rev. St. § 4916 [U. S. Comp. St. 1901, p. 3392] authorizing a reissue in such cases.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 198½; Dec. Dig. § 136.*

For other definitions, see Words and Phrases, vol. 4, pp. 3488, 3489.]

3. PATENTS (§ 156*)—REISSUES—EFFECT OF FAILURE TO FILE DISCLAIMER.

Broadly speaking, the reissue and disclaimer sections of the patent statute, Rev. St. §§ 4916, 4917 (U. S. Comp. St. 1901, pp. 3392, 3393) have different purposes and different results, and that the owner of a patent has not filed a disclaimer as to claims held invalid within such time as to save his right to maintain a suit for infringement of other claims under section 4922 (U. S. Comp. St. 1901, p. 3396) does not necessarily debar him from the right to a reissue by which he surrenders all right to sue for prior infringements.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 228; Dec. Dig. § 156.*]

4. PATENTS (§ 328*)—VALIDITY OF REISSUE—KINETOSCOPE.

The Edison reissue patent No. 13,329 (reissue of reissue No. 12,037, original No. 589,168), for a kinetoscope, which repeats claims 1, 2, and 3 of the first reissue without change, and narrows claim 4, which was adjudged invalid as functional by a Circuit Court of Appeals four years before the application for reissue, *held* not invalid because of the failure to previously file a disclaimer as to such claim 4, nor because of laches or intervening public rights.

In Equity. Suits by the Motion Picture Patents Company against Carl Laemmle and the Independent Moving Pictures Company of America, and against the Imp Films Company and Carl Laemmle. On final hearing. Decrees for complainant against the corporation defendants, and dismissed as to defendant Laemmle.

See, also, 178 Fed. 104; 186 Fed. 641.

Dyer & Taylor, of New York City (J. Edgar Bull and John Robert Taylor, both of New York City, of counsel), for complainant.

Edmund Wetmore, Waldo G. Morse, and John L. Lotsch, all of New York City, for defendants.

William Houston Kenyon, of New York City, for Mutual Film Corporation, as amicus curiæ.

MAYER, District Judge. The suits are brought to restrain infringement of letters patent reissue No. 13,329 for kinetoscopes or motion picture cameras, granted December 5, 1911.

The patent is a reissue of reissue No. 12,037 dated September 30, 1902, which itself was a reissue of original patent No. 589,168 dated August 31, 1897.

The defenses are: (1) Invalidity; (2) noninfringement; and (3) unreasonable delay so as to render the reissue void. At the outset, an outline of the history of the litigation is desirable.

The original patent was passed upon by the Circuit Court of Appeals for the Second Circuit in Edison v. American Mutoscope Com-

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

pany, 114 Fed. 926, 52 C. C. A. 546. Of the four claims, three were in issue and were held invalid as too broad. In view of this decision in (as it is called) the "First Mutoscope Case," the patent was reissued. The three claims were limited to conform with the decision, and the fourth was repeated in the reissue without change.

This first reissue (No. 12,037) also came before the Circuit Court of Appeals for this circuit in Edison v. American Mutoscope & Biograph Company (the "Second Mutoscope Case") 151 Fed. 767, 81 C. C. A. 391. Claims 1, 2, and 3 were held valid while claim 4, then put in issue for the first time, was held invalid because it was functional. Two cameras of the defendant in that suit were involved—the Biograph and the Warwick. The court found infringement as to claims 1, 2, and 3 as to the Warwick, but not as to the Biograph. The usual interlocutory decree followed (March 25, 1907), but before the controversy went to final decree the parties settled their differences.

At the time the Second Mutoscope Case was commenced, suits based on reissue No. 12,037 were pending against: (1) Selig Polyscope Company in the United States Circuit Court for the Northern District of Illinois Eastern Division; (2) Sigmund Lubin in the United States Circuit Court for the Eastern District of Pennsylvania; and (3) American Vitagraph Company et al. in this district. After the decision in the second Mutoscope Case complainant moved for a preliminary injunction against the Selig Company. The motion was contested and decided favorably to complainant by Judge Kohlsaat on October 24, 1907.

A second suit was brought against American Vitagraph Company et al. on June 10, 1907, but proceedings were suspended in view of negotiations for a license. In April, 1907, suit was commenced against Miles Brothers, but was not contested.

In the fall of 1907, in addition to the Edison Company and the Mutoscope Company, the only manufacturers of motion pictures in the United States were the Vitagraph Company, Lubin, Selig Company, Pathe Frères, Kalem Company, and Essanay Film Manufacturing Company. By January, 1908, all of these manufacturers were operating under licenses acquiescing in the validity of reissue No. 12,037. The Mutoscope Company had discontinued using the Warwick and was using the Biograph, which the court had held did not infringe, but later on even the Mutoscope Company obtained a license under the Edison patent. In the summer of 1908, the complainant company was organized, and it purchased, among other things, the reissue No. 12,037, and in December, 1908, granted licenses to the Edison and Mutoscope Companies and to all of the manufacturers above mentioned to whom Edison had granted licenses in January, 1908. Until the summer of 1909, the complainant and its licensees conducted business without (except in one minor instance) encountering infringement. By this time, the remarkable possibilities of the business apparently attracted many, and the task of pursuing alleged infringers became necessary and difficult. To prove infringement it

was requisite, of course, to show clearly the detail of the interior mechanism of the alleged infringing cameras; and, as the infringing business consisted, not in the sale, but in the use, of cameras, it was essential that the interior mechanism should be examined either just before or just after a camera had been used in taking a motion picture. Motion pictures are taken in studios and also out of doors. Great care was taken by alleged infringers to prevent access to studios by strangers, and in outdoor work, bystanders were kept at a distance, and in brief the most thorough precautions were exercised to prevent inspection or discovery of the interior mechanism. The record amply sustains the assertions of complainant as to its tribulations in obtaining the necessary proof upon which to proceed in the courts, and then in following up the fly-by-night disappearances of some of the alleged infringers.[1]

Between July, 1907, and May, 1911, about 30 suits were brought, in many of which motions for preliminary injunctions were granted.

On December 11, 1909, a suit was brought in this court against the Independent Moving Pictures Company of America, one of the defendant corporations in the case at bar, and Carl Laemmle, the individual defendant herein. A motion for preliminary injunction arising out of the use by the company of a Warwick type camera was argued before Judge Noyes. The principal defense consisted of the contention that the complainant did not have the title to the patent because, as was alleged, it acquired the patent in pursuance of a contract in violation of the Sherman Anti-Trust Law. Judge Noyes overruled this defense and granted the injunction against the company. Motion Picture Patents Co. v. Carl Laemmle et al. (C. C.) 178 Fed. 104. Subsequently a motion to punish the Independent Moving Pictures Company of America and two of its officers for contempt, arising out of a violation of the injunction because of continued use of the Warwick type of camera against which the injunction had been issued, was argued before Judge Lacombe, and he found the company guilty of contempt. 186 Fed. 641. Motions for preliminary injunction under reissue No. 12,037 were brought in November, 1910, against William Steiner and others, trading under the name of Atlas Film Company, and against a corporation conducted by the same individuals and known as the Yankee Film Company. Before these motions were argued the defendants interposed demurrers, on or about November 25, 1910, to the bill on various grounds. One ground was that reissue No. 12,037 was void under section 4922 of the Revised Statutes (U. S. Comp. St. 1901, p. 3396) for unreasonable neglect and delay on the part of complainant to file a disclaimer of the fourth claim of that patent, which had been held void as functional by the Court of Appeals in the Second Mutoscope Case. This was the first time that this defense had been urged, and Judge Lacombe decided adversely to defendants and overruled the demurrers. The motions for preliminary injunction were thereupon argued, and Judge Lacombe

[1] See history of the litigations against National Cameraphone Co. et al.

granted injunctions against the defendants, referring, in his opinion, to the fact that the disclaimer defense (also presented in opposition to the motions) had already been disposed of on demurrer. The orders for preliminary injunction were thereupon made, but contained a provision excepting from the terms thereof a certain camera which had been exhibited to the court.

It is stated that slight consideration was given by the then complainant's counsel to the disclaimer defense, in view more especially of Judge Lacombe's disposition of the question on demurrer; but, on the argument on review, Judge Noyes, it is said, indicated that complainant's counsel had not treated the disclaimer defense as seriously as it deserved. At the request of counsel, the court was asked not to decide the disclaimer question on the record as it then stood, and on May 8, 1911, the Circuit Court of Appeals handed down a memorandum for reversal (187 Fed. 1007, 109 C. C. A. 664) as follows:

"The principal question presented upon these appeals is whether the complainant by its failure to enter a disclaimer of the claim declared invalid by this court has 'unnecessarily neglected or delayed,' and so lost its right to maintain suits for the infringement of the other claims. Were we certain that all the facts were before us we should consider it our duty to examine the question upon its merits for the purpose of determining whether the Circuit Court should be directed to dismiss the bills. But the complainant insists that it has not had full opportunity to present the facts, and, in view of this contention, we shall go no further than to say that, in our opinion, the case presented is too doubtful to warrant the issuance of preliminary injunctions."

Complainant was now confronted with a difficult problem, and, on advice of counsel, concluded to apply for another reissue; and thus on May 24, 1911 (16 days after the memorandum supra was handed down), application was made to the Patent Office for a reissue of reissue No. 12,037. The Patent Office was fully informed as to the situation, and reissue No. 13,329 here in controversy was granted on December 5, 1911.

Reissue No. 13,329 retains the first three claims of No. 12,037, and adds claims 4 and 5, which, it is contended, are narrower in scope than was original claim 4, and are drawn to conform with the decision in the Second Mutoscope Case.

After reissue No. 13,329 was granted, these suits were commenced and motions for preliminary injunctions were made in March, 1912. These motions were denied by Judge Lacombe with the following memorandum:

"The additions to the prior art do not impress. Complainant's argument as to reissue is a strong one, but in view of what was said by the Court of Appeals in the Yankee and Steiner Cases and of Maitland v. Goetz Mfg. Co., 86 Fed. 124 [29 C. C. A. 607], the application for a preliminary injunction is denied. The question is one for the Court of Appeals."

From the orders of denial no appeal was taken, and the suits are now here on final hearing.

[1] As to the prior art. The specifications and the drawings of the first and second reissues are the same. A comparison between

claim 1 of the first reissue and claims 4 and 5 of the second reissue will be readily noted:

Claim 1 of the First Reissue.	Claims 4 and 5 of the Second Reissue.
1. An apparatus for taking photographs suitable for the exhibition of objects in motion having in combination a camera having a single stationary lens; a single sensitized tape-film supported on opposite sides of, and longitudinally movable with respect to, the lens, and having an intermediate section crossing the lens; feeding devices engaging such intermediate section of the film and moving the same across the lens of the camera at a high rate of speed and with an intermittent motion,	4. An apparatus for taking photographs suitable for the exhibition of objects in motion having in combination a camera having a single stationary lens; a single sensitized tape-film supported on opposite sides of, and longitudinally movable with respect to, the lens, and having an intermediate section crossing the lens, feeding devices engaging such intermediate section of the film and moving the same across the lens of the camera at a high rate of speed and with an intermittent motion, *said feeding devices comprising means proportioned to cause the devices to so advance the film that its periods of rest shall exceed its periods of motion;* and a shutter exposing successive portions of the film during the periods of rest, substantially as set forth.
and a shutter exposing successive portions of the film during the periods of rest, substantially as set forth.	
1. An apparatus for taking photographs suitable for the exhibition of objects in motion, having in combination a camera having a single stationary lens; a single sensitized tape-film supported on opposite sides of, and longitudinally movable with respect to, the lens, and having an intermediate section crossing the lens; feeding devices engaging such intermediate section of the film and moving same across the lens of the camera at a high rate of speed and with an intermittent motion; and a shutter exposing successive portions of the film during the periods of rest, substantially as set forth.	5. An apparatus for taking photographs suitable for the exhibition of objects in motion, having in combination a camera having a single stationary lens; a single sensitized *perforated* tape-film supported on opposite sides of, and longitudinally movable with respect to, the lens, and having an intermediate section crossing the lens; feeding devices *provided with teeth* engaging *the perforations of* such intermediate section of the film and moving *it* across the lens of the camera at a high rate of speed and with an intermittent motion; and a shutter exposing successive portions of the film during the periods of rest, substantially as set forth.

I agree with complainant that we start in this case with two propositions which were established by the decision in the Second Mutoscope Case: First, claims 1, 2, and 3 are not anticipated by anything which was before the court in the First and Second Mutoscope Cases; second, these claims are infringed by the Warwick camera before the court in the Second Mutoscope Case.

It is agreed that the summer of 1889 was the date of Edison's invention, and therefore the question is what patents or publications prior to that date are produced in this record which were not before the Circuit Court of Appeals in the Second Mutoscope Case.

Of the total of 49 patents and publications of the alleged new prior art, 25 are of dates prior to the summer of 1889. These are divided into four groups, viz.:

"(1) Those describing apparatus suitable for photographing an object in motion; (2) those describing apparatus for feeding a tape with an intermittent motion; (3) those describing flexible, sensitive films; (4) those describing mechanism for photographically recording telegraph signals on a light-sensitive surface."

Group 3 may be disregarded because no claim is made for a film as such. Group 4 may likewise be disregarded because no claim is made for a mechanism for photographically recording telegraph signals. As to group 1 there are but two patents: (a) Connon 369,165 (1887); and (b) Steffens 394.221 (1888). Neither describes mechanism anything like that in suit, nor can either accomplish the results desired and necessary for a motion picture camera.

Under group 2 much emphasis is placed on the Wheatstone (1858), Ostrogovich (1883), Siemens British (1868), and Thomas & Jenkins (1876), British patents for automatic telegraph instruments.

Taking the most favorable view for defendants, the most which can be said is that Edison found in one element of a telegraph instrument a suggestion for one element of a combination for a motion picture camera. I think that the Wheatstone and the rest do not go so far, but, if they do, it still required inventive ability to utilize the element in combination with other elements in a nonanalogous art.

But, after all, the best test is the human inquiry, Why did no one from 1858 until 1889 utilize the feeding mechanism of the Wheatstone in a motion picture camera, if its adaptability was so plain?

The art is one requiring a high degree of mechanical and scientific knowledge and ability; and before Edison's invention, men of more than ordinary attainments, such as Du Cos, Marey, and Le Prince, were working to solve the problem. The Wheatstone, for instance, was well known and not merely a paper buried in the files of the Patent Office; and I cannot escape the conclusion that there were enough men "skilled in the art" to grasp the value of the Wheatstone, the Ostrogovich, and the rest, if they appeared as plain and relevant then as they do now to defendants' expert.

There is much close analysis (suggested to some extent by both sides) of the opinions of the Circuit Court of Appeals in the two Mutoscope cases; but so far as the correctness of these opinions is questioned, this court cannot sit in review, for while Edison was not a pioneer, I think it is clear that he was the first to work out a practical commercial apparatus, namely, a motion picture camera comprising an intermittently-moved film and means for moving it, and that, in effect, was the decision in the Second Mutoscope Case.

Much is argued as to the feeding device of the patent being the take-up reel and not the sprocket wheels, and therefore that the "feeding device" does not engage with the "intermediate section of the film" because the take-up reel does not so engage; but, so far as this court is concerned, that subject seems to be foreclosed by the opinion of the Circuit Court of Appeals, Edison v. American Mutoscope & Biograph Co., 151 Fed. at page 771, 81 C. C. A. 391.

For the reasons outlined necessarily briefly, I may say, as did Judge

Lacombe, that "the additions to the prior art do not impress," and that the defense of noninvention has not been sustained.

As to infringement. Claim 5 is concededly narrowed to conform with the decision in the Second Mutoscope Case, and obviously was added to make assurance doubly sure. Defendants' camera clearly infringes this claim.

I am satisfied that the camera here in suit is in every material respect identical with the Warwick camera, before the court in the Second Mutoscope Case, and therefore that claims 1, 2, and 3 are infringed.

As to claim 4, it is doubtful whether the limitation as to the feeding device "comprising means proportioned to cause the devices to so advance the film that its periods of rest shall exceed its periods of motion" is a patentable feature, but I need not determine that question, for I incline to the view that in defendants' camera the period of rest and the period of motion are substantially equal. I have not forgotten the illustrative demonstration made by each counsel to support his argument on this proposition, but, as the question is close, and the burden is on complainant, I am not satisfied that the complainant has sustained its burden, and therefore conclude that claim 4 has not been infringed.

The question, however, concerning which there is the sharpest contest, is the validity of No. 13,329, the second reissue.

Defendants contend that the reissue in suit is invalid: (a) Because the alleged error of reissue 12,037 did not occur through inadvertence, accident, or mistake; (b) because the patentee unreasonably delayed and neglected to enter a disclaimer of claim 4 of reissue 12,037; (c) because of laches in applying for reissue 13,329; and (d) because intervening public rights accrued between March 5, 1907, the date of the decision in the Second Mutoscope Case, and May 24, 1911, the date of the application for reissue 13,329.

[2] (a) Considering the application for reissue 13,329 solely as to the question whether the error sought to be corrected had arisen by inadvertence, accident, or mistake in order that the patentee might be entitled to the benefits of section 4916, it seems to me that the case at bar is well within the purview of the statute. It is by no means easy to determine whether or not a claim is functional, and there was ample room for a genuine difference of opinion as to what the courts would hold in the case of a claim such as claim 4 in reissue 12,037. It is far from simple to fix on phraseology for patent specifications and claims which will successfully resist attack, and where, as here, there was no fraud or deceptive intention, and the patentee claimed more as new than he was entitled to such error was clearly due to that inadvertence, accident, or mistake in respect of which the statute was intended to afford relief. In the last reissue, the first three claims were repeated ipsissimis verbis; the fourth claim was narrowed and the fifth claim was drafted, concededly, to conform with the decision in the Second Mutoscope Case.

[3] (b) (c) and (d). Broadly speaking, the disclaimer and reissue statutes have different purposes and different results.[2]

At common law, a patent bad in part was bad in whole, and no suit could be maintained on it while in such defective condition.

Grant v. Raymond, 6 Pet. 221, 8 L. Ed. 376, recognized the right to amend a defective patent, and shortly after this decision, in 1832, the first reissue section became statute law. Section 3, Patent Act of 1832 (chapter 162, 4 Stat. 559). The section enacted the common-law right to amend a defective patent, but, in order to obtain a reissue, it was necessary that the old patent be surrendered, and thereby all of the rights of the patentee under the old patent were extinguished. Thus the public could freely use the invention up to the time the reissue was granted. Five years later the disclaimer sections were enacted. These sections did not take away from the patentee any of the rights he already had under the reissue section, but gave him valuable additional rights.

Thus, coming to the present, under the reissue and disclaimer sections, there may be one of two results according to which statute is availed of. In the case of reissue, the patentee loses all of the rights which he had prior to the reissue and he may ask for injunctive relief and damages only from a date subsequent to the reissue, while in the case of a proper disclaimer, the patentee may still obtain injunctive relief or damages for infringement prior to the date of disclaimer, or both, in regard to that part of the invention which is truly and justly his own.

[2] The reissue section reads as follows:

"Sec. 4916. Whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the *surrender* of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee, or, in case of his death or of an assignment of the whole or any undivided part of the original patent, then to his executors, administrators, or assigns, *for the unexpired part of the term* of the original patent. Such surrender shall take effect upon the issue of the amended patent. The commissioner may, in his discretion, cause several patents to be issued for distinct and separate parts of the thing patented, upon demand of the applicant, and upon payment of the required fee for a reissue for each of such reissued letters patent. The specifications and claim in every such case shall be subject to revision and restriction in the same manner as original applications are. Every patent so reissued, together with the corrected specifications, shall have the same effect and operation in law, on the trial of all actions for causes thereafter arising, as if the same had been originally filed in such corrected form; but no new matter shall be introduced into the specification, nor in case of a machine patent shall the model or drawings be amended, except each by the other; but when there is neither model or drawing, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was a part of the original invention, and was omitted from the specification by inadvertence, accident, or mistake, as aforesaid." (U. S. Comp. St. 1901, p. 3392.)

The disclaimer sections read as follows:

"Sec. 4917. Whenever, through inadvertence, accident or mistake, and without any fraudulent or deceptive intention, a patentee has claimed more than

It was quite natural that the valuable additional rights thus conferred by the disclaimer sections should be surrounded with substantial safeguards, and the Congress determined that the patentee should not eat his cake and have it, too. Therefore it was provided, among other things, that no patentee should be "entitled to the benefits of this section" if he "unreasonably neglected or delayed" to enter a disclaimer. "The benefits of this section" undoubtedly mean the right to "maintain a suit at law or in equity for the infringement of any part thereof" [meaning "the thing patented"] "which was bona fide his own."

There has been a good deal of discussion as to what would constitute unreasonable neglect or delay so as to deprive a patentee of the benefits of the disclaimer sections; and, when appeals in patent cases went direct to the Supreme Court, it was held that delay until the Supreme Court had finally passed on the validity of the claim was not unreasonable. O'Reilly v. Morse, 15 How. 62, 120, 14 L. Ed. 601; Seymour v. McCormick, 19 How. 96, 15 L. Ed. 557; Gage v. Herring, 107 U. S. at page 646, 2 Sup. Ct. 819, 27 L. Ed. 601.

It is urged by counsel for complainant that since the creation of the Circuit Courts of Appeal by the so-called Evarts Act (Act March 3, 1891, c. 517, 26 Stat. 826 [U. S. Comp. St. 1901, pp. 488, 547]), a delay to disclaim cannot be held unreasonable until the patentee has first exhausted every effort to reach the Supreme Court of the United States. Such efforts have not infrequently involved the litigating

that of which he was the original or first inventor or discoverer, his patent shall be *valid for all that part which is truly and justly his own*, provided the same is a material or substantial part of the thing patented; and any such patentee, his heirs or assigns, whether of the whole or any sectional interest therein, may, on payment of the fee required by law, make disclaimer of such parts of the thing patented as he shall not choose to claim or to hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent. Such disclaimer shall be in writing, attested by one or more witnesses and recorded in the Patent Office; and it shall thereafter be considered as part of the original specification to the extent of the interest possessed by the claimant and by those claiming under him after the record thereof. But no such disclaimer shall affect any action pending at the time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing it."

"Sec. 4922. Whenever, through inadvertence, accident or mistake, and without any willful default or intent to defraud or mislead the public, a patentee has, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor or discoverer, every such patentee, his executors, administrators and assigns, whether of the whole or any sectional interest in the patent, *may maintain a suit at law or in equity, for the infringement of any part thereof, which was bona fide his own*, if it is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right, notwithstanding the specifications may embrace more than that of which the patentee was the first inventor or discoverer. But in every such case in which a judgment or decree shall be rendered for the plaintiff, no costs shall be recovered unless the proper disclaimer has been entered at the Patent Office before the commencement of the suit. But no patentee shall be *entitled to the benefits of this section* if he has unreasonably neglected or delayed to enter a disclaimer." (U. S. Comp. St. 1901, pp. 3393, 3396.)

of the validity of a patent in even more than two circuits, as was instanced in the Grant Tire Case, which was held invalid by the Court of Appeals for the Sixth Circuit, 116 Fed. 363, 53 C. C. A. 583, and again by the Court of Appeals for the Seventh Circuit, and later came before the Court of Appeals for the Second Circuit, which held the patent valid (Consolidated Rubber Tire Co. v. Firestone Tire & Rubber Co., 151 Fed. 237, 80 C. C. A. 589) and finally reached the Supreme Court by certiorari, where the decision sustaining the patent was affirmed (Diamond Rubber Co. v. Consol. Tire Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527). See, also, the Tesla Motor patent, Dayton Fan & Motor Co. v. Westinghouse Elec. & Mfg. Co., 118 Fed. 562, 55 C. C. A. 390, Sixth Circuit; Westinghouse Elec. & Mfg. Co. v. Catskill & P. Co., 121 Fed. 831, 58 C. C. A. 167, Second Circuit; Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co., 133 Fed. 167, 68 C. C. A. 523, First Circuit; Diamond Meter Co. v. Westinghouse Elec. & Mfg. Co., 152 Fed. 704, 81 C. C. A. 630, Seventh Circuit; the Bywater Patent, Hanifen v. E. H. Godshalk Co., 84 Fed. 649, 28 C. C. A. 507; Hanifen v. Price, 102 Fed. 509, 42 C. C. A. 484; Hanifen v. Armitage (C. C.) 117 Fed. 845.

But it is not necessary to determine whether complainant was guilty of unreasonable neglect and delay so as to deprive it of the benefit of the disclaimer sections, nor what would have been its fate had it gone to final hearing in the Yankee and Steiner Cases.

The failure to disclaim did not of itself render the patent void. It simply resulted in closing the door to recovery for past damages and injunctive relief at that time, because complainant itself closed that door when the patent was surrendered and reissue 13,329 was applied for.

It is important throughout, to keep in mind the distinction between the purposes and results of the two statutes. It will be noted that the reissue statute does not contain any admonition as to neglect or delay, but the courts have worked out and applied certain principles which seem simple enough when stated. The difficulty lies, not in an understanding of the principles, but in their application to any particular set of facts.

The books are full of cases where the courts have appreciated the importance of intervening rights, and have realized the injury which may or will be done to the public where, after either an unreasonable delay or a process of experimentation with court decisions, an attempt is made to broaden claims. In such instances, industry and commercial progress may be arrested if the courts were to hold to any doctrine which made it dangerous for energetic men to enter upon some well-defined field of activity only to discover subsequently that a grant theretofore given had been enlarged beyond the limits so defined. Thus it is that there is a line of cases of which Miller v. Brass Co., 104 U. S. 350, 26 L. Ed. 783, and Thomson-Houston Electric Co. v. Western Electric Co., 158 Fed. 813, 86 C. C. A. 73, are examples. Nowhere, however, has it been held that a reissue wherein the claims are narrowed is void for laches. It is true that in Pelzer v. Meyberg, 97 Fed. 969, it was held that there were degrees of diligence in apply-

ing for a reissue, and that a higher degree was required in the case of a broadened claim than in the case of a narrowed claim. The case came up on demurrer, and apparently there no excuse for the delay was set forth.

I cannot say that I agree that the question turns upon the degree of diligence, nor is it necessary to determine whether a narrowed reissue cannot, in any event, be defeated, because of laches under circumstances which amount to estoppel. I realize that cases may arise where the facts may be analogous in principle with those in Richardson v. Osborne (C. C.) 82 Fed. 92, and where, therefore, a patentee has so conducted himself in regard to a reissue on narrowed claims as to invalidate his patent generally or as to deprive him of injunctive relief as against some particular defendant.

[4] But it is not necessary in the case at bar to announce general principles obiter; for here the facts, I think, clearly entitle the owner of the patent to reissue 13,329.

Throughout the period beginning in March, 1907, the date of the decision of the Second Mutoscope Case, and ending with the memorandum of the Court of Appeals for the Second Circuit in the Yankee and Steiner Cases, claims 1, 2, and 3 were valid. It may very well be that cameras could be used which would infringe claims 1, 2, and 3 and not infringe claim 4, but I am satisfied that there was no camera akin to the Warwick which would infringe claim 4 and not infringe claims 1, 2, and 3.

The complainant was pursuing alleged infringers practically all over the country. Instead of being idle and supine, it was engaged in activities so marked as to call for the defense in 1910 from two of the defendants in the present litigation that the complainant was itself a monopoly, or was a member of a combination in violation of the federal anti-trust statute (178 Fed. 104).

The defendants Laemmle and Independent Moving Pictures Company of America knew perfectly well what the claims of complainant were, as is evidenced by the case in 178 Fed. 104; and, indeed, all of the defendants here were sufficiently grown up to know their way about and not to be deceived nor misled by any acts of complainant so far as the litigation here is concerned. In fact, the defendant Imp Films Company is in a sense the moral, though perhaps not technically the legal, successor of the Yankee-Independent Moving Pictures Company of America, and Laemmle was apparently the dominant factor in the defendant corporations.

Unless, as matter of law, reissue 13,329 is void, there is nothing that complainant has done in relation to these defendants which entitles the defendants to claim that they have been injured, or that complainant is estopped as against them by reason of delay in applying for reissue 13,329. The truth is that defendants took their chance as to what the courts might determine in regard to the status in law of the Edison patent. They have done very well from a practical standpoint, because they are free of all claims for infringement prior to the date of the second reissue. On the other hand, the complainant, when confronted with the necessity of deciding what to do after the Yankee and

Steiner opinion of the Circuit Court of Appeals, adopted the course of least danger and least resistance.

Upon the facts in the case, I am unable to find warrant for the conclusion that the reissue is void, as matter of law. The valid claims were simply repeated, the new claims were narrowed, the infringement of the discarded claim necessarily involved the infringement of the valid claims, the business and court history was one of constant assertion of the validity of the patent and pursuit of infringers, and nowhere were there any real intervening rights.

To declare the present reissue invalid would be to deprive the owner of the patent of the fruits of an invention which the courts have declared valid in all substantial particulars and which I regard as a meritorious invention and a useful contribution to an industry that has advanced by leaps and bounds, that has given employment to many thousands of people, and that has afforded amusement and instruction to the public at large. So far as the facts in this case disclose, the intervening rights of the public in respect of which the defendants feel so deeply are synonymous only with the intervening hazards of infringers.

For the reasons indicated, I am of opinion that reissue 13,329 is valid, and that claims 1, 2, 3, and 5 are infringed.

For purposes of brevity I have referred throughout to "the defendants," but there is no evidence in this record which will charge the defendant Laemmle individually with infringement. Therefore, the bill as to him will be dismissed, and complainant may have the usual decree as to the other defendants.

I think it unnecessary to decide in detail the motions made at the opening of the final hearing. If counsel think otherwise, that may be brought up at the time of the settlement of the decree.

UNDERFEED STOKER CO. OF AMERICA v. RILEY et al.

(District Court, D. Massachusetts. May 22, 1914.)

No. 459.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—FURNACE.

The Daley patent, No. 644,664, for an underfeed furnace, discloses patentable improvements over the furnaces of the prior patents to Jones & Garden, and is valid; also *held* infringed.

In Equity. Suit by the Underfeed Stoker Company of America against R. Sanford Riley and others. On final hearing. Decree for complainant.

See, also, 207 Fed. 963.

Fish, Richardson, Herrick & Neave, F. P. Fish, and J. L. Stackpole, all of Boston, Mass., for plaintiff.

Louis W. Southgate, of Worcester, Mass., for defendants.

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

BROWN, District Judge. This is a bill in equity, alleging infringement of letters patent No. 644,664, March 6, 1900, on application of March 23, 1896, to Fred A. Daley, for furnace.

This patent was in litigation in Underfeed Stoker Co. of America v. American Ship Windlass Co. (C. C.) 165 Fed. 65, 77. It was considered also in American Stoker Co. v. Underfeed Stoker Co. of America (C. C.) 182 Fed. 642, 652, and on appeal 188 Fed. 314. The opinion of this court on petition for preliminary injunction in the present case is reported in 207 Fed. 963.

In view of the full descriptions of the Daley invention contained in these opinions, it seems unnecessary to repeat at length. The patent relates to improvements by Daley upon the type of underfeed stoker shown in the patent to Jones, No. 470,052, and that to Garden, No. 648,251.

The specific and limited character of Daley's improvements, and the particular purpose for which his modifications of the Jones and Garden stokers were made, should not be lost sight of in considering the matters urged in defense as anticipatory or as limiting the claims. If we consider that Daley's structural improvement upon Garden consisted simply in substituting for Garden's air ducts, which led compressed air to the top of the retort, a large air chamber, which also performed this function, and thus was an efficient substitute for Garden's air ducts, we must also consider that in so doing his air chamber performed two functions additional to those of Garden's air ducts: First, to cool and thus preserve the life of Garden's side plates; second, to heat the air so that it was introduced into the retort at a higher temperature. We have, therefore, not a mere substitution of one form of air supply for another form of air supply, but the substitution of a form of air chamber which did all that Garden's air pipes did and also used the air in a different way and for purposes different from those for which it has been used in the prior art.

In considering whether there was anticipation or lack of invention, these things must be kept in mind.

At final hearing the defendants put special stress upon the patents to Dumery, French patent No. 11,867, December 1, 1854, and six certificates of addition, and British patent No. 129 of 1855. Dumery discloses an underfeed stoker wherein at the top of a retort is a series of large inclined grate openings upon which the fuel is to be burned. Below these openings is fed the green fuel, and it was designed to coke the green fuel by the heat at the top of the retort. At the sides of the retort are also longitudinal grates for the burning of fuel. The air for combustion is supplied both under the grates at the top of the retort and under the side grates from an open ash pit below. Dumery suggests the use of a forced draft, if desirable.

The grate openings at the top of the retort are substantially different both in construction and in function from the tuyere openings of the Daley, Jones, and Garden patents. Dumery's grate openings both at the top of the retort and at the sides admit air in the ordinary way in which air is admitted to grates, and are not designed to hold the air under pressure, or to admit it in restricted and definite quantity and

direction Jones, Garden, and Daley are distinguishable from Dumery in that they all admit the air only to the retort and through tuyere openings The defendant Riley, as will be seen hereafter, admits air to the retort in precisely the same way as Jones, Garden, and Daley, though Riley has the additional feature, which will be considered when we reach the question of infringement, of admitting air elsewhere than to the retort, and of using the air so admitted for combustion. As the matter of the distinction between grates and tuyeres was discussed in the opinion upon preliminary injunction, it seems sufficient to refer to that opinion without here repeating.

While Dumery's patents are discussed with great minuteness, this discussion does not seem to relate to the specific improvements made by Daley, nor does it seem to add anything to the defense presented upon motion for preliminary injunction in connection with the Howell patent, No. 54,730, which was considered in former litigation.

It may be conceded that it was old in actual practice with overfeed furnaces to use a forced draft under fuel-burning grates, and that with both natural and forced draft the air was admitted under and through the entire grate surface, and had a cooling effect on the grate bars or perforated fuel supports. We may also assume that in the prior patented art are disclosed underfeed furnaces having fuel-burning grates through which air passes from an ash pit or air chamber, by natural or forced draft, into the fire box, and with more or less cooling effect upon these fuel-burning grates; but, so far as appears, any cooling effect was directly associated with and incidental to the admission of air for the purpose of combustion.

Mr. Browne, defendants' expert, says that in utilizing the entire space below the fuel and ash supports for the admission of air blast under pressure, Daley reverted simply to the common practice of the earlier art. He says also that Jones and Thompson (Garden) in this respect—i. e., in introducing the air to the top of the retort through pipes or ducts—were peculiar to themselves. This, however, seems to give substantial support to complainant's contention that Jones and Garden constitute the only real and relevant prior art with respect to the Daley patent.

It was the fact that the air was not admitted in the ordinary way, but was forced into the top of a retort directly over the fresh fuel, and at the same time under the mass of burning coal, that developed new conditions and gave rise to the special defect that Daley remedied.

Both Jones and Garden supplied the air only where it was needed to promote combustion. At this place grates were not supplied to support the burning fuel, since it was supported by the underlying mass of green fuel. Side grates were not required to admit air for combustion, though side supports of some kind were required for the ignited fuel and ash which overflowed the sides of the retort. When Garden substituted for the side dead grates of Jones imperforate dead plates, there was a new kind of division between fire box and the space below the fire box.

The use of air pipes or ducts leading directly to the top of a retort was a departure from old types of furnace which resulted in leaving the

metal parts, which supported a portion of the contents of the fuel chamber and formed a part of the partition between the fire box and the space below the fire box, without the protection of a supply of live air. With a grate furnace, the air which supports combustion also cools the grate bars, and, as it is supplied for combustion to the whole grate surface, it also has its cooling effect on the whole grate surface.

The burning out of the side supports both in Jones and Garden was due to the presence of heat above and the absence of live air below.

Neither of them, so far as appears, seems to have perceived what Daley perceived and embodied in his patented structure; i. e., that the metal parts, which, unlike a grate, did not serve the function of admitting air for combustion, still needed a supply of air in order to prevent their burning out. Daley's use of a large chamber in order to direct his supply of air under pressure, not only to the retort, but also to a place where it was not needed for combustion, but only for the specific purpose of cooling a metal part which required an air supply for no other purpose than its preservation, in my opinion, is not anticipated by anything in this record.

It is further urged that an air chamber arranged under the fuel-supporting partition, and coextensive therewith, into which air is forced under pressure of a blower, being an old form of air supply, Daley's alleged invention is a mere aggregation of the same with an old underfeed stoker. As to this proposition the defendants rely upon Heald v Rice, 104 U. S. 737, 26 L. Ed. 910, Hailes v. Van Wormer, 20 Wall. 353, 22 L. Ed. 241, and Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856.

The defendants' contention as to invention is put in the form of a question:

"Is this court going to sustain broadly a patent for merely putting an old form of air chamber under an old form of fire box?"

The case, however, cannot be stated fairly with such simplicity.

If it can be said that Garden shows a form of fire box which, as to Daley, was old, it cannot be said that Daley shows an old form of air chamber merely because air chambers coextensive with grates were old. This ignores the very material difference between the top portion of the old ash pits, consisting of grates or plates perforated for combustion, and the top of Daley's air chamber, which is imperforate or substantially so to avoid the defects of Jones' dead grates.

Moreover, as we have said, Daley does not make a mere substitution of one form of air supply for another, since his air chamber performs, not only the function of supplying air to the retort for combustion, but also the function of supplying air at a certain place merely for the purpose of cooling and preserving the life of parts which are not provided with air for combustion.

That Daley's improvement was of very substantial importance in the practical art, and prevented a serious defect which was present in both the Jones and Garden structures, namely, the rapid burning out of the metal parts, seems very satisfactorily established by the testimony. Whether there is a practical advantage in the preheating of the air by contact with the hot metal parts, so that it goes into the furnace at a

higher temperature advantageous to combustion, is quite sharply disputed. There is doubtless some rise of temperature. The defendant contends that as a practical advantage it is negligible. I am of the opinion that upon the whole testimony as to this point the preheating of the air is of some advantage for combustion, and that this feature must necessarily be associated with the cooling of the metal parts.

In Underfeed Stoker Co. v. American Ship Windlass Co. (C. C.) 165 Fed. 65, 68, it was conceded by the complainant, as it is now conceded, that the scientific principles applicable to underfeed furnaces for the combustion of bituminous coal were well understood. All that portion of Dumery's patent which relates to these general principles is therefore but a restatement in other form of matters that were formerly before the courts. It has not been made to appear that any device embodying these principles was, before Jones or Garden, developed to such a point as even to suggest the specific problem with which Daley had to deal, and which he solved by means not obvious to Jones or Garden.

After careful consideration of the defendants' argument on the question of validity of the patent, I am of the opinion that the patent is valid.

Considering the question of infringement: It is an essential feature of Daley's invention that the side plates be sufficiently imperforate to maintain the air under pressure, and they should form so effective a roof for the air chamber that the air therein is held under pressure, so as to extract the heat from the retorts and side plates, cooling the side plates, and heating the air before its injection into the fuel chamber.

Upon the petition for preliminary injunction it was contended that, if the side plates permitted the escape of a substantial amount of air, the device was not within the Daley patent. This view was then held erroneous, and is now considered erroneous, for the reason that, if the defendants' air chamber performs the functions of Daley's air chamber, the fact that it also permits the escape of air through the fuel supports would not avoid infringement, since, even if there were some utility in permitting the escape through the fuel supports, this would be regarded merely as an improvement, and would not justify the defendants in using a structure which, despite the openings, was substantially Daley's air chamber.

Upon the present hearing the question of infringement is presented in a somewhat different aspect. The defendants now contend that there is no construction in the Riley stoker depending upon the use of restricted openings to maintain a pressure in the air chamber, that the whole structure is intended to get as much air as possible vertically through Riley's so-called grates, and that the only restriction to the passage is the fuel bed itself.

Upon a consideration of the model and of the drawings, as well as the entire testimony in the case, I am of the opinion that this contention is not supported by the evidence.

The defendants insist that the Riley side fuel supports are grates, and that Riley's structure resembles the grates of Howell and of Dumery, rather than the side plates of Daley.

In the continued use of the term "grates" the defendants' counsel and experts beg a question which is before the court for decision. The upper edges of the retort carry overlapping blocks, which are similar to the Taylor tuyere blocks, which, in Underfeed Stoker Co. of America v. American Ship Windlass Co. (C. C.) 165 Fed. 65, 77, were found to be equivalents for the fuel-supporting means of the Daley patent. They perform the function of admitting air to the retort precisely as the openings in the Daley patent perform this function. These blocks are overlapping, and are ridged so that upon the upper surface they present the appearance of grates; but air is not supplied vertically from below as through grates, since that part of the blocks underlying these ridges is imperforate. The air is blown through openings of limited size at the ends of the blocks, so that there is a very slight resemblance between the apertures for admitting air between these ridges and grate openings admitting air vertically. As the bottoms of the so-called grate blocks are substantially imperforate, and the area of a cross-section of the openings which admit air at the end of these grate blocks is very small in proportion to the area of the grate blocks, the use of the term "grates" is misleading, since it ignores the fact that the place where air is ordinarily admitted to a grate is blocked up and the metal bottoms of the blocks which close the space below the ridges afford an imperforate roof underneath the ridges called grate bars. It is more correct to call these blocks tuyere blocks, with side openings into the retort and end openings at the sides of the retort, than to call them grates.

An inspection of the model shows that the roof of Riley's air chamber may fairly be described as substantially imperforate and that it affords a resistance to air under pressure. The contention that the only restriction to the passage of air is the fuel bed itself does not seem to me sound, in view of the evidence afforded by the model, as well as that of complainant's experts. I cannot agree with the view of Mr. Browne that Riley keeps his grates cool in precisely the same way that all common grates are kept cool—by providing them with openings through which the air passes. The openings through which the air passes to Riley's fuel supports are very small in proportion to the size of ordinary grate openings and are not coextensive therewith. There are doubtless certain features of Riley's stoker which are substantially different from Daley's. The provision for removing ash from the side plates and the provision for supplying air for combustion at certain portions of the side plates seem to be improvements; but the primary question is still whether Riley has Daley's air chamber.

Certain experiments by the defendants as to the maintenance of pressure in the Riley air chamber, both when the furnace was in operation with a fuel bed and when there was no fuel bed, are relied upon by the defendants. The complainant's experts are of the opinion that these experiments, which were ex parte, are of no significance, for the reason that the pressures were so low as to create conditions which were not normal. It is obvious that the resistance of the roof of the air chamber would rapidly increase with increase of the pressure of the air supply. The experiments, to be of any significance, should cover the range of operating conditions, in order to negative the crit-

icism that the experimenter had selected merely that condition favorable to the defendants' proposition rather than tested the actual pressure under varying conditions.

Neither Dumery nor Howell shows any indication that he intended to hold air under compression for purposes of cooling the metal parts, or of preheating the air for combustion. In order to justify the argument that the Riley air supply is that of the prior art, the defendants should adopt between their retorts a true open grate structure rather than blocks that form a substantially imperforate roof for the air chamber.

If the defendants' argument is sound, and it is intended to get as much air as possible through the grates, and the only restriction to the passage of air is the fuel bed, then there can be no substantial reason why that large proportion of the top of the air chamber which is now imperforate should not be made perforate, as in ordinary grates.

After a very careful consideration of the defendants' expert testimony and brief, I am of the opinion that the defendants have appropriated the invention covered by the Daley patent, and the fact that they may have improved Daley's device is not a legal justification for infringement.

It may be said, further, that the questions in this case are of a character to permit of an honest difference of opinion between the parties as to whether the Riley structure is within the Daley patent. The case involves to some extent a question of degree, and cases depending upon differences of degree are usually cases of difficulty.

The defendants also contend that the term of Daley's patent is limited by the terms of British and French patents to Daley. The patent in suit issued March 6, 1900; the British patent was sealed May 8, 1900, and is therefore a later patent, which does not affect the term of the patent in suit. Siemens v. Sellers, 123 U. S. 276, 283, 8 Sup. Ct. 117, 31 L. Ed. 153. Daley's French patent was delivered March 3, 1900, and is a prior patent, which both sides agree expires November 14, 1914.

If, as the defendants assert, the term of the patent in suit is limited by matter not apparent upon the face of the letters patent, it seems but just that such limitation should be noted in the decree for an injunction; otherwise, a decree in ordinary form would give the complainant an injunction for the apparent rather than the true term of its patent.

The defendants have properly raised the question by pleading and proof, and at final hearing complainant did not deny that the French patent is for the same invention, but urged simply that the question does not affect the present right to an injunction and accounting. It does, however, affect the term of the injunction, and I am of the opinion that a court of equity should so limit its decree as not to give the complainant an apparent right larger than its true rights as shown by the proofs.

If necessary, the parties, upon the settlement of the decree, may be further heard upon the question of the limitation of the term of the patent in suit by the French patent.

Though the Daley patent has been before me on previous hearings, I have tried to consider this case de novo upon the testimony and arguments presented in this case. My conclusion is that the claims in suit are valid and are infringed.

A draft decree may be presented accordingly.

COWEN v. BOSTON WOVEN HOSE & RUBBER CO.

(District Court, D. Massachusetts. June 13, 1914.)

No. 454

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PROCESS OF CLEANING RUBBER.

The Cowen patent, No. 642,814, for a process of cleaning rubber, or any similar or analogous substance, by reducing it to a plastic condition and forcing it under pressure through a strainer to remove foreign substances, is void for lack of patentable invention in view of prior patents for machines for forcing clay in a plastic condition through a strainer for the same purpose.

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—MACHINE FOR CLEANING RUBBER.

The Cowen patent, No. 642,813, for a machine for cleaning rubber by forcing it in a plastic condition through a strainer, is limited to the described construction and arrangement of straining devices. As so construed, *held* not infringed.

In Equity. Suit by Emma R. Cowen against the Boston Woven Hose & Rubber Company. On final hearing. Decree for defendant.

Arthur L. Woodman, of Boston, Mass., for plaintiff.

William J. Sperl, of Boston, Mass., for defendant.

DODGE, Circuit Judge. This bill is brought by the present owner of United States patents 642,813 and 642,814, issued February 6, 1900, to Robert Cowen. The first patent is for an apparatus for cleaning rubber; the second for a process of cleaning rubber. The plaintiff is Cowen's widow and holds the patent by assignment from his administrator. She alleges infringement by the defendant of both patents. The defendant denies the validity of both.

It appeared from the plaintiff's uncontradicted evidence that before and at the time of his application, and from then until his death in 1902, Cowen was in the defendant's employ as its superintendent; that during the same period a process and apparatus for straining rubber, and said to have been patented by him, were introduced and used in the defendant's factory; and that the same process and apparatus for carrying it into effect have ever since been so used by it, without license or permission from Cowen or his representatives, or the payment of any royalty to him or them, so far as shown. Nor does any transfer of Cowen's rights in the inventions claimed, nor any contract regarding the patents between him and the defendant, appear to have been made. The defendant does not contend that it acquired any rights

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

in his alleged inventions merely by virtue of the fact that he was in its employ as above.

The following statements are made in both patents:

"As is well known, rubber, whether it be the raw material or shoddy, etc., which it is desired to work over again is usually more or less filled with foreign substances, such as bark, dirt, pieces of wood, stones, etc., in the case of the raw rubber, and nails, pieces of buckles, straps, cloth, and various other foreign substances in the case of shoddy, etc. Heretofore the rubber has been cleansed of these foreign materials in various ways, the details of which it is not necessary to set forth herein further than to say that sometimes the rubber mass has been ground and dried and subjected to a blower which would separate the parts by gravity, and the metallic parts have been removed by being passed in front of magnets, while also the fibrous foreign matter has been removed by being eaten away by sulphuric acid. All the methods mentioned have, however, more or less objectionable features and are also tedious and expensive, and accordingly I have invented the hereindescribed apparatus, which accomplishes the desired object quickly and thoroughly and does it in a simple manner and at slight expense.

"Stated in general terms, my invention consists in means for reducing the rubber (whether in the form of raw or shoddy rubber or otherwise) to a plastic or partially-fluid condition and then straining it, thereby separating the foreign substances (nails, strings, bits of leather, bark, etc.) mechanically without in any wise deteriorating or damaging the rubber."

The plaintiff's uncontradicted evidence at the hearing was that prior to the filing of Cowen's application on April 1, 1899, the method used in the defendant's and in other rubber factories for removing foreign matter from the rubber was to reduce it, whether old rubber, scrap, or shoddy, to small pieces; to treat it in that condition with acid, thereby destroying any wood, bark, or fiber contained in it; and then to pass it in a series of rifles with water running through it, through or over magnets which detained any brass, steel, or iron particles. It was then devulcanized by heating until soft enough to work. This testimony supplemented the above statements quoted from the patents, without materially varying from them, except perhaps in one particular. According to the testimony, the patented process takes longer than the methods previously followed, but is superior in removing all foreign matter, whether metallic or not, more thoroughly and completely.

[1] It will be convenient to consider the process patent first (No. 642,814). The general terms in which the alleged invention is described have been quoted above. The patent has three claims: The first for reducing rubber to a plastic condition, then straining it under pressure; the second for reducing it to a plastic condition by heating and then straining it under pressure; the third for first macerating it, then reducing it to a plastic condition by heating, and then straining it under pressure..

By "plastic," it would seem from the quotation above made, is also to be understood "partially fluid." Later the patentee states that in carrying out his invention he first makes the rubber "plastic or sufficiently fluid to flow under pressure." And still later, in describing his machine (which he does in both patents), it is stated that, when it reaches the strainers after being heated, the rubber is "plastic like dough, just enough not to be inconveniently sticky."

The patentee, as has appeared, does not limit himself to any particular method of reducing the rubber to the plastic condition. Nor does he limit himself even to rubber; on the contrary, he expressly says that he intends to "include thereby any similar or analogous substance requiring substantially similar cleaning." And he does this because, as he states:

"I regard it as broadly new to clarify rubber by forcing it in a plastic condition, as described, through mechanical strainers, and accordingly I do not intend to limit my invention to any details otherwise than as expressed in the claims."

That there was nothing broadly new in removing foreign matter from a fluid or plastic substance by straining, I take to be of common knowledge. That there was anything broadly new in doing the same thing by forcing the fluid or plastic substance to be cleaned through mechanical strainers would be in any case hard to believe; but that there was not seems to me sufficiently shown by United States patents 4,676 to Miller & Roller, July 31, 1846; 73,921 to Norton, January 28, 1868; and 138,824 to Thompson, May 13, 1873—upon which the defendant relies. Each of the three covers a machine for forcing clay in a plastic state through a strainer, and in each the object or one of the objects to be attained was to remove foreign matter from the clay. If it was old thus to clean other plastic substances, I do not see how it can be said that there was invention in using the same method to clean rubber or substances similar or analogous thereto. Nothing new in principle or function is involved, and no object or result which can properly be called new is attained. Cowen does not and could not claim to have discovered either that rubber could be made fluid or plastic enough to be strained, nor how to make it so, whether by heat or otherwise; any more than he could claim to have discovered how to macerate it. For the purposes of his process patent, I must regard the rubber, or the similar or analogous substances referred to in it, merely as substances capable of being made fluid or plastic enough to be strained. No difficulty in straining, peculiar to them, is shown. Notwithstanding the presumption from the grant of this patent, I must hold it void as disclosing no patentable invention.

[2] It follows that the remaining patent, No. 642,813, covering Cowen's apparatus, does not describe a machine effecting any broadly new result, but is to be considered merely as a machine for mechanically straining rubber or other substances which are or can be made sufficiently plastic. The machine, as the patent states, has "some of the general characteristics of an ordinary tube machine." In it a spirally fluted conveyer rotates within a jacketed tubular chamber, the walls whereof are kept hot by steam or hot water circulating through the jacket. Into this the rubber is fed in pieces through a hopper, the conveyer forces these toward one end of the chamber, the heated walls of the chamber make them plastic as they proceed through it, and the pressure of the conveyer forces the rubber, when sufficiently plastic, through strainers arranged in that end of the chamber toward which the pressure is exerted.

The other patents above referred to make it clear that there was nothing new in employing, upon plastic material contained in a chamber, mechanical pressure to force it through a strainer, covering an exit from the chamber. United States Patent to Hoffman, No. 458,754, September 1, 1891, describes a machine for employing mechanical pressure upon plastic material in general, contained in a chamber, to force it, not through a strainer, but through small apertures in the bottom of the chamber. Nor was there anything new in employing a spirally fluted conveyer rotating within a tubular jacket chamber, kept hot as described in the patent in suit, to force rubber, made or kept plastic by such heat, through a small tube-forming aperture at one end of the chamber. This was done by the machine described in United States patent to Vernon & John Royle, No. 325,363, September 1, 1885. The Royle machine did not purport to effect any straining of the rubber, but with the substitution of the strainer in place of its tube-forming aperture, I think it would be, for all material purposes, the same thing as the Cowen machine. So far as their combined operation is concerned, in making rubber plastic enough to be forced, and then in forcing it through restricted outlets at the end of the heater, Cowen's heater and conveyer did nothing that had not been done before. His invention, if any, must be found in the particular method of straining adopted in his machine. He is not entitled to cover broadly a foraminous strainer of whatever kind, in combination with his heater and conveyer.

It appears, from what his patent sets forth, that his strainer device is adapted to meet certain requirements considered by him as necessary for the accomplishment of his result. He states that "enormous pressure must be exerted" to force the rubber through the fine apertures of the diaphragm, and that it is mechanically impossible to make a properly apertured diaphragm capable of withstanding such pressure. He therefore employs a plate thick enough to withstand it, provides the plate with a number of holes, each of comparatively small diameter, and provides each hole with shoulders affording firm support for small and thin diaphragms constituting the active strainer surfaces. These, it is said, give the greatest strength if circular or disk-like in form. The ledges referred to are so arranged within their respective holes as to leave pockets on the inner side of the strainer-disks, below the surface of the plate, wherein foreign matter strained from the rubber may accumulate and be removed from time to time with the strainer-disk, when enough has accumulated thereon to clog its diaphragm. In order to facilitate such removal and cleaning, and permit it to be done with the least possible interference with the operation of the machine, the strainer plate is movably mounted in the machine, the walls whereof are provided with openings through which it may slide; and the plate is made oblong, so as to contain more than one set of diaphragm-carrying apertures, and so that, when one set becomes clogged and needs cleaning, it may be readily removed and another substituted for it by sliding the plate. Finally, a plurality of removable strainer plates is employed, one behind the other, and having successively finer strainer holes in the diaphragms carried; and the specification provides that

the outermost plate may be removed endwise of the machine. The above are the features covered by the seven claims of the apparatus patent.

The defendant contends that in view of the prior patents above mentioned and of United States patent to Madden, No. 446,873, February, 1891, describing a machine for molding separator plugs for battery elements, one feature whereof is a slidable loader plate containing perforations through which plastic material is forced, every feature described and claimed in the apparatus patent in suit is either anticipated or is merely an adaptation of old and familiar devices involving only ordinary mechanical skill. These contentions seem to me by no means without force; but the defendant offered no testimony directly supporting them, and its evidence consists only of the prior patents relied on. I do not think I am warranted, merely by what they disclose, in holding the apparatus patent void as against the presumption created by its issue I think it clear, however, that it cannot be extended in its scope beyond Cowen's described construction and arrangement of strainer devices, and I must hold that the defendant infringes only so far as it has used or is using these. The plaintiff's evidence would seem to indicate that the defendant is not now using in any of its machines the precise straining device described in the patent in suit. It does indicate that on four of the machines the defendant now uses a strainer fixture described and shown on the fourth page of a circular marked "Complainant's Exhibit D," and manufactured by Edred W. Clark, of Hartford, Conn., is used. I am unable, for the reasons stated, to hold this device an infringement of Cowen's patent. It is neither Cowen's strainer device, nor sufficiently like Cowen's to be called an infringement. As to the strainer device now used on the defendant's other machines, one of them was produced at the hearing, but not very fully or satisfactorily described in the testimony. It consisted of three parts, marked "A1," "A2," "A3," respectively. It has no sliding plate containing more than one set of apertures, so that in no event does it infringe claims 5 or 6. Nor is there found in it the plate containing holes with shoulders, each supporting a small strainer diaphragm, called for by the other claims. That the defendant has at any time since February 6, 1900, used other strainer devices more nearly resembling those described and claimed by Cowen, there is nothing to show. In the view of the patent which I have taken, I am unable to find sufficient proof of infringement.

The bill must therefore be dismissed, with costs.

STILES v. JUDSON et al.

(District Court, E. D. Missouri, E. D. April 27, 1914.)

No. 4249.

TRUSTS (§ 56*)—VALIDITY—CAPACITY OF CREATOR—LACHES—DELAY IN BRINGING SUIT.

A bill to set aside an agreement made by a decedent disposing of his property in trust for the benefit of himself and his wife during their lives and of his descendants after their deaths, on the ground of his age and mental incapacity when it was executed, filed by an adult daughter 14 years after the agreement was executed and had gone into operation, and nearly 10 years after his death, *held* to disclose such laches on the part of complainant as to bar the right to relief in equity.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 76; Dec. Dig. § 56.*]

In Equity. Suit by Reba Cole Stiles against Frederick N. Judson and others. On motions to dismiss bill. Motions sustained.

Frank K. Ryan and Chester H. Krum, both of St. Louis, Mo., for plaintiff.

Judson, Green & Henry and Arthur N. Sager, all of St. Louis, Mo., for defendants.

DYER, District Judge. This is a bill in equity brought by Reba Cole Stiles, a resident and citizen of the state of New York, against Frederick N. Judson, Richard H. Cole, Hallie Cole Hebert, Ernest H. Cole, Herman C. Cole, Nathan Cole, Jr., Amadee B. Cole, Rebecca L. Cole, and the Nathan Cole Investment Company, defendants.

It appears from this bill that the complainant is a daughter of Nathan Cole, deceased; that Nathan Cole died March 4, 1904, intestate. It further appears that in 1899 a corporation was formed under the laws of the state of Missouri, by Nathan Cole and others, with a capital stock of $300,000, divided into 3,000 shares of $100 each. To this corporation Nathan Cole and his wife conveyed practically all of his real estate and other property, and received in consideration therefor all of the stock of said corporation; that is to say, 2,600 shares to Nathan Cole and 400 shares to his wife, Rebecca L. Cole.

Subsequently, to wit, on the 21st of June, 1899, an agreement in writing was entered into by and between Nathan Cole and his wife, Rebecca L. Cole, parties of the first part, and Frederick N. Judson, as party of the second part. This agreement is set forth in the bill of complaint in hæc verba. While the agreement is lengthy, it is necessary to a full understanding of the situation that the same should be inserted here. The agreement is as follows:

"This agreement, by and between Nathan Cole and Rebecca L. Cole, his wife, of the city of St. Louis, and state of Missouri, parties of the first part, hereinafter called the first parties, and Frederick N. Judson, of the city of St. Louis, and state of Missouri, hereinafter called the second party, witnesseth:

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

"That whereas, the parties of the first part have conveyed the real estate and personal property belonging to each of them to the body corporate known as the Nathan Cole Investment Company, in consideration of the issue to said Nathan Cole of twenty-six hundred shares of the full paid capital stock of said company, and of the issue to said Rebecca L. Cole of four hundred (400) shares of the full paid capital stock of said company, each of the said shares being of the par value of one hundred ($100.00) dollars, in a total capitalization of three hundred thousand ($300,000) dollars, a full description of said real estate and personal property conveyed by each of the parties of the first part to said corporation being set forth in the respective deeds of conveyance, and in the records of said corporation, and to which reference is made:

"And, whereas, said corporation was organized and said conveyances were made by the first parties in view of their advanced years and of the uncertainties of life, in order to facilitate the management of their estates and the securing of the income thereof during their joint lives, and of the survivor of them during his or her life, and also to facilitate the distribution of said properties so represented by said capital stock among the children of said first parties:

"Now, therefore, for the purpose of more effectually securing the said purposes, by an irrevocable settlement in trust of their respective estates represented by the capital stock of said corporation, and in consideration of the premises and of the sum of one dollar paid by the second party, the receipt of which is hereby acknowledged, the said first parties hereby assign, transfer and set over unto the second party the entire capital stock of said body corporate, the Nathan Cole Investment Company, the said Nathan Cole so assigning, transferring and setting over the entire twenty-six hundred (2,600) shares to which he is entitled, three of said shares being held, one share each, by Amadee B. Cole, Ernest H. Cole and Percival V. Cole, for the purpose of organization; and Rebecca L. Cole, so assigning, transferring and setting over the entire four hundred (400) shares to which she is entitled; and the said three thousand (3,000) shares so assigned, and the certificates therefor, being delivered to said second party in trust, and the said trusts are herein specifically declared and set forth as follows:

"First. Said trustee shall hold the certificates of stock so transferred to him, and at his discretion he may cause the same to be transferred to himself in trust on the stock book of said company, if he deem such transfer on the books necessary or proper for the preservation of his title in trust, and at the annual election for directors of said corporation, the said trustee shall vote all of said stock, excepting the three shares so held as aforesaid for the purpose of maintaining said corporation, and excepting also such other shares as he may, in his discretion, from time to time, with the consent of the first parties, or the survivor of them, assign to other parties for the purpose of maintaining said organization, or for qualifying for election to the position of director in said company; provided, however, that during the life of the parties of the first part and the survivor of them, no person other than the first parties or the survivor of them or their children herein named, shall be voted for by said second party for said office of director, excepting that the first parties or the survivor of them request the said trustee to vote for some other party or parties therefor.

"Second. All dividends earned and declared on said stock shall be paid to said Nathan Cole during his life, and after his death, to said Rebecca L. Cole, if she then survives, during her life; and the said trustee shall make from time to time whatever assignment or order, or direction in writing, that may be required for the purpose of effectuating such payment; so that the entire net income of said property so represented by said stock as declared in dividends, shall be paid as herein directed.

"Third. On the death of the survivor of said first parties hereto, this trust shall terminate and the entire stock herein conveyed, including all shares then standing in the name of said trustee or his successor in trust, and any shares held by the parties above named, or other parties for the purpose of maintaining the organization of said corporation, to wit, the total three thousand

shares, shall be apportioned and distributed by the second party, or his successor in trust, in equal parts to the children of the first parties who shall be then living, to wit, Amadée B. Cole, Ernest H. Cole, Nathan Cole, Jr., Richard H. Cole, Herman C. Cole, Percival V. Cole, Hallie Cole Hebert and Reba Cole Stiles; and said trustee or his successor in trust shall thereupon cause said certificate to be canceled and new certificates to be issued to the parties entitled thereto. If any one of said children so named shall have died before the death of the survivor of said first parties, leaving child or children living at the time of the death of such survivor, such child or children shall take the share which would have gone to the deceased ancestor; but if any one or more of said children of the first parties shall die before the time thus fixed for the distribution of the estate, leaving no children or their descendants living at such time, then the share of the child or children so dying shall go to the survivor of such children of first parties or descendants, provided that during the joint lives of the first parties and the life of the survivor of them, there shall be no right of anticipation or alienation of interest in said stock by any of said children named, or their descendants, and any attempted anticipation, or alienation by any one of them shall be wholly void; provided, further, that the said trustee shall retain the shares thus allotted to each of the said daughters of the first parties, Hallie Cole Hebert and Reba Cole Stiles, causing a certificate to be issued to himself, as trustee, in trust for each, for her separate use for and during her natural life, paying to each the dividends accruing upon the share so held in trust for her, upon her personal receipt, without any power in either of said beneficiaries of anticipation or alienation and upon the death of each of said beneficiaries, said Hallie Cole Hebert and Reba Cole Stiles, the trust as to her shall terminate and the stock so theretofore held in trust as to her shall be assigned and delivered to her lawful heirs.

"Fourth. The second party, said trustee, may at any time resign his trust by notification in writing to the parties of the first part, or the survivor of them, or after the death of said survivor, may in like manner resign said trust as to either or both of said beneficiaries, said Hallie Cole Hebert and Reba Cole Stiles by notice in like manner to said beneficiary and upon such resignation the said trust shall vest in the Union Trust Company of St. Louis, and the trust company shall thereupon succeed as trustee upon receiving notice in writing from said retiring trustee, and shall thereupon be entitled to and shall receive all the stock so held in trust by said second party with all the powers and subject to all the duties hereinbefore declared, to the same extent as if said trust company had been designated as the original trustee in the first instance in this agreement. So in like manner, if said second party shall die or become disabled in any manner from performing the duties of said trust before the termination thereof, by death of last surviving beneficiary, the said Union Trust Company shall succeed as trustee and exercise all the powers and perform all the duties of said trust as herein declared until the termination thereof, as fully in all respects as if the said trust company had been designated as the original trustee in this agreement.

"Fifth. The second party and his successor in trust shall be entitled to receive from the dividends declared on the stock, or from said Nathan Cole Investment Company, a reasonable compensation for services as trustee, not exceeding the amount allowed by law to executors and administrators for similar services, and said second party herein, while serving as trustee hereunder, may also act as attorney or counselor of the trust, if such services are required, either in his opinion or in the opinion of the party or parties of the first part, receiving for such services reasonable compensation in addition to such compensation as trustee.

"(The words 'of first parties' interlined before execution on third page.)

"In witness whereof, the parties hereto set their hands and seals this 21st day of June, 1899. Nathan Cole. [Seal.]

"Rebecca Cole. [Seal.]

"Frederick N. Judson. [Seal.]

"Witness: John F. Green.

"[60.00 Internal Revenue Stamps.]"

This bill is brought by the complainant, who is one of the children of Nathan Cole, deceased, and is mentioned in the aforesaid agreement. The bill, although lengthy, charges substantially that Nathan Cole prior to the date of said agreement had become mentally demented and physically infirm, and that at the time of the execution of said agreement he was of unsound mind and incapable of managing his affairs. For that reason the complainant seeks to have this agreement set aside. This is the gravamen of the whole case.

The defendants, Frederick N. Judson, Nathan Cole, Jr., and Amadee B. Cole, filed separate motions to dismiss the bill. The motions are substantially the same, and the grounds alleged in these motions are: (1) The bill does not state sufficient facts to constitute a valid cause of action in equity. (2) That the cause of action is barred by the five-year statute of limitations of the state of Missouri. (3) That the complainant has been guilty of such laches and delay in filing the suit that it cannot now be maintained in a court of equity. (4) If the facts stated in the bill are true, the only proper party to bring such action would be the administrator of the estate. (5) The bill of complaint is defective in the nonjoinder of the necessary parties, to wit, the grandchildren of Nathan Cole, the children of the complainant, and of the defendant Hallie Cole Hebert, and such children are necessary parties to the suit. (6) That the same cause of action is now pending in the circuit court of the city of St. Louis, between the same parties, and was so pending at the time this suit was instituted.

Some question has been raised as to whether or not the allegation that a similar suit was pending, at the time of the institution of this suit, in the state court, involving the same question, may be taken advantage of by a motion to dismiss. It was insisted upon the hearing of this matter that that could only be made to appear by an answer under the rules recently adopted by the Supreme Court of the United States.

In the view the court takes of this case it is not necessary that I should pass upon the various questions raised by these motions, and I prefer to rest this decision upon the third cause assigned for the dismissal of the case, to wit, that the complainant has been guilty of such laches and delay in the filing of this suit that it cannot be maintained in a court of equity.

The agreement against which this bill is leveled was made in March, 1899, and, from that time up to the time of Nathan Cole's death in 1904, was in full operation and was being executed as directed in said agreement.

This bill of complaint appears here 14 years after that agreement was made, and almost 10 years after the death of Nathan Cole. The charge is that Nathan Cole was mentally demented and of unsound mind and physically incapacitated in 1899, and was therefore incapable of making the agreement.

Nathan Cole was an old man when he died, and those of his acquaintances and conferees in 1899 must, many of them, have passed away by this time. The evidence that would otherwise have been

available had the case been brought earlier cannot in the nature of things be had now.

While not stopping to discuss the other grounds alleged in these motions to dismiss, I may say in passing that if it be true, as alleged in the motions to dismiss, that a similar suit was pending in the state circuit court at the time of the filing of the complainant's bill of complaint, this court would not take jurisdiction of the case, but would remit the parties to the remedy in the forum first chosen; and I may also say that the children or heirs of the complainant here would be necessary parties to the determination of this cause, for by this agreement the heirs of the complainant have vested interests. But as I have before said, the laches of this complainant effectually, in my judgment, disposes of this case.

The bill is dismissed.

In re JOSEPH.

(District Court, W. D. Texas, Austin Division. June 19, 1914.)

No. 189.

ALIENS (§ 63*)—NATURALIZATION—ALIEN MINOR.

Act June 25, 1910, c. 401, § 3, 36 Stat. p. 830 (U. S. Comp. St. Supp. 1911, p. 530), provides that any person of a class entitled to become citizens of the United States, who has resided constantly in the United States for five years next preceding May 1, 1910, and who, because of misinformation, has acted under the impression that he could become a citizen, and in good faith has exercised the rights of an intended citizen of the United States, on making a showing of such facts satisfactory to a court having naturalization jurisdiction, may be naturalized and receive a final certificate of naturalization, without proof of a former declaration of intention. Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (U. S. Comp. St. Supp. 1911, p. 529), declares that an alien may be admitted to become a citizen after having first declared on oath before the clerk of any court authorized by the act to naturalize aliens, or his authorized deputy, 2 years prior to his admission, and after he has reached the age of 18 years, his intention to become a citizen, etc. *Held* that, where an alien minor attained his majority some 7 months after the passage of the act of 1910, he, not having made any declaration of intention to become a citizen, was not entitled to be naturalized.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 126, 127; Dec. Dig. § 63.*]

Petition by Anthony Joseph for letters of citizenship. Petition dismissed.

M. H. Anthoni, of Houston, Tex., for Bureau of Naturalization.

MAXEY, District Judge. In the present case the petitioner, an alien, attained his majority on October 25, 1910. Without making a previous declaration of intention, he filed a petition, on March 19, A. D. 1914, for letters of citizenship, based upon section 3 of the Act of June 25, 1910, 36 Stat. 830, 831. The section referred to provides as follows:

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

"Provided further, 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."

By the first clause of section 4 of the act of June 29, 1906 (34 Stat. pt. 1, p. 596), it is, among other things, provided:

"That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise: First. He shall declare on oath before the clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years," etc.

It may be that, under the act above quoted, a minor alien, above the age of 18 years, would be entitled to letters of citizenship upon filing his declaration of intention and by otherwise complying with the requisites of the statute. But it is thought that, prior to the enactment of the statute of 1906, although children could become citizens through the naturalization of their parents, yet letters could issue to those only who had attained their majority, except under certain circumstances not relevant to the present inquiry. See Mutual Benefit Life Insurance Co. v. Tisdale, 91 U. S. 245, 23 L. Ed. 314, and Boyd v. Thayer, 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103.

In the case at bar the applicant attained his majority some 7 months after the passage of the present law, and the court is of the opinion that he was not entitled to naturalization, either 5 years prior to May 1, 1910, or 5 years prior to the date of filing his petition. His case is, therefore, not embraced within the terms of section 3. To authorize the court to grant him letters of citizenship, he should first make his declaration of intention, and thereafter proceed according to the provisions of the naturalization statutes.

It is therefore ordered that the petition be dismissed, but without prejudice to the right of the petitioner to make a declaration of intention and thereafter proceed in conformity with law. The court concurs in the conclusion announced by Judge Cochran in the case of In re Urdang (D. C.) 212 Fed. 557.

Dismissed without prejudice.

BELLEVUE MILLS CO. et al. v. BALTIMORE TRUST CO.

(District Court, D. Maryland. June 17, 1914.)

1. CORPORATIONS (§ 187*)—SALE OF CORPORATE PROPERTY—ACCOUNTING—LIABILITY.

An individual and a trust company, creditors of a bankrupt owning three mills, purchased the mills, and then organized a corporation which issued bonds secured by a mortgage on the property. The trust company received a part of the bonds and the individual the balance. The corporate stock all went to the individual. Subsequently the corporation sold a mill at an advance to a purchaser who gave notes for the price, secured by a first lien on the property. The notes were divided between the individual and the trust company. It was agreed that the trust company should be under no obligation to surrender any of its bonds until the purchase-money notes should be paid and until the individual had surrendered for cancellation all his bonds, and in default of the happening of either it was to be under no obligation to account to the corporation or the individual for any of the proceeds of the purchase-money notes. The purchase-money notes were paid with interest, and the trust company collected interest on the bonds, and subsequently all the bonds held by it were paid with interest. *Held*, that the trust company was liable to account, either to the corporation or to the individual, for the interest received on the purchase-money notes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 702, 703; Dec. Dig. § 187.*]

2. CORPORATIONS (§ 187*)—SALE OF CORPORATE PROPERTY—ACCOUNTING—LIABILITY—ESTOPPEL.

Where a corporation and its stockholder sought to deduct from the amount payable to a holder of bonds of the corporation a sum equivalent to interest, which it was supposed the holder received on notes given by a purchaser of corporate property, but the holder insisted on payment of the interest on the bonds and threatened foreclosure of the mortgage securing the bonds for nonpayment, and the agreement between the parties might be construed to relieve the holder from any liability to account for either principal or interest of the notes until all had been paid and the bonds canceled, and all the parties recognized that the right of the corporation or its stockholder to recover interest on the notes received by the holder of the bonds was an open question, neither the corporation nor the stockholder was estopped from requiring the holder of the bonds to account for interest received on the notes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 702, 703; Dec. Dig. § 187.*]

3. ACCOUNT (§ 15*)—AGREEMENTS UNDER SEAL—LIMITATIONS.

A suit for an accounting under agreements under seal, none over 12 years old at the time of the beginning of the suit, is not barred by limitation, especially where it is not clear that an accounting could have been demanded before 24 days before the bringing of the suit.

[Ed. Note.—For other cases, see Account, Cent. Dig. § 72; Dec. Dig. § 15.*]

4. CORPORATIONS (§ 187*)—SALE OF CORPORATE PROPERTY—ACCOUNTING—LIABILITY.

An individual and a trust company, creditors of a bankrupt, purchased the mills of the bankrupt and organized a corporation which issued bonds secured by a mortgage on the property. The bonds were divided between the individual and the trust company. Subsequently the corporation sold a mill, and the purchase-money notes were divided between the individual and the trust company, on the theory that the notes last maturing, which

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

the trust company acquired, were not worth their face value. The notes, with interest, were paid. It was understood at the time of the division of the notes that the trust company, in the event of the payment of the notes with interest, would receive the profit by reason of taking the notes at a discount. *Held*, that the trust company was entitled to retain the profit so received.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 702, 703; Dec. Dig. § 187.*]

5. INTEREST (§ 43*)—ACCRUAL OF INTEREST.

Where one receiving the proceeds of notes was not liable to account for any of the proceeds until the happening of a contingency, its liability for interest could not begin before the happening of the contingency, and the party entitled to an accounting was at least entitled to interest from the date of the filing of a suit for accounting.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 92; Dec. Dig. § 43.*]

6. INTEREST (§ 26*)—ACCRUAL OF INTEREST.

Where a trust company knew that a party with whom it dealt claimed interest received by the trust company on notes held by it, a mere delay of the party in suing to recover the amount of interest did not prevent his recovering interest on the sum from the date the trust company was liable to pay the same over to the party.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 7–10; Dec. Dig. § 26.*]

7. CORPORATIONS (§ 506*)—ACTIONS—DEFECT OF PARTIES—EFFECT.

Where a corporation or its stockholder was entitled to maintain a suit brought by both, defendant could not complain because the stockholder was made a party, especially where during the trial of the case there was no distinction between the corporation and the stockholder.

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

In Equity. Suit by the Bellevue Mills Company and another against the Baltimore Trust Company. Decree for complainants.

Edgar Allan Poe, of Baltimore, Md., and Joseph De F. Junkin, of Philadelphia, Pa., for complainants.

Gans & Haman and W. Calvin Chestnut, all of Baltimore, Md., for defendant.

ROSE, District Judge. [1] The plaintiffs are the Bellevue Mills Company and one Peter H. Corr. It will be called the Bellevue. It is a New Jersey corporation. He is a citizen of Massachusetts. In the transactions out of which this litigation arose he originally had as an associate a citizen of Pennsylvania. He has acquired all the latter's rights in the matters in dispute. To avoid a useless repetition of names, it will be assumed he always had them.

The defendant is the Baltimore Trust Company. It is a corporation of Maryland. It is the successor of the International Trust Company, also incorporated under the laws of the last-named state. There is no occasion to distinguish between these two trust companies. The word "defendant" will be used whichever is meant.

In 1905 Corr and the defendant were creditors of the Southern Textile Mills, then in bankruptcy. The debtor owned three mills—

the Windsor, the Chicora, and the Moorhead. They were widely separated. No two of them were in the same state. More than 700 miles lay between the first and the last. All of them were thought to be valuable. At a bankrupt sale they might go for a song. Corr was an experienced mill man. The defendant had ample financial resources. They agreed to act together for the protection of their claims against the estate. They became the successful bidders for all three mills. The bankrupt owed the defendant upwards of $130,000; Corr about $43,500. Its stake was almost precisely three times as great as his. He was to have a one-fourth, it a three-fourths, interest in the common venture. Had this simple and obvious arrangement been strictly adhered to, the present controversy would not have arisen. It was departed from because the services which the two partners were best fitted to render were different and because the ends they had in view were not quite the same. Defendant did not feel itself specially qualified either to operate or to sell cotton factories. It did not want to put any more money into these particular mills. It had no desire to take any more chances with them. It was anxious to get out what it had in them and wash its hands of the transaction. If it could do that much, it then thought it would be content. Corr believed that he could sell the mills at a satisfactory advance. While looking for a buyer he hoped to operate them at a profit. If money could be made out of them he wanted to make it. He was willing to back his judgment with his credit and his resources. In order that each of the partners could be put in the position which he or it wished to occupy, some more or less complicated provisions were made.

As time went on, various unexpected things happened. To meet them new modifications of the original arrangements were made. In planning them thought was not always given to the effect they would have upon the original scheme or as to how each of them could be fitted in to all the others. Hence this suit.

When Corr and the defendant bought the mills, they organized the Bellevue. It issued $175,000 bonds. Defendant received $131,500 of them; Corr $43,500. If any profits were made he was to get them. Accordingly, all the capital stock went to him. He promised to spend at once $15,000 in mill betterments. He was to give his personal attention to operating and selling the factories. Nothing was said about working capital. It was assumed that he would supply it. He agreed that $30,000 of defendant's bonds should be redeemed before any of his were paid off. The mortgage securing the bonds required that on the 1st of January, 1907, and every six months thereafter, the Bellevue should pay the defendant not less than $5,000 for the redemption of bonds. Corr personally guaranteed that this promise should be fulfilled. That is to say, he agreed that by the 1st of July, 1909, defendant should receive at least $30,000 of the principal of its bonds. Defendant hoped that by that time still more of them would be paid off. To stimulate Corr's zeal to that end, it promised to pay him a 5 per cent. commission on all bonds in excess of that $30,000 worth that he might cause to be redeemed within three years. By their express terms the bonds might be paid off at any time upon 30 days' notice. The deed of

trust which secured them provided that the Bellevue might at any time sell any or all of the mills at not less than $45,000 for the Windsor, $55,000 for the Chicora, and $75,000 for the Moorhead. Bonds were to be redeemed with the proceeds. Thereupon the semiannual increments of the sinking fund were to be proportionately reduced.

In March, 1907, Corr found a purchaser for the Chicora Mills. The price offered would, after the payment of commissions and expenses of sale, net $127,500. None of this was, however, to be paid in cash. Promissory notes for $12,500 each, except the last, which was to be for $2,500 bearing interest and maturing one every three months, were to be given for the purchase price. They were to be indorsed by the purchaser and were to be secured by a first lien on the property sold. Doubtless both Corr and the defendant would have been glad to get cash. If payment had been so made, this suit would never have been brought. Nevertheless, both of them thought the offer a good one.

On January 1, 1907, Corr had, as he had promised, provided money for the payment of $5,000 of defendant's bonds. Under the terms of the original agreement, if the sale was made defendant would have been entitled to all of the proceeds of the first two $12,500 notes. Of the remaining $102,500, it would have had the right to demand three-fourths, or $76,875. Corr would have gotten the other one-quarter, or $25,625. When the last note had been paid, defendant would have been left with $24,625 of bonds, Corr with $17,875. As the purchase notes were paid, the semiannual installments payable to the sinking fund would have been proportionately reduced. When the notes had all been met and their proceeds applied to the extinguishment of the bonds, the semiannual increment of the sinking fund would have been less than $1,400. Defendant would have liked to have the purchase money distributed precisely as the agreement between it and Corr required. He had other wishes. He had spent large sums in equipping the mills and in supplying the Bellevue with what was its only working capital. It owed much to him and to others. In March, 1907, the money market was already under severe strain. Signs in the financial skies presaged the storm which broke seven months later. He needed cash, or the closest approximation to cash he could get. He asked the defendant to let him have $77,500 of the purchase-money notes and to include therein all of the earliest maturities and to content itself with the $50,000 which had the longest time to run. It was not willing to go so far. It was, however, content greatly to relax the rigidity of the existing contract between it and him. To that end it made him a counter proposition. This was subsequently modified in important respects, but it formed the basis of the subsequent agreement, the dispute as to the construction of which had led to this litigation.

Defendant said it was ready to divide the purchase-money notes equally with him. It told him that notes which matured at intervals from 12 to 33 months after date were not worth as much as those which were payable in 9 months or earlier. All of them bore interest. If there was any difference in value among them, it must have been due solely to the greater possibility of default upon those whose payment might lawfully be long postponed. Defendant suggested that the

first three notes, aggregating $37,500, were worth par, the next four, totaling $50,000, 97½ per cent. of their face or $48,750, and the last four, amounting to $40,000, 95 per cent. or $38,000. Upon this basis the present worth of the whole $127,500, was $124,250. At the discounts indicated $64,450 of the notes maturing at the most remote dates it figured would come to precisely $62,125, which was one half of the estimated cash value of all of them. He could have the other half which consisted of notes of the face value of $63,050, but which were payable before those which defendant was willing to take were demandable.

The modifications which were subsequently made to other terms of this offer of the defendant did not affect the division of the notes. That was made as above outlined.

Defendant's letter contemplated that all of Corr's bonds and $62,125 of its should be at once canceled. In that event the proceeds of the sale of one of the mills would have extinguished three-fifths of the entire bond issue By the terms of the deed of trust the semi-annual increment of the sinking fund would have been proportionately cut down and in future would have been only $2,000. Defendant, however, stipulated that $2,500 should be paid into the sinking fund every six months. It also insisted that Corr should renew his guaranty that $25,000 in all would be paid into the sinking fund to be applied exclusively to the redemption of defendant's bonds. This was also a term of the final agreement.

Defendant further stipulated that, in consideration of its agreeing to modify the original bargain, Corr should give it $25,000 of the stock of the Bellevue. This also in a somewhat modified form was actually done.

Thus far all the defendant asked was plain and consistent. It, however, insisted upon something else which could not be so readily reconciled with the fundamental theory upon which its proposition was based. It demanded that Corr should personally guarantee the payment of the purchase-money notes which it was to take. It suggested what it said was equal division of the notes. In determining what would be an equal division, it had made an allowance for the extra risk which would be assumed by the holder of those having a long term to run. The request for Corr's guaranty required him to take that risk, although it and not he was to receive the sum which it had itself estimated to be the equivalent thereof. In the final agreement reached this guaranty by Corr was embodied. It is one of the terms which makes difficult any logical construction of the bargain into which the parties entered.

Corr, through his counsel, answered the letter in which defendant made its offer. Most of the terms were accepted. Some alterations were suggested. One of them related to the stock for which defendant asked. The parties do not appear to have had any difficulty in reaching an agreement about it. The stock seems now to be valueless. No question has been raised about it. What was said as to it might be ignored altogether were it not that one provision relating to it illustrates the difficulty the parties had in keeping clearly in their minds the real basis on which their agreement rested.

The agreement provides that, at the final liquidation of the Bellevue, the stock to be transferred to defendant should not participate until after Corr had received out of the assets the sum of $50,000. In this $50,000 he was, however, required to include the amount by which the purchase notes received by him exceeded the $43,500 necessary to redeem his bonds.

According to the defendant's theory, plaintiff was to get notes worth $62,125. Such excess would have been, therefore, $18,625. The agreement said it was $19,550, which is the amount by which the face value of the notes he was to get exceeded the par value of his bonds.

The other change suggested by Corr had incidentally more important consequences. Defendant had contemplated an immediate cancellation of bonds. Corr proposed that all the bonds should be kept alive until the last of the purchase-money notes were paid. At that time defendant would cancel $62,125, of its; Corr, all of his.

Subsequently the parties met in Baltimore. The subject was discussed. The conclusions reached were embodied in two agreements. In one of them the defendant contracted in its individual right. In the other it assumed to act as trustee under the mortgage securing the bonds. Such a distinction between its two capacities might at any time have become important. It never did. None of the bonds ever passed under the effective control of any one other than itself and Corr. As things turned out, any bargains to which it, he, and the Bellevue were parties bound everybody in interest. The making of the agreement between Corr and the defendant in its own right was declared to be a condition precedent to the execution of the other. It bound Corr to guarantee the making of the sinking fund payments and to indorse in blank and deliver to defendant upon certain terms certificates for $25,000 par value of the stock of the Bellevue.

To the other contract the Bellevue, Corr, and the defendant as trustee were parties. By it the defendant assented to the sale. It protected itself against possible claims of persons into whose hands bonds might subsequently come by requiring the fact of the sale, the release of the lien, and that the distribution of the proceeds had been provided for by agreement, to be stamped on each and every bond. The same provision for the reduction of the sinking fund which was found in the other agreement was embodied in this.

It was agreed that $90,000 of the purchase-money notes should be secured by a mortgage on the Chicora Mills given by the purchaser to the defendant as trustee. Of the proceeds of the notes to be delivered to Corr, $19,550 was to be used in reducing the indebtedness of the Bellevue to him, and the balance to satisfy the other current indebtedness as far as it would go.

It appears from the evidence that all of the money paid upon said notes was used in paying indebtedness other than that due Corr. This circumstance does not, however, seem to be material. No controversy arises out of any of these terms. The dispute turns solely upon the construction which should be put upon the fourth paragraph of the agreement.

Defendant says that when the contract was about to be closed it was surprised to learn that Corr was not going to turn in his bonds for cancellation. It then understood him to say or imply that he could not because they were pledged as collateral security for debts which he did not want then to discharge. He says that he never understood that defendant wanted the bonds. If he had he could and would have produced them. He appears to be a candid witness. The transactions and circumstances about which he and the other witnesses on either side testify are now seven years old. Had the bonds then been canceled, there would have been no necessity at all for this complicated fourth paragraph. Defendant suggested that they should be canceled. It was Corr who proposed that they be kept alive until the last of the notes were paid. It was highly probable that it was he who was reluctant to produce them. He may be right in thinking that it was not altogether out of his power to do so. Defendant, on the other hand, may readily have inferred his inability from his reluctance. However that may be, the paragraph in question expressly provided that the defendant should be under no obligation to surrender any of its bonds to itself as trustee until all the purchase-money notes should be paid and until Corr had within three years surrendered for cancellation all his. After both these things happened, the defendant was to cause itself to cancel $62,125 of its bonds. In default of the happening of either of them, it was to be under no obligation to account to the plaintiffs for any of the proceeds of the purchase-money notes. In that connection it is expressly declared that the portion of the purchase price received by it was in no way a satisfaction in whole or in part of the bonds held by it except subject to the conditions mentioned.

Within a little over two years all the purchase-money notes, principal and interest, were paid. During this time the defendant collected interest on the bonds against which it held the notes. Since then all the other bonds held by it have been paid off, together with all interest thereon. It has therefore received the principal of all the bonds it ever owned, interest on them for all the time they were outstanding, and in addition $7,401.18 of interest on purchase-money notes and $2,325, the amount by which the face of these notes exceeded the par value of the bonds it canceled in consideration of the receipt thereof.

It follows that defendant has, in addition to principal and legal interest, taken to itself the sum of $9,726.18. Plaintiffs say that it must account to them, or to one of them, for that amount. It asserts that under the agreement it was and is entitled to take and keep all of that sum for its own use.

Its right to the amount received as interest will be first considered.

It does not assert that the agreement in so many words says anything on the subject. It bases its claim to interest on what it says is the logical result of the provisions found in the contract.

It further contends that the history of the preceding relations between the parties makes such construction both natural and equitable.

In order to do justice to such contention, the story of what the parties did or proposed to do has been so fully told.

It lays stress upon what it yielded. Some of the concessions it

enumerates were more apparent than real. Fixing the semiannual increment of the sinking fund at $2,500 when first suggested was the imposition of an added burden upon Corr. In the form the agreement finally took, the sinking fund provision may have given him more than he could technically claim. He apparently gave up the commission to which he would have been entitled had the bonds been canceled as defendant first suggested. The fact that his bonds remained outstanding did not expose the defendant as trustee to any liability or possibility thereof. As has been stated, each and every bond by a stamp put upon it was expressly made subject to the terms of the new agreement. In allowing Corr to have nearly $40,000 more of the notes than under the original contract between them he could have claimed, defendant acted generously. It may be that it still remained amply secured. Very possibly, in view of all the circumstances with which it found itself and Corr surrounded, the course it took was the best for it as well as for him. Nevertheless, to perceive so much sometimes requires a greater breadth and liberality of view than all men possess. It is unnecessary to estimate any more accurately the relative value of what each surrendered. The parties agreed that the defendant had given more than it had received and should be compensated therefor. To provide such compensation was one of the purposes of the first of the two agreements of March 30, 1907, the one to which the defendant in its individual capacity was a party.

Had the purchaser not anticipated the payment of some of his notes, defendant would have received from him as interest nearly $8,000. It now claims that by the agreement to which in its right as trustee it was a party this large additional sum was secured to it. It admits that at the time the bargain was made nothing was said on the subject. There is no suggestion that the plaintiffs, or either of them, ever thought they were conferring any such benefit upon it. It is not even contended that the defendant sought any such advantage or before the execution of the contract ever gave as much as a thought to it. Its officers and the counsel who acted for it are all honorable men. If when the agreements were prepared they had supposed that they were providing that the defendant should receive some additional thousands about which not a word had been said to the plaintiffs, they would have spoken. The agreement, by its proviso that in case of default defendant should not be bound to account for the proceeds of the notes, recognized that if no default took place such accounting was a matter of right. In truth, however, no critical analysis of the language of the documents is necessary. The parties were dealing upon a basis of equality. When either of them wanted the other to depart from it, it was bound to say so in plain English. It must therefore be held that the defendant had no right to refuse to account for the interest received by it on the purchase-money notes.

[2] Defendant says that, whatever was or is the proper construction of the agreements, plaintiffs are now without remedy. It asserts that with full knowledge of the facts they voluntarily paid the interest on the bonds and cannot now reclaim it. Technically they are not seeking to do so. They are putting forward a claim for an ac-

counting for interest on the notes. Such interest was not paid by them at all, and the principle of law relied on by defendant is therefore not strictly applicable. The distinction suggested is not a mere evasion. Under all the circumstances of this case, it is one of some substance. When, subsequently to the making of the agreements in question, the time for paying interest on the bonds came around, plaintiffs sought to deduct, from the amount which would otherwise have been payable to defendant as trustee, a sum equivalent to the interest they supposed the purchasers to have paid defendant on the notes it held. Defendant insisted that the interest on the bonds must be paid. It called attention to the fact that if the coupons remained in arrears for 90 days the mortgage could be foreclosed.

The terms of the agreement in controversy are such that it is quite possible to argue that no accounting for either principal or interest of the purchase-money notes could be required until all of them had been paid and the bonds canceled. Under such circumstances, plaintiffs could continue to pay the interest on the bonds without first insisting on an accounting for the interest on the notes. That the defendant did not consider that the plaintiffs by such payments were estopped from demanding an accounting is made clear by the terms of an agreement made at the time the bonds were actually canceled. A formal contract was then entered into between the parties. It recited the dispute which had arisen between them with reference to this interest. Each of them states its view as to the proper construction of the contract of March 30, 1907. They both recognize the controversy is an open one. Not one word is said about the plaintiffs being estopped to make the claim they now do. Indeed, the paper in question was obviously intended to prevent any estoppel arising because of the presentation by Corr of his bonds for cancellation. Had defendant then supposed that the plaintiffs were already estopped, it would have said so.

The plaintiffs are not by anything they have done precluded from demanding an accounting from the defendant for the interest received by it upon the purchase-money notes.

[3] Defendant with some hesitation sets up the statute of limitations. It would not appear to be applicable. This suit is brought for an accounting under various agreements, all of them under seal. No one of them was twelve years old when the bill was filed. Moreover, it is by no means clear that an accounting could have been demanded by the plaintiffs at any time before all the bonds secured by the deed of trust had been paid off. That did not take place until December 2, 1913. This suit was brought on the 26th of the same month.

It follows that the plaintiffs are entitled to a decree for at least the $7,401.18 recovered by the defendant as interest on the purchase-money notes.

[4] It has already been stated that there also came into its hands $2,325 of the principal of those notes. For this sum it has never accounted. Plaintiffs say they are entitled to it. They rely on the implication of the proviso already mentioned to the effect that if there was no default defendant should account for the proceeds of the

notes. They assert that such notes were taken by it merely as collateral security for the payment of the bonds. They point out that Corr was required to guarantee their payment. Such guaranty covered their full face value. Under such circumstances, they contend that the parties could not have intended that defendant, who had put the risk upon Corr, should take the profit which would result if the notes were paid.

There is much force in all this. Yet the agreements themselves, the negotiations leading up to them, and the actions of the parties under them, prove that such was in fact their intention. Very probably some or all of them had not thought out precisely how such purpose harmonized with the other terms of the contract into which they were entering. It may be that, if they had, objection would have been made and conceivably something else done. Nevertheless, they then understood that the defendant would get that profit. It was not until more than 6½ years had elapsed that any suggestion to the contrary appears ever to have been made. Such a bargain may have been unreasonable and in that sense unfair. It was made by adult men under no disability. It was not forbidden by any rule of law or of public policy. It must be enforced.

The only question remaining for determination is whether any interest, and if so how much, should be allowed plaintiffs on the $7,401.18 to which they have been held entitled.

[5] Corr's bonds were not canceled until July 22, 1909. Until then defendant was not bound to account for any of the proceeds of the purchaser's notes. Its liability for interest could not earlier begin. There can be as little question that plaintiffs have a right to interest from, at the latest, the date of the filing of the bill in this cause, December 26, 1913. Nashua & Lowell Railroad Corp. v. Boston & Lowell Railroad Corp., 61 Fed. 237, 9 C. C. A. 468.

[6] The disputed question is as to whether interest should or should not be awarded for the period of four years five months and four days between the canceling of the bonds and the filing of the bill.

Defendant acted in good faith. It and its counsel believed that it was entitled to retain for its own use the interest paid by the purchaser. It argues strongly that plaintiffs were guilty of laches in not earlier bringing their suit. At the hearing I was much impressed with these considerations and so stated. There is, however, a great deal to be said on the other side. The plaintiffs were entitled to this sum of $7,401.18. Defendant knew that they claimed it. Any delay upon their part in aggressively asserting their rights did less harm to it than it might have done to persons differently situated. Putting money to profitable use is its business. It must be assumed to have turned this to advantage. On the other hand, the plaintiffs, up to a few days before the filing of this bill, were themselves paying it interest. It made a profit out of that which belonged to them. It must account for that profit. That profit may be fairly assumed to have been at the rate of 4 per cent. per annum. The plaintiffs on that basis will be entitled to a decree for $7,401.18 with interest thereon at

the rate of 4 per cent. per annum from July 22, 1909, to December 26, 1913, and at 6 per cent. since the latter date.

[7] Defendant suggests that Corr is not entitled to maintain this suit. Either he or the Bellevue is. It does not appear that it is in any way hurt by his being made a party plaintiff. In point of fact as between the parties to this cause there has never been any distinction between Corr and the Bellevue.

VAN DEMAN & LEWIS CO. et al. v. RAST, County Tax Collector, et al.

(District Court, S. D. Florida. October 23, 1913.)

1. INJUNCTION (§§ 85, 105*)—STATE OFFICERS—ENFORCEMENT OF VOID STATUTE.
State officers may be enjoined from threatened prosecutions to enforce a void statute by either civil or criminal proceedings, where property rights will be destroyed and irreparable damage be occasioned thereby.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 155, 156, 178, 179; Dec. Dig. §§ 85, 105.*]

2. INJUNCTION (§ 118*)—STATE STATUTES—ENFORCEMENT—ADEQUATE REMEDY AT LAW—PLEADING.
In a suit to enjoin state officers from enforcing an alleged unconstitutional statute imposing an unequal license tax on merchants issuing coupons or profit-sharing certificates to further the sale of merchandise, a bill alleging that complainants had large stocks of goods and merchandise subject to the exactions of the statute, that they were under contract for the sale of such merchandise, that seizure of their stocks and arrest of their employés was threatened for failure to comply with the law, and that such seizure would cause the loss of trade and customers, interrupt their business, cause the sacrifice of stock seized, and subject them to heavy fines, etc., sufficiently showed that complainants had no adequate remedy at law, so as to entitle them to injunctive relief.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223–242; Dec. Dig. § 118.*]

3. TAXATION (§ 2*)—POWER TO TAX—EXERCISE.
Power of taxation is an incident to and inherent in every sovereign state, and may be exercised to such an extent as to embarrass and even destroy, unless restrained by the organic law.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 2; Dec. Dig. § 2.*]

4. CONSTITUTIONAL LAW (§§ 209, 255, 278*)—FOURTEENTH AMENDMENT—DEPRIVATION OF LIFE, LIBERTY, AND PROPERTY.
The fourteenth amendment of the federal Constitution, providing that no state shall deprive any person of life, liberty, or property without due process of law or deny to any person within its jurisdiction the equal protection of the laws, prohibits the states from passing any law that will arbitrarily deprive a person of life or liberty or arbitrarily deprive him of property, and requires that equal protection and security shall be given to all under like circumstances in the enjoyment of their personal and civil rights, and that no greater burden shall be laid on one than is laid on others in the same calling and condition.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 678, 730–738, 740–745, 763, 765, 767–770, 772–777, 779–806, 808–810, 816–824, 907–924, 942; Dec. Dig. §§ 209, 255, 278.*]

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

5. CONSTITUTIONAL LAW (§ 230*)—LICENSES (§ 7*)—LICENSE TAXES—EQUALITY.
Laws Fla. 1913, c. 6421, § 35, in so far as it imposes a state license tax of $500 and a county license tax of $250 on merchants offering with merchandise any coupon, profit-sharing certificate, or other evidence of indebtedness or liability redeemable in premiums, etc., is not based on any just classification and is therefore invalid as violative of the equality clause of the fourteenth amendment of the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Dec. Dig. § 230;* Licenses, Cent. Dig. §§ 7–15, 19; Dec. Dig. § 7.*]

In Equity. Suit by the Van Deman & Lewis Company and others against John W. Rast, as Tax Collector for Duval county, Fla., and others. On motion for a temporary injunction. Granted.

Cooper & Cooper, of Jacksonville, Fla. (Charles M. Cooper, of Jacksonville, Fla., and E. F. Spitz, of New York City, of counsel), for complainants.

Thomas F. West, Atty. Gen., of Tallahassee, Fla., for defendants.

CALL, District Judge. This cause comes on to be heard on a motion for an interlocutory injunction before Circuit Judge SHELBY and District Judges SHEPPARD and CALL, at Huntsville, Ala., on September 18, 1913; upon consent of the parties 20 days were allowed the Attorney General of the state of Florida to file additional briefs.

Van Deman & Lewis Company, a corporation, and five others, corporations and individuals, and others similarly situated, filed their bill of complaint against John W Rast, tax collector of Duval county, Fla., and the tax collectors of each county in the state, the different state's attorneys, county solicitors, and prosecuting attorneys of the circuits and counties of the state of Florida.

The bill of complaint alleges, among other things, that each of the complainants are engaged in business as merchants handling certain articles enumerated, at the sale of which it is the custom to give coupons, slips, certificates, or other tokens which are redeemable in merchandise or receivable in part payment for certain articles to be selected by the customer from a list of same furnished by the manufacturer in some instances and the merchant in others. This list is too long to be set out here.

The bill further alleges: That each of these complainants has been, long prior to the passage of the act hereinafter referred to, and still is engaged in the business of selling said goods or some of them, and giving these coupons, slips, certificates, or other tokens, redeemable as before mentioned. That trading stamps are substantially like some of the coupons or certificates before mentioned. That each of them carry largs stocks of said goods and other articles of merchandise. That coupons, slips, certificates, or other tokens are given by the different manufacturers of different lines of goods. That under the act of the Legislature, hereinafter referred to, each is liable to have his stock seized and his person imprisoned and exorbitant fines imposed, and his business broken up, and his avocation destroyed, and his customers driven away.

The bill further alleges that each of the complainants have paid all license taxes due to the state of Florida, or any county thereof, for carrying on the several businesses of each, other than the license taxes concerning any coupon, profit-sharing certificate, or other evidence of indebtedness or liability mentioned in the act to be referred to. Also that the amount required to be paid by each will be more than $3,000.

The bill further alleges: That at the session of the Legislature of the state of Florida, held during the year 1913, "chapter 6421, entitled an act imposing licenses and other taxes, providing for the payment thereof, and prescribing penalties for doing business without a license or other failure to comply with the provisions thereof," was passed by said Legislature and approved June 5, 1913, by the Governor of Florida, and then proceeds to attack section 35 of the act on various grounds as violating the Constitution of the state of Florida, the commerce clause of the Constitution of the United States, the fourteenth amendment to the same, and various other portions of the Constitution, specifically set out in the bill of complaint. Further that irreparable damage will occur to each by the seizure of their stocks of goods by the tax collectors of the several counties; etc., setting out the facts whereby such irreparable damage will occur. That the state's attorneys, county solicitors, and prosecuting officers do threaten to proceed against them to enforce by criminal proceedings said statute, etc. That the tax collectors of the different counties, acting under instruction from the comptroller of the state, are threatening to seize their stocks, etc., to enforce said license tax. The bill then prays for an injunction order, interlocutory and permanent, against the defendants, restraining and enjoining each of them from attempting to enforce said section 35.

The Attorney General of the state of Florida, specially appearing for each of the defendants, moved to dismiss the bill of complaint on the grounds:

(1) That no sufficient facts are averred in complainants' bill of complaint to authorize this court to take jurisdiction in this cause and enjoin and restrain the defendants, who are officers of the state of Florida, from the performance of the duties imposed upon them by the statute referred to, viz., section 35 of chapter 6421, Acts of 1913, Laws of Florida.

(2) That it appears from the averments of complainants' bill of complaint that complainants have a complete and absolute remedy at law.

(3) That it appears from the averments of complainants' bill of complaint that they seek to enjoin and restrain prosecuting officers of the state of Florida from the performance of their official duty in the enforcement of a criminal statute of the state of Florida, of a general and public nature.

(4) That it appears from the averments of the complainants' bill of complaint that they seek to enjoin an alleged threatened seizure of personal property of complainants in the enforcement of the collection of an alleged illegal tax.

(5) That it appears from the averments of complainants' bill of complaint that they seek to enjoin a threatened seizure of personal property of complainants in the enforcement of the collection of a tax

imposed by a statute of the state of Florida, of a general and public nature.

(6) That it does not appear from the facts averred in complainants' bill of complaint that an enforcement of the provisions of the statute referred to will regulate, hinder, restrain, prohibit, or destroy interstate commerce between the state of Florida and other states of the United States, in violation of the provisions, or any of them, of the Constitution of the United States.

(7) That it does not appear from the facts averred in complainants' bill of complaint that an enforcement of the provisions of the said statute will deprive or tend to deprive complainants of liberty or property without due process of law, in violation of the provisions, or any of them, of the Constitution of the United States.

(8) That it does not appear from the facts averred in complainants' bill of complaint that an enforcement of the provisions of the said statute will deny to complainants the equal protection of the law, in violation of the provisions, or any of them, of the Constitution of the United States.

(9) That it does not appear from the facts averred in complainants' bill of complaint that an enforcement of the provisions of the said statute will tend to impair contractual obligations of the complainants, in violation of the provisions, or any of them, of the Constitution of the United States.

(10) That it does not appear from the facts averred in complainants' bill of complaint that an enforcement of the provisions of the said statute will require or result in an arbitrary and unlawful classification of the business of complainants for purposes of taxation, in violation of the provisions, or any of them, of the Constitution of the United States.

The section of the act called in question by the bill of complaint reads as follows:

"Sec. 35. Merchants, druggists and storekeepers shall pay a license tax as follows: For the first one thousand dollars or fraction of one thousand dollars of stock of merchandise, three ($3.00) dollars in each county and for each place of business, and one and one-half ($1.50) dollars for each additional thousand or fraction thereof; but dealers in merchandise at wholesale only, shall pay a license tax of one and one-half ($1.50) dollars for each one thousand dollars of their stock of merchandise: Provided, that the words 'stock of merchandise,' shall be held to mean the cash value of the merchandise or goods on hand and not the amount of the capital stock invested in the business: Provided further, that any merchant keeping sewing machines in stock for sale in the same manner as other merchandise shall not be taxed as a sewing machine agent or dealer: Provided further, that each and every person, firm or corporation, who shall offer with merchandise bargained or sold in the course of trade any coupon, profit-sharing certificate, or other evidence of indebtedness or liability, redeemable in premiums, shall pay annually a state license tax of five hundred ($500.00) dollars, and a county license tax of two hundred and fifty ($250.00) dollars, in each and every county in which said business is conducted or carried on, and if more than one place of such business shall be operated by any person, firm or corporation, a separate state and county license shall be taken out for each such place; and no person, firm or corporation shall offer with merchandise, bargained or sold as aforesaid, any coupon, profit-sharing certificate or other evidence of indebtedness or liability, redeemable by any other person, firm or corporation than the one

offering the same without paying the above license for each other person, firm or corporation who may redeem the same. The license prescribed in this section shall be in addition to other licenses prescribed by this act. Any person violating any of the provisions of this section, whether acting for himself or as agent of another, shall on conviction thereof be punished by fine not exceeding one thousand dollars or by imprisonment in the county jail not exceeding six months. * * * Merchants using trading stamps, shall pay a license tax of two hundred and fifty ($250.00) dollars for each place of business where they use such stamps."

This section also prescribes license taxes for mercantile agencies and merchant tailors. Chapter 6421, Laws of 1913, § 35.

The instant suit is brought by complainants and all others similarly situated against the tax collectors of the different counties, the state's attorneys for the several circuits, and prosecuting officers of the several counties to restrain them and each of them from enforcing the portion of section 35 of chapter 6421 of the Laws of Florida, requiring the payment of a license tax from those issuing coupons, certificates, etc., as mentioned in said election.

The jurisdiction of this court is invoked on the ground that the statute violates the interstate commerce clause of the Constitution of the United States, and the fourteenth amendment to the Constitution, in that it abridges the privileges and immunities of complainants and other citizens of the United States, and will deprive them of liberty and property without due process of law, and will deny to them the equal protection of the laws. Equity jurisdiction is invoked to avoid a multiplicity of suits and to prevent irreparable injury to the business and property of the complainants.

The Attorney General of the state of Florida, on behalf of the defendants, moves to dismiss the bill of complaint on the several grounds set out in his motion.

[1] The first and third grounds of the motion may be considered together. It is well settled that state officers may be enjoined from threatened prosecutions to enforce a void statute, by either civil or criminal proceedings, where property rights will be destroyed and irreparable damage be occasioned by such actions. Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; Dobbins v. Los Angeles, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169; Davis & Farnum Manufacturing Co. v. Los Angeles, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. Ed. 778.

[2] The second, fourth, and fifth grounds of the motion may be disposed of together. The bill alleges a large number of persons interested, their liability to have their property seized, their business destroyed by such seizures and arrest, their customers lost and deprived of their avocations. Ordinarily the seizure of personal property will not be enjoined by a court of equity, but in the instant case under the allegations of the bill of complaint that such seizures and arrests, on account of the peculiar uses and character of the property, whereby they maintain their business and occupations, their losses would be impossible of ascertainment and computation, and thus they have no adequate remedy at law, and brings this case within the exception recognized by all the courts.

And it is on the theory that complainants in the cases had a complete, adequate, and sufficient remedy at law that the Supreme Court of Florida rendered the decision cited by the Attorney General in Odlin v. Woodruff, 31 Fla. 160, 12 South. 227, 22 L. R. A. 699, wherein they cite with approval the case of Baldwin v. Tucker, 16 Fla. 258, wherein the court says:

"Courts of chancery have uniformly refused to grant an injunction to restrain * * * a mere trespass, except in rare cases, where the mischief would be irreparable by reason of some extraordinary value or quality of the thing endangered."

The Supreme Court of the United States, in the case of Boise Hot & Cold Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796, say:

"Equity will not interpose where there is a remedy at law which is as complete, practicable, and adequate as equity could afford. * * * Injunctions should not issue against the enforcement of the tax merely because it is unconstitutional or illegal, unless other circumstances bring the case within some clear ground of equity jurisdiction. Even though some states may, for convenience of remedy, permit equity to enjoin the collection of a tax for mere illegality, courts of a different and paramount sovereignty should not do so, and federal courts should not interfere by injunction with the fiscal arrangements of a state, if the rights involved can be preserved in any other manner."

The showing made by the bill of complaint that these complainants have large stocks of goods and merchandise subject to the very drastic exactions of this section of the statute, that they are under contract for the sale of such merchandise, and that the seizure of their stocks, and arrests, as threatened, will cause the loss of trade and customers, interrupt their business and occupations, cause the sacrifice of stock seized, and subject them to heavy fines, etc., in our opinion make such a case of irreparable damage to property and property rights as is properly cognizable in equity, and falls squarely within the rule laid down by the Supreme Court above quoted.

The second, fourth, and fifth grounds of the motion are not therefore well taken.

The sixth, seventh, eighth, ninth, and tenth grounds of the motion challenge the different allegations of the unconstitutionality set up in the bill of complaint and bring us to the consideration of the question whether the section violates the Constitution in any respect.

[3] The power of taxation is an incident to and inherent in every sovereign state and may be exercised to such an extent as to embarrass and even destroy, unless restrained from so doing by the organic law. Postal Telegraph Co. v. Charleston, 153 U. S. 699, 14 Sup. Ct. 1094, 38 L. Ed. 871; McCray v. United States, 195 U. S. 27, 24 Sup. Ct. 769, 49 L. Ed. 78, 1 Ann. Cas. 561; Kehrer v. Stewart, 197 U. S. 60, 25 Sup. Ct. 403, 49 L. Ed. 663.

[4] The fourteenth amendment to the Constitution of the United States declares that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. And we may say in passing that the Constitution of the state of Florida contains the same

limitations on the action of the Legislature. This clause of the federal Constitution has been construed by the Supreme Court of the United States as a prohibition upon the states passing any law that would arbitrarily deprive a person of life or liberty or arbitrarily deprive him of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; and that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. Missouri v. Lewis, 101 U. S. 22, 25 L. Ed. 989.

[5] The tenth ground of the motion contends that this section is not an unlawful and arbitrary classification of business for taxation.

Mr. Justice Harlan, in Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679, says:

"The difficulty is not met by saying that, generally speaking, the state, when enacting laws, may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification must 'always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' But 'arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this.'" Gulf, Col. & Santa Fé Ry. Co. v. Ellis, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; Cotting v. Kansas City Stock Yards Co., 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92.

Is there a just basis for the classification attempted in this section of the act? Merchants, etc., all pay a tax according to the value of the stock carried by each, but, if they sell goods for which coupons, etc., are given by themselves or others, then they must pay this additional tax for each place of business in each and every county in which said business is conducted or carried on. And, if goods are offered for sale with which coupons are given redeemable by persons other than the seller, then this tax must be paid by him for each of said lines of goods. We can see no just basis for such classification. It is an arbitrary selection of one merchant for the imposition of a "greater burden" than that imposed on others in the same calling and condition.

The legality of what is generally known as the trading-stamp business has been generally affirmed by the courts, state and federal. The use of coupons, profit-sharing certificates, etc. is an entirely legitimate method of advertising, and the merchants, etc., employing this method are entitled to the protection of the Constitution of the United States. State v. Shugart, 138 Ala. 86, 35 South. 28, 100 Am. St. Rep. 17; Ex parte Drexel, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. (N. S.) 588, 3 Ann. Cas. 878; Hewin v. Atlanta, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795, 2 Ann. Cas. 296; Commonwealth v Sisson, 178 Mass. 578, 60 N. E. 385; Long v. State, 74 Md. 565, 22 Atl. 4, 12 L. R. A. 425, 28 Am. St. Rep. 268, and many others cited in the case of Little et al. v. W. V. Tanner, as Attorney General, et al., 208 Fed. 605, Eastern District of Washington, recently decided.

The Attorney General in his brief refers to the act of the Legislature prohibiting the shipment of green fruit sustained and upheld by

the Supreme Court of Florida, upon authority of the case of Savage v Jones, 225 U. S. 501, 32 Sup. Ct. 715, 56 L. Ed. 1182.

These cases, it seems to us, are not in point. Each of these cases was so decided because it was an exercise of police power for the protection of the health of the community. A legitimate subject for police regulation. As before pointed out, this coupon business is legitimate, in no way affecting the health or morals of the community.

We do not care, however, to consider the question whether the act violates the interstate commerce clause of the Constitution. Having reached the conclusion that the section violates the fourteenth amendment, it is unnecessary that we consider the other grounds of unconstitutionality alleged in the bill of complaint.

It is therefore ordered that the interlocutory injunction. issue as prayed in and by said bill of complaint.

SHELBY, Circuit Judge (concurring). On the facts appearing in the record, I am of the opinion that the plaintiffs are entitled to the interlocutory injunction. I concur, therefore, in the order granting the same.

SHEPPARD, District Judge, concurs.

THE ADVENTURESS.

(District Court, D. Massachusetts. April 23, 1914.)

No. 542.

1. COLLISION (§ 71*)—DRIFTING AND MOORED VESSELS—UNSAFE ANCHORAGE.
A yacht anchored for the night in Bar Harbor, with a southeast storm threatening. During the evening the wind rose, and she dragged her anchors and finally came into collision with libelant's launch, which was lying at moorings with no one aboard, and by direction of the master the launch was cut loose and drifted on the shore and was wrecked. The master of the yacht did not know the harbor, but made no inquiries of nearby vessels, and anchored where the bottom was rocky and anchors would not hold. There was safe anchorage on the lee of the island, and the wind, which attained a velocity of some 40 miles, was not very unusual at the season. *Held*, that the master was in fault for not inquiring about the anchorage, and for cutting the launch loose without asking assistance from the shore or from other vessels, and the yacht could not avoid liability on the ground of inevitable accident.
[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.*]

2. COLLISION (§ 75*)—MOORED LAUNCH—LIGHTS AND WATCHMAN.
It was not a fault on the part of the launch, which was moored with other boats in shallow water and out of the usual track of moving vessels, that she did not carry lights nor have a watchman aboard; there being no local regulation so requiring.
[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 105–121, 207; Dec. Dig. § 75.*]

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

In Admiralty. Suit by Alfred E. Connors, owner of the launch Rover, against the yacht Adventuress. Decree for libelant.

Benjamin Thompson, of Portland, Me., and Edward S. Dodge, of Boston, Mass., for libelant.

Russell, Moore & Russell, of Boston, Mass., for claimant.

HALE, District Judge. [1] The libelant, surviving partner of the firm of Conners Bros., owner of the launch Rover, claims compensation for damages to that launch, sustained in consequence of her being cut adrift from her mooring at Bar Harbor, Me., by the crew of the yacht Adventuress, on the night of July 28, 1911.

The Rover was known as a cabin launch, and was about 44 feet in length; her beam was 8 to 9 feet; she drew from 4 to 4½ feet of water.

The Adventuress is an auxiliary schooner about 50 feet in length, 15 feet beam; her draft is 7 feet, and she is equipped with a 25 to 50 horse power motor. On the evening in question the Rover was lying at her usual mooring about 1,500 feet off Connors' wharf, between the wharf and the southerly end of Bar Island, about 400 to 600 feet from the island.

The Adventuress is owned by the claimant, who chartered her to Joseph Cullman, Jr., of New York, in July, 1911. She had a crew of four men, all told. She arrived at Bar Harbor about 5 o'clock on the afternoon of July 28, 1911, and anchored in about 25 feet of water, at a point in a northeasterly direction from the Maine Central wharf, a little more out into the harbor than any of the other yachts lying there. Her port anchor was dropped, and 15 to 20 fathoms of chain paid out. The wind was easterly, the barometer low, the weather threatening.

Soon after anchoring, all the yacht's company went ashore except two men and the yacht's crew. The wind soon commenced to breeze up; the sea became rougher. About 8 o'clock the yacht let go her second anchor, and afterwards commenced to drag down towards the steamer El Placita and power boat Shad, both of which were lying astern of her at their moorings. Still farther astern were many other launches and small boats. The yacht continued to drag from a quarter to a half a mile, when she was between the steamer Mascot and the Rover. As the wind hauled more to the southward, she swung over and fouled the Rover. The two vessels were together nearly an hour. During that time, one of the yacht's seamen was twice on board the Rover; the last time he went aboard, by direction of the master, he cut the Rover's mooring, and set her adrift. She was then carried by the strong wind onto the shore of Bar Island, and became substantially a total loss.

The libelant charges that the damage sustained by him was due to the careless, negligent, and improper management and care of the yacht Adventuress by her officers and crew.

The claimant says that at all times those in charge of the navigation of the Adventuress failed in no duty, but were in the exercise of rea-

sonable care in holding the yacht to her anchorage, and in her management after she began to drag; that they carefully used the ground tackle with which the yacht was properly equipped; that the disaster was caused by a force of the wind and sea which could not be reasonably expected, and against which those in charge of the navigation of the yacht were not bound to provide; that the libelant was promptly notified of the cutting adrift of the launch; and that for the consequences of the unavoidable accident the claimant is not responsible.

The collision occurred between a moving vessel and one lying at her mooring. The burden is upon the moving vessel to account for the collision. She starts with the presumption of fault against her. Does the evidence show affirmatively that the occurrence was one which could not have been avoided by that degree of prudence, foresight, and care which the law requires of every mariner?

About 5 o'clock in the afternoon the Adventuress came to anchor; there was a southeasterly storm coming on; everything pointed to a bad night. Capt. Cardiff, the master, gives substantially the following testimony: That he expected there would be a blow of from 35 to 40 miles an hour; he had no knowledge of the character of the bottom where he anchored; he did not know it was rocky and kelpy, and did not ascertain its character from the chart, or from vessels lying near by; the weather had been threatening all day, with a low barometer; after anchoring it commenced to blow hard, with a choppy sea; it got worse all the time, and during the night it blew harder and rained; the velocity of the wind increased until 12 o'clock; he should call the storm the western edge of a north Atlantic hurricane; at times it was blowing 70 miles an hour; it was blowing so hard a man could not stand without holding onto the rigging; no one in the month of July would expect there would be a blow of 70 miles an hour, although he thought there would be one of 35 or 40; he based his estimate of 70 miles upon experience in two cyclones in the China Sea, and several hurricanes in the North Atlantic; he supposed it was once in 40 years that they get a blow like that. His contention as to what happened during the evening is clearly stated in the answer, and is as follows: After the yacht arrived at Bar Harbor, the port anchor, weighing about 220 pounds, was dropped, with 15 or 20 fathoms of chain; before 8 o'clock the starboard anchor, weighing about 253 pounds, was let go, and further scope given on the port anchor; so that soon after 8 o'clock both anchors were out, with about 40 fathoms of chain on each anchor; a kedge anchor weighing about 125 pounds was also dropped; during the night the wind increased, and more chain was paid out, until about 60 fathoms were out on each anchor; the motor was started, and for a time served to hold the yacht; the wind increased until it was blowing about 70 miles an hour, causing a very heavy sea, and a condition of wind and weather which could not have been reasonably anticipated by those in charge of the yacht; the propeller of the yacht became fouled, disabling the engine; and thereupon, by the unprecedented force of the wind and sea, the yacht dragged her mooring, and drifted towards the launch; the wind shifted from the northeast to the southwest, still blowing heavily; the yacht drifted broadside on-

to the launch; for a long time those in charge of the yacht succeeded in fending off the launch; but with the shifting of the wind this became impossible; one of the crew of the yacht was sent aboard the launch in the attempt to slacken her off and let her drop astern, but she was moored in such a manner that this could not be accomplished; it becoming evident to those in charge of the yacht that, if the vessels continued to pound, both would sink, the moorings of the launch were cut, and she was set adrift.

All those on the yacht swear that the wind was blowing 70 miles an hour during the night. There is some other testimony in support of this contention. The reports of the Weather Bureau on the night in question show, however, that the maximum velocity of the wind at Boston was 34 miles, at Portland 40 miles, and at Eastport 41 miles, an hour. The testimony in behalf of the libelant tends to show that the wind during the night at Bar Harbor did not reach a maximum velocity greatly exceeding the maximum velocity at Eastport, that of 41 miles an hour. The testimony of persons who estimate the force of the wind on any particular night is unsatisfactory. Evidence as to what happened to shipping at the time in question at Bar Harbor is much more convincing. Such evidence is in the case before me. The steam yacht El Placita lay at her mooring near the Adventuress, but a little farther up the harbor. Her master, Capt. Foss, testifies that at 9 o'clock, when he came on deck, it had breezed up considerably; he saw the Adventuress and was sure she would drag; he was so sure of this that he gave orders to his engineer to get up steam, fearing the Adventuress would drift into his own yacht. At 10 o'clock, after the Adventuress had begun to drag, Capt. Foss estimates the velocity of the wind at 35 miles an hour; he saw a small power boat go out by the El Placita's bow, and go around Bar Island, when the wind was at its height; and a 25 or 30 foot launch go across the El Placita's bow. Capt. Mack, of the Constance, testifies that at about 9 o'clock in the evening he went off to Mr. Pulitzer's yacht, the Liberty, in the Constance, a 30-foot launch, with the captain and the doctor, and returned, put the Constance at her mooring, and came ashore in a 12-foot pea pod at Conners' slip. At about 11 o'clock the same night, he went back to the wharf and took the pea pod and went off alone in it to the launch Herbert; then went to the Constance to see if the boats were all right, and it took him about half an hour to do this; that it was rough rowing among the boats, but "nothing alarming," and he had known quite a number of nights when the wind was as strong in Bar Harbor as it was that night. Three or four of the boats chafed off their moorings and went ashore. Capt. Perkins, in the employ of the libelant, says he was on the wharf and in a rowboat practically all night. He went off to look after some catboats in the harbor about 11 o'clock, at which time the wind was blowing 40 or 50 miles an hour. The place where he went was the worst in the harbor on account of shoal water; he had no difficulty in handling a 14-foot rowboat; he had no trouble in carrying out the anchor for the second catboat which had chafed off her mooring. The evidence on this point induces the belief that the wind at Bar Harbor on the night in question attained

about the same maximum velocity as at Eastport, the nearest Weather Bureau station; this was 41 miles an hour.

The whole testimony leads me to believe that the captain of the Adventuress did not exercise the care of a reasonably prudent mariner. His initial fault was in anchoring his yacht for the night in an exposed roadstead, with indications of an easterly storm, and no knowledge of the character of the bottom where he anchored, making no inquiries of others who were familiar with the place, and who were easily accessible to him. An examination of the coast pilot would have informed him that at Bar Harbor the—

"bottom is generally rocky and poor holding ground except near the head of the harbor; the water deepens quickly from four to thirteen fathoms. A swell heaves in during southeast winds, and vessels should not attempt to ride out a gale here from that direction."

He saw a large number of launches and boats lying astern, and knew that in the event the wind and sea should increase, and his vessel should drag, she was liable to foul the El Placita and the Shad, and later to drag down upon some of the many boats lying at their moorings. If he had inquired of Capt. Foss of the El Placita, or of Capt. Simmons of the Shad, he could not have failed to learn that those vessels were lying at moorings, while the position selected for the Adventuress to anchor was a ridge where, if her anchors did start, they would fill with kelp and seaweed, and become useless. He would have found, too, that good anchorage in the lee of Bar Island was easily accessible to the Adventuress at the time she came to anchor.

In view of this testimony, I cannot believe that he exercised the care of a prudent mariner when he anchored his vessel in the most windward and exposed position of any of the large fleet of yachts then at Bar Harbor, without making inquiries as to facts of which he was ignorant, and without examining his chart, to ascertain the character of the bottom. A shipmaster who voluntarily places his vessel in such a position as the Adventuress was placed by Capt. Cardiff on the night in question cannot set up the defense of inevitable accident, when by the prompt adoption of reasonable precautions he could have avoided danger. Under such circumstances he must observe reasonable care and prudence, not only against present dangers, but against impending perils. He must take seasonable measures of precaution. The Syracuse, 12 Wall. 167, 172, 20 L. Ed. 382; The Wenona, 19 Wall. 41, 54, 22 L. Ed. 52. In The Europa, 2 Eng. Law & Equity, 559, Dr. Lushington says that "inevitable accident" must be considered as a relative term, and must be construed, not absolutely, but reasonably, with regard to the circumstances of each particular case. In The Morning Light, 2 Wall. 550, 561, 17 L. Ed. 862, Mr. Justice Clifford remarks that inevitable accident may be regarded as an occurrence which the party charged with the collision could not prevent by the exercise of any ordinary care, caution, and maritime skill. He further remarks in The Merrimac, 14 Wall. 199, 203, 20 L. Ed. 873, that most collisions are unavoidable at the moment they occur; that the primary rule is that precautions must be seasonable; and if they are not so, and a collision ensues in consequence of the delay, it is no valid

defense to say that nothing could be done at the moment to prevent the injury; that it is generally possible to trace the cause of the disaster to some negligent act, or some antecedent omission of duty on the part of one of the vessels. In The Louisiana, 3 Wall. 164, 173, 18 L. Ed. 85, the collision was caused by the Louisiana drifting from her moorings; and the Supreme Court held that she must be liable for the damages consequent thereon, unless she can show affirmatively that the drifting was the result of inevitable accident, or a vis major, which human foresight and a proper display of nautical skill could not have prevented. The court held, further, that the drifting of the vessel was not caused by a sudden hurricane which nautical experience could not anticipate. In that case the wind was a "half gale," a "stiff breeze." It was of such a character that by proper precaution its effects might have been anticipated and prevented. Chancellor Kent has said:

"Vis major, or an act of God, is a natural and inevitable necessity, and one arising wholly above the control of human agencies, and which occurs independent of human action or neglect."

Such a defense cannot be successfully made where the injury could have been avoided by precaution, and nautical skill. The Thule, Fed. Cas. No. 1595. In The Lincoln, Fed. Cas. No. 8354, 1 Lowell, 46, Judge John Lowell held that when one vessel drives upon another at anchor, and in a proper position, the presumption is that the former is in fault. In J. S. Winslow & Co. v. Susquehanna Coal Co. et al. (D. C.) 201 Fed. 174, 176, this court followed the rule laid down in The Louisiana and The Lincoln. In The Olympia, 61 Fed. 120, 123, 9 C. C. A. 393, Judge Lurton fully considers the question of inevitable accident. He quotes from Lord Esher in The Merchant Prince, reported in the Law Reports, Probate Division 179:

"Unless you can get rid of it, it is negligence proved against you that you have run into a ship at anchor. * * * He can only get rid of that proof against him by showing inevitable accident; that is, by showing that the cause of the collision was a cause not produced by him, but a cause the result of which he could not avoid."

In Bradley et al. v. Sullivan et al., 209 Fed. 833, 126 C. C. A. 557, the court found that a vessel which broke from her moorings and injured other moored vessels by collision is liable therefor unless the owners affirmatively show the exercise of proper care, and that the breaking away and drifting were the result of inevitable accident.

As a result of the failure on the part of the captain and crew of the Adventuress to use timely and seasonable measures of precaution in selecting her anchorage, the yacht afterwards came upon dangers from which her crew could not, or at least did not, relieve her. Later in the evening, when it became apparent that a heavy breeze was coming on, a rough sea was making, and the yacht began to drag, the evidence leads me to the opinion that her crew should have started her engines, held her up, and sighted her anchors to see whether or not they were fouled. Even at that time she might have proceeded by her own power to the leeward of Bar Island, where there was a safe anchorage. The whole testimony induces me to believe that the yacht might then

have obtained assistance from the El Placita or the Shad, or even from the shore; for, as I have already pointed out, small launches and small boats were going to and from the wharves all through the evening; and there is testimony from Capt. Conners, who was on the wharf, and from captains of several of the vessels in the harbor, that they could and would have rendered timely and efficient help if any one of them had been called upon by the crew of the Adventuress.

Still later in the evening, when the Adventuress had drifted down upon the Mascot and the Rover, I am of the opinion that reasonable nautical skill and courage would have enabled the crew of the yacht to take a line to the Mascot in order to hold the Adventuress off from the Rover until help could be obtained from the shore. I am persuaded by the whole evidence that there never was a time when it became necessary to adopt the reckless expedient of cutting the Rover adrift. In my opinion, the Adventuress has failed to show affirmatively that her drifting was the result of inevitable accident, or that those in charge of her navigation were justified in cutting the Rover from her moorings, and allowing her to drift upon the lee shore of Bar Island.

The testimony indicates, too, that those in charge of the Adventuress did not exercise good faith in trying to find the owner of the Rover during the evening, or in seasonably notifying him on the morning after the injury.

[2] The learned proctor for the claimants contends in argument that the owner of the Rover was negligent in allowing his launch to lie at her mooring without a watch, on the evening in question. This defense was not, however, set up in the answer.

The testimony shows that, while the Adventuress was afoul of the Rover for nearly an hour, the libelant had at least eight men on the wharf for the purpose of looking after his boats and property; that he had other men off in the harbor looking after other of his vessels, and in assisting small boats; that he had anchors and warps which could readily have been carried, if needed, to the assistance of the Adventuress and of the Rover; that there were lines aboard the Rover, easily accessible, which could have been used to effect the safety of both the Rover and of the Adventuress; and that a reasonably observant and prudent mariner who went aboard the Rover might have found these lines and used them in the exigency in which the boats were placed; that the Adventuress gave no signal to the shore, and called for no assistance. The evidence shows, too, that the Rover was lying with other launches and small boats in comparatively shoal water at moorings, and that none of these vessels had a watch on board. It is not reasonable that boats so moored, out of the usual track of moving vessels, should be under a duty to maintain a watch, or exhibit lights, or to warn approaching vessels of danger, unless local harbor regulations require it, which they did not in this case. The Lucille (D. C.) 169 Fed. 719; The Erastus Corning (D. C.) 25 Fed. 572; The Bridgeport, 14 Wall. 116, 20 L. Ed. 787; The Granite State, 3 Wall. 310, 18 L. Ed. 179.

I find the Adventuress to have been in fault, and the libelant to have been free from fault.

A decree may be entered for the libelant. Albert T. Gould, Esq., of Boston, is appointed assessor to assess the damages sustained by the libelant, and make his report to the court.

SYDNEY v. MUGFORD PRINTING & ENGRAVING CO. et al.

(District Court, D. Connecticut. May 27, 1914.)

No. 1383.

1. COURTS (§ 347*)—EQUITY RULES—BILL—SET-OFF—COUNTERCLAIM.
The new Equity Rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi), providing that a defendant may set out in his answer any set-off or counterclaim against plaintiff which might be the subject-matter of an independent suit in equity against him, did not affect or change the substantive law providing what could be treated as a set-off or counterclaim, as it existed prior to the taking effect of the rules.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

2. SET-OFF AND COUNTERCLAIM (§ 9*)—MATTERS AVAILABLE—STATE LAW.
Under the Connecticut law, a defendant can only set up matters as a counterclaim which are so connected with the matter in controversy that their adjudication is necessary for the determination of the rights of the parties thereto.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 12; Dec. Dig. § 9.*]

3. PRINCIPAL AND AGENT (§ 143*)—UNDISCLOSED PRINCIPAL—RIGHTS.
An undisclosed principal may appear and hold the other party to a simple contract made with the agent, and where a third person, who has contracted with an agent in ignorance of the fact that the agent is not the real principal as he assumed to be, has sued on the contract by the undisclosed principal, such third person may avail himself of every defense which existed in his favor against the agent at the time the principal first demanded fulfillment of the contract.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 502–512; Dec. Dig. § 143.*]

4. CONTRACTS (§ 190*)—PARTIES—PERSONAL SERVICES.
Where a person contracts with another for the latter's personal services, the latter may be held to a strict performance of the services he has contracted to perform, and the former cannot be forced to accept the services of another in substitution therefor.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 834, 903½; Dec. Dig. § 190.*]

5. PRINCIPAL AND AGENT (§ 143*)—CONTRACTS—UNDISCLOSED PRINCIPAL.
Where it clearly appears either from the terms of an agreement or from the attendant circumstances that a contract was exclusively with an agent personally, an alleged undisclosed principal cannot become a party thereto nor maintain a suit thereon.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 502–512; Dec. Dig. § 143.*]

6. SET-OFF AND COUNTERCLAIM (§ 41*)—AVAILABILITY—RESCISSION OF CONTRACT—BREACH OF DIFFERENT CONTRACT.
In a suit in equity against a corporation by an undisclosed principal to enforce a rescission of a sale of the company's shares and a return of the purchase money on the ground that the value of the stock was misrepresented to her agent, who she claimed purchased the stock for her benefit,

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

the corporation could not plead as a set-off or counterclaim damages which accrued to it because of the incompetency, unskillfulness, and negligence of the agent whom it employed in its business under a contract negotiated by him at the time he purchased the shares; the corporation believing at that time that he was purchasing for his own benefit and paying for the stock with his own money, there being nothing to show that with reference to the contract of employment he represented complainant, or in making the contract of employment agreed to perform any duty that complainant was bound to perform.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 76–79, 81; Dec. Dig. § 41.*]

In Equity. Suit by Ada M. Sydney against the Mugford Printing & Engraving Company and others. On motion to strike defendants' equitable defense of set-off and counterclaim. Granted.

Henry & McGraw, of Cleveland, Ohio, and Joseph L. Barbour, of Hartford, Conn., for plaintiff.

Perkins, Wells & Scott and Elmer H. Lounsbury, all of Hartford, Conn., for defendants.

THOMAS, District Judge. This matter is now before the court on the plaintiff's motion to strike out the "equitable defense, set-off, and counterclaim" which the defendants have appended to and filed in court in connection with their answer.

The plaintiff has brought suit against a corporation, its officers, directors, and certain of the stockholders, on the ground that it and they made certain false statements as to the amount of business which the said corporation was doing, the amount of dividends earned and paid by it on its stock, and its otherwise general successful financial condition, to one H C. Mills, plaintiff's agent, as an inducement to her making purchase of certain shares of stock in said corporation; and that, as a result, plaintiff (who was an undisclosed principal), after making careful inquiry of the defendants, and inspecting the company's plant while in operation, and also its other properties, the true condition of which the defendants were all the time concealing from plaintiff and her said agent, did invest $4,000, of her own money, in the purchase of 160 shares of the capital stock of the said corporation; that after she had ascertained the actual condition of the defendant corporation's business and its financial affairs, and had thereby learned that the statements which defendants had made were false, she had tendered back said shares of stock and certain dividend checks which she had received, to the defendant corporation and certain officers thereof, and had made request for the return of her money which had been refused; and that she then placed the certificates, with a proper power of attorney for the transfer of the same, and all the dividend checks which she had received from the said corporation, in the registry of this court, thereby making tender of the same to the defendants, wherefore she claims, "by way of equitable relief, a rescission of said sale by the order and decree of this court, together with such other and general relief as may to the court seem just and equitable."

The defendants in their said "equitable defense, set-off, and counter-

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

claim" allege, in substance, that said Mills made purchase of the said 160 shares of stock of the Mugford Company in his own name, and at no time disclosed that he was acting for the plaintiff or any person other than himself; that he falsely claimed to be a man of considerable financial means and willing to become connected with the defendant coropration as a stockholder therein, provided the corporation would engage him as superintendent and manager of its photo engraving department; that he likewise falsely stated that he had had some 20 years of experience in the business of photo engraving, was thoroughly competent to work at that business, and of sufficient ability to manage its said department; and that, if employed, he would so manage its said department as to cause it to be of a much larger source of profit than it had theretofore been; that the defendant corporation was induced thereby to engage said Mills as superintendent and manager of its said photo engraving department, after he had first obtained its promise thereto as a condition precedent to his purchasing the said 160 shares of stock; that said Mills was the superintendent and manager of its photo engraving department from November 19, 1912, to May 6, 1913, during which time it paid him a salary of $40 per week, but, because of his incompetency and his negligent or unwise methods during said time, he had succeeded in disorganizing the said part of defendants' business and caused it to lose a very large number of customers, and had caused an increased cost in the work of said department to the corporation, with the result that the said corporation sustained a large amount of damage and loss thereby, and was therefore entitled to an equitable counterclaim of $10,000 against plaintiff, for which the said corporation has prayed judgment.

The pleadings in this case are not by any means what might be called "models of the legal draftsman's art," as they are so drawn as to be somewhat confusing; one reading the bill is at a loss to know just which of the defendants, other than the corporation, the plaintiff can expect to hold in view of its prayer for equitable relief. The bill is, in effect, the ordinary complaint for damages arising from a conspiracy to deceive and defraud, and the original claim for relief, which was for damages only, tends to bear out the conclusion that it was originally intended as such. The counterclaim, on the other hand, may be said to have been drawn with a view of benefiting but one of the defendants (the Mugford Printing & Engraving Company), although it purports to have been filed in behalf of all the defendants. However, the court is now called upon to render a decision on the situation which has been presented, by the filing of the counterclaim and the motion to strike out.

By the motion to strike out, plaintiff's attorneys have raised questions which would ordinarily be expected to be raised by a demurrer, were it not for the provisions contained in sections 29, 30, and 33 of the rules of practice for the courts of equity of the United States, promulgated by the Supreme Court on November 4, 1912, and which became effective February 1, 1913, and by which all the rules theretofore prescribed for the regulating of the practice in suits of equity in the Federal Courts, were abrogated. In re Jones (D. C.) 209 Fed. 717.

[1] It is the duty of the court, therefore, to inquire as to what would have been legally sufficient facts to plead in a set-off or counterclaim before the said new rules were adopted, for the court does not apprehend that any one will seriously question the statement that rule 30 (198 Fed. xxvi, 115 C. C. A xxvi) of the new rules was not intended to, nor did it as a matter of fact, in any way effect or change the substantive law relating to what could be pleaded as a set-off or counterclaim, as the same obtained prior to the taking effect of said rules. It seems to the court that the law on this subject remains unchanged and as before. Adamson v. Shaler (D. C.) 208 Fed. 566.

As was said by Judge Geiger in Adamson v. Shaler, supra:

"If rule 30 be given the broad construction permitting a defendant in effect to file an original bill by way of counterclaim, we would have a system whereunder the defendant could answer fully all of complainant's original causes of action, but complainant could in no event assert his right to affirmative relief upon a defendant's original cause of action set out by way of counterclaim. If the rules be considered in the light of the former practice which was foundationed upon the principle that complainant's bill determines the scope of the exercise of jurisdiction, there appears to be no reason for giving to rule 30 any larger office than that requisite to bring about the change so obviously indicated, i. e., that of incorporating in an answer: (1) The matters formerly included in answers proper; (2) matters formerly the subject of auxiliary or cross remedies through cross bills."

The court is aware that the opinion of Judge Chatfield, in Marconi Wireless Telegraph Co. v. National Electrical Signaling Co. et al. (D. C) 206 Fed. 295, has been considered as taking a somewhat different view of this rule than was taken by Judge Geiger, in Adamson v. Shaler, supra; but a close reading of the Marconi Case will, I believe, justify the conclusion that no very great difference of opinion does in reality exist between these judges in regard to the rule when it comes to an application of it to the same or a similar state of facts.

It will be noticed that Judge Chatfield, in the Marconi Case, permitted the plea of set-off and counterclaim to stand; but it will be further noticed that the subject-matter of that case was that of the infringement of patents, and that the judge merely allowed the parties therein to set off, one against the other, their respective claims as to such infringements, though the patents were issued as of different dates. It seems to me that, even if the pleading in that particular case did not relate to the same transaction, it was so closely connected with the subject of the action which was the basis of the plaintiff's case, as to be inseparable from it, and to be permitted under the practice in Connecticut. Avery v. Brown, 31 Conn. 398.

[2] It is the established rule in Connecticut that, where a counterclaim is set up by a defendant, he is entitled to bring in for adjudication only such matters as are a proper subject of set-off, or such matters as are so connected with the matter in controversy, that their adjudication by the court is necessary for a determination of the rights of the respective parties as to that controversy. Downing v. Wilcox, 84 Conn. 437, 80 Atl. 288.

The Supreme Court of Connecticut, in Downing v. Wilcox, 84 Conn. on page 441, 80 Atl. on page 289, has said that:

Although "courts of equity exercised jurisdiction upon the subject of set-off before the statute of 2 Geo. II which first conferred upon courts of law the power to do so, the enactment of that and following statutes in England and this country made the occasions rare when equity courts were called upon to exercise their jurisdiction. But they retained it, and upon proper occasions exercised it. where the law courts were unable to accomplish what equity demanded by reason of their being circumscribed in their power by the statutes; * * * the existence of this power in our own (Connecticut) courts of equity was recognized before the adoption of the (Connecticut) practice act, and of course was not lost by its adoption. * * * The right of set-off, whether legal or equitable, has always been confined to rights of action arising from contract." And that claims arising out of tort have never been brought within its application.

The main question herein presented for decision is: Can a defendant corporation against which a suit in equity has been brought by an undisclosed principal who claims a rescission of a sale of stock shares and return of the purchase money and interest thereon, on the ground that the value of said stock was misrepresented to her, plead, as a ground of set-off and counterclaim, damages which accrued to it because of the incompetency, unskillfulness, negligent, and unwise acts of a person whom it employed in its business, under a contract entered into by it and that person, although, as a matter of fact, the person thus employed was at the time the agent of the plaintiff, in negotiating for the purchase and sale of the said stock shares which the corporation issued to and in the name of said agent personally (while believing that he was acting for himself, and was paying for the stock with his own money, as he had claimed), where it is not alleged in the said counterclaim, or otherwise made to appear, therefrom, that the said person thus employed was the representative of the plaintiff in the matter of the contract of employment, or that, with the plaintiff's knowledge and consent, he undertook, by entering into said contract of employment, to perform a duty which plaintiff was bound to perform, although it does appear by the pleading that the defendant corporation would not have employed the said agent but for the fact that he made the said false statements and purchased the said stock shares in his own name?

[3] The rule is elementary that an undisclosed principal may appear and hold the other party to a simple contract made with the agent (Sullivan v. Schailer, 70 Conn. 733, 40 Atl. 1054; Foster v. Graham, 166 Mass. 202, 44 N. E. 129; Ford v. Williams, 21 How. 287, 16 L. Ed. 36, and that where a third person, who has entered into a contract with an agent in ignorance of the fact that the agent was not the real principal as he assumed to be, is sued upon the said contract by the undisclosed principal, the third person may avail himself of every defense which existed in his favor against the agent, at the time the principal first demanded fulfillment of the contract (Huntington v. Knox, 7 Cush. [Mass.] 371).

The reason of the rule which permits the principal to bring such cases in his own name is that he is entitled to the ultimate benefit of the contract which was made by his agent, so, in seeking to recover that benefit, he must assume the position of the agent whose contract he is endeavoring to enforce, and the action so instituted by him is open

to those defenses which might have been interposed to the suit if it had been brought by the agent at the time the principal first sought to enforce the contract. Story on Agency, § 340; Mechem on Agency, §§ 769–773.

[4, 5] A person, however, has the right always to choose with whom he shall contract, and another person should not be thrust upon him against his expressed will. Therefore, where a person contracts with another for the personal service of that other, the person so contracting can hold the other party to a strict performance of the services he contracted for, and cannot be forced to accept the services of another in substitution therefor, and, where it is clearly shown, either from the terms of the agreement or the attendant circumstances, that the contract was exclusively with the agent personally, the principal does not become a party thereto, and cannot maintain a suit upon it. Sullivan v. Schailer, supra.

[6] Notwithstanding the elaborate discussion of the subject contained in the very excellent brief filed by counsel for defendants, the court is nevertheless constrained to conclude that the authorities therein cited, when read in the light of the circumstances of this case, can have no application thereto, for the court is convinced that in this matter the pleadings disclose two separate and distinct transactions, to wit: One on the part of the plaintiff concerning the purchase and sale of shares of stock by her agent for her benefit and with her money; and the other, a contract made with Mills, personally, whereby his own services were secured for use in the Mugford Printing & Engraving Company's business, as an employé thereof.

The point of distinction between the present case and those cited by counsel as authorities to support the defendant's claim is that whereas in those cases the courts were called upon to decide as to the allowance of certain equities existing between the parties to the controversy, and which were based wholly upon matters either arising out of the same transaction or so connected with it as to be inseparable from the subject forming the basis of the complaints, or were cases where the matters set up in the counterclaims were purely matters allowable in set-off, while in this case the defendants are attempting to set up matter nothing more than collateral to the transaction forming the basis of plaintiff's claim, without attempting in any way to show her connection therewith. This cannot be allowed.

If this were a case wherein the plaintiff was attempting to recover as an assignee of Mills for unpaid salary, the Mugford Company would be in a position to have applied the doctrine set forth in many of the cases cited by the defendants, and made exceptionally clear in Durant Lumber Co. v. Sinclair Lumber Co, 2 Ga. App. 209, 58 S. E. 485; Withers v Greene, 50 U. S. (9 How.) 213, 13 L. Ed. 109; Monroe & Co. v. Adamo, 136 Ky. 252, 124 S. W. 296. See, also, American Sign Co v. Electric Lens Sign Co. (D. C.) 211 Fed. 196. But as the contract which Mills made with that corporation for his personal services must be considered as a separate and distinct transaction entered into by him for his own benefit, and having no direct connection with the negotiations which he has carried out as plaintiff's agent, for the pur-

chase of stock shares, the circumstances of this case are quite unlike those of the cases mentioned.

It may be that at a trial of the case it will be shown that Mills was in fact the principal in both transactions, and not the principal's agent at all; but any conclusion as to that must be left to the evidence which will be produced at the trial, as the court is not now in a position to decide that question. If it should so appear, then the Mugford Printing & Engraving Company will have its proper remedy; but in no event can the plea of set-off and counterclaim as now before the court be invoked to the benefit of the other defendants.

Keeping in mind the facts of this case, and the Connecticut decisions as to the scope which pleas of set-off and counterclaims are entitled thereunder, and the decision in the case of Adamson v. Shaler, supra, and Terry Steam Turbine Co. v. Sturtevant Co. (D. C.) 204 Fed. 103, it would appear that the motion to strike out defendant's special defense and counterclaim should be granted.

Let an order to that effect therefore be entered.

CONNERS v. BUCKSPORT NAT. BANK.

(District Court, D. Maine. March 16, 1914.)

No. 693.

1. BANKRUPTCY (§ 166*)—PREFERENCES—KNOWLEDGE OF INSOLVENCY.

In a suit by a bankrupt's trustee against a bank to recover an alleged preference, evidence that the bankrupt's checks had been protested prior to March, 1910, and also in October and November, before the mortgages constituting the alleged preferences were executed late in the latter month, was sufficient to put the bank on inquiry as to the bankrupt's solvency.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. § 166.*]

2. BANKRUPTCY (§ 166*)—PREFERENCES—INSOLVENCY—REASONABLE CAUSE TO BELIEVE—EVIDENCE.

Where a bankrupt during 1910 had often overdrawn his bank account, and the bank knew he owned no real estate, and that his crops and animals were largely mortgaged, and in November, prior to the execution of certain mortgages alleged to constitute preferences, the president of the bank ascertained that the bankrupt had forged the names of indorsers to certain of his notes discounted at the bank, such facts were sufficient to give the bank reasonable cause to believe that the bankrupt was insolvent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. § 166.*]

3. CHATTEL MORTGAGES (§ 47*)—VALIDITY—DESCRIPTION.

Where a mortgage described the property as "3,500 bushels of marketable potatoes in the potato storehouse near the B. & A. R. R. Station at Winterport," but pointed out no method of locating the potatoes in the storehouse, it was insufficient to transfer the title to the mortgagee as against subsequent mortgages conveying the same property and bills of sale transferring the mortgagor's equity of redemption.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 87, 88, 96–103; Dec. Dig. § 47.*]

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

In Equity. Suit by Charles P. Conners, trustee in bankruptcy of the estate of John I. Frederick, against the Bucksport National Bank. Judgment for complainant.

Bertram L. Fletcher, of New York City, Lauren M. Sanborn, of Portland, Me., and J. Richard Larkin, of Boston, Mass., for complainant.

Fellows & Fellows, of Bangor, Me., and Frank Fellows, of Portland, Me., for defendant.

HALE, District Judge. This bill in equity seeks to set aside two chattel mortgages dated November 28, 1910, and lawfully recorded November 29, 1910, alleging them to be preferences under the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). The bill also seeks to set aside as preferences the sale of the equity of one of the mortgages dated January 14, 1911, and duly recorded January 19, 1911, and the sale of the equity in the other mortgage, together with other equities dated January 24, 1911, and duly recorded January 28, 1911; all these alleged preferences being given by the bankrupt, John I. Frederick, to the Bucksport National Bank; all these mortgages and sales being dated and recorded within four months prior to the date of the filing of the involuntary petition in bankruptcy against said Frederick, namely, February 6, 1911. The proofs show that on November 28, 1910, the bankrupt gave to the bank the two chattel mortgages in question; one of the mortgages was for the express consideration of $1,500, and purported to convey to the bank "all my personal property situated in the said town of Winterport." It was made to secure "the amounts due said Bucksport bank on notes now held by said bank and deposited to the account of said John I. Frederick, according to the tenor of said notes now deposited at said bank." The second chattel mortgage of the same date was for the express consideration of $4,850, and purported to convey to the bank "ten thousand bushels of potatoes now contained in the potato house situated in said Winterport near the Bangor & Aroostook Railroad station, said potatoes being in bins numbered 1 to 12, inclusive." This mortgage was to secure the sum named "according to the tenor of five certain promissory notes now held by said bank, a more particular description of which is hereby attached and made a part of this instrument." In both these mortgages the bankrupt warranted the property "against the lawful claims and demands of all persons." The proofs show further that on January 14, 1911, the bankrupt made to the bank, for the express consideration of $1 and other valuable considerations, the sale of "twenty-five thousand bushels of potatoes in potato storehouse at Bangor & Aroostook R. R. station in Winterport in bins 1 to 10, inclusive, hereby releasing all interest in mortgage to these grantees, recorded in town clerk records of Winterport, Maine, Book 6, pages 3, 4 & 5, and conveying all other potatoes in said bins whatsoever the source of title." The sale contained the following clause, namely, "I hereby warrant the same to be free from incumbrance." On January 24, 1911 (as the proofs further show), the bankrupt made to the bank, for the ex-

press consideration of $1 and other valuable consideration, a sale of "all the personal property described in mortgage given by me to said Bucksport National Bank, dated November 28, 1910, recorded in records of the town of Winterport, Book 6, pages 1 & 2; also all equity I have in and to other personal property mortgaged by me to these grantees, recorded in said records, Book 4, page 86; also all equity in and to the personal property mortgages to C. W. Conant & Co., which mortgage is recorded in the records of the town of Winterport, Book 5, pages 278, 279 & 280."

The answer admits that on November 28, 1910, the bankrupt was indebted to the bank in the sum of $15,697.54, and on January 14, 1911, in the sum of $17,302.11. The answer denies the insolvency of Frederick at the time of the alleged conveyances; or, if he was insolvent, that the bank knew of his insolvency; or that it had notice sufficient to put an ordinarily prudent man on inquiry as to the bankrupt's solvency. It denies that any property was conveyed by the bankrupt to the bank by the two chattel mortgages, or by the two sales in question. It denies that the two mortgages and two sales were given to secure pre-existing debts; or that they were voidable preferences.

The proofs lead the court to the inquiry whether, under the provisions of section 60b, such proofs entitle the trustee to recover any or all the property alleged to be transferred by the bankrupt, as set forth in the bill in equity on the ground that such alleged transfers constituted voidable preferences. The act defines such preference, so far as is applicable to this case, as: (1) A transfer of property; (2) within four months of the filing of the petition in bankruptcy; (3) by a person who is insolvent; (4) the party to whom the transfer is made shall then have reasonable cause to believe that the enforcement of such transfer would effect a preference, or, in other words, "will enable the creditor, to whom the transfer is made, to obtain a greater percentage of his debt than any other such creditors of the same class."

When these essential elements are found in a transaction between a bankrupt and his creditors, such preference shall be "voidable by the trustee; and he may recover the property, or its value."

1. The proofs leave me in no doubt that, within the meaning of the Bankruptcy Act, the bankrupt was insolvent on November 28, 1910, on January 14, 1911, and on January 24, 1911, the dates of the alleged transfers. Without going into the details of the proofs it is enough to say that they lead me to the clear conclusion that on November 28, 1910, Frederick owed substantially $100,000, and that his assets were of value not exceeding $30,000.

[1] 2. Did the bank know, or by the exercise of reasonable diligence could it have known that the bankrupt was insolvent at the time the mortgages were given to the bank on November 28, 1910, and also at the time of the alleged sales on January 14, 1911, and January 24, 1911?

A sharp contention is made upon this point. It is urged with great earnestness and ability by learned counsel for the bank that complainant has not met the burden of showing that at the time of giving the

mortgages, and of making the sales, the bank knew of the insolvency of the bankrupt, or had any reason to believe he was insolvent. It is urged that, although many of the bankrupt's checks had been protested in October and November, before the mortgages were made late in November, this fact should have very little probative value, inasmuch as, throughout the whole course of dealing with the bank, the bankrupt had been slow in payments and had been accustomed to have his checks protested before payment. The proofs show that many of Frederick's checks had been protested prior to March, 1910, and that this course of dealing was maintained up to the time the mortgages were given. Although the bank for a long time had been accustomed to protest the checks of the bankrupt, it cannot be held that the reasoning of ordinary business men was abandoned by the bank. The protest of checks, however long continued, must be held to put a bank upon inquiry. Pittsburgh Plate Glass Co. v. Edwards, 148 Fed. 377, 78 C. C. A. 191.

[2] It appears also from the proofs that the bank officials knew that during the year 1910 the bankrupt often overdrew his bank account; that he owned no real estate; that he had 160 acres of potatoes planted; that he had mortgaged a large portion of his growing crops; that he owed large sums for fertilizer; that his horses were mortgaged; and that his potato house was mortgaged. The proofs convince me that the familiarity of the bank with the affairs of the bankrupt must be held to charge it with knowledge that, at the time the mortgages were given, the bankrupt owed nearly $100,000, and that his assets must be very much less than that sum. On November 25, 1910, a note for $1,500 held by the bank fell due, the note purporting to be signed by one Grant and his wife, of Winterport; the Grants received notice from the bank on the morning of November 26, 1910; Grant telephoned Gilmore, president of the bank, on Sunday, November 27th. Mr. Gilmore testifies that Mr. Grant told him on that day that he and his wife had never signed the note; and on Monday, November 28th, Mr. Gilmore called on Mr. Grant, and said that the bankrupt had acknowledged the forgery, and given the bank security on potatoes and other things. The knowledge of Gilmore, the president, relating to the bankrupt's situation, must be imputed to the bank. Taken in connection with all other testimony, the fact of the forgery must be held to have constituted reasonable cause to believe that Frederick was insolvent.

The proofs, taken together, leave me in no doubt that on November 28, 1910, on January 14, 1911, and on January 24, 1911, the bank had reasonable cause to believe that the bankrupt was insolvent. It clearly had evidence in its possession sufficient to put it upon inquiry; and due inquiry must have led to the assurance that the bankrupt, at the times alleged, was in a bankrupt condition. McElvain v. Hardesty, 169 Fed. 31, 94 C. C. A. 399; English v. Ross (D. C.) 140 Fed. 630; In re Coder, 152 Fed. 951, 82 C. C. A. 99.

[3] 3. Was there a transfer of property of the bankrupt to the bank by the two mortgages of November 28, 1910, and by the two conveyances of January 14, 1911, and January 24, 1911?

Here the defendant makes a sharp contention. It urges that the property sought to be transferred was already the property of the bank, and was not the property of the bankrupt. The proofs show that on January 31, 1911, the potato house at Winterport was burned, with its contents; that at that time the bank had 28,500 bushels of potatoes in the burned house. It is unnecessary to enter into the details of the proofs upon this point. They are full and convincing as to the amount of the potatoes in the house at the time of the fire. The bank sets up in its answer and claims that, under the proofs, it has shown, that the title to the potatoes in the potato house was not derived from the mortgages and sales alleged in the bill of complaint. It urges that it obtained title to 3,500 bushels of potatoes by virtue of a mortgage from Frederick to the bank on October 3, 1910; and hence it is not accountable for this property to the trustee in bankruptcy. Upon an examination of the mortgage of October 3, 1910, it is found that the description contained in such mortgage is indefinite. The mortgage describes "3,500 bushels of marketable potatoes in the potato storehouse near the B. & A. R. R. station at Winterport." No way is pointed out of locating the potatoes in the potato house; they are not described as being in any particular bins, or in any special location in the house. There is no method of designation by which the potatoes could be identified or could be found. Afterwards, on November 28th, by the mortgage of November 28th, the bankrupt warranted title to the potatoes conveyed in the sale of January 14, 1911; Frederick warranted the potatoes free from incumbrance. The whole proofs, taken together, lead me to the conclusion that the complainant has met the burden of proving that the mortgage of November 28, 1910, and the sale of January 14, 1911, gave the bank a good title to the potatoes in bins 1 to 12, inclusive, in the Winterport potato house notwithstanding the mortgage of October 3, 1910. Thurlow v. Dresser, 98 Me. 161, 56 Atl. 654; Jones on Chattel Mortgages, §§ 55a, 56; Northwestern Bank v. Freeman, 171 U. S. 620, 19 Sup. Ct. 36, 43 L. Ed. 307; Stimpson v. Thomaston Bank, 28 Me. 259.

The bank further alleges in its answer that it obtained title to 10,000 bushels of potatoes from Lewis E. White by virtue of an agreement between White and Frederick dated September 27, 1910, and by virtue of transfers and assignments of this agreement from Frederick and White to the bank. An examination of the proofs leads me to the conclusion that the agreement between White and Frederick was a chattel mortgage under the laws of Maine, and was so regarded by both White and Frederick. Kelley v. Goodwin, 95 Me. 538, 50 Atl. 711; Hill v. Nutter, 82 Me. 199, 19 Atl. 170; R. S. of Maine, c. 113, § 5.

The proofs show that practically all of the White potatoes were in the Winterport storehouse when the instrument was drawn. White says he knew his potatoes were mixed with other potatoes hauled to Frederick. By the terms of the chattel mortgage, Frederick was to procure an insurance upon the potatoes; he had made distinct promises in reference to the amount he should pay White for them. It appears from the testimony of White that Frederick partially paid him for the potatoes; that he paid $500; and after November, 1910, the bank's answer says the bank paid White $4,000 for the White potatoes. The

bank contends that it paid more than the $4,000; but the evidence upon this point is unsatisfactory.

The proofs lead me to the conclusion that Frederick paid one-ninth of the White potatoes, $500, and that the bank paid eight-ninths of the price, or $4,000. As regards the one-ninth of the potatoes delivered by White, into the storehouse, the bank can make no claim that it received title from White. The bank, then, can fairly claim that, by virtue of the payments made by it to White, it acquired title to 8,889 bushels of potatoes. The proofs show that when the bank took the assignments from Frederick and White, dated December 1, 1910, and January 14, 1911, it knew that the White potatoes had been delivered into the Winterport potato house; that the title of the potatoes passed to Frederick by virtue of the recorded mortgage from Frederick to White, and the oral sale from White to Frederick preceding the mortgage. The bank's attorney, Bowden, was looking after its potatoes; he knew that the White potatoes were being mixed with the Frederick potatoes. The proofs show that he had this knowledge as early as October 1st, and must have known it at the time of the assignment December 1, 1910. The bank, therefore, is charged with knowledge of it at that time. Bowden drew the original agreement between Frederick and White on September 27, 1910. These potatoes, which are spoken of as the "White potatoes," were practically all in the potato house at the time of the sale of Frederick's property in Winterport from Frederick to the bank on November 28, 1910. By the mortgage of that date, the bank obtained title to all of the White potatoes subject to White's chattel mortgage of November 27, 1910. By taking an assignment of the mortgage and paying White $4,000, the bank claims to be subrogated to White's rights. Deducting the proportion of the potatoes belonging to White which the bank paid for, namely, 8,889 bushels, from the 28,500 bushels which the bank had at the time of the fire, there remain 19,611 bushels belonging to the bank, by virtue of the two mortgages from Frederick, dated November 28, 1910, and the two sales in January, 1911. It is claimed on behalf of the bank that Bowden transferred to the bank 4,500 bushels of potatoes; hence that the amount covered by the mortgages in question, of November 28, 1910, and of the sales of January, 1911, should be diminished by this amount. Without entering into a discussion of the testimony upon this point, it is sufficient to say that the court is not satisfied with the proofs. The transfer is not claimed in the answer of the bank and is not sustained by the proofs in the case.

The bank claims, too, that it acquired title to certain potatoes in the storehouse by virtue of its mortgage to L. W. Frederick, dated July 25, 1910, and assigned to the bank on the same day. The bank made no contention in its answer that it acquired title to these potatoes under this mortgage. The proofs are unsatisfactory and insufficient to show that the bank acquired title to these potatoes as claimed by it under the Frederick mortgage of July 25, 1910. With reference to certain other claims made by the bank to reduce the amount of property transferred by the mortgages of November 28, 1910, and sales of January, 1911, it is sufficient to say that the proofs do not sustain the contention of the bank. The court finds, then, that, out of the 28,500

bushels of potatoes in the Winterport storehouse at the time of the fire the bank acquired title to 19,611 bushels of potatoes by virtue of the two chattel mortgages of November 28, 1910, and the two sales of January 14, 1911, and January 24, 1911. The court cannot sustain the contention of the learned counsel for the bank that no property in any potatoes passed to the bank from Frederick by virtue of the mortgages or by the sales.

It appears by the testimony that the potatoes were worth in Winterport on November 28, 1910, and on January 14, 1911, 35 to 40 cents per bushel. They were paid for by the insurance companies at the rate of 40 cents per bushel. It is clear that these potatoes were not worth less than 35 cents per bushel; and the court will adopt this price. The 19,611 bushels at 35 cents a bushel amount to $6,863.85.

4. Were the mortgages of November 28, 1910, made within four months prior to the filing of the petition in bankruptcy, or February 6, 1911? And were they given solely to secure pre-existing debts? Were they, then, voidable preferences?

On the face of them, these conveyances were made for the purpose of securing definitely described debts. No question is made but that the mortgages were duly and lawfully recorded within the four months before bankruptcy. Without discussing the proofs in detail, it is enough to say that they are convincing that the conveyances were made to secure pre-existing indebtedness. I have already discussed the transaction with White. I cannot sustain the contention of the defendant with reference to this transaction. The money paid him cannot be treated as part consideration for the conveyances.

5. The proofs leave no doubt that the effect of the two mortgages of November 28, 1910, and the two sales of January 14, 1911, and January 24, 1911 (all of these conveyances having been duly recorded), was to enable the defendant bank to obtain a greater percentage of its debt than other creditors of the same class. The trustee, Conners, testified that no assets whatever have come into his hands; and that he has been unable to discover any. The referee testifies that the general creditors filed claims against the bankrupt estate for $26,946.71; and that one priority creditor filed a claim of the amount of $20.60.

6. I have already found that the value of the property transferred from Frederick to the bank by the two mortgages of November 28, 1910, and the two sales in January, 1911, was $6,863.85.

A decree may be entered for the complainant that both the said mortgages of November 28, 1910, and the two conveyances of January 14, 1911, and January 24, 1911, be set aside and declared void; that the value of the property obtained by the defendant in consequence of the said mortgages and conveyances is decreed to be $6,863.85; and that said sum be paid to the said complainant as damages, together with interest from the filing of the bill of complaint, to wit, May 15, 1912.

The complainant may file a draft decree on or before April 2, 1914.

Defendant may file corrections on or before April 11, 1914.

Decree to be settled April 20, 1914, at 10 o'clock in the forenoon.

The complainant is to recover costs.

PACIFIC IMPROVEMENT CO. v. SCHUBACH-HAMILTON S. S. CO.

(District Court, W. D. Washington, N. D. May 29, 1914.)

No. 4216.

1. SHIPPING (§ 39*)—CHARTERS—CONSTRUCTION.
   The presumption is that a charter party is a contract of affreightment merely, and the contrary must clearly be made to appear before it will be held to constitute a demise.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 141–148; Dec. Dig. § 39.*]

2. SHIPPING (§ 39*)—CHARTER—CONSTRUCTION—INSURANCE—LIABILITY FOR BREACH OF WARRANTY.
   A time charter of a steamship for three voyages between Puget Sound and Alaskan ports, providing that the owner should pay and provision the master and crew, maintain the vessel, and equipment in efficient condition and be responsible for loss or damage to cargo resulting from insufficiency of tackle, but should be exempted from liability for losses from the usual perils of navigation "even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowners," that the master should prosecute his voyage with the utmost dispatch, and which contained no provision for redelivery in good condition, *held* not a demise of the vessel but an affreightment charter, notwithstanding further provisions that the captain should be under the orders and directions of the charterer as regards employment, agency, and other arrangements, and the prosecution of the voyage, and that he should be furnished by the charterer with all requisite instructions and sailing directions; such provisions contemplating only such orders as the charterer might see fit to give in the matter of cargo, fuel, loading and discharging, the ports to be made, etc., leaving the owner responsible for the general navigation of the vessel and for a breach by the master of a warranty in the insurance policy by entering Bering Sea before the date stipulated therein.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 141–148; Dec. Dig. § 39.*]

In Admiralty. Suit by the Pacific Improvement Company against the Schubach-Hamilton Steamship Company. Decree for respondent.

Huffer & Hayden, of Tacoma, Wash., for libelant.

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

CUSHMAN, District Judge. The question in this case is one of liability, as between the owner and charterer, for injuries to the chartered vessel in the ice of Bering Sea, and depends upon the construction of the charter party.

The owner of the steamship San Mateo, by a letter dated February 27, 1909, proposed a charter of that vessel to the respondent, which was accepted. The letter was as follows:

"Gentlemen: Referring to our conversation with your Mr. Schubach, concerning charter of the San Mateo for season 1909, Alaska business:

"As per our verbal understanding, we will charter the San Mateo to your company, under government form, at rate of $250.00 per day.

"This company will install four sets of winches, vertical type 8x10, and 8 new booms, as mentioned in your letter to me of February 26th.

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

"We will forward the vessel to Seattle at once for dockage and necessary work, all of which will be done under supervision of our representative at Seattle, Mr. W. E. Pearce.

"Charter party to begin May 20th to 25th; to consume three trips of not less than 135 days, and not to extend beyond the insurance limit on Alaska business.

"It is understood, that you are to pay in addition to the daily rate mentioned above, the increased insurance demanded on vessels plying between Seattle and Alaska points.

"It is understood that you will nominate a captain, subject to our approval, who will operate the vessel as an employé of the Pacific Improvement Company, and be paid by us. This captain also to be selected jointly with you and Mr. Pearce, our representative of this company at Seattle.

"Further, that you will buy Carbon Hill coal for operating the San Mateo during life of charter party, at prevailing rates."

On May 6th, a charter party was entered into, the material portions of which are:

"That the former party (Pacific Improvement Company) agree to let, and the latter party (Schubach-Hamilton Steamship Company) agree to hire the said steamship San Mateo for three round trips, between Seattle and St. Michael and Nome, Alaska. The hire to commence from the day on which she is delivered to or placed at the disposal of the charterers at Seattle, Washington, on or about May 24, 1909, in such dock or such safe wharf or place (where she may always safely lie afloat), as charterers may direct, she being then ready with clear holds, tight, staunch, strong and every way fitted for the service (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage); to be employed in such lawful trades as charterers or their agents shall direct, as hereinbefore stated, on the following conditions:

"That the owners shall provide and pay for all provisions and wages of the captain, officers, engineers, firemen and crew; shall pay for the insurance on the vessel and consular fees; also for all deck, galley and engine-room stores, bunker coal excepted, and maintain her in a thoroughly efficient state in hull and machinery for the service.

"That the charterers shall provide and pay for all bunker coals, port, light and dock charges, pilotages, agencies, commissions, laborage, Suez and other canal dues when incurred, also all charges appertaining to the cargoes they may put on board.

"That the charterers shall accept and pay for all coal in ship's bunkers upon commencement of hire; and the owners shall on expiry of this charter party pay for all coal then left in the bunkers, at current market prices of the port where the hire begins and ends.

"That the charterers shall pay for the use and hire of the said vessel at and after the rate of two hundred and fifty & $^{no}/_{100}$ ($250.00) dollars, United States gold coin per day, payment to be made in cash in advance monthly, commencing on the day of delivery as aforesaid; hire to continue from the time specified for terminating the charter until her redelivery to owners (unless lost) at Seattle, Washington, on or before October 25, 1909, and to be payable in San Francisco or at owners' option by telegraphic transfer on London at their expense.

"Should the vessel be on a voyage occupying more time than herein stipulated, the rate of hire for such additional period to be in the same proportion as above, and if redelivered with owners' consent, before the expiration of the time stipulated, a corresponding rebate of hire to be allowed.

"In default of punctual and regular payment or payments as herein specified, the owners shall have the right of withdrawing the vessel from the service of the charters, without prejudice to any claim they may otherwise have on the charterers, in pursuance of this charter.

"That the cargo or cargoes shall be laden $^{and}/_{or}$ discharged in any dock, or at any wharf or place that charterers may direct where the vessel can always safely lie afloat.

"That the whole reach, burden, and passenger accommodation, if any (for cattlemen and cabin passengers), of the ship (not being more than she can reasonably stow and carry) shall be at the charterers' disposal, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions and stores. The steamer to give the entire deck space for stock. Ballast tanks to be at the disposal of charterers for conveyance of fresh water, said fresh water to be paid for by the charterers. Steamer not responsible for mortality, nor for stock washed overboard. Charterers to have the privilege of loading any usual lawful deck cargo to be carried at charterers' and/or shippers' risk.

"That the captain shall prosecute his voyage with the utmost dispatch, and under the direction and control of charterers, and shall render all customary assistance with any cranes and/or winches the steamer has, also with her crew and boats (and likewise work the condenser when required), and when in port to work from 7 a. m. to 5 p. m., or during such hours as charterers or their agents may require, charterers paying usual overtime.

"That the captain shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements; and shall sign bills of lading as presented, and at any rate of freight the charterers or their agents may choose, without prejudice to this charter party; and the charterers hereby agree to indemnify the owners from any consequences and liabilities that may arise from the captain signing such bills of lading, or in his otherwise following the charterer's instructions.

"That the owners shall provide all ropes, falls, blocks and slings necessary for handling ordinary cargoes up to three tons weight, also sufficient lanterns for night work. Should ship or cargo be damaged through insufficiency or inefficiency of the steamer's tackle, the loss or damage so occasioned to be assured or paid for by the owners.

"That if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers or engineers, the owners shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments.

"That the steamer shall dock and paint when and where required by charterers, but not more than once in every six months, at owners' expense, time so occupied not to be paid for by charterers.

"That the master shall be furnished, by the charterers, from time to time, with all requisite instructions and sailing directions, and shall obey the same, and shall keep a full and correct log of the voyage or voyages, which are to be patent to charterers or their agents. That the owners shall not be responsible for damage to or claims on cargo, caused by bad stowage, the stevedores being employed by the charterers.

"Average, if any, to be settled according to York-Antwerp Rule, 1890.

"That in the event of loss of time from deficiency of men or store, breakdown of machinery, collision, docking, stranding or other accident, or damage, or by detention by process of any court, government or authority for any cause for which owners are liable preventing the working of the vessel for more than twenty-four consecutive hours, the time lost shall be allowed to the charterers; including first twenty-four hours, and if such detention shall exceed thirty days charterers to have the option of canceling this charter; but should the vessel be driven into port or to anchorage, by stress of weather, or from accident to the cargo, such detention or loss of time shall be at the charterers' expense.

"That should the vessel be lost, the hire is to cease and determine on the day of her loss, and if missing from the date when last heard of, and any hire paid in advance and not earned shall be returned to charterers.

"The ship has liberty to call at any ports in any order, to sail with or without pilots, and to tow and assist vessels in any situation, and to deviate for the purpose of saving life or property.

"The act of God, perils of sea, fire, barratry of the master and crew, enemies, pirates, and thieves, arrests and restraints of princes, rulers and people, collisions, stranding, and other accidents of navigation excepted, even

when occasioned by negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowners.

"Ship or owners not answerable for losses, damage, or personal injuries arising through explosion, bursting of boilers, breakage of shafts or tackle, not arising from negligence of said owners, or any latent defect in the machinery or hull, not resulting from want of ordinary diligence by the owners of the ship, or any of them in supplying such boilers, shafts, tackle, machinery or hull.

"That should any dispute arise between the owners and charterers as to the meaning and intention of this charter party, or as to any act or thing to be done thereunder, the matters in dispute shall be referred to three commercial persons in San Francisco, one to be appointed by each of the parties hereto, and a third by the two so chosen, their decision or that of any two of them shall be final, and, for the purpose of enforcing any award, this agreement may be made a rule of court.

"That the owners shall have a lien upon all cargoes and subfreights for arrears of hire, port charges, or any disbursements, coals, etc., unpaid, and charterers to have a lien on the ship for all moneys paid in advance and not earned.

"That all salvages, derelicts, shall be for owners' and charterers' equal benefit.

"In the event of war, being declared during the currency of this charter, by or against the nation to which the steamer belongs charterers to have the option of canceling this charter and also the option of canceling if steamer is not delivered as above in seaworthy condition on or before May 24, 1909, but hire not to commence before the 22d day of May, 1909.

"The charterers hereby agree to pay the extra insurance on hull and machinery valued at not over one hundred and eighty-five thousand ($185,000) dollars, for the privilege of sailing in Alaskan waters.

"If the ship is not redelivered to owners at Seattle on or before October 25, 1909, the charterers agree to pay the further extra insurance incurred by not being out of Alaskan waters on or before October 15, 1909.

"It is agreed that the charterers will pay at the rate of fifty (50) cents per meal for meals served on board at St. Michael and Nome to men who are not on the ship's articles, and one (1) dollar per day for pursers and freight clerks employed by the charterers.

"It is also agreed that the charterers will purchase Carbon Hill coal, when obtainable, at current market prices, throughout this charter party.

"Penalty for nonperformance of this contract estimated amount of damages."

On May 17th, libelant, from San Francisco, wrote respondent a letter, in part, as follows:

"Gentlemen: The following is copy of a slip that will be attached to our insurance policies, covering trips to Alaska, as per current charter party. Will you kindly note and be governed accordingly.

" 'Pacific Improvement Company.

" 'In consideration of $——— additional premium, at the rate of 2 per cent., permission is hereby granted for the steamer San Mateo to use ports and places in Alaska (excluding inside passages north of Comox) during the season of 1909, but warranted not to proceed north of Unalaska or Dutch Harbor into Bering Sea before June 8th, and to leave ports and places in the Bering Sea on the direct homeward trip not later than October 15, 1909. This slip is attached to and hereby made a part of Policy No. ——— issued to Pacific Improvement Company by Edward B. Haldan Co. Established 1879. Insurance ——— San Francisco, April 7, 1909.———.'

" * * * The San Mateo expects to sail this afternoon with a small cargo that can be discharged quickly, and I have no doubt that the steamer will be at your disposal, as requested; that is, May 24th, 7 a. m. We trust that you will be pleased with the recent improvements made on the steamer and that the coming voyages will be successful."

The charterer scheduled and advertised the San Mateo to sale from Seattle May 29th for Nome and St. Michael. She was turned over to the charterer at Seattle May 24th. The charterer instructed the captain to proceed with her to Tacoma to take fuel. Under like instructions, she was moved from dock to dock in taking cargo. The charterer also gave the master loading instructions and cautioned him—

"to use every precaution against accident in the operation of your vessel and discharge of her cargo. You should be duly careful in examining all winches, gear, tackles, falls, slings, and other apparatus used in the discharge, so that in the event of accident claim cannot be made against us for furnishing insufficient material.

"If any of the winchmen or others in position to negligently injure any of the men show any incompetency or disposition to be careless, do not hesitate to supplant them with proper men."

The master of the vessel testified:

"About 5 o'clock on May 30th, Sunday morning, on May 28th or 29th, I am not just quite sure of the date, I said to Mr. Dawson, 'I presume you will have some sailing instructions for me, Mr. Dawson, before I sail?' 'Oh,' he said, 'Captain, there is no use of my wasting my time and taking up your time, you know what to do just as well as I do; when the ship is loaded you go ahead and do the best you can, and get her up there as soon as you can, and take care of your ship, and take care of your crew."

The owner furnished the master with a copy of the charter party. It does not appear that the captain was advised by any one concerning the warranty in the insurance policies, not to proceed north of Unalaska or Dutch Harbor into Bering Sea before June 8th.

The owner placed the insurance. The charterer paid for it. The warranty clause in the policies was customary in insurance for Alaskan waters. Nothing unusual is shown in the time consumed in loading. The ship's former master was retained.

The San Mateo finally sailed from Seattle at 5 o'clock on the morning of May 30th, made ordinary time to Unimak Pass, and entered Bering Sea June 6th, proceeding north of Unalaska and Dutch Harbor before June 8th, and on June 9th got into the ice and was damaged. The insurance company refused to pay the damage on account of the breach of the warranty above set out. Libelant seeks to recover the amount of the damage—which is not disputed—from respondent.

The grounds of respondent's alleged liability are set forth as follows in the libel:

"That respondents, in breach of their contract as contained in said charter party, well knowing that said vessel was not privileged to enter Alaskan waters until the 8th day of June, 1909, by the express condition of the policies of insurance upon her hull and machinery, and the respondent having no right to navigate said vessel in Alaskan waters without insurance covering said vessel, and knowing that said vessel was not covered by insurance on the 6th day of June, 1909, or before the 8th day of June, 1909, wrongfully caused said vessel to be navigated in Alaskan waters, to wit, Bering Sea, before the respondents were privileged so to do under said charter party, and said insurance policies written in pursuance thereof; and the said vessel was damaged by reason of the wrongful, careless, and negligent acts of the respondents, as aforesaid, to the extent of $13,571.82; and that said damage was not due to the ordinary and reasonable navigation, use, and wear and tear upon said vessel."

Libelant's position is that, by the terms of the charter party, the charterer took the whole vessel into its possession and under its sole direction and control in all things, including navigation of the vessel, and that the master of the vessel was, on the voyage, the servant and agent of the charterer, under its sole direction and control.

Libelant relies upon the following authorities: Carver's Carriage by Sea (3d Ed.) p. 140; Newberry v. Colvin (Eng.) 7 Bing. 190; Hills v. Leeds (D. C.) 149 Fed. 878; American Steel-Barge Co. v. Cargo of Coal (D. C.) 107 Fed. 964; The Del Norte (D. C.) 111 Fed. 542; The India (D. C.) 14 Fed. 476; The Bombay (D. C.) 38 Fed. 512; The Endsleigh (D. C.) 124 Fed. 858; Auten v. Bennett, 183 N. Y. 496, 76 N. E. 609, 5 Ann. Cas. 620; Golcar S. S. Co. v. Tweedie Trad. Co. (D. C.) 146 Fed. 563; McCormick v. Shippy (D. C.) 119 Fed. 226; Waterhouse v. Rock Island Alaska Min. Co., 97 Fed. 477.

Respondent relies on the following authorities: Stevens on Charter Parties, p. 45; Zabriskie v. New York (D. C.) 160 Fed. 236; The Santona (D. C.) 152 Fed. 516, 518, affirmed 169 Fed. 275, 94 C. C. A. 551; The Hathor (D. C.) 167 Fed. 194; The Leader (D. C.) 166 Fed. 139; Dunlop S. S. Co. v. Tweedie Trad. Co., 178 Fed. 673, 102 C. C. A. 173; The Volund, 181 Fed. 643, 104 C. C. A. 373; Luckenbach v. Insular Line, 186 Fed. 327, 108 C. C. A. 405.

A correct decision depends upon whether, under the terms of the charter party, there was a demise of the ship to respondent, with full right of control and navigation, with corresponding responsibility, or whether the charter party was a contract of affreightment, leaving the control of the ship, so far as its navigation was concerned, with libelant.

[1] The presumption is that the contract was one of affreightment, merely, and the contrary must clearly be made to appear before it will be held to constitute a demise. Reed v. U. S., 11 Wall. 591, 601, 20 L. Ed. 220; 36 Cyc. 68.

"Where the provisions of the charter are inharmonious, the general intent, as evidenced by its written portions and its evident leading purpose, should control the minor provisions, and parol evidence is admissible to explain the written contract by applying it to the subject of it, the common-law doctrine of bailment and common carriers being applicable." 36 Cyc. 64.

[2] The charter party provides:

"That the captain shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements; and shall sign bills of lading as presented, and at any rate of freight the charterers or their agents may choose, without prejudice to this charter party; and the charterers hereby agree to indemnify the owners from any consequences and liabilities that may arise from the captain signing such bills of lading, or in his otherwise following the charterer's instructions.

"That the captain shall prosecute his voyage with the utmost dispatch and under the direction and control of charterers. * * *

"That the master shall be furnished, by the charterers, from time to time, with all requisite instructions and sailing directions, and shall obey the same. * * *"

If these provisions stood alone, it might plausibly be contended that full possession and control had passed to the charterer. Yet even that contention would be weakened by an analysis of the foregoing. If full

control was intended to be given, there would be no need to particularize the granted powers, as is done, concerning "employment, agency, and other arrangements" and in signing "bills of lading" and furnishing "requisite" instructions and sailing directions.

This being a time charter, at the agreed price of $250 per day, the provison "that the captain shall prosecute his voyage with the utmost dispatch" would have no place in it if a demise were intended, for the obvious purpose of this provision is to bind the owner to celerity in the carriage that he has undertaken under the contract.

These provisions, so far as orders, directions, instructions, and control upon the part of the charterer are concerned, contemplate such orders as the charterer sees fit to give in the matter of cargo, fuel, loading, unloading, the time of departure from ports, the ports to be made, the order in which made, the wharves, or means to be used in loading or unloading, and similar directions concerning the voyage, and were, evidently, the only ones in contemplation.

That the contract was one of affreightment only is further shown by other provisions of the charter party. It provides that the owner shall pay the officers and crew. This, while not absolutely controlling, is persuasive. It also provides that the owner "shall * * * maintain her (the ship) in a thoroughly efficient state in hull and machinery for the service." It would be impossible for the owner to do this were it not in possession and general control.

That this was not merely a formal undertaking on the part of the owner is shown by the provisions subjecting it to liability for damage in case of not keeping the equipment efficient; the provision to that effect being:

"Should the ship or cargo be damaged through insufficiency or inefficiency of the steamer's tackle, the loss or damage so occasioned to be assured or paid for by the owners."

The provision that docking the vessel and painting be done at the owner's expense—the time occupied not to be paid for by charterer, but charterer to determine when and where it be done—is evidently a limitation, in certain particulars, upon the owner's duty and right in maintaining the ship's efficiency, as provided by the foregoing clause.

In the provisions of the charter party, exempting the owner from the usual perils of navigation, the master is designated as the servant of the shipowner. The provision is as follows; the italics being those of the court:

"The act of God, perils of sea, fire, barratry of the master and crew, enemies, pirates and thieves, arrests and restraints of princes, rulers and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by negligence, default or error in judgment of the *pilot, master, mariners or other servants of the shipowners.*"

There is no provision in the charter party by which the charterer undertakes to deliver the vessel, on the expiration of the charter party, in as good condition as when received, usual use, wear, and tear excepted. The undertaking of the charterer was "to pay the extra insurance * * * for the privilege of sailing in Alaskan waters." It was not an undertaking to provide and pay for such insurance.

There are many minor provisions in the charter party that argue for

the same construction as that here given; but, as they are not wholly inconsistent with a demise of the vessel, which the foregoing are held to be, for brevity's sake, they will not be dwelt upon.

The charter party in the case of the Del Norte (D. C.) 111 Fed. 542, decision by Judge Hanford, affirmed by the Court of Appeals for this circuit (119 Fed. 118, 55 C. C. A. 220), differed in several important particulars from that in the present case. In that charter party, the owners were to protect the ship against liens for debts contracted prior to the date of the delivery to the charterer. It provided that, upon failure of the charterer to pay the rent for the vessel, as required, "the owners may retake possession of the vessel," and on "his (the owner's request, the master would hold possession of the ship as his representative." The provision of the charter party in the present case is:

"In default of punctual and regular payment or payments as herein specified, the owners shall have the right of withdrawing the vessel from the service of the charterers. * * *"

In the Del Norte Case the charterer was to "have full charge of the vessel during the continuance of the charter party; to pay all expenses of the vessel, including wages of officers and crew." They "to be in all respects under the order and direction of the charterer."

The charter party in that case contained a provision—already mentioned as wanting in the one now before the court—obligating the charterer to redeliver the vessel to the owner, subject only to the exceptions of reasonable wear and tear; damages from collisions, etc. That charter party further provided that the charterer should protect the vessel from being libeled for any matter or thing subsequent to his receiving possession by virtue of the charter party. There were also other provisions in the Del Norte charter party manifesting that a demise of the vessel was intended, which are wholly wanting in the present case.

Decree will be for respondent.

JESSE L. LASKY FEATURE PLAY CO., Inc., v. CELEBRATED PLAYERS' FILM CO.

(District Court, S. D. New York. May 19, 1914.)

1. CONTRACTS (§ 350*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action involving a contract for the exclusive privilege of exhibiting certain moving picture films in certain states, which provided that, if such films were not passed by municipal authorities because of objectionable scenes which might be eliminated without materially injuring the production, the lessee should be required to accept them, evidence *held* to show that the "cut-outs" ordered by municipal authorities materially injured the production.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1819–1823; Dec. Dig. § 350.*]

2. CONTRACTS (§ 299*)—BREACH—DELAY IN ACCEPTANCE.

A contract, granting the exclusive privilege of exhibiting a series of moving picture films in certain states, provided that, if any of the films

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

were not passed by the Chicago municipal authorities because of objectionable scenes which might be eliminated without material injury, the lessee should be required to accept them and might elect to accept them, notwithstanding the refusal of such authorities to license the exhibition thereof, but that if the authorities should refuse to permit the exhibition, and the lessee should refuse to accept the film, the lessor might sell to other parties. On April 14th, the Chicago authorities ordered certain "cut-outs" from one of such films, and on April 15th a set of the films with a memorandum of the "cut-out" requirements were delivered to the licensee, who, believing in good faith that the eliminations would materially injure the production, took the matter up with the deputy superintendent of police and was informed that a further investigation would be made. On April 17th, the licensor wired its attorneys in Chicago to see that the licensee accepted the films the following day at the latest, and on April 20th it granted rights to produce the films to another party. *Held*, that the facts showed a breach of the contract by the licensor, and not by the licensee, who apparently did everything to keep the contract in force that reasonable conduct would require.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1372–1381, 1394, 1395; Dec. Dig. § 299.*]

3. INJUNCTION (§ 59*)—BREACH OF CONTRACT—EQUITABLE RELIEF.

Where a manufacturer of moving picture films, which had granted an exclusive right to exhibit such films in certain territory, broke the contract by granting a right to exhibit the films to another party, the licensee had no adequate remedy at law and was entitled to equitable relief.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 114–116, 128; Dec. Dig. § 59.*]

In Equity. Suit by the Jesse L. Lasky Feature Play Company, Incorporated, against the Celebrated Players' Film Company. On motion by each party for an injunction. Defendant's motion granted.

Wise & Lichtenstein, of New York City (Arthur S. Friend, of New York City, of counsel), for plaintiff.

Nathan Burkan, of New York City, for defendant.

MAYER, District Judge. Plaintiff is a manufacturer, importer, and dealer in films of moving pictures, including motion pictures founded on well-known dramas and novels.

[1, 2] On January 23, 1914, plaintiff entered into a written agreement with the defendant wherein it was recited that plaintiff planned to produce, import, and deal in a series for the year beginning March 1, 1914, consisting of ten films more or less, which films would be known as "The 1914 Special Service of the Jesse L. Lasky Play Co., Inc.," and whereby it was agreed that plaintiff let or licensed to defendant the sole and exclusive privilege of exhibiting the films of this 1914 Service in the states of Illinois, Wisconsin, and Indiana. The Service was to include "The Squaw Man" with Dustin Farnum and "Brewster's Millions" with Edward Abeles in the respective leading roles. Defendant agreed to pay $5,700 for each production, in cash, on the delivery by plaintiff to defendant in the city of Chicago of three sets of positive prints of each of the film productions. It was further provided:

"That if any of said films are not passed by such municipal authorities because of objectionable scene or scenes, and such scene or scenes may be elim-

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

inated or modified without materially injuring said production, then the lessee shall be required to accept the same. If, notwithstanding, the refusal of the municipal authorities of the city of Chicago to license the exhibition of any such production the lessee elects, nevertheless, to receive and accept the same, than it shall pay for such production the amount herein above agreed in such manner as though the production of such film had been licensed by such municipal authority. Provided, further, that if said municipal authority shall refuse to permit the exhibition of such production in the city of Chicago and the lessee refuses to accept the same, then as to such production so rejected by the municipal authority the lessor shall have the right to sell the said production for exhibition in said granted territory to any other person that it may elect, without affecting, however, the respective rights and obligations of the parties hereto in reference to any other production covered by this contract."

The first photo play film duly delivered to defendant was "The Squaw Man," and the purchase price of $5,700 was duly paid therefor. The difference between the parties arose at the time of the receipt at Chicago of the second of the series, which was "Brewster's Millions." Three sets of positive prints of this photo play each containing five reels were received at Chicago on April 13, 1914, by Messrs. Hirsch & Schwartz, the Chicago attorneys of plaintiff. On the following day these attorneys took one of the prints to the office of Maj. Funkhouser, second deputy superintendent of police of the city of Chicago, who is the official who has charge and supervision of the censoring of motion pictures and the issuance of permits allowing their exhibition. The business of exhibiting motion pictures in the city of Chicago is very extensive, often requiring the inspection of many reels each day, so that it is impossible for any single individual to inspect all of such proposed pictures. The result is that the mayor of Chicago, pursuant to authority duly conferred upon him, has appointed assistants to the general superintendent of police who are colloquially known as "censors." The censors witness the screen examination of the film productions and submit to Maj. Funkhouser their report with their recommendations. This board of censors examined the positive prints of "Brewster's Millions" in executive session on April 14, 1914, and one of its members handed to the Chicago attorneys a memorandum of so-called "cut-outs" upon the making of which the board would recommend the issuance of a permit.

By "cut-outs" is meant that part or parts of the play required to be eliminated before its production would be permitted in the city of Chicago.

That afternoon Mr. Hirsch got into telephone communication with Mr. Hartmann, also a Chicago attorney and an officer of the defendant. Mr. Hartmann told Mr. Hirsch that the defendant desired to "run off" (meaning thereby to examine) the pictures and would do so on the following afternoon. The next afternoon (April 15th), Mr. Hirsch delivered to some one in charge of the office of the defendant one set of the "Brewster's Millions" films together with a memorandum of the so-called "cut-out" requirements. These "cut-outs" were of certain scenes in three of the reels and involved four incidents.

On April 17th, Messrs. Hirsch & Schwartz received a telegram from their client, the plaintiff, inquiring as to delay of acceptance. To this the Chicago attorneys replied that defendant was trying to have the

"cut-outs" diminished and desired a "couple" of days. The same day plaintiff telegraphed Messrs. Hirsch & Schwartz to see that defendant accepted the reels the following day at the latest. This was succeeded on April 18th by a telegram from plaintiff to their Chicago attorneys that defendant must accept and pay for the picture that day or that the Chicago attorneys must return the picture to New York immediately.

The affidavits are convincing that defendant was anxious to have this play of "Brewster's Millions," and did everything that fair dealing business men would be expected to do, and made every reasonable effort to urge that the play be permitted without the eliminations required by the Chicago officials. Maj. Funkhouser stated (in his affidavit verified April 29, 1914) that on April 16, 1914, Mr. Hartmann, representing defendant, discussed with him the subject-matter of the picture and objected to the "cut-outs," and that thereupon he (Funkhouser) did not indicate or advise Hartmann that the recommendations of the censors in reference to the "cut-outs" were a final determination, but, on the contrary, that he then and there stated to Hartmann that he would make a further investigation of "Brewster's Millions" and confer with the corporation counsel in reference thereto, and would then advise Hartmann as to his conclusion. Hartmann's point was, when the censored scenes were considered with the context of the play, that it would be manifest that neither the purpose nor the representation was evil, but both were consistent with the farcical theme and character of the play.

On April 20th, however, the plaintiff company entered into a contract with Famous Players' Film Service, Inc., a competitor of defendant, for the production of this same play of "Brewster's Millions" in the same states of Illinois, Indiana, and Wisconsin. This contract of April 20th, according to the affidavits presented on behalf of defendant, was the result of negotiations that were opened upon the morning of April 20th; the Famous Players' Service having already a contract with plaintiff for Pennsylvania. The affidavits of the treasurer of that company and of Lasky, president of plaintiff, state that the Famous Service agreed to pay and did pay $5,700 for "Brewster's Millions" for Illinois, Indiana, and Wisconsin.

The contract between plaintiff and the Famous Players' Service clearly indicates that plaintiff had a grave doubt as to what the courts might say as to the alleged breach by the defendant herein of its contract with the plaintiff. The contract is further informing because it discloses that plaintiff and the Famous Players' Service had already a contract covering considerable additional territory. Further, the contract clearly apprised the Famous Players' Service that there was a question as to plaintiff's right to enter into the contract covering "Brewster's Millions."

I have no doubt that defendant company honestly believed that these eliminations materially injured the production. With the correctness or propriety of the decision of the Chicago officials this court has no concern.

What shall or shall not be permitted in the city of Chicago is a matter to be regulated by its own citizens under such ordinances or official

supervision as the people of the city of Chicago may determine. When therefore I refer to the question of "material injury," I am speaking solely from the play production standpoint as the same is disclosed in the papers and as may be ascertained from an actual witnessing of the play.

This play of "Brewster's Millions" is founded on the book of the same name by George Barr McCutcheon, a well-known novelist. The play is intended to afford amusement. Brewster, the paternal grandfather of "Monty" Brewster, bequeaths a million dollars to "Monty." An uncle dies leaving "Monty" $7,000,000 contingent upon his getting rid, within a year, of the $1,000,000 left by Grandfather Brewster. The play is largely taken up with "Monty's" attempts to spend the $1,000,000 and his uniform luck, so that he cannot succeed in spending his money. One of the basic points is to constantly create laughter by the queer adventures of Brewster, the central figure, and three of the eliminated scenes are manifestly intended for that purpose. An abduction scene is part of an incident obviously intended to introduce a little heroism into the situation, while the other three scenes were meant to carry out the farcical incidents which run throughout the production.

As requested by counsel, I saw the play as produced at a theater in New York City without the eliminations recommended by the Chicago censors. I can readily understand the point of view which required the "cut-out" of part of the prize fight and of the scene at Monte Carlo. The so-called "hold-up" scene, however, was treated by the audience as amusing and elicited laughter, and the scene on the yacht was, as it seemed to me from a play production standpoint, necessary to the incident or adventure of which it was a part.

I gather from the affidavit of Maj. Funkhouser that he is a fair-minded official, and that he would have taken under consideration the application for a modification of the recommendation of the censors in order to arrive at a decision, which would be just to the producer on the one hand, and consistent with the policy of the city of Chicago on the other. But, as has already been indicated, plaintiff was in too much of a hurry to allow any reasonable opportunity for further consideration by the Chicago officials.

From the play production standpoint there may be some fair difference of opinion as to the elimination of the prize fight and Monte Carlo scenes; but the so-called "hold-up" scene is a part of the incident revolving around the man Coolan, and the "gagging" scene is preliminary and essential to the rescue of "Peggy," which is intended to be an exciting affair.

Interpreting the contract between the parties as it was meant by them to be construed, at least these two "cut-outs" resulted in a material injury to the production.

Two affidavits (Sherry and Steele) offered by the plaintiff are interesting on this point. William L. Sherry, who is the executive head of a film company, acquired from plaintiff the license to exhibit "Brewster's Millions" in the state of New York. His affidavit is in some respects illuminating. He says of one "cut-out" that "it is of no great

value." He speaks of another as "amusing," but that "no great harm is done" by its elimination. Of a third, he states that "the elimination * * * does not greatly injure the picture." He says that "cutting out" the abduction scene does not "injure the picture to any material extent."

It will be noted that, in effect, he states that three out of four "cut-outs" will result in some injury, and he falls just short of saying that the abduction scene results in material injury.

It was interesting to me to observe in the lobby of the theater to which the Sherry Company (according to the imprint) had licensed the play, that there was prominently displayed a photograph of one of the "cut-out" scenes.

If Mr. Sherry's judgment is sound, the best way to demonstrate the fact is for Mr. Sherry henceforth to eliminate these scenes from the productions over which he has control in the state of New York, and if, when the time comes for final hearing, he shall have eliminated these scenes, that fact may be of some persuasive value.

Mr. Steele of the Famous Players' Company may perhaps fortify the plaintiff's case at final hearing, if outside of the city of Chicago he will also eliminate the scenes objected to by the Chicago censors.

What men do is always much more indicative of their purpose than what they say, and I am satisfied, on the papers before me, that plaintiff considered these scenes as desirable and important from the motion picture point of view, and this is well illustrated by the advertising matter of plaintiff.

Without analyzing the affidavits further in detail, I may say that it seems to me that plaintiff was only too anxious to get matters into a situation where a breach of contract might be forced, and that defendant was anxious to have the contract kept in force, and did everything to that end that reasonable conduct would require. It is the plaintiff and not the defendant which has breached the contract.

[3] It is urged that defendant has an adequate remedy at law, but I cannot agree with this contention. I think the case is properly on the equity side as to the counter controversies, and that equitable relief is the only relief which will fully protect defendant.

Plaintiff insists that an injunction as to "Brewster's Millions" will be of no practical service. If plaintiff is correct, then an injunction will not do any harm.

The motion of plaintiff for an injunction against defendant as to "The Squaw Man" is denied. The motion of defendant for an injunction against plaintiff is in all respects granted; but, so far as affects "Brewster's Millions," the injunction may be suspended on the giving of a bond.

One of the reasons for suspending the injunction is that the order to be made herein cannot be reviewed until the fall. The amount of the bond will be considered on the settlement of the order.

In order, however, that plaintiff may have a trial promptly, the case will be preferred on the equity calendar and set down for the first Monday of October, 1914.

Settle order on two days' notice.

In re LARKEY et al.

In re KONNER et al.

(District Court, D. New Jersey. May 27, 1914.)

1. BANKRUPTCY (§ 11*)—JURISDICTION OF COURT—CONTROVERSY OVER LEASE.
Pending a hearing on an involuntary petition in bankruptcy, and after the appointment of receivers, lessors of the alleged bankrupts filed a petition for recovery of the leased premises on the ground of breach of covenants in the lease. The alleged bankrupts had previously subleased the premises, with the lessors' consent, by a separate instrument for the remainder of the term. *Held* that, as the title to the leasehold was in the alleged bankrupts who were still liable on the lease, the subtenants merely claiming through them, their rights under the lease were the subject-matter of the proceeding, and it was within the jurisdiction of the court of bankruptcy.

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

2. BANKRUPTCY (§ 11*)—JURISDICTION OF COURT—CONTROVERSY OVER LEASE.
The court, having acquired jurisdiction on such petition of the subject-matter and of the parties, had power, as a court of equity, and was under the duty to determine the rights of all parties, even though the receivers made no claim, and before the hearing a composition had been confirmed.

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

3. LANDLORD AND TENANT (§ 37*)—CONSTRUCTION OF LEASE—PROVISION FOR FORFEITURE.
A provision for a forfeiture in a lease will be construed strictly in favor of the tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 98; Dec. Dig. § 37.*]

4. LANDLORD AND TENANT (§ 34*)—CONSTRUCTION OF LEASE—PROVISION FOR FORFEITURE.
A provision of a lease making it subject to forfeiture by the lessor, "if proceedings in bankruptcy shall be instituted by or against the lessees, * * * whereupon the said demised premises shall be taken or attempted to be taken, or if a receiver or trustee shall be appointed of the lessees' property," does not render the lease forfeitable because of the mere filing of a petition in bankruptcy against the lessees, nor because of the appointment of a receiver as custodian pending a hearing on the petition, where no attempt has been made to take or interfere with the demised premises which are in the possession of a subtenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 97; Dec. Dig. § 34.*]

5. BANKRUPTCY (§ 11*)—COURT OF BANKRUPTCY—EQUITABLE JURISDICTION.
Where a court of bankruptcy has acquired jurisdiction to determine the right of a lessor to a forfeiture under the terms of the lease, it will proceed on equitable principles and will refuse to enforce a forfeiture, if inequitable, even though, as strict matter of law, the lessor may be entitled to it.

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

In Bankruptcy. In the matter of Aaron Larkey and others, trading as Larkey Bros., alleged bankrupts. On application of Jacob

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

Konner and Gustav Mikola to have the receiver, the alleged bankrupts, and a subtenant surrender certain leased premises. Petition denied.

Bilder & Bilder, of Newark, N. J., for petitioners.

Charles B. Dunn, of Paterson, N. J., and Aaron V. Dawes, of Heightstown, N. J., for respondent Feinstein.

HAIGHT, District Judge. This matter is before the court on an intervening petition filed in the bankruptcy proceedings. The petitioners, Jacob Konner and Gustav Mikola, pray that certain premises, belonging to them and leased to the alleged bankrupts, be ordered surrendered, because of alleged breaches of a covenant in the lease. The original lease, which is dated the 9th of August, 1911, contains the following provision:

"That if the lessees shall at any time during the term hereby demised become insolvent, or if proceedings in bankruptcy shall be instituted by or against the lessees, or if the lessees shall compound the lessees' debts or assign over the lessees' estate or effects for payment thereof, or if any execution or attachment shall issue against the lessees, or any of the lessees or any of the lessees' effects whatsoever, whereupon the said demised premises shall be taken or attempted to be taken, or if a receiver or trustee shall be appointed of the lessees' property or if this lease shall, by operation of law, devolve upon or pass to any person or persons other than the said lessees, then, and in each of said cases, it shall and may be lawful for the lessors at the lessors' election, into and upon the said demised premises or property, or any part thereof, in the name of the whole, to enter and the same to have, hold, possess and enjoy, as of the lessors' former estate discharged from these presents and the demise intended to be hereby made as aforesaid, anything herein contained to the contrary thereof in any wise notwithstanding."

Subsequently, by an instrument dated the 20th of August, 1912, the landlords consented that the lessees might sublet the premises "subject to all of the covenants and provisions of the said lease" (the original lease). Thereupon the lessees (the alleged bankrupts), by an instrument dated the 21st day of August, 1912, sublet the premises for the balance of the term of the original lease to the respondent, Samuel Feinstein, who shortly thereafter entered, and has since continued in possession of the same. The sublease contained the same provisions as the original lease, and the same rent was reserved. It is entirely clear from the evidence that the landlords knew, before they consented to the sublease, who the subtenant was to be, and that they approved of him and of the purpose for which he was to use the premises. On the 20th of December, 1913, an involuntary petition in bankruptcy was filed against the original lessees, and a receiver was appointed. Almost immediately thereafter the landlords filed the petition, upon which these proceedings are based. In it they expressed their election to reenter the premises because of two alleged breaches of the covenant. They pray:

"That an order may be made authorizing and directing the said ———, as receiver in bankruptcy of the said bankrupts, and the said alleged bankrupts, and the said Samuel Feinstein, trading as the Hudson Cloak & Suit Store, to surrender up the demised premises."

Upon the filing of the petition, an order to show cause why the prayer of the petition should not be granted was made. Upon the return of this order, the subtenant and the alleged bankrupts appeared, by counsel, in opposition. The receiver did not appear. Subsequent to the return of the order to show cause and the taking of proofs, the bankrupts offered a compositoin, which was confirmed.

[1] There was never an adjudication, and consequently no trustee was appointed. At the time of the argument, I was in doubt as to the jurisdiction of this court, as a court of bankruptcy, over the subject-matter of the litigation, as the whole controversy was between the landlords and the sublessee; the receiver asserting no right or claim to the leased premises. Both parties have consented and requested that the court take jurisdiction, but this would not be sufficient if the court did not in fact have jurisdiction of the subject-matter. I have concluded that the court had such jurisdiction at the time this proceeding was instituted. The leasehold estate, which is the subject-matter of this proceeding, was the property of the alleged bankrupts. The rights of the subtenant were dependent upon those of the original lessees, unless there was some equity between the subtenants and the landlords which gave the former superior rights. Although the alleged bankrupts had sublet the premises for the balance of their term, still they had the possibility of a reverter upon the breach of any of the conditions of the sublease, and they were obligated to the landlords on the original lease and to the subtenant on the sublease. The title to the leasehold was in them. It had not been assigned, and there was no adverse claimant to the title; the sublessees merely claiming, through the alleged bankrupts, a right to possession by virtue of the sublease. The proceeding must be viewed initially as one to determine the interest and rights of the alleged bankrupts in the leasehold, which had become subject to the jurisdiction of the Bankruptcy Court as property of the bankrupt. This court, as a court of bankruptcy, therefore, had jurisdiction of the subject-matter of the litigation. Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157; Gazlay v. Williams, 210 U. S. 41, 28 Sup. Ct. 687, 52 L. Ed. 950.

[2] The fact that the receiver did not assert any claim to the leasehold does not oust the court of jurisdiction, if the alleged bankrupts did in fact have an interest. As above shown, they did have such an interest. All of the bankrupts' property, title to which is not held adversely by a third person, is, upon the filing of the petition in bankruptcy, placed in custodia legis (Cameron v. U. S., 231 U. S. 710, 34 Sup. Ct. 244, 58 L. Ed. 448), and jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of the rights therein (Whitney v. Wenman, supra). In the latter case it was held that the voluntary surrender of certain property, which was the subject-matter of the suit, by the receiver, did not defeat the jurisdiction of the bankruptcy court; Mr. Justice Day remarking:

"The court had possession of the property and jurisdiction to hear and determine the interests of those claiming a lien therein or ownership thereof"

The court having acquired jurisdiction of the subject-matter and of the parties, and this being a proceeding in equity, the power is conferred and duty imposed upon the court to consider and determine the rights and claims of all the parties to the subject-matter of the litigation, even though it were determined that the bankrupts' estate had no further interest in the leasehold. In re Blake, 150 Fed. 279, 80 C. C. A. 167. Nor did the confirmation of the composition terminate the court's jurisdiction to determine this controversy. In re J. C. Winship Co., 120 Fed. 93, 56 C. C. A. 45 (C. C. A. 7th Ct.); In re Cadenas & Coe (D. C. S. D. N. Y.) 178 Fed. 158; United States v. Sondheim (D. C. Mass.) 188 Fed. 378.

The case, therefore, may be considered on the merits. Two breaches of the covenant in question are alleged, by virtue of either of which, it is urged, the leasehold has, upon the election of the landlords, become forfeited, namely: (1) That proceedings in bankruptcy have been instituted against the lessees; and (2) that a receiver has been appointed.

[3] Forfeitures are not favored either at law or in equity (MacKensie v. Trustee, 67 N. J. Eq. 652, 61 Atl. 1027, 3 L. R. A. [N. S.] 227), and a provision for a forfeiture will be construed strictly in favor of the tenant (Tiffany on Landlord & Tenant, § 194, p. 1393, and cases there cited).

[4] As I construe the covenant, having in mind the above-stated principles, there has not been a breach in either of these respects which has worked a forfeiture. The mere instituting of proceedings in bankruptcy is not a ground for forfeiture, but is only when, by virtue of such proceedings, the "demised premises shall be taken or attempted to be taken" that a right of re-entry is given. The words "whereupon the demised premises shall be taken or attempted to be taken" relate to and qualify the words "if proceedings in bankruptcy shall be instituted by or against the lessee." This is the grammatical as well as the reasonable construction. The manifest purpose of the covenant was to prevent the leasehold from passing to any other person than the lessees and to thereby avoid the possibility of an undesirable tenant being forced on the lessors. Strength is given to this construction when it is considered that a covenant against subletting or assigning or prohibiting a sale under execution or other legal process is not broken where the leasehold has passed from a bankrupt to the trustee by operation of law, nor even where there is a sale by the trustee of the bankrupt's interest. Gazlay v. Williams, 210 U. S. 41, 28 Sup. Ct. 687, 52 L. Ed. 950. It was to obviate such a condition that I think the covenant in question was inserted. There was a further covenant in the lease against subletting and assigning, and provision for re-entry upon nonpayment of rent. The mere institution of the bankruptcy proceedings would not affect the lessors, unless the result was to take the leasehold estate from the lessees, any more than would the issuing of an attachment or an execution. It is perfectly clear that the issuing of an execution or an attachment against the lessees would not be ground for a forfeiture unless the "demised premises shall be taken or attempted to be taken." No attempt has been made in this case, by virtue of the bankruptcy proceedings or otherwise, to take the demised premises."

The further provision of the covenant "if a receiver shall be appointed," I think, must be construed to mean a person upon whom title to the leasehold would devolve by legal proceedings or by operation of law. The purpose of the covenant, as I have interpreted it, would seem to render this conclusion inevitable. The context would also seem to bear out this construction, for the clause immediately following indicates that character of the person whose appointment would be a breach of the covenant, namely, one upon whom the title to the lease would devolve. A receiver in bankruptcy takes no title, but is a mere custodian, and the title to the leasehold did not devolve upon any other person than the lessees by reason of either these proceedings in bankruptcy or the appointment of the receiver; nor was the possession in any way changed. A marshal might just as well have been appointed as a receiver, and his interest in the title to the leasehold or possession of the premises would have been just the same as a receiver. The appointment of a marshal to take charge of the lessee's property is not made a ground for forfeiture in the covenant. If it was intended that the appointment of a mere custodian should give a right to re-entry, it is difficult to understand why the appointment of a marshal to take charge of the lessee's property should not have been made a basis for forfeiture, as well as the appointment of a receiver.

[5] If my construction of the covenant is erroneous, and there has been a breach in either or both respects, still I do not think that the petitioners are entitled to a decree which would enforce a forfeiture. This is a proceeding in equity. Houghton v. Burden, 228 U. S. 161, 33 Sup. Ct. 491, 57 L. Ed. 780; Bardes v. Hawarden Bank, 178 U. S. 525, 20 Sup. Ct. 1000, 44 L. Ed. 1175; In re Blake, 150 Fed. 279, 80 C. C. A. 167 (C. C. A. 8th Ct.); Dodge v. Norlin, 133 Fed. 363, 66 C. C. A. 425 (C. C. A. 8th Ct.); In re Rochford, 124 Fed. 182, 59 C. C. A. 388 (C. C. A. 8th Ct.).

It was said by Mr. Justice Brewer in Hurley v. Atchison, Topeka & Santa Fé R. R., 213 U. S. 132, 29 Sup. Ct. 468, 53 L. Ed. 729 (quoting from In re Chase, 124 Fed. 753, 59 C. C. A. 629):

"Bankruptcy proceeds on equitable principles so broad that it will order a repayment when such principles require it, notwithstanding * * * the trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the courts either of common law or chancery."

I cannot perceive why any different rule should be applied to persons other than the trustee.

In Re Chambers, Calder & Co. (D. C.) 98 Fed. 865, a proceeding in ejectment to recover possession of leased premises was enjoined, although there was a strict legal right in the landlords to re-enter. Judge Brown, in the course of his opinion, said:

"The jurisdiction of this court having attached to the exclusion of jurisdiction at law, the right of the landlord can be enforced only upon equitable terms."

I think the clear effect of these decisions is that the bankruptcy court may dispose of matters which come before it, upon equitable

principles, when justice and equity require that it should do so. While many cases might arise in which it would be considered equitable to enforce, against a bankrupt's estate, a surrender of leased premises for breach of covenants, with a right of re-entry, because the landlord could not proceed to enforce his legal right in any other court, still the bankruptcy court may properly refuse such relief when it would be inequitable to grant it. To hold otherwise would be to deny the right to apply equitable principles in proceedings which are in equity.

It is a fundamental principle of equity that it will not lend its aid to the enforcement of a forfeiture where it would be equitable or harsh to do so. Pomeroy's Equity Juris. (3d Ed.) § 409; Brewster v. Lanyon Zinc Co., 140 Fed. 801, 819, 72 C. C. A. 213. In that case Mr. Justice Van Devanter (then a Circuit Judge) exhaustively examines and discusses the authorities in the federal courts and elsewhere. He states the correct rule to be:

"That in cases, otherwise properly cognizable in equity, there is no insuperable objection to the enforcement of a forfeiture when that is more consonant with the principles of right, justice, and morality than to withhold equitable relief."

The present application does not conform in any degree to this standard, but, on the other hand, the granting of the relief prayed for would be inequitable and harsh. The enforcement of the forfeiture would cast an undue hardship upon the respondent Feinstein. If there has been a breach of the covenant, it is one which in no way has injured or can injure the landlords. They are in exactly the same position as they would have been had there been no breach. The premises are occupied by a tenant who was acceptable to them, and who is carrying on a business, the nature of which they expressly consented to. No question of the financial ability of the subtenant to continue to pay the rent appears. In fact, he has offered to give satisfactory security. The title to the leasehold estate has never passed from the original lessees, and the bankruptcy proceedings are virtually at an end. The only conceivable benefit which a forfeiture would confer upon the landlords is that they might, if relieved of the present tenants, be able to lease their premises at a larger rental. But such a consideration should not commend itself to a court of equity.

I feel, therefore, that the matter is one that calls for the application of equitable principles, and a denial of the relief prayed for.

The rule to show cause will therefore be discharged, and the prayer of the petition denied, with costs to the respondent, Feinstein.

Ex parte CHOOEY DEE YING.

(District Court, N. D. California. April 3, 1911.)

No. 15118.

1. ALIENS (§ 32*)—CHINESE EXCLUSION ACTS—PROCEDURE ON APPLICATION FOR ADMISSION.

On the examination of a Chinese person as to his right to enter the United States, where the issue was as to whether the applicant was the minor son of a Chinese merchant, admittedly a native of this country, a physical comparison between the applicant and his alleged father was competent and material evidence; and, where such an examination was made by the acting commissioner, his findings thereon must be embodied in the record on an appeal from his decision to the Secretary of Commerce and Labor.

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

2. ALIENS (§ 32*)—CHINESE EXCLUSION ACTS—PROCEDURE ON APPLICATION FOR ADMISSION.

Under the regulations governing the admission of Chinese of February 1909, which require "the officer in charge" at a port to examine applicants for admission, and authorizing an appeal from his decision, there is but one tribunal competent to make such decision; and, where it is made by the commissioner, he does not act as an appellate tribunal, although the evidence may have been taken before some other officer, but as a trial court, and all evidence whether taken before him or others is properly a part of the record.

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

Application by Chooey Dee Ying for writ of habeas corpus. Writ granted.

D. M. Duffy and Hiram W. Johnson, Jr., both of San Francisco, Cal., for petitioner.

Earl H. Pier, Asst. U. S. Dist. Atty., of San Francisco, Cal., for the United States.

DIETRICH, District Judge. [1] This is an application for a writ of habeas corpus presented upon behalf of a Chinese boy, who, after a hearing held by the officers of the immigration service, was denied entrance at the port of San Francisco. The applicant claims a right to enter upon the ground that he is a minor son of one Chooey Ngin Chow, a Chinese merchant, born and residing in the United States. The status of Chooey Ngin Chow was not seriously controverted, but upon the question of the alleged relationship the findings of the acting commissioner of immigration were adverse to the applicant, and his order of exclusion was, upon appeal, afterwards affirmed by the honorable Secretary of Commerce and Labor. By the petition here it is represented that the applicant was not given a fair hearing in that: (1) The testimony of one of his witnesses was not taken; and (2) the acting commissioner did not transmit to the Secretary of Commerce and Labor all of the material evidence received. Issue having been

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

joined upon an order to show cause, the matter was referred to a special referee and examiner to take and report the evidence with his findings and conclusions upon the question whether or not the applicant had had a full and fair hearing, and it is now submitted upon exceptions taken by the government to the referee's report, wherein it is recommended that a writ issue as prayed for, upon the ground that all the material evidence was not transmitted to and considered by the Secretary of Commerce and Labor as required by the rule announced in Re Can Pon, 168 Fed. 479, 93 C. C. A. 635. My impression at the hearing was that the facts did not bring the case within the principle of this decision, but upon a more thorough analysis of the record I am constrained to concur in the referee's conclusion. It seems that at the hearing before the immigration department the applicant was represented by counsel, and that at some stage of the proceedings, the exact time being in doubt, through his counsel he requested of the chief law officer that a physical comparison be made of himself with his alleged father, for the purpose of observing resemblance in feature and manner. While the chief law officer, who testified at length upon behalf of the government, has no distinct recollection of the incident, he declines to deny that such request was made, and admits that such comparisons were not unusual. And I think it must be held to be an established fact in the case that upon the request of the applicant's counsel a physical comparison of the applicant and his alleged father was made in person by the chief law officer. It cannot be doubted that such comparison is competent and may disclose most convincing evidence of kinship, especially where the relationship sought to be established is that of father and son. 2 Wigmore on Evidence, §§ 1150–1154; In re Jessup, 81 Cal. 418, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594; Gilmanton v. Ham, 38 N. H. 108, 113. In passing it should here be remarked that in the matter of these hearings the chief law officer virtually performs the duties of the commissioner of immigration. The evidence in this case was in fact considered by the law officer who actually prepared the findings and the order of exclusion to which the commissioner's name was signed as a matter of course. While, therefore, in form the decision is that of the commissioner, in fact it is that of the chief law officer. And in this respect the procedure followed seems to have been in accordance with and not an exception to the general rule. If I properly read the record, it is to be inferred therefrom that all parties, both in and out of the service, entertained the view that the hearing was under the direction of the chief law officer, and that, subject the right of appeal to the Secretary, his findings would in fact be conclusive. He expressly states that he was not bound by the reports of the inspectors, and that it was within his discretion to direct the taking of additional evidence. In considering the case his action may therefore be regarded as the action of the commissioner.

It is conceded that the record forwarded to the Secretary of Commerce and Labor, and upon which his decision was based, contained no finding upon or reference to the physical comparison. The request for such comparison was oral and informal, and was not accompanied or followed by any suggestion that the officer make or incorporate in

the record findings thereon; nor did any witness testify as to the results of such comparison.

If the practice prevailing in the immigration service were attended with the formality and regularity generally characterizing judicial procedure in courts of law, it might therefore very properly be held, as argued by counsel for the government, that the applicant himself is in a measure to blame for the failure of the record to disclose the fact of the question whether the camparison was made by an inspector referee the entire hearing in such a case is informal and radically different from ordinary judicial procedure. A very loose practice seems to prevail as to the time and manner of making such comparison and of bringing the results to the attention of the reviewing officer. The request for such comparison is sometimes presented in writing and sometimes made orally. The comparisons are often made by the inspector, and not infrequently made by the commissioner or one or more of his law officers. Sometimes findings thereon are incorporated in the record transmitted to the Secretary, and sometimes no reference at all thereto is contained in the record. No very satisfactory explanation is furnished for this diversity of practice. From one portion of the testimony given by the chief law officer it might be inferred that a distinction is made between cases where the request is in writing and cases where it is oral, but the reason for such distinction is not apparent. The result of the comparison, if actually made, is the important consideration, and it is quite immaterial whether the officers are moved by a formal written demand or by an informal oral request upon the part of the applicant. From another portion of the testimony it is to be inferred that in cases where the comparison is made by the commissioner or his law officer no reference is made to the fact in the record which goes to the Secretary of Commerce and Labor, whereas in cases where a comparison is made by the inspector the finding thereon is incorporated in the report. But why such a distinction? If the comparison is deemed to be evidence it would seem that the Secretary of Commerce and Labor ought to have the benefit of it, regardless of the question whether the comparison was made by an inspector or by one of his superiors. The probative force of the comparison is the primary consideration, and that should be the same regardless of the official station of the individual making it.

Upon the whole I am inclined to think that the applicant had the right to assume that the comparison would be deemed to be a part of the evidence in the case, and that the result thereof, together with the other evidence, would be brought to the attention of the Secretary upon appeal. The applicant was represented by counsel familiar with the practice in the department, and his testimony leaves no doubt that he was unaware of any distinction between cases where the comparison is made by an inspector and those made by the commissioner or his law officer.

[2] It is urged upon behalf of the government that the chief law officer was without authority to receive evidence in the first instance, and that therefore the comparison did not properly become a part of the record. This suggestion seems to be predicated upon the theory

that the commissioner's office performs functions only of an appellate tribunal, whereas, as I view the law and the departmental rules, its status is more nearly that of a trial court. By referring to the printed regulations (Edition of February, 1909) Governing the Admission of Chinese, I find that by rule 5, it is provided that:

"Rule 5. Immediately upon the arrival of Chinese persons at any port mentioned in rule 4, it shall be the duty of the officer in charge of the administration of the Chinese exclusion laws to have said Chinese person examined promptly, as by law provided, touching their right to admission; and to permit to land those proving such right."

Rule 6 provides that:

"Rule 6. The examination prescribed in rule 5 shall be separate and apart from the public, in the presence of government officials and such other witnesses only as the examining officer shall designate; and all witnesses presenting themselves on behalf of any Chinese applicant shall be fully heard. If upon the conclusion of the hearing the Chinese applicant is adjudged to be inadmissible, he shall be advised of his right to appeal by a notice written or printed in the Chinese language."

Rules 12 and 13 are as follows:

"Rule 12. Every Chinese person refused admission under the provisions of the exclusion laws by the decision of the officer in charge at the port of entry may take an appeal to the Secretary of Commerce and Labor by giving written notice thereof to the officer in charge within two days, exclusive of Sundays and legal holidays, after such decision is rendered.

"Rule 13. Notice of appeal provided for in rule 12, shall act as a stay upon the disposal of the Chinese person whose case is thereby affected until a final decision is rendered by the Secretary of Commerce and Labor; and, within five days after the excluding decision is rendered, unless further delay is required to investigate and report upon new evidence, the complete record of the case, together with such briefs, affidavits, and statements as are to be considered in connection therewith, shall be forwarded to the Secretary of Commerce and Labor by the officer in charge at the port of arrival, accompanied by his views thereon in writing. If, on appeal, evidence in addition to that brought out at the hearing is submitted, it shall be made the subject of prompt investigation by the officer in charge and be accompanied by his report."

I find in these regulations no support for the theory that the commissioner or his law officer is in any sense an appellate tribunal. It will be observed that by the terms of these rules the authority to hear and decide questions pertaining to the right of Chinese persons to enter the United States is conferred upon "the officer in charge of the administration of the Chinese exclusion laws" at the port where admission is sought. Such officer seems not to be designated by any distinctive title, and it may be that at the several ports, or under varying circumstances, officers of different titles are charged with these duties. In this respect a somewhat bewildering situation is presented by the record of the department in this case. Attached to the evidence taken at the original hearing is a report dated November 17, 1910, signed by A. G. Montgomery "Chinese Inspector" and addressed to "Chinese Inspector in Charge, Immigration Service, Angel Island, Cal."; another report, addressed in the same fashion, dated December 28, 1910, and signed by Chas. D. Mayer, "Chinese Inspector"; a paper headed Findings and Decree, dated January 4, 1911, signed "Luther C. Stew-

ard, Acting Commissioner"; a notice addressed to the Chinese Counsel, dated January 4, 1911, signed "H. Edsell, Acting Commissioner", a notice (the date of which is not clear) addressed to the applicant, and signed "Charles Mehan, Inspector in Charge Chinese Division." This notice is a printed form and advises the applicant that he has been refused admission by the decision of "the honorable Commissioner of Immigration." There is another notice of similar import printed in both the English and the Chinese language, dated January 4, 1911, and signed "Charles Mehan, Officer in Charge." The notice of appeal to the Secretary is upon a printed form, presumably approved by the department, and therein the order appealed from is designated as "the decision of the commissioner of immigration," and the letter transmitting the record on appeal is signed "Luther C. Steward, Acting Commissioner." While, as will be observed, there seems to be much confusion of official titles disclosed by this record, I assume that the "commissioner," who signed the findings and transmitted the record, was the "officer in charge" within the meaning of the general regulations above referred to. It is also clear, I think, that at the port of San Francisco there was but a single tribunal, the functions of which were essentially those of a trial court. The hearing before the commissioner was in contemplation of law an original hearing, and his decision was the first and only decision by the local officers. To be sure there may be other examining officers to take testimony and assemble the evidence, as there may be examiners or referees in this court. But in theory the hearing is before the "officer in charge," who alone is vested with authority to give a decision. In this view, while it is competent for the officer in charge to refer the taking of the testimony, in whole or in part, to other officers in the service, he is not bound to do so. He has the unquestionable right to require or consent that the hearing, either in part or as a whole, be had in his presence, and it would scarcely be suggested that the testimony of any witness does not necessarily constitute a part of the record to be transmitted to the Secretary, merely because such witness testified in the presence of the commissioner. Upon principle it is thought to be equally true that, other material evidence adduced before him, whether it be in the form of documents or the result of a physical comparison, as in this case, should be deemed to be a part of such record. The chief law officer, who, as has already been stated, acted for the commissioner in these matters, testified that he supposed these comparisons were requested by attorneys for claimants, for the purpose of influencing his opinion or affecting his judgment; but that is thought to be the very purpose of evidence. It is difficult to understand how the officer can, with propriety, consent to make such comparisons, knowing that thereby it is sought to affect his judgment, unless the result thereof is deemed to be in the record as a part of the applicant's case. It is true that the law officer testifies that he places little, if any, value upon such evidence, but admittedly comparisons are deemed to be of some importance, for when they are made by a subordinate examining officer, he is required to make a report thereon. And perhaps no stronger argument could be adduced in support of the applicant's contention than the assertion of the law of-

ficer that he holds such comparisons lightly, and usually makes them only to satisfy the attorneys. Others may not unreasonably entertain a different view, and it is entirely possible that the Secretary may hold the results of such comparison in higher esteem, and consequently in a close case the evidence thus furnished might control the decision.

Let the writ issue.

STATE OF MAINE LUMBER CO. et al. v. KINGFIELD CO et al.

(District Court, D. Connecticut. May 27, 1914.)

No. 1408.

INJUNCTION (§ 163*)—RESTRAINING ORDER—DISSOLUTION.

Facts *held* to require a dissolution of a temporary injunction on affidavits presented by defendant; complainants having relied on the bill and affidavits attached thereto, without having presented any additional evidence, and the truth of the allegations having been fully denied by the answering affidavits

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 357–371; Dec. Dig. § 163.*]

In Equity. Suit by the State of Maine Lumber Company and others against the Kingfield Company and others. On motion to dissolve certain restraining orders. Motion denied as to the restraining order against the Maine Land & Lumber Company, and granted as to defendant Kingfield Company.

Perkins, Wells & Scott, of Hartford, Conn., for complainants.

Hugh M. Alcorn, R. W. Thompson, and Francis H. Parker, all of Hartford, Conn., for defendants.

THOMAS, District Judge. On March 23, 1914, a double restraining order was issued by this court, the first enjoining the Maine Land & Lumber Company, and its officers and directors from taking any steps toward the dissolution of said corporation, and from filing any certificate of dissolution with relation to said corporation, or causing or bringing about the final dissolution of said corporation in any other method, or doing anything to terminate or affect its present corporate existence. The second enjoined the Kingfield Company and certain individuals as officers and directors of said company from passing any votes, executing any mortgages or conveyances, or doing anything in any way to mortgage, incumber, or convey said timber land or cause any of the timber on said land to be cut or removed therefrom.

On the 14th of April, 1914, the Kingfield Company and Herbert S. Wing, one of the directors of said company, filed a motion to dissolve the temporary injunction issued on March 23, 1914, and said motion was heard on May 5, 1914. At the hearing it was agreed by counsel that the order restraining the Maine Land & Lumber Company from filing its final certificate of dissolution might stand until the final deter-

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

mination of the suit. The sole question, then, is whether the temporary order restraining the Kingfield Company should stand or be dissolved. Upon the hearing the complainants offered no testimony, but relied entirely upon the affidavits of two of the complainants and the affidavit of the State of Maine Lumber Company, by Samuel D. Viets, its vice president, which are attached to the original bill. The respondents offered evidence tending to deny the truth of the allegations of the bill as pertinent to the present inquiry. For the purpose of determining the point in issue, I have taken the affidavits above mentioned as sufficient to establish a prima facie case.

From the evidence offered by the respondents, however, I find that the complainants have failed to show that the facts as alleged by them are true; it appearing in evidence and uncontradicted that the complainants Viets and Bancroft had, on the 6th of December, 1913, notified Joseph P. Tuttle in person, one of the respondents, and the one who had carried on nearly all of the negotiations, that they had been unable to raise the money with which to save the property then under foreclosure, the time of redemption expiring on December 10, 1913, all of which was well known to the complainants. It was upon the strength of their inability to carry out the terms of their contract that the said Tuttle was forced to take some immediate steps to save the property to the stockholders of the Maine Land & Lumber Company, which saving involved the immediate raising of $43,184 from the time Viets notified Tuttle on the 6th of December to the 10th of December, the law day fixed in the decree of foreclosure. Said Tuttle was unable to raise said $43,184, and upon his arrival in Maine undertook to make satisfactory arrangements with the holders of the mortgage to pay $25,000, at the same time securing an extension of time for the payment of the balance. In this he was unsuccessful. The money which was raised for the purpose of saving the property was raised by Tuttle from those who afterwards became the incorporators of the Kingfield Company, of which Herbert S. Wing, of Kingfield, Me., was one; he having contributed, at the earnest solicitation of Mr. Tuttle, $10,000, one-half of which was subsequently transferred to one Dr. Simmons, of Kingfield, Me. On the strength of this evidence it seems to me that the Kingfield Company and Herbert S. Wing are entitled to have the temporary injunction restraining them as set forth in the order dissolved.

Nor does it sufficiently appear that the complainants have no adequate remedy at law. On the contrary, if the complainants are able to sustain their contention upon the trial of the case upon its merits, they have, it seems to me, as long as the temporary restraining order as to the Maine Land & Lumber Company is in force, a remedy at law for the recovery of any damages that they may be able to prove.

I find the testimony given by Joseph P. Tuttle sufficient to overcome a prima facie case made out by the affidavits of the complainants upon which the restraining order was issued. The complainants had the advantage of cross-examining Joseph P. Tuttle, and the respondents did not have the advantage of cross-examining the complainants, either at the time the order was signed or upon the hearing to dissolve the tem-

porary injunction; nor does the bill allege that irreparable damage would result to the complainants in the event that the respondents should either carry out or attempt to carry out any of the acts sought to be enjoined and appearing in the restraining order and affecting the Kingfield Company.

For the purpose of the present inquiry it does not appear to the court that it is necessary to pass upon the question of whether Mr. Tuttle acted as attorney, as set out in the bill; but in view of his testimony with reference to what took place, it seems to me that the weight of evidence tends strongly to favor the contention that he did not act as attorney for the complainants Viets and Bancroft during the negotiations as alleged in the bill.

Restraining the Maine Land & Lumber Company from final dissolution will protect the interest of the complainants.

The motion to dissolve the temporary injunction is therefore denied as to the first order, that is, the order restraining the Maine Land & Lumber Company, its officers, directors, and stockholders, from taking any further steps toward the final dissolution of said corporation, and from filing any final certificate of dissolution with relation to said corporation, or causing or bringing about the final dissolution of said corporation in any other method, or doing anything to terminate or effect its present corporate existence, until the final determination of this suit, or until further order of this court; and the motion to dissolve the injunction restraining the Kingfield Company, its officers, directors, stockholders, agents, and employés, from passing any votes, executing any mortgages or conveyances, or doing anything in any way to mortgage, incumber, or convey the said timber land, or cause any of the timber now on said land to be cut or removed therefrom, until the final determination of this suit, or until further order of this court, is granted.

Let an order be entered accordingly.

THE WILLIAM H. YERKES, JR.

(District Court, D. Massachusetts. June 9, 1914.)

No 704.

1. TOWAGE (§ 11*)—CARE REQUIRED OF TUG.
The captain of a towing tug is under the duty to observe weather conditions and to exercise ordinary prudence as to the conditions of his voyage, having in view the qualities of his tug and the character of his tow.
[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11–23; Dec. Dig. § 11.*]

2 TOWAGE (§ 11*)—LOSS OF TOW—LIABILITY OF TUG.
A tug which undertook to tow around Cape Cod a small lighter with a 5-foot side and a blunt flat bow, obviously not designed for sea service, *held* in fault and liable for the loss of the tow for proceeding over the shoals toward Vineyard Haven in the face of a choppy sea and a 25-mile wind instead of lying by for better weather.
[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11–23; Dec. Dig. § 11.*]

In Admiralty. Suit by John R. Burke against the steam tug William H. Yerkes, Jr.; the Doane Steamboat Company, claimant. Decree for libelant.

J. J. McCarthy and William E Burke, both of Boston, Mass., for libelant.

Russell, Moore & Russell, of Boston, Mass., for claimant.

HALE, District Judge. This is a libel for loss of the lighter John the First, alleged to have been sustained by reason of negligent towing by the steam tug William H. Yerkes, Jr. Under an agreement entered into on September 26, 1912, the Doane Steamboat Company, the owner of the tug Yerkes, agreed for a lump sum to tow the lighter from Sandwich, Mass., to Wood's Hole Harbor. The contract of towage was an oral one; and there is a sharp conflict as to its terms. It is contended by the libelants that, at the time the agreement was made, the owners of the Yerkes were informed in respect to the size and age of the lighter, and were told that she would be put in condition to tow around the Cape; her gear standing about the deck would be made fast, hatches battened, hold pumped out, and all things necessary would be done in order to make the vessel fit for the trip; but nobody would be furnished by the libelant to go on the lighter; the agent of the tug was warned that the lighter was not a seagoing vessel; she was fit to go in smooth seas, and in ordinary weather, but was not constructed to go around the Cape in anything but fair weather; in other words, she was a lighter and had "got to have a chance, because she was not a seagoing vessel and would have to pick a reasonable time to go." Her build was obvious to any mariner. She was flat-bottomed, 70 feet long, 25 feet beam, with a 5-foot side and a blunt, flat bow; she was built for work on the canal, and obviously not for sea duty.

The claimant urges that the agent of the tug was informed that the

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

lighter was strong, staunch, and seaworthy; the outward appearance of the boat would tend to show a sufficient degree of stability for the work to be undertaken; there was nothing apparent in the construction of the lighter to charge the claimant with any notice but that she was fit for sea service; that she had inherent defects of which the claimant was not advised. The claimant further contends that there was no negligence in starting from Sandwich, or in continuing upon the course around the Cape; the weather conditions were good, and no disaster could reasonably have been anticipated; the claimant is liable for only reasonable care; and the lighter received such care throughout the towage service; that no negligence has been shown on the part of the tug, or of the claimant; and there should be no recovery by the libelant.

On October 3, 1912, at about 8 o'clock, the tug started with her tow. The testimony satisfies me that before leaving the canal the captain and crew of the Yerkes had full opportunity to make whatever examination of the lighter they found necessary; that it must have been apparent to any person of maritime experience that a small lighter with a flat bottom and a blunt stern was not a seagoing vessel, and would not be able to encounter heavy seas. The start was made in the morning; there was a fair wind and a good chance as far as Chatham. It appears from the official record that at 8 o'clock at Highland Light the wind was blowing 25 miles an hour. The 56 miles from Sandwich to Chatham was run in 10 hours. After leaving Chatham, the tug and tow proceeded at a speed of about 4 miles an hour, the wind southwesterly. They left Chatham at about 6 o'clock in the afternoon, the wind continuing to blow at about 25 miles an hour, and being characterized as a strong wind; they proceeded as far as Pollock Rip, and, turning there, headed up still more into the wind towards the Shovelful Shoal. After going around the Handkerchief Light ship, and at a point about 19 miles from Chatham, the lighter was seen to have a slight list to port; they proceeded, however, until about five miles east of Half Moon Shoal Buoy, the list increasing. At about this point the lighter turned on her side, and soon after seemed to "jump ahead." The tug, with what was left of the lighter, proceeded to Vineyard Haven Harbor, where she arrived at daybreak, and it was discovered that "all the tug had on her hawser was a part of the deck of the lighter."

The libelant does not impute negligence to the tug up to the time she left Chatham. He does contend, however, that, if her master had been a careful, prudent, and experienced mariner, he would have known, when he left Chatham, having in tow a flat-bottomed lighter, with a blunt bow, that he would not be able to go safely beyond Chatham, encountering a wind blowing, from the southwest, about 25 miles an hour; that a prudent mariner would have realized, if he proceeded beyond Chatham, he would encounter a short, choppy sea, and, if he still continued, heading up into the wind, there would be increased dangers as he proceeded westerly. The testimony shows that Capt. Parker of the tug had no experience in going around the Cape, and had no license to go as master of a vessel over the Shoals; that he

was not allowed to navigate in those waters except with a duly licensed pilot; that he had never been in charge of a vessel going over the Shoals, although he had taken the trip 12 or 15 times as mate under other captains. Upon this trip he had obtained the services of Capt. Swimm, a pilot of some experience.

[1] It has been repeatedly held that a tugboat cannot be considered a common carrier, or an insurer; the highest possible degree of skill and care is not required of her; but she is required to use reasonable skill and care. The want of such care is a fault rendering the tug liable. The captain of a tug is under the duty to observe weather conditions, and to exercise ordinary prudence as to the condition of his voyage, having in view the qualities of his tug and the character of his tow. The Margaret, 94 U. S. 494, 24 L. Ed. 146; The McWilliams Case, 74 Fed. 648, 20 C. C. A. 580; Consolidated Coal Co. v. Knickerbocker Steam Towage Co. (D. C.) 200 Fed. 840; Thompson v. Winslow (D. C.) 128 Fed. 73.

[2] Upon an examination of the whole testimony in the case at bar, I am of the opinion that the Yerkes was at fault. The tug had in charge a small lighter with a five-foot side, and a blunt, flat bow; built with no fitness for sea service. When the captain left Chatham with this craft, he knew that he would not be able to get a good lee on his way over the Shoals. With the wind blowing from the southwest 25 miles an hour, I think it was the part of a prudent mariner to stay in the lee of the Cape at Chatham, and await a favorable opportunity to go over the Shoals. Instead of doing this, Capt. Perkins continued over the Shoals in the face of a strong wind. After he had gone beyond Chatham, and when he came to Pollock Rip, he headed up still more into the wind towards the Shovelful Shoal. At this point a prudent mariner must have known, I think, that he was in great danger, with the craft he had in charge. In my opinion, it was not the part of a prudent mariner to tow beyond this point, with a 475-foot hawser, through a choppy sea, with the wind blowing at least 25 miles an hour. Capt. Perkins had not the necessary experience to know the dangers of his situation at this point. Capt. Swimm, the pilot, should have informed him of the perils he would be sure to encounter if he proceeded on his way to Vineyard Haven. When he had proceeded some 19 miles beyond Chatham, between the Handkerchief and the Half Moon Shoal Buoy, and the lighter began to show a list, it must have been evident to a prudent mariner that she was at that time filling with water. At this point, I think the captain should have turned about and tried to go back to a good lee at or near Chatham. He certainly would have been safer in adopting this course than in undertaking to go in the teeth of a strong wind towards Vineyard Haven. But, whatever may be said of the conduct of the captain at any time after the lighter began to show a list, it seems clear to me that he must be held in fault in leaving a good lee at Chatham and attempting to proceed over the Shoals in the face of a strong wind, with such a craft as he had in charge. If he had used the care, skill, and caution of a prudent mariner, he would have waited at Chatham for better weather. He seems to have proceeded with this tow very much as he would

have done with a seagoing vessel; whereas, it must have been evident to a mariner of any experience that the lighter he had in charge was not a seagoing vessel.

When this case was on trial, I adverted to the case of The Carbonero, 106 Fed. 329, 45 C. C. A. 314, Id., 122 Fed. 753, 58 C. C. A. 553, as presenting many facts quite similar to the case at bar. The alleged faults, too, were somewhat similar. In the Carbonero Case, it was alleged that those in charge of the tug used bad judgment in departing from Vineyard Haven with the tow, in threatening weather. It was contended, also, that they were negligent in failing to turn back. And the court held that there was no liability on the part of the Carbonero. The vessels towed in that case were coal barges, built for sea service. It is true they were heavily laden with coal, and had a freeboard of not over four feet. In that case, however, a question was not presented involving the negligence of a towboat captain in towing a lighter, obviously unfit for sea service. Each case must be decided upon its own facts. The issue in the Carbonero Case was so different from that in the case at bar that the court receives very little guidance from that case. In The Hercules, 73 Fed. 255, 19 C. C. A. 496, the Court of Appeals in the Second Circuit was dealing with the case of a tug towing two seagoing barges; and it was held that the tug was not liable, either on the ground that her master was not warranted in leaving the breakwater in bad weather, or because he did not turn back when he found the storm increasing, there being apparently as much danger from the shoals near the Capes in attempting to regain the breakwater in the darkness, as in continuing to face the storm. In that case, also, the tow consisted of seagoing vessels.

In the case at bar, no such service was undertaken. The proposition was merely to take the lighter around the Cape. The build of the lighter was apparent. The master was at perfect liberty to await a "good chance" before going around the Cape. He might have held on to his lee at Chatham. Even after he got by Handkerchief Shoal, and was headed for the Half Moon Shoal Buoy, when the lighter began to show a list, if he had turned back he would not, as in the case of the Hercules, have been facing a risk "apparently as menacing and real as any to which he was likely to be exposed by holding on." Even then, I think, he should have turned back, as I have before indicated.

The initial fault, however, as I have said, was not where the lighter began to show a list, but at the point where a good lee was left at Chatham. Under all the circumstances of the case at bar, I must hold that the captain was at fault; that he did not exercise the care of a reasonably prudent mariner in the towage service of the lighter in question; and that as a result of such negligence the lighter was lost.

Albert T. Gould, Esq., of Boston, is appointed assessor, to assess the damages in the case, and report to the court.

In re McKEE.

(District Court, N. D. Texas, at Dallas. July 8, 1914.)

No. 1041.

BANKRUPTCY (§ 48*)—VOLUNTARY PROCEEDINGS—DISMISSAL—RIGHT OF BANKRUPT TO DISMISS.

A voluntary bankruptcy proceeding may not be dismissed on motion of the bankrupt after adjudication by consent of all parties.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 47; Dec. Dig. § 48.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Robert Lee McKee. On motion of the bankrupt to dismiss the proceedings. Denied

Ross M Scott, of Dallas, Tex., for bankrupt.

Greenwood, Walker & Williamson, of Dallas, Tex., for Blair-Hughes Co.

MEEK, District Judge. The bankrupt, Robert Lee McKee, moved the court to withdraw his voluntary petition in bankruptcy on which he had been adjudicated a bankrupt, and to dismiss this proceeding upon payment of all costs. Thereupon the court entered an order referring the motion to Eugene Marshall, Esq., referee in bankruptcy, for hearing and report. Hereinbelow is incorporated in full the report of the referee, together with an opinion prepared by him on the motion to dismiss:

"In pursuance of the order referring to me the motion of the bankrupt in the above cause, for the dismissal of these proceedings in bankruptcy, I beg leave to make the following report:

"On the 17th day of June, 1914, the bankrupt filed in the office of the United States district clerk his motion for the withdrawal of his petition and dismissal of these proceedings upon the payment of all costs. The motion set up no other grounds for the dismissal except that it was the desire of the bankrupt that the case be dismissed and that all the creditors consent to the same and agree that the dismissal will be in their interest and the interest of all parties to the proceeding and waive statutory notice of the motion. To the motion for dismissal are attached the respective consents and waivers of the creditors. Upon the receipt of the order of reference, I set the motion down to be heard before me, at my office, in the city of Dallas, on June 19, 1914, at 11 o'clock a. m., and, notwithstanding the waivers, gave notice thereof to the creditors and parties in interest as their names appear of record in this cause.

"On the 19th day of June, 1914, no other creditors appeared except Blair-Hughes Company, who appeared by its attorneys, Greenwood, Walker & Williamson. The bankrupt appeared in person and by his counsel, Ross M. Scott. The trustee appeared in person. Those present having announced ready, I proceeded with the hearing and took the deposition of Vernon Hall and George F. Rockhold, the trustee, who were offered as witnesses in support of the motion of the bankrupt. These depositions are herewith transmitted for the information of the judge.

"At the conclusion of the examination of the witnesses, the matters in controversy were submitted to me in argument upon all the law and evidence, which consists of the record in this case and the said depositions.

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

"The uncontradicted and admitted facts in relation to the said motion are as follows:

"Statement of Facts.

"A voluntary petition in bankruptcy was filed, as aforesaid, by Robert Lee McKee, in the United States district clerk's office, on the 16th day of May, 1914, and on the same day the petitioner was adjudged bankrupt by the judge, and the case referred to me, as one of the referees in bankruptcy of this court, before whom it is still pending. In connection with this petition, the bankrupt filed proper schedules of his assets and liabilities as prescribed by law, and deposited with the clerk the necessary filing fees. In his schedules he listed about 14 creditors, some of whom are stated to be in the city of Dallas, and the rest in Ellis county, near Ferris. As appears from his schedules, his indebtedness aggregates the sum of $2,089, and his assets consisting of a small stock of groceries at Patrick Schoolhouse, in Dallas county, Tex., are estimated to be of the value of $1,300, some accounts of the face value of $607.95, and his homestead and other exempt property of the value of $1,270. His largest creditor appears to be Blair-Hughes Company, of Dallas, who according to the deposition of Vernon Hall, its credit manager, claim an indebtedness of $1,294; but it has never proved its claim or sought to have it allowed.

"George F. Rockhold, of Dallas, was appointed receiver, on the 22d day of May, 1914, and having given the required bond took possession of the stock of merchandise, which he inventoried at its cost value. The stock according to his inventory is of the value of $714, the fixtures $200, and the accounts of the face value of $626.55; but the actual value of these accounts is doubtful. In performing his work as receiver he incurred an expense of $25.80, which has been duly reported and which was approved at the first creditors' meeting, but is unpaid. The first creditors' meeting was held on the 8th day of June, 1914, pursuant to ten days' notice thereof to all the creditors listed by the bankrupt. At this meeting the bankrupt appeared, and also a witness by the name of Chapman, who had been summoned by Blair-Hughes Company, to testify respecting the affairs and conduct of the bankrupt. There being no creditors present who had proven their claims, the court thereupon appointed George F. Rockhold, as trustee, who qualified as such on the 13th day of June, 1914. The bankrupt was examined and the meeting was adjourned until Monday, the 15th of May, upon motion of the bankrupt to enable him to make an offer of composition. Pursuant to the adjournment the parties again reassembled and stated that they were unprepared then to offer a composition, but would do so on Wednesday, the 17th instant, and the meeting was accordingly adjourned over until the 17th instant, on which day the parties again appeared and sought another continuance for the same purposes of securing a composition, and the creditors' meeting was accordingly passed over to the 19th day of June. In the meanwhile the motion to dismiss was submitted to the judge, who, as above stated, referred said motion to me for hearing. George F. Rockhold, who had been appointed trustee, qualified as such by giving bond in the sum of $1,000 on the 13th day of June, 1914.

"It appears from the motion for a dismissal that all the creditors join in said motion and agree that it is for the best interest of all parties that said proceeding shall be dismissed in accordance with the prayer of the motion and that the purpose of said motion was to effect some sort of settlement with the creditors, the precise terms of which were not disclosed at the meeting, except that the Dallas creditors were to receive 50 per cent. of their claims, and that Blair-Hughes Company was to receive a little less than that amount, but were to dismiss certain proceedings instituted by them against the bankrupt prior to the filing of the petition in bankruptcy, on condition that the bankrupt pay all costs of that proceeding. This was a suit in sequestration, whereby the Blair-Hughes Company claimed that by reason of false statements which had been made by the bankrupt they had extended credit to the bankrupt and he purchased a large portion of his stock on credit from them, which was delivered to the bankrupt on the faith of said statement. That by reason of the fraud practiced by the bankrupt no title passed to him

for said goods, and said sequestration proceeding was instituted to reserve the title and possession of said property. At the time of the institution of the proceedings in bankruptcy the sheriff was holding said property under said writ of sequestration, and when the receiver was appointed he (the sheriff) voluntarily turned the property over to the receiver, who knew nothing at the time of the character of the possession of the sheriff or writ he was holding under. The order appointing the receiver authorized the receiver to take possession of only such property as was voluntarily turned over to him, and no protest was made at the time against the action of the sheriff. When the matter was brought to the attention of the court, the Blair-Hughes Company stated that no point would be made by them as to the rightfulness of the custody of the receiver of the goods sequestered by them in said suit. It is proper to say that I stated that, if the point was made that the receiver's custody was not lawful, I would direct the trustee to surrender to the sheriff all or such part of the property as would appear to have been seized by the latter, and direct the trustee to apply to the court having jurisdiction of the writ for a release of the same to him as trustee. From the little testimony that was introduced on the subject of the bankrupt's fraud, I did not think it could be sustained, since the fraud charged seemed to have been committed more than one year before the suit was instituted, and it was practically impossible that Blair-Hughes Company could have relied on it in extending credit and if it did then laches had waived the fraud. At all events the Blair-Hughes Company waived in these proceedings any claim arising under its writ of sequestration. The purpose of the motion to dismiss is to enable the bankrupt to settle all these controversies on terms agreeable to his creditors which are said to be the payment of 50 cents on the dollar to the Dallas creditors, the dismissal of the proceedings in sequestration, and the payment of all costs and $50 attorneys' fee, by the bankrupt. Blair-Hughes Company would thus receive $500 net. The costs of this proceeding in bankruptcy will not exceed $50, which includes the aid of the stenographer in taking the testimony. An itemized statement is hereto attached and made a part of this report.

"The motion for withdrawal and dismissal of the petition was fully argued before me, upon the law and the evidence, and I announced at the conclusion thereof that in my opinion there was no authority in the bankruptcy law authorizing a dismissal of proceedings by a petitioner, with the consent or after notice to the creditors after his adjudication and the appointment and qualification of his trustee.

"I have briefly elaborated these views in an opinion which I transmit herewith under another cover.

"If the judge does not concur in the view therein expressed, then it will be discretionary with him to dismiss the proceedings and the wishes of the creditors would be largely controlling upon him in the exercise of that discretion. But as yet no creditor has proven or offered to prove any claim against his estate.

"I therefore recommend that the motion for dismissal be refused upon the ground that there is no authority conferred by the bankruptcy act for the petitioner to dismiss his petition with the consent of creditors, after adjudication and the appointment of his trustee."

"Opinion.

"In this case an individual voluntary petition was filed in this court with schedules annexed. The petition and schedules were in compliance with the provisions of the act, the petitioner was accordingly adjudged bankrupt by the judge, and the usual general order of reference was made to the referee. The first meeting of the creditors was held pursuant to 10 days' notice to creditors, and a trustee was appointed thereat and has qualified, and is now in possession of a stock of merchandise belonging to the bankrupt's estate. After these proceedings had been taken in the court, the petitioner, joined in by his creditors whose names are set forth in the schedules, filed a motion to withdraw and dismiss his petition in this court, which has been referred by the judge to the referee for report, and all proceedings stayed until the final

hearing. The question submitted is whether, under the facts above stated, the bankruptcy court has been conferred by the act with authority to permit a petitioner to withdraw or dismiss his petition, when the ground for such dismissal is the consent of creditors and the agreement that such dismissal will be in the interest of all parties, and to enable them to make a settlement outside of the court.

"Upon the question I submit the following suggestions:

"A voluntary petition in bankruptcy is in effect a suit by a debtor against his creditors for a discharge from his debts, accompanied by a surrender of all his property not exempt to be distributed upon a scheme of equality prescribed by the bankruptcy act. Until there is an adjudication, the proceeding is, as to the discharge at least, a suit in personam; after adjudication it is a proceeding in rem as well as in personam. It may be conceded as true that proceedings in personam are generally in control of the parties and are subject to withdrawal or dismissal by their consent at any time before final decree. In bankruptcy this general right to dismiss by consent or for want of prosecution, which in its last analysis is the same thing as consent of the parties, is subject to the restriction that, when the petitioner moves to dismiss, his creditors must receive 10 days' notice of the proposed dismissal. But after adjudication the rights and relations of parties change substantially. An adjudication is to all intents and purposes a final decree on the petition. It confers jurisdiction completely and exclusively both in rem and in personam. All creditors are parties, but they are not the only parties. All persons in any way interested in the res are also parties. The adjudication is, like other judicial determinations, subject to the rule that matters once having been litigated and determined by the judgment of a court of competent jurisdiction cannot again be made the subject of legal contention as between the parties and privies. The rights of petitioners are then concluded. If the adjudication has been lawfully made and assented to, the court can only then entertain a motion for a rehearing or a petition to set aside or vacate the adjudication, and it is well settled that, the condition of parties having materially changed, they will not be heard to vacate the adjudication and demur to the petition. Collier on Bankruptcy (9th Ed.) p. 435, and cases cited.

"Until the adjudication is vacated by a direct proceeding it is as binding and conclusive upon the bankrupt and the other parties as a judgment inter partes on due hearing in a court of competent jurisdiction. In this respect all persons as above stated who are interested in the res are parties including lienors and the trustee. [Chapman v. Brewer] 114 U. S. 169 [5 Sup. Ct. 799, 29 L. Ed. 83]; Carter v. Hobbs (D. C.) 92 Fed. 594; [In re Henry Ulfelder Clothing Co. (D. C.)] 98 Fed. 409; Michaels v. Post, 21 Wall. 398 [22 L. Ed. 520].

"The effect of an adjudication is to render voidable many solemn contracts of the petitioner, including liens obtained by judicial process and to operate as a stay of judicial proceedings, in which other parties than those listed as creditors of the debtor have a vital interest. It follows that when there has been an adjudication regularly obtained the function of the petition has practically ceased. In other words, the adjudication is the final decree on the petition. If the petitioner desires to obtain a discharge, he must petition again, and the court is obliged to give him another and independent hearing. While predicated upon the adjudication, the discharge is in effect a separate and independent proceeding requiring separate and independent notice and hearing. If the petitioner and his creditors desire to dispose of the bankruptcy proceeding and escape the small cost of administration, they have the right either to move to vacate the adjudication or to agree to a composition under the eye of the court as provided in section 12 of the act (Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]). Pretermitting all questions of jurisdiction of the court over the petition or petitioner, it is difficult to see upon what ground a motion in a voluntary petition to vacate the adjudication, once made, could be sustained, since under the provisions of the present act any person who owes debts and files his petition and schedules and who has resided the requisite length of time in the jurisdiction of the court can invoke the benefits of the act. It may happen that in the proceedings in partnership

cases because of fraud or of nonjoinder of partners, or because the nonjoining partners desire to administer the assets, the court will set aside an adjudication and dismiss the proceedings. But these rest upon specific statutory provisions. The pendency of a former petition in a court of competent jurisdiction, the want of jurisdictional residence, the failure of a petitioner to file proper schedules, may also be grounds for vacating an individual adjudication. But these are jurisdictional in their nature. From the nature of an individual voluntary petition the grounds for setting aside an adjudication must be few. The interval between the filing of the petition, its reference, and the adjudication thereon is in practice very short. These proceedings are practically simultaneous in ordinary cases. This may give rise, as counsel urges, to the question: When has a creditor the right to move to vacate the adjudication, since he has in practice no notice thereof in a voluntary case? The answer to this would be certainly not later than the first creditors' meeting and before the appointment of a trustee. Every one at that time has had notice both of the adjudication and the filing of the petition and the right of the creditors to move to vacate is certainly concluded then, if not sooner. It is clear that, up to the time the bankrupt is adjudicated either in a voluntary or involuntary case, the parties may move to dismiss the case by consent, but not afterwards, except upon the confirmation of a composition. A dismissal in such cases is discretionary, and the consent of creditors is largely controlling on the court in the exercise of this discretion. The statutory provisions in the present bankruptcy act providing for dismissal of bankruptcy proceedings seems to me to be in thorough accord with the view that the dismissal by consent must be confined to the petition and before adjudication.

"Section 1 defines a petition as follows: ' "Petition" shall mean a paper filed in a court of bankruptcy with a clerk by debtor praying for the benefits of this act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named.'

"When this paper or 'petition' is filed in a voluntary case, it is the duty of the judge to hear it forthwith and either adjudicate or dismiss the petition. In case of his absence from the district or division of the district, it is referred to the referee, who must likewise either adjudicate or dismiss the 'petition.'

"Section 18, subd. G, provides: 'Upon the filing of a voluntary petition the judge shall hear the petition and make adjudication or dismiss the petition.'

"This is apparently a general power conferred upon the court to dismiss petitions with or without notice, but there is a restriction imposed by section 59G upon the proposed dismissal by consent of parties or for want of prosecution. Before the amendment of 1910, section 59G read as follows: 'A voluntary or involuntary petition shall not be dismissed by petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors.'

"It is thus seen that a dismissal by the court upon motion of the petitioner, either for want of prosecution or by consent of parties, could not be had without notice to the creditors. The court still has the general right to dismiss for any other reason appearing upon the face of the petition in the record. Nothing I apprehend can be drawn from this language as indicating legislative intention to give an additional right to dismiss after adjudication, since upon adjudication the petition, as we have seen, has served its purpose. The provision added by the Act of June 25, 1910, c. 412, § 10, 36 Stat. 841 (U. S. Comp. St. Supp. 1911, p. 1506), as to notice, now makes it imperative on the judge in such cases 'to delay the hearing thereon for a reasonable time to allow all creditors and parties in interest opportunity to be heard,' which indicates quite clearly that a dismissal by consent could only take place before the final hearing on the petition.

"Another method of procuring a dismissal is by composition as provided by section 12, upon the confirmation of which 'the case,' not the 'petition,' is dismissed, which confirmation and dismissal under the terms of section 14C operates as a discharge and under the provisions of section 70F operates eo instanti to revest the title of the bankrupt's property in the bankrupt. This is the only instance in the present act authorizing the revesting of the

title in the bankrupt which has been vested in the trustee by adjudication. Can it be said that the court at the request of petitioner and creditors can by its order in absence of statutory authority revest the title in a bankrupt after adjudication? It seems to me that Congress, having provided a mode by which the title and possession of property may be returned to the bankrupt, denies this court the right of exercising that authority in any other or different method. A potent reason for thus restricting this power is to render secure titles to property which are constantly passing in bankruptcy proceedings. If the court has authority upon consent of parties to control the disposition of the trustee's title, that title would be subject to doubt in the interpretation of the decrees of court or the intention of the parties. In the present bankruptcy law there are but two methods of divesting the title once vested by adjudication in the trustee: First, by confirmation of a composition; and, second, by the trustee's conveyance. There is indeed some judicial doctrine grown up in reference to burdensome property, but that proceeding is in the interest of lien creditors, and in its analysis is a mere transfer by the trustee of his title or such title or interest as he has in satisfaction of the debt or lien against the property. Some light is thrown on this question by the cognate provision of the Act of March 2, 1867, c. 176, 14 Stat. 517, of which the present act is practically a reproduction.

"It was uniformly held under the act of 1867, before that act was amended in 1874 [Act June 22, 1874, c. 390, 18 Stat. 178], that an application for dismissal came too late after adjudication.

"Judge Treat, in response to a motion to dismiss after adjudication, said: 'This motion comes too late. All creditors have the right to present their claims and have the estate of the debtor wound up under the proceedings in bankruptcy. If the parties desire to make the settlement, they may proceed under section 43 of the act, and have the estate wound up under trustees.' In re Sherburne, Fed. Cas. No. 12,758.

"This was the well-settled practice under the act of 1867 as originally passed until the amendment of June 22, 1874. Section 14 of that amendment provides: 'All proceedings in bankruptcy may be discontinued on reasonable notice and hearing, with the approval of the court and upon the assent in writing of such debtor and not less than one-half of the creditors in number and amount, or, in case all the creditors and such debtors assent thereto such discontinuance shall be ordered and entered; and all parties shall be remitted in either case the same rights and duties existing at the date of the filing of the petition in bankruptcy, except so far as such estate shall have been already administered and disposed of.' In re McKeon, Fed. Cas. No. 8,858, Judge Blatchford.

"It will be observed that the amendment carefully restored the title vested in the assignee to the same condition as it was at the time of the filing of the petition, except so far as such estate shall have been administered and disposed of. It may be worthy of remark that this amendment, together with compositions authorized by it and the loose practice arising thereunder, opened wide the door to all manner of frauds and collusive arrangements and settlements between the debtor and his creditors, which was the chief complaint against the Bankruptcy Act of 1867. In fact, it was said that this amendment changed the law entirely. These fraudulent compositions and settlements and exorbitant charges of officers led as a matter of history to the repeal of the act of 1867 as being the simplest way out of the difficulties in amending the law with the legislative promise that a new law would be framed at once to take its place. But the memory of the frauds and scandals arising under this act was such that the new law was not passed until the intolerable conditions grown up under state insolvent laws forced Congress to pass the present act, in which most of the objectionable provisions of the former act were eliminated. Among these was manifestly the right to make settlements after adjudication, except under the eye of the court with proper safeguards, notice, and investigation, and only then, when the court was satisfied that such settlements were in the interest of all creditors and that none of the provisions of the law either in letter or in spirit were violated. I have not been cited to a single decision construing the provisions above

quoted of the present act as authorizing a dismissal by consent of parties of a petition after adjudication or the appointment of a trustee. The case relied upon by counsel (In re Salabery [D. C.] 5 Am. Bankr. Rep. 847, 107 Fed. 95) did not pass upon this question and it is significant that in the opinion of the court the dismissal is denied, and the trustee was directed to administer upon the estate. The simple question that the court passed upon was that in case of a dismissal the parties seeking the same would have to pay the costs.

"I therefore conclude that after adjudication in a voluntary case the right of a petitioner to dismiss a petition by consent of creditors ceases. After adjudication, the remedy is by vacating the adjudication the same as vacating any other final judgment, and that after the appointment of a trustee it is too late for any party to move to vacate the adjudication, except upon questions which go to the jurisdiction of the court. If the bankrupt desires a settlement with his creditors, he must seek it under the provisions of section 12, providing for composition. Otherwise it will be the duty of the trustee to proceed with the administration by sale and distribution of the assets in accordance with the provisions of the act."

I have given consideration to the report of the referee and the conclusions reached by him, and also to the learned opinion submitted in support thereof. I fully concur with the referee in his conclusion that a bankruptcy proceeding may not be dismissed by consent of parties on motion, after adjudication, and so hold.

Accordingly, an order will be entered denying the motion of the bankrupt to dismiss.

In re LUMMUS.

(District Court, N. D. Georgia. November 6, 1913.)

BANKRUPTCY (§ 293*)—ADVERSE CLAIM TO PROPERTY—JURISDICTION OF COURT OF BANKRUPTCY.

The fact alone that property was transformed and delivered by a bankrupt to a creditor on the day before the bankruptcy proceedings were commenced against him, and that the creditor knew of the intended proceedings, does not give the bankruptcy court jurisdiction to adjudicate his rights summarily, where it appears that the indebtedness to him was bona fide and he claims the property as purchaser.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. § 293.*]

In Bankruptcy. In the matter of W. A. Lummus, bankrupt. On application for a summary order to require Gus Coggins to deliver property to receivers. Denied.

C. L. Harris and L. E. Wisdom, both of Cumming, Ga., and Bell & Ellis, of Atlanta, Ga., for petitioning creditors.

Gober & Jackson, of Atlanta, Ga., for alleged bankrupt.

NEWMAN, District Judge. The facts in this case are that certain creditors of W. A. Lummus and persons interested were having a conference in Atlanta as to the advisability of putting Lummus into bankruptcy, with every indication that they would endeavor to do so. About this time, Coggins, who had been absent out West in connec-

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

tion with his mule business, arrived in Atlanta and was informed of what was going on. During the day he paid to a bank in Atlanta a note for $1,000 on which he was an indorser for Lummus. He claims that Lummus owed him this $1,000 and a considerable amount in addition thereto.

Coggins and Lummus, who was also in Atlanta, went to the Kimball House, and Coggins told Lummus that he ought to pay him what he owed him, and Lummus sold him the certain buggies, mules, and horses now in controversy.

A memorandum is presented to the court, written on the Kimball House paper, on which appears a list of certain horses and mules, 14 top buggies, and 1 secondhand open buggy; the price being attached to each item and aggregating $1,145. Just below this is the following:

"One note signed by W. A. Lummus and John McClure for $1,000.00, 8 Hundred due Gus Coggins for mules."

This is said to be a memorandum of the sale by Lummus to Coggins of this property for the amount named, $1,145.

Of course, it is perfectly plain that the effort was for Coggins to get as much as he could on the debt he claimed against Lummus before the property could be taken into possession by the court. That night the property was turned over by Lummus' representative to Coggins' representative and taken from Alpharetta, Ga., where Lummus' place of business was, to Canton, Ga., where Coggins lived and had a place of business.

This is a summary proceeding to require Coggins to turn over the property so received to the receivers appointed by the court for Lummus' estate, against whom, the next day after this transaction occurred, a petition in bankruptcy was filed and receivers appointed.

The sole question at the threshold of this matter is whether Coggins is an adverse claimant within the meaning of the law.

I have recently had this question before me in the case of In re Spalding Cotton Mills (D. C.) 193 Fed. 554. An examination of that case will therefore show the view entertained by this court as to the distinction between an adverse claimant and one whose claim is merely colorable.

In the case of In re Teschmacher & Mrazay (D. C.) 127 Fed. 728, the first headnote states the opinion of the court on the question involved here, which is as follows:

"Where a third person claims property alleged to belong to a bankrupt, a court of bankruptcy has only jurisdiction to inquire summarily as to whether the property is held by the person in possession as the bankrupt's agent, or mere representative; and if, on such inquiry, the court is satisfied that a real adverse claim exists, such claim must be determined in a plenary suit in the state or federal court."

In the opinion this is said:

"It follows therefore that as the testimony taken by the referee discloses that Gerenday is making a real, and not merely a colorable, claim to the ownership of the property in dispute, he is entitled to have his contention examined and judged according to the ordinary and regular process of the law, unless his consent to the summary proceeding before the special referee has

bound him irrevocably to go on with it to the end. It is well settled that mere consent cannot give jurisdiction."

In the case of In re Adams (D. C.) 130 Fed. 788, the opinion, which is very short, is as follows:

"The claim of Nass that, before the filing of the petition in bankruptcy, he had received the property in question as part payment of a debt, and that he had no reasonable cause to believe that it was intended thereby to give a preference, was clearly an adverse claim. In re Hartman (D. C.) 10 Am. Bankr. Rep. 387, 121 Fed. 940. The referee, however, found as facts that the taking of possession by Nass was without authority from Adams; that Nass knew, or had reasonable cause to know, that the taking constituted a preference; and that the taking of the property was equivalent to trover and conversion, and carried no title; that, in consequence thereof, Nass had not even a colorable claim to title. This was not a decision that, upon the facts as claimed by Nass, he was not an adverse claimant, nor an inquiry into the existence of an adverse claim; but a decision of the merits of an adverse claim of right, and a finding that the claim was not adverse because, in the opinion of the referee, it was not, as a matter of evidence meritorious in point of fact. As it is clear from the report of the referee, and from his decree, that Nass was, properly speaking, an adverse claimant, the referee, upon objection, should have declined to finally adjudicate the merits of the case on a summary petition. Mueller v. Nugent, 184 U. S. 1, 15, 22 Sup. Ct. 269, 46 L. Ed. 405; Louisville Trust Co. v. Comingor, 184 U. S. 18, 25, 22 Sup. Ct. 293, 46 L. Ed. 413; Jaquith v. Rowley, 188 U. S. 620, 625, 23 Sup. Ct. 369, 47 L. Ed. 620; In re Tune (D. C.) 115 Fed. 906."

This whole matter depends, of course, upon the decision of the United States Supreme Court in Mueller v. Nugent, 184 U. S. 1, 15, 22 Sup. Ct. 269, 275 (46 L. Ed. 405). In the opinion by Chief Justice Fuller in that case, in discussing the very question we now have, the following language is used:

"The position now taken amounts to no more than to assert that a mere refusal to surrender constitutes an adverse holding in fact, and therefore an adverse claim when the petition was filed, and to that we cannot give our assent. But suppose that respondent had asserted that he had the right to possession by reason of a claim adverse to the bankrupt, the bankruptcy court had the power to ascertain whether any basis for such a claim actually existed at the time of the filing of the petition. The court would have been bound to enter upon that inquiry, and in doing so would have undoubtedly acted within its jurisdiction, while its conclusion might have been that an adverse claim, not merely colorable, but real even though fraudulent, and voidable, existed in fact, and so that it must decline to finally adjudicate on the merits."

Counsel for the receivers in this case cites the case of In re Friedman (D. C.) 18 Am. Bankr. Rep. 713, 153 Fed. 939, affirmed by the Circuit Court of Appeals (20 Am. Bankr. Rep. 37, 161 Fed. 260, 88 C. C. A. 306), the first headnote of which is as follows:

"If property formerly in the possession of the bankrupt, is found in the possession of any other person, and such person is, in the opinion of the court, very clearly but a cover or receptacle for that property, which, as between the bankrupt and such other person, is still the property of the bankrupt, or such other person is but the alter ego of the bankrupt, then a summary order to turn over is proper, and no pretended instruments or transfer, no apparatus of conveyances, should prevail."

Certainly this is true, and that is the effect of the decision in Mueller v. Nugent, supra.

The main ground, apparently, relied upon by counsel for the receivers, at least one of the grounds, is that the books of the bankrupt were sent with the buggies and live stock to Canton; it further appearing that there is no account on the books of the bankrupt, which have since been sent back, with Coggins. This whole transaction looks suspicious, of course; but the facts remain that there was a sale, or an attempted sale, by Lummus to Coggins on the day before the bankruptcy proceedings were commenced, that Coggins took the property and had the same in his possession at the time the bankruptcy proceedings were instituted, and at the time this rule seeking to recover the property by summary order was applied for, that Coggins produced his books in court and showed an account with Lummus, apparently regularly kept, which showed large transactions between them for the purchase and sale of live stock, and that there is a real adverse claim on the ground that he bought the property as stated.

This property cannot be recovered by summary proceedings on the mere suspicion raised by the haste with which the alleged sale was accomplished and the goods were delivered, and what occurred with reference to Lummus' books. This would be in the teeth of all the decisions on this subject which I have been able to find, and even reversing the conclusions reached by this court in the case of In re Spalding Cotton Mills, above referred to.

Of course, the denial of this application is without prejudice in any way to the right of the trustee, when elected, to proceed, as he may be advised, by plenary proceeding to set aside this sale and recover the property. There may be a little delay about such a proceeding, but there would be no question that justice and the rights of the parties would be subserved, while under this proceeding they cannot be.

The application for a summary order is denied, and the petition dismissed, without prejudice.

UNITED STATES v. NALDRETT et al.

(District Court, W. D. Michigan, N. D. July 22, 1914.)

JUDGMENT (§ 585*)—CONCLUSIVENESS—RES JUDICATA—ISSUES.

Complainant sued to set aside certain patents and a timber deed for fraud, and to have certain conveyances to H. set aside on the ground that he took with notice of the invalidity of the title of his grantors. Complainant was successful in vacating the patents and timber deed, but was unsuccessful as to the conveyances to H., which were declared an equitable mortgage taken in good faith and entitled to protection. Thereafter complainant brought a new suit to procure the discharge of the mortgage lien by compelling the grantors of H. to pay the debt or by a foreclosure of the mortgage and sale of the land. *Held*, that the second suit was based on a different cause of action or claim from that set up in the first, and hence the judgment therein was not res judicata, but operated only as an estoppel between the parties as to points actually litigated and determined and was not conclusive as to other matters which might have been, but were not, litigated nor decided.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062–1064, 1067, 1073, 1084, 1085, 1092–1095, 1132; Dec. Dig. § 585.*]

In Equity. Suit by the United States of America against Charles S. Naldrett and others. Decree for complainant.

E. J. Bowman, U. S. Dist. Atty., of Greenville, Mich.
John A. Brown, of Chicago, Ill., for defendant Hewitt.
Edwin H. Lyon, of St. Johns, Mich., for defendant Montigel.

SESSIONS, District Judge. The chief defense in this suit, and the only one requiring consideration, is the claim urged by counsel for defendant Montigel that the decrees in the former suits between these parties are res judicata of the issues here presented. In this respect, reliance is placed upon the familiar and settled rule of estoppel by judgment or decree that, when a second suit is upon the same cause of action and between the same parties as a former one, the judgment or decree in the first is conclusive in the second as to every question which was or might have been presented and determined. While it is conceded that the questions here presented were not litigated and the relief here sought was neither prayed for nor granted in the former suits, counsel earnestly insist that such questions and also complainant's right to relief might have been there determined had complainant so desired, and therefore, under the rule above stated, the decrees in the former suits are a complete bar to the relief here sought.

The vice of this contention lies in the fact that the cause of action set forth and alleged in the present bill is not the same as, but is wholly different from, those involved in the earlier suits. There, the sole purposes were to have the patents to Naldrett and Montigel and the timber deed from the latter to the former canceled and set aside, because they were fraudulently procured and made, and to have the conveyances to Hewitt canceled and set aside upon the ground that he took and received them with full notice of the invalidity of the title of his grantors and, consequently, was not a good-faith purchaser or mort-

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

gagee entitled to protection. Complainant was successful in having the patents and timber deed canceled for fraud in their procurement and making, but was unsuccessful as to the conveyances to Hewitt which were decreed to be an equitable mortgage taken in good faith and entitled to protection. The purposes and grounds of the present suit are entirely different. Here the validity and lien of Hewitt's mortgage are conceded and recognized. The relief sought is to procure the discharge of the lien of the mortgage by compelling, if possible, Naldrett and Montigel, by and through whose wicked and fraudulent conduct it was created, to pay the debt which it secures, or, if that is found to be impossible, by foreclosure of the mortgage and sale of the land.

The decision of this case, therefore, is governed and controlled by another well-settled rule that, when a second suit is upon a different cause of action or claim, but between the same parties as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action; but it is not conclusive as to other matters which might have been, but were not, litigated or decided. Southern Pacific R. Co. v. United States, 186 Fed. 737, 742, 108 C. C. A. 607; Cromwell v. Sac County, 94 U. S. 351, 352, 24 L. Ed. 195; Nesbitt v. District, 144 U. S. 610, 618, 12 Sup. Ct. 746, 36 L. Ed. 562; Southern Pacific R. Co. v. U. S., 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; Virginia-Carolina Chemical Co. v. Kirven, 215 U. S. 252, 257, 30 Sup. Ct. 78, 54 L. Ed. 179; Northern Pacific R. Co. v. Slaght, 205 U. S. 122, 131, 27 Sup. Ct. 442, 51 L. Ed. 738; Millie Iron Mining Co. v. McKinney (C. C. A. 6) 172 Fed. 42, 48, 96 C. C. A. 156; Linton v. National Life Ins. Co., 104 Fed. 584, 587, 44 C. C. A. 54; Smith v. Smith (D. C.) 210 Fed. 947, 952; Lim Jew v. United States, 196 Fed. 736, 739, 116 C. C. A. 364; Water, Light and Gas Co. v. City of Hutchinson, 160 Fed. 41, 90 C. C. A. 547, 19 L. R. A. (N. S.) 219, and authorities there cited; Commissioners v. Platt, 79 Fed. 567, 571, 25 C. C. A. 87; Commissioners v. Sutliff, 97 Fed. 270, 274, 38 C. C. A. 167; Louisville & N. R. Co. v. Railroad Commission (D. C.) 205 Fed. 800, 804; T. B. Wood's Sons Co. v. Valley Iron Works (D. C.) 198 Fed. 869, 870; Elk Garden Co. v. T. W. Thayer Co. (D. C.) 206 Fed. 212, 216, 217.

A decree will be entered in favor of complainant in accordance with the prayer of the bill, with costs to be taxed against defendants Naldrett and Montigel.

AMERICAN BONDING CO. OF BALTIMORE v. RICHARDSON et al.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1914.)

No. 2441.

1. TRUSTS (§ 240*)—COTRUSTEE—LIABILITY.

A trustee in general is responsible only for his own acts or defaults, and, except for his own fraud or negligence, is not liable for the trust property which has been in the exclusive possession and under the sole control of a cotrustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 347; Dec. Dig. § 240.*]

2. TRUSTS (§ 179*)—COTRUSTEE—CARE REQUIRED.

A trustee's obligation to his trust is satisfied by the exercise of the same degree of diligence that a man of ordinary prudence would be expected to exercise in the care of his own property under the same circumstances.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 233; Dec. Dig. § 179.*]

3. TRUSTS (§ 262*)—COTRUSTEES—SEPARATION OF PROPERTY—FRAUD OF SINGLE TRUSTEE—LIABILITY OF COTRUSTEE.

Testator died leaving a large estate invested in Ohio and Indiana, which he devised to trustees, one located in each state. Both had been his close friends and advisors during his lifetime, and had actively assisted him in his investments in their respective localities. Litigation having been instituted in Indiana to recover a large amount of back taxes on property, and the Indiana trustee having been enjoined from removing any of the assets in his possession from the state, the trustees were advised by the Ohio probate court administering the trust to divide the estate into two parts each taking charge of assets in his own state. This was done, and thereafter separate bonds were executed by the trustees and separate accounts made and approved; each giving to the other power of attorney authorizing separate action with reference to the property held by each. The Indiana trustee was a man of high standing in his locality, made prompt and full accounts, and there was no evidence of defalcation until after his death, when it was found that he was a defaulter to the trust in a large sum. *Held*, that neither the Ohio trustee nor his successor were negligent in failing to investigate the Indiana property in the hands of the defaulting trustee from time to time, so as to render them liable for the defalcation to the defaulter's surety.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 372; Dec. Dig. § 262.*]

4. TRUSTS (§ 387*)—TRUSTEES—SURETIES—LIABILITY—INTEREST.

On the death of a cotrustee in Indiana an inventory of the property in his hands was filed in February, 1909, and showed a defalcation. His surety, instead of availing itself of the tendered assistance and co-operation of the Ohio trustee, commenced suit to compel the latter to hold it harmless from the payment of any sum whatever, the bill being filed in May, 1909, and a decree denying such relief and granting a recovery on the bond was not obtained until July 24, 1912. *Held*, that the court properly charged the surety with interest on the penalty of the bond from the date of the filing of its bill, instead of the date of the decree.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 626–632; Dec. Dig. § 387.*]

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

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

Suit by the American Bonding Company of Baltimore against Charles C. Richardson and another. Judgment for defendants, and complainant appeals. Affirmed.

James Buck and the defendant, Richardson, were trustees under the will of Job M. Nash, deceased. James Buck misappropriated and embezzled upwards of $50,000 of the trust funds. The American Bonding Company of Baltimore (complainant) was the surety on Buck's bond in the probate court of Hamilton county, Ohio, in the penal sum of $50,000. The defendant Morgan is the successor of Buck. In this suit, complainant seeks to have the defendant Richardson adjudged liable for the defalcation of Buck, his cotrustee. The cause was referred to a special master to take testimony and to report therefrom his findings of fact and conclusions of law. The master's findings of fact, somewhat condensed and abbreviated, are as follows:

On August 1, 1893, the last will and testament of Job M. Nash, deceased, was duly admitted to probate in and by the probate court of Hamilton county, Ohio. Among other bequests contained in the will was one of $268,000 to James Buck of Lafayette, Ind., and William Augustus Goodman, of Cincinnati, Ohio, and to their survivors or successors, in trust, to be invested by them in good productive personal property, or secured by first mortgage upon good productive real estate, and the net income thereof to be paid semiannually by them, or their survivors or successors, to certain designated beneficiaries. Letters of trusteeship were issued without bond; none being required by the will. The trustees duly qualified and entered upon the discharge of their duties, and, on the 1st day of January, 1894, received the trust funds and securities, amounting to $268,000. The trust funds were already invested in ground rents in the city of Cincinnati to the amount of $141,000, and in mortgage loans in three counties in Indiana to the amount of $127,000. Mr. Buck had been a resident of the city of Lafayette for many years, and had acted as the business agent of Mr. Nash in making investments in that vicinity. Mr. Goodman had rendered like services to Mr. Nash in and near the city of Cincinnati. Mr. Buck took possession of the trust securities in Indiana, and Mr. Goodman took possession of those in Ohio. They filed three joint semiannual accounts, which were duly approved and allowed by the probate court. Thereafter, semiannually, each trustee filed his own separate account and reported his own separate doings, including receipts, investments, compensation, and disbursements, with relation to the properties of the trust under his own separate control and management.

The trust funds and properties were divided and separate accounts were filed under the advice of counsel and of the probate court. This advice was given and followed so as to prevent the whole trust estate being drawn into certain tax proceedings which were being prosecuted against the estate of Job M. Nash by the tax authorities of the city of Lafayette and the county of Tippecanoe, Ind., under assessments made for omitted taxes claimed to be unpaid and delinquent for 13 years, and amounting to upwards of $200,000. In January, 1897, suit for these taxes was commenced against Buck, as trustee, and he was enjoined from removing from the county of Tippecanoe the trust securities and property in his hands. A judgment in the lower court was subsequently obtained against him and affirmed by the Supreme Court of the state of Indiana. In January, 1905, Mr. Buck took an appeal to the Supreme Court of the United States where, on the 27th day of May, 1907, the judgment of the Supreme Court of Indiana was reversed. Buck v. Beach, 206 U. S. 392, 27 Sup. Ct. 712, 51 L. Ed. 1106, 11 Ann. Cas. 732. During this period, the several successive judges of Hamilton county probate court were fully informed of these tax proceedings. They advised Trustee Goodman to stay out of the state of Indiana so as to avoid the jurisdiction of its courts and to keep the trust funds in his separate control from being drawn into the litigation and thereby subjected to the tax claims made against the Nash estate by the Indiana taxing authorities. From and after the year 1896, the probate court, in the exercise of its jurisdiction of the trust, authorized the separate and exclusive control, dominion, and management by Mr. Buck of the part of the trust property reported by him as being in his separate possession in Indiana, and the separate and exclusive control, dominion, and

management by Mr. Goodman of the part of the trust property reported by him as being in his exclusive possession in the city of Cincinnati. From January, 1897, to March, 1904, the trustees, Goodman and Buck, each made detailed semiannual reports to the probate court without regard or reference to the course taken by the other, either as to the form of the report or the time of filing it. The accounts of each trustee, contained in such reports, were each independently allowed and approved by the probate court. The trust assets reported by Mr. Goodman in each of his separate accounts amounted to $141,000, and the trust assets reported by Mr. Buck in each of his separate accounts amounted to $127,000. The beneficiaries were fully informed of the separation and division of the trust funds and securities.

On the 29th day of March, 1904, the probate court was informed of the death of Mr. Goodman, and appointed the defendant Charles C. Richardson as his successor. In the application for the appointment of Mr. Richardson, the trust assets which were to come into his possession were represented to consist of ground rents and real property in the city of Cincinnati of the estimated value of $141,000. Each of the trustees, Buck and Richardson, presented and filed a separate bond in the penal sum of $50,000, conditioned for the faithful discharge of his duties as trustee. The Ætna Indemnity Company became surety upon Richardson's bond, and the complainant, American Bonding Company, became surety upon Mr. Buck's bond, and, for a premium paid to it, thereafter continued as such surety. After the death of Goodman, there was no change in the control, dominion, and management of the trust assets as they were then found in the separate possession of each of said trustees, Messrs. Buck and Richardson, nor was there any change in the mode of accounting to the court. Each trustee dealt with his part of the trust property independently of the other, made semiannual reports which were allowed and approved separately by the probate court, and made separate distribution to the beneficiaries of the income from the trust property in his possession. Each beneficiary of the trust was furnished with a copy of each of Mr. Richardson's semiannual accounts, was fully informed of its contents, accepted the income distributed to him, and acquiesced in the management of the trust.

In the tax litigation, the complainant, American Bonding Company, became surety on Mr. Buck's several appeal bonds, and for the purpose of securing it against liability thereon, United States bonds of the face value of $40,000 and a mortgage of $9,500, belonging to the trust, were placed in the joint and exclusive control of itself and Mr. Buck, where they remained until after the judgment of reversal by the Supreme Court of the United States on May 27, 1907. Mr. Richardson had no notice or knowledge of this transaction.

The net expenses of the tax litigation amounted to the sum of $10,041.15. In order to indemnify the trust funds in Mr. Buck's hands for this outlay, Mr. Richardson, as trustee, from time to time withheld and reserved, with the consent of the beneficiaries of the trust, certain parts of the semiannual income due them. By means of this expedient a fund was created in the hands of Mr. Richardson whereby the beneficiaries, out of their incomes, reimbursed the trust fund for its outlays.

On the 3d day of February, 1894, Mr. Goodman, as one of the trustees, executed to Mr. Buck, as his cotrustee, his power of attorney, whereby he constituted Mr. Buck his attorney to sign his name to any and all receipts, checks, notes, vouchers, acquittances, discharges, assignments, etc., necessary to the transaction of the business of the trust, also to take full charge and control of the trust property in Indiana, to make payments of the moneys derived from the investment of the trust funds to the beneficiaries, to accept proper receipts therefor, and properly to invest the trust funds. Mr. Buck gave Mr. Goodman a similar power of attorney. After the death of Mr. Goodman, a like power of attorney was given by Mr. Buck to Mr. Richardson and by Mr. Richardson to Mr. Buck. By virtue of the power of attorney, Mr. Buck, in his own name and that of Mr. Richardson as trustees, at different times between May 31, 1904, and September 6, 1906, released of record 13 mortgages that had been executed to William Augustus Goodman and James Buck, trustees, for moneys which he himself had loaned as trustee, these releases being made at the times he had received the redemption moneys in his own

hands. In addition to these, on the 11th day of April, 1904, Messrs. Buck and Richardson, as trustees, personally signed releases of two mortgages, the moneys being paid to Mr. Buck.

On the 9th day of January, 1909, Mr. Buck died insolvent. Upon his death search was made for the properties of the trust in all places wherein they could reasonably have been expected to have been found. This search resulted in the finding of United States bonds of the face value of $10,000, and mortgage securities and other properties of the value of $53,072.45, and no more. His accounts in the probate court, beginning with that filed on July 15, 1904, reported 11 mortgage loans, aggregating $33,900 made by him. On October 19, 1908, he entered upon his journal a mortgage loan for $3,000, and on December 10, 1908, another for $4,000. These loans, amounting to $40,900, were never made and were wholly fictitious.

The actual trust assets in Mr. Buck's possession on the 13th day of April, 1904, when his bond was given to the probate court, amounted to $127,821.98. The actual trust funds in his possession on the 30th day of June, 1904, the date of his first account after the appointment of Mr. Richardson, amounted to $127,000, and the amount of the trust funds found among his effects on the date of his death amounted to $64,750.11, which was turned over to his successor, defendant Morgan. Mr. Buck's defalcation, exclusive of interest, amounts to more than the penalty of his bond upon which complainant is surety.

The master's findings of fact also contain the following: "Mr. Buck for many years had enjoyed the confidence of Mr. Nash, who spoke of him in his will as his friend and made him a legatee in the sum of $3,000. He was and had for many years been in the real estate, loan, and investment business, had borne a good reputation in that line as a man of ability and integrity. He was also esteemed a good judge of values of land situated in Tippecanoe and the other counties hereinbefore mentioned. His dealings with the trust fund in his possession from the beginning, as far as they were known, did not justify any suspicion against his character for honesty, or any doubt as to his business capacity. The good reputation he had as a business man in his line warranted the reposing of the fullest confidence in the safety and the financial soundness of the investments that had been made by him. Richardson paid no attention whatsoever to the part of the trust property separately held by Buck, nor to his dealings with it. By reason of the judicial action of the probate court, Richardson was justified in looking upon it in the light of a separate trust from his own. He so conducted himself as trustee, excepting therefrom, however, the personal releases of the two mortgages above mentioned, and the creation of the reserve fund to indemnify Mr. Buck's outlays in the tax litigation. The power of attorney given by him to Mr. Buck to use his name and to act in his place and stead in the dealings of the trust property by Mr. Buck was, for conformity, made necessary by the creation of the joint trust. Richardson's conduct was that of a reasonable and prudent man dealing with his own property under the same circumstances. As such he was not called upon to question Mr. Buck's business capacity in making the reported investments, nor suspect him to be the rogue which the revelations after his death proved him to have been, nor to call for the inspection of the securities. The defalcations of Mr. Buck and his fraudulent concealment of them, as well as the success of the deception practiced by him in his accounts to the probate court, were not in any manner attributable to any act or omission on the part of Mr. Richardson in the discharge of his duty as trustee. There was at no time any complaint made as to the character or value of the actual investments made by Buck. The deficit and loss of $57,451.38 are wholly ascribable to his dishonest appropriation of the trust fund."

Lawrence Maxwell, of Cincinnati, Ohio, and Edward Duffy, of Baltimore, Md., for appellant.

Ferdinand Jelke, Jr., and W. M. Schoenle, both of Cincinnati, Ohio, for appellees.

Before DENISON, Circuit Judge, and EVANS and SESSIONS, District Judges.

SESSIONS, District Judge (after stating the facts as above). The master's findings of fact above set forth were approved and reaffirmed by the District Judge, are fully sustained by the evidence, and therefore, under the well-settled rule, will be accepted and adopted by this court.

This suit is not brought by the beneficiaries of the trust, nor by any one in their behalf or in privity with them. On the contrary, the surety for hire upon the separate bond of a defaulting trustee is seeking to recover for itself from a cotrustee, who has been guilty of no active wrongdoing, the amount of the defalcation upon the sole ground that the honest trustee did not prevent the malfeasances of the dishonest one. This fact alone is sufficient to distinguish the present case from Caldwell v. Graham, 115 Md. 122, 80 Atl. 839, 38 L. R. A. (N. S.) 1029; In re Beatty's Estate, 214 Pa. 449, 63 Atl. 975; Bermingham v. Wilcox, 120 Cal. 467, 52 Pac. 822, and similar cases upon which counsel for plaintiff place their chief reliance.

[1] It is settled that, as a general rule, a trustee is responsible only for his own acts or defaults, and, except for his own fraud or negligence, is not liable for the trust property which has been in the exclusive possession and under the sole control and dominion of a cotrustee. Peter v. Beverly, 10 Pet. 532, 563, 9 L. Ed. 522; Movius v. Lee (C. C.) 30 Fed. 298, 307; Ohio v. Guilford, 18 Ohio, 500, 509; Dyer v. Riley, 51 N. J. Eq. 124, 26 Atl. 327; McKim v. Aulbach, 130 Mass. 481, 483, 39 Am. Rep. 470.

[2] It is also settled that a trustee's obligation to his trust is met and satisfied by the exercise of the same measure of diligence that a man of ordinary prudence would be expected to exercise in the care of his own property under the same circumstances. King v. Talbot, 40 N. Y. 76; McCabe v. Fowler, 84 N. Y. 314; In re Bartol, 182 Pa. 407, 38 Atl. 527; Smith v. Bank of New England, 72 N. H. 4, 54 Atl. 385; Mattocks v. Moulton, 84 Me. 545, 24 Atl. 1004; Scoville v. Brock, 81 Vt. 405, 70 Atl. 1014.

[3] But, conceding the correctness of these rules of law, complainant insists that the conduct of Richardson does not measure up to their requirements in that the trust was not separable into parts, but was joint, requiring the joint and not the separate management of the trustees, while "Richardson paid no attention whatsoever to the part of the trust property separately held by Buck, nor to his dealings with it." So the real question to be decided is whether Richardson was justified in acquiescing in the division of the trust estate into two distinct and separate parts and in retaining the management of one part and permitting the other part to be and remain under the sole dominion and control of his cotrustee. The determination of this question involves and requires a consideration of all the peculiar circumstances, conditions, and difficulties attending and surrounding the creation, continuance, and management of the trust. The original trustees, Buck and Goodman, were both close and intimate friends and advisors of the testator and creator of the trust in his lifetime. Both had actively as-

sisted him with reference to his investments in their respective localities. Buck was a beneficiary under his will. It was natural that each trustee should take active charge of the property with which he was familiar. The tax litigation arose, and Buck was enjoined by the courts of Indiana from removing from that state any of the assets of the estate in his possession. Large adverse judgments were obtained in the state courts. The final outcome of the litigation was very doubtful. The attorneys for both trustees advised and the probate court of Hamilton county, Ohio, authorized and directed a division of the estate into two parts. Goodman was advised not to go into the state of Indiana, and not to do anything to submit himself or the Ohio property to the jurisdiction of the Indiana courts. This advice was given, and this direction was made in the bona fide belief that such action was necessary for the protection and preservation of the trust property. Pursuant to such advice and direction the division was made, or rather the natural division theretofore actually existing was formally declared and made a matter of record. Thereafter, with the knowledge and approval of the probate court, each of the two parts of the trust estate was treated as a separate trust. Each trustee managed his part without reference to the actions of the other. Each rendered a separate account every six months without reference to the account of the other. Each account was independently approved by the probate court. Separate distributions of the income were made to the beneficiaries. Goodman died, and Richardson was appointed his successor. Then, for the first time, the trustees were required to furnish bonds. Separate bonds were furnished. The Ætna Indemnity Company became surety upon Richardson's bond, and the complainant became surety upon the bond of Buck. In his application to the complainant to become surety upon his bond, Buck truthfully described and set forth the Indiana property in his possession for which the surety was to become responsible. Acting under like advice and direction as had been given to his predecessor, Richardson took charge of and continued to manage and control the Ohio property, and permitted the Indiana property to be and remain in the sole custody of Buck. By the semiannual reports of the trustees and otherwise, the complainant was, at all times, fully informed as to the condition and method of the administration of the trust estate, and made no objection or protest until after the death of Buck and the discovery of his defalcation. Even at this late day, the gist of its complaint is that Richardson was negligent in that he failed to personally examine the securities held by his cotrustee or to investigate the Indiana records and thus to discover that fictitious mortgages were being reported. But, to have done either would have been to act contrary to the advice of his counsel and in violation of the direction of the probate court. Besides, Buck was the older trustee, appointed by the creator of the trust, and was a man of reputed ability, honesty, and integrity. His reports were made regularly, and the apparent income from the trust funds was paid promptly to the beneficiaries. There was no reason to suspect him of dishonesty. Under these circumstances, it cannot be said that Richardson was negligent, or that he was lacking in care, prudence, and diligence in his actions with reference to the trust property. In re

Halstead, 44 Misc. Rep. 176, 89 N. Y. Supp. 806, and In re Halsted, 110 App. Div. 909, 95 N. Y. Supp. 1131, affirmed 184 N. Y. 563, 76 N. E. 1096; In re Westerfield, 32 App. Div. 324, 53 N. Y. Supp. 25, and 48 App. Div. 542, 63 N. Y. Supp. 10; Croft v. Williams, 88 N. Y. 384; Paulding v. Sharkey, 88 N. Y. 434; In re Cozzen's Estate (Sur.) 15 N. Y. Supp. 771; Ormiston v. Olcott, 84 N. Y. 339; Estate of Fesmire, 134 Pa. 67, 19 Atl. 502, 19 Am. St. Rep. 676; Colburn v. Grant, 181 U. S. 601, 21 Sup. Ct. 737, 45 L. Ed. 1021.

[4] The defendant trustees filed a cross-bill, seeking to recover against complainant the amount of Buck's defalcation to the extent of the bond. Complaint is made of the finding of the master, affirmed by the District Court, that complainant is equitably chargeable with interest on $50,000, the penal amount of its bond, from the time of the filing of its bill instead of from the date of the decree. The bill was filed May 26, 1909. The decree was made July 24, 1912. The record shows that on January 25 and February 8, 1909, the trustees, Richardson and Morgan, notified complainant of the death of Mr. Buck, and warned it to take measures for its own protection. They offered their co-operation. They made an indefinite estimate of the probable deficit of Buck, but made no demand of payment of a definite amount. The bill alleges that, in February, 1909, an inventory of all of the Indiana trust property which had been found after Buck's death was filed in the circuit court of Tippecanoe county. This inventory and the investigation then made showed that the deficit was large. Instead of availing itself of the tendered assistance and co-operation of the trustees and offering to make good the amount of the loss, complainant commenced this suit in which it sought to compel Richardson to hold it harmless from the payment of any sum whatsoever. As said by the master:

"While it was entitled to the aid of the court of equity to determine the amount of its liability under the bond, it cannot equitably take advantage of the delays incidental to this judicial inquiry and thus postpone the date from which interest should be charged. Spalding v. Mason, 161 U. S. 375, 395 [16 Sup. Ct. 592, 40 L. Ed. 738]; Sturn v. Boker, 150 U. S. 312, 342 [14 Sup. Ct. 99, 37 L. Ed. 1093]."

The decree of the lower court is affirmed.

GOLCONDA CATTLE CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. April 6, 1914.)

No. 2143.

PUBLIC LANDS (§ 19*)—"UNLAWFUL INCLOSURE OF PUBLIC LANDS"—SUIT FOR INJUNCTION.

Defendant cattle company constructed and maintained a fence about 40 miles long around 37,000 acres of land, 26,000 acres of which was public land. The remainder was mostly owned by defendant and practically surrounded that owned by the government. The fence was built entirely on such land, no part of it being on the government land, and there were nine openings in it, varying from 90 to 3,400 feet in length. It appeared

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

from the evidence that the fence was not built with any intent to inclose the government land, nor to exclude the public from entering upon it for purposes of settlement, grazing, or other uses, but for the bona fide protection of defendant's own lands. *Held* that, under such facts, the fence did not constitute an "unlawful inclosure of public lands," within the meaning and intent of Act Feb. 25, 1885, c. 149, § 1, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), and the United States was not entitled to an injunction to restrain its maintenance under section 2 of the act.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 25, 26; Dec. Dig. § 19.*]

Hunt, Circuit Judge, dissenting.

On rehearing. Reversed.

For former opinion, see 201 Fed. 281, 119 C. C. A. 519.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. Our former decision in this case is reported in 201 Fed. 281, 119 C. C. A. 519. A rehearing was granted, and after its reargument, and a very careful reconsideration of the record, we are convinced that in two respects indicated in the former opinion the court was in error—one as to a matter of fact and the other of law. In regard to the latter, it was said in the opinion—following the decision of the Circuit Court of Appeals of the Eighth Circuit in the case of Homer v. United States, 185 Fed. 741, 108 C. C. A. 79—that the question of intent with which the fencing was done could not be considered by the court. A reconsideration of that question satisfies us that this court had held the reverse in the cases of Potts v. United States, 114 Fed. 52, 51 C. C. A. 678, and Hanley v. United States, 186 Fed. 711, 108 C. C. A. 581, and that the Supreme Court so held in the case of Camfield v. United States, 167 U. S. 528, 17 Sup. Ct. 864, 42 L. Ed. 260. In the opinion in the case of Homer v. United States, supra, from which Judge Van Devanter, now a Justice of the Supreme Court, dissented, the court said:

"The Camfield Case was heard on an exception to defendant's answer to the effect that said answer did not state facts sufficient to constitute a defense to the bill. The answer sought to justify the erection of the fence in that case on the ground that defendants owned all the odd-numbered sections upon which the fence was built, and that they were engaged in building large reservoirs for the purpose of irrigating the land by them owned. They also denied that they had any intention of monopolizing the even-numbered sections or to exclude the public therefrom. With these allegations in the answer, this court affirmed the judgment of the Circuit Court abating the fence, and the Supreme Court, in affirming the judgment of this court, necessarily decided that building a fence on one's own land without an intention of inclosing lands of the United States was no defense, if in fact the lands mentioned were actually inclosed."

Turning to the case of Camfield v. United States, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. Ed. 260, it is seen that the bill averred in substance that the defendants, with intent to encroach and intrude upon the lands of the United States in an illegal manner, and to monopolize the use of the same for their own special benefit, did, on or about the 1st of January, 1893, construct and maintain a fence which inclosed and in-

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

cluded about 20,000 acres of the public domain; that the effect of such inclosure was to exclude the United States and all other persons except the defendants therefrom; and that the lands thus wrongfully inclosed consisted of all of the even-numbered sections in townships numbered 7 and 8 north of range 63 west of the sixth principal meridian. The bill further averred that said townships 7 and 8 lie within the limits of the grant made by the government to the Union Pacific Railroad Company; that the defendants had acquired from that railroad company the right to use all the odd-numbered sections of land which lie within the said townships 7 and 8 and outside thereof, immediately adjacent to the even-numbered sections lying within and on the margin of said townships, and that in building the fence complained of the defendants had constructed it entirely on the odd-numbered sections, either within or without townships 7 and 8, so as to completely inclose all of the government lands aforesaid, but without locating the fence on any part of the public domain so included. The defendants by the answer admitted that they had constructed a fence so as to inclose all of the even-numbered sections in townships 7 and 8 substantially as set out in the bill, save and except that at each section line a swinging gate had been placed to afford access to so much of the public domain as was inclosed by the aforesaid fence, and by their answer sought, among other things, to justify the erection of the fence in question upon the ground that they owned all the odd-numbered sections in townships 7 and 8, and they denied that they had any intention of monopolizing the even-numbered sections inclosed by said fence, or to exclude the public therefrom.

An exception to the answer upon the ground that it was insufficient to constitute a defense to the bill was sustained by both the trial and the Supreme Court. The latter, after setting out the provisions of the statute of February 25, 1885, entitled "An act to prevent unlawful occupancy of the public lands," 23 Stat. 321, the construction and application of which were involved, said:

"Defendants are certainly within the letter of this statute. They did inclose public lands of the United States to the amount of 20,000 acres, and there is nothing tending to show that they had any claim or color of title to the same, or any asserted right thereto under a claim made in good faith under the general laws of the United States. The defense is in substance that, if the act be construed so as to apply to fences upon private property, it is unconstitutional."

And, after referring to the general proposition that a man may do what he will with his own, and pointing out that that right will not justify him in maintaining a nuisance, or in carrying on a business or trade that is offensive to his neighbors, proceeded as follows:

"While the lands in question are all within the state of Colorado, the government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. * * * It needs no argument to show that the building of fences upon public lands with intent to inclose them for private use would be a mere trespass, and that such fences might be abated by the officers of the government or by the ordinary processes of courts of justice. To this extent no legislation was necessary to vindicate the rights of the government as a landed proprietor. But the evil of permitting persons, who owned or con-

trolled the alternate sections, to inclose the entire tract, and thus to exclude or frighten off intending settlers, finally became so great that Congress passed the act of February 25, 1885, forbidding all inclosures of public lands, and authorizing the abatement of the fences. If the act be construed as applying only to fences actually erected upon public lands, it was manifestly unnecessary, since the government as an ordinary proprietor would have the right to prosecute for such a trespass. It is only by treating it as prohibiting all 'inclosures' of public lands, by whatever means, that the act becomes of any avail. The device to which defendants resorted was certainly an ingenious one, but it is too clearly an evasion to permit our regard for the private rights of defendants as landed proprietors to stand in the way of an enforcement of the statute. So far as the fences were erected near the outside line of the odd-numbered sections, there can be no objection to them; but so far as they were erected immediately outside the even-numbered sections, they are manifestly intended to inclose the government's lands, though in fact erected a few inches inside the defendants' line. Considering the obvious purpose of this structure, and the necessities of preventing the inclosure of public lands, we think the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon the lands of a private individual. * * * The government has the same right to insist upon its proprietorship of the even-numbered sections that an individual has to claim the odd sections, and if such proprietor would have the right to complain of the government fencing in his lands in the manner indicated and leasing them for pasturage, the government has the same right to complain of a similar action upon his part. * * * These grants were made in pursuance of the settled policy of the government to reserve to itself the even-numbered sections for sale at an increased price; and if the defendants in this case chose to assume the risk of purchasing the odd-numbered sections of the railroad company for pasturage purposes, without also purchasing or obtaining the consent of the government to use the even-numbered sections, and thereby failed to derive a benefit from the odd-numbered ones, they must call upon their own indiscretion to answer for their mistake. The law and the practice of the government were perfectly well settled, and if it had chosen in the past to permit by tacit acquiescence the pasturage of its public lands, it was a policy which it might change at any moment, and which became the subject of such abuses that Congress finally felt itself compelled to pass the act of February 25, 1885, and thereby put an end to them. It was not intended, however, to prohibit altogether the pasturage of public lands, or to reverse the former practice of the government in that particular. Indeed, we know of no reason why the policy, so long tolerated, of permitting the public lands to be pastured may not be still pursued, provided herdsmen be employed, or other means adopted by which the fencing in and the exclusive appropriation of such land shall be avoided. The defendants were bound to know that the sections they purchased of the railway company could only be used by them in subordination to the right of the government to dispose of the alternate sections as it seemed best, regardless of any inconvenience or loss to them, and were bound to avoid obstructing or embarrassing it in such disposition. If practices of this kind were tolerated, it would be but a step further to claim that the defendants, by long acquiescence of the government in their appropriation of public lands, had acquired a title to them as against every one except the government, and perhaps even against the government itself. * * * So long as the individual proprietor confines his inclosures to his own land, the government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor; but when, under the guise of inclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to inclose the lands of the government, he is plainly within the statute, and is guilty of an unwarrantable appropriation of that which belongs to the public at large."

In deciding the Camfield Case, the Supreme Court manifestly, we think, took into consideration the intent with which the defendant to

that action erected the fences there in question, for the court, after setting out specifically how and where they were erected, including a diagram thereof, said:

"The device to which defendants resorted was certainly an ingenious one, but it is too clearly an evasion to permit our regard for the private rights of defendants as landed proprietors to stand in the way of an enforcement of the statute. So far as the fences were erected near the outside line of the odd-numbered sections, there can be no objection to them; but so far as they were erected immediately outside the even-numbered sections, they are manifestly intended to inclose the government's lands, though, in fact, erected a few inches inside the defendants' line. Considering the obvious purpose of this structure, and the necessities of preventing the inclosure of public lands, we think the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon the lands of a private individual."

And the court concluded with the declaration that:

"So long as the individual proprietor confines his inclosure to his own land, the government has no right to complain, since he is entitled to the complete and exclusive enjoyment of it, regardless of any detriment to his neighbor; but when, under the guise of inclosing his own land, he builds a fence which is useless for that purpose, and can only have been intended to inclose the lands of the government, he is plainly within the statute, and is guilty of an unwarrantable appropriation of that which belongs to the public at large."

So in the case of Hanley v. United States, 186 Fed. 711, 108 C. C. A. 581, this court sustained an instruction given to the jury by the trial court, holding it to have stated the law fairly in respect to the point there referred to, which instruction is as follows:

"It is sufficient, within the intendment of the statute, that the inclosure comprising any of such public lands was designed and intended by the person or individual constructing or maintaining the same to hinder or impede the ordinary ranging of stock, or its natural and free ingress from without, or egress from within, or is reasonably calculated in the manner of its construction or maintenance to accomplish a like result, or which serves to exclude or to hinder or impede other persons or the public from free and unrestrained access to and upon the lands so inclosed for the purposes for which any individual has the right of access to public lands. Nor is it essential that the person so constructing or maintaining the inclosure shall do so by fencing entirely his own, but he may accomplish the result by joining his fencing to that of others, so as to make the barrier complete, or he may conjoin his fence to natural barriers, such as ledges of rock, precipitous bluffs, steep declivities, or mountain ranges, or other natural obstructions, not readily passable, or which in their practical effect would impede or interrupt the ordinary ranging of stock, or which, together with the fencing, would prevent, obstruct, or impede in some measure the more natural and free passage of persons and individuals to and upon the public lands so inclosed. There is no controversy here as to the lands described in the indictment being a part of the public domain, and the defendant lays no claim to any of such lands, by entry or otherwise, with a view to their acquirement from the general government; so that these two elements of the offense charged may be taken as proven. The case, therefore, turns wholly upon the question whether the defendant maintained or controlled fences which, being joined onto the rim rock, constituted an inclosure as defined of such public lands. The government has described what fencing and rim rock or other natural barriers constitute the inclosure complained of, by setting forth the beginning and ending point, and the courses and distances thereof, and it is thereby confined in its proof to the establishment of such an inclosure as is alleged. * * * The intent or purpose with which fencing or an inclosure was constructed or maintained, if

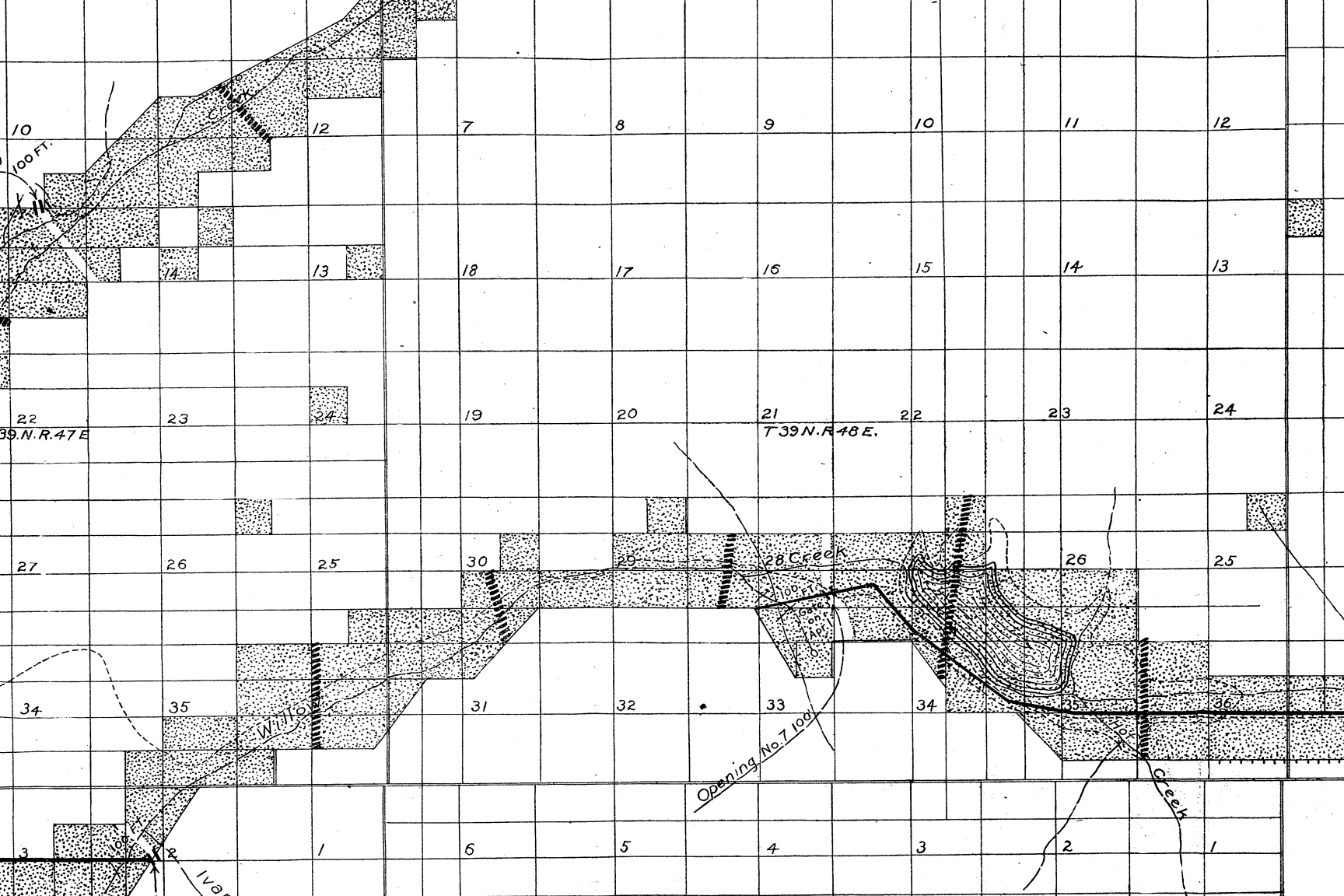
so constructed or maintained, may be gathered from all the testimony showing the local conditions and environment, the ownership or want of ownership of the lands affected by the inclosure, their occupancy, and the use of which they are susceptible. Men do not build fences, or construct or maintain inclosures, except for a purpose. That purpose is usually manifest. It is to control in some degree at least the use or the manner of use and occupancy of the lands or premises inclosed. Indeed, an inclosure is the assertion of a claim of some right or title to the premises inclosed, and it operates as a notice to others of such claim. Nor does it affect such assertion of claim and notice that gates and bars that may be opened and closed are provided at convenient intervals in such fencing. These are primarily constructed for the use and convenience of the proprietor of the fencing, and usually only for others and the public when placed upon private easements or public highways. So that ordinarily any person breaking the close, or going upon the lands and premises inclosed for occupancy, or taking his stock thereon for pasturage, would be accounted a trespasser, a violator of private rights, or even a wrongdoer in a criminal sense; and thus is demonstrated the deterrent effect the maintenance of an inclosure about public lands will have upon those desirous of entering thereon for any purpose.

"A person has a right, under the law, to erect fences wholly upon his own land, and to maintain them, if he so desires, and if incidentally such fences may obstruct or impede the ingress or egress of stock ranging upon the public lands, or the free passage of persons upon or over such lands, no one can complain, because a man has a right to do what he pleases with his own, so long as he does no willful injury to another. But he cannot make the construction of fencing upon his own lands a subterfuge for inclosing or preventing free passage upon the public lands. To make plain to you what I mean, I will allude to some of the facts as they appear in this case. The Harney Valley Development Company owns the narrow strip of land, consisting of 40-acre tracts, by legal subdivisions joining one upon another in continuous succession, running from Fish creek north 12¼ miles to the vicinity of the North fork of Little Krumbo creek, thence east about 2¾ miles, thence north 2½ miles, and thence east 2 miles, more or less, to a junction with the rim rock at McCoy creek, and another strip of like character running from Blitzen river west about 7¾ miles to a little beyond the road to Roaring Springs. Upon these narrow strips of land has been constructed but a single line of fencing for their entire length, which, if conjoined upon the rim rock described, with barriers constructed in the draws of the rim rock, serves, with other fencing upon the north, to inclose 80,000 acres of the public lands. The lands comprised by the narrow strips are in very large proportion practically valueless for any purpose, except for grazing. Now, if title to these strips of land was acquired and the fences were constructed thereon as a subterfuge or pretext, so that it could be said that the fences were constructed entirely upon private lands, the device could not avail the owner. The inclosure yet would be an inclosure of public lands within the inhibition of the statute. So a maintenance of such fence is likewise inhibited by the statute.

"You are the judges of the purpose for which this fencing was constructed in the first place, whether to inclose public lands or not; and, if so, whether it was maintained by the defendant as alleged in the indictment; and, if so, for what purpose."

And, as said by Judge Van Devanter in his dissenting opinion in Homer v. United States, supra, the case of Potts v. United States, 114 Fed. 52, 51 C. C. A. 678, decided by this court, is in principle to the same effect.

The evidence in the present case shows, we think, that such fences as the appellant company built upon its own lands were not constructed with any intent to inclose any government land, or to exclude the public from entering upon the public domain, either for purposes of set-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tlement, grazing, or other uses, but were for the bona fide protection of its own lands, extensive portions of which it had planted to various agricultural crops in connection with its stock business; and such was, in effect, the finding of the trial court. While those fences were very extensive, amounting in the aggregate to about 40 miles in length, various openings were left in them at points most frequently used by cattle and other animals in their passage to and from the grazing lands of the United States, and at points at which the public highways entered and left the appellants' lands, which openings were nine in number, the widest of which was 3,400 feet in width, and the narrowest 90 feet; others being as much as 120 and 312 feet in width. Such openings, in view of the situation and condition of the lands of the government and of the cattle company as disclosed by the evidence, in our opinion admitted of reasonable access by the public to the public domain, for which reason the fences in question cannot be properly held to unlawfully inclose the lands of the United States.

It results from the above views that the order appealed from must be and hereby is reversed.

HUNT, Circuit Judge (dissenting). Upon the rehearing it was argued by appellant that in addition to the outside there were some inside fences upon appellant's lands, and that appellant did not intend to give the court to understand that the fences maintained by it were *only* upon the outside of its lands. Inasmuch as the closest precision should control in arriving at the physical situation, the language of the former opinion should have referred to the fences maintained by appellant as situated not "only" upon the outside of appellant's lands, but also as in part upon the inside of certain fields of appellant's lands. The point, as I view it, is not of special importance; but it should, of course, be made clear that there were some inside fences which served to inclose certain portions of the appellant's lands.

To make clearer the meaning of what I may say, I annex a reduced copy of the plat used in evidence before the lower court. The heavy shaded lines (purple on the original map) do not show openings found by the lower court to have existed at the time of the filing of the bill, but were intended to represent where additional openings would have to be made by the defendant company under the order of the lower court.

In the south half of section 33, township 40 north, range 48 east, some inside fences were built, so as to inclose a field of about 120 acres. A fence had also been constructed in the southwestern portion of the tract from opening No. 1, running easterly through part of section 33, township 39 north, range 47 west; thence in a southerly direction to a point in section 4, township 38 north, range 47 east; thence easterly to a point in section 2, same township, described in the opinion of the court below as opening No. 8, 100 feet wide—this opening having been made in June, 1911, so that with the outside fence which joined to the fence just described at openings No. 1 and No. 8, a field of approximately 2,500 acres of the company's land was inclosed.

Some inside fences also had been built about a reservoir maintained

by the company down toward the southern part of the tract. The testimony as to the fences about the reservoir is hard to apply to the map, inasmuch as the witness who explained the situation pointed to the map used at the hearing before the District Court, without describing with certainty the particular place to which he was pointing. I quote from his testimony as follows:

"Q. Then the only complete inclosure of Golconda Cattle Company land about which you know anything is that land near the so-called reservoir, as indicated upon the plat, and beginning at a point approximately in section 29— A. No. Q. Where does it begin? A. At this lane. Q. Beginning at a point in section 28? A. I think probably it did. Q. Approximately section 28, and ending at what point? A. Well, my survey, I had Mr. Taylor survey, my point commenced here; they was constructing this fence when I left the Golconda Cattle Company. Q. You were engaged in constructing that fence, and it was your intention to run it to a point somewhere in section 36?

"The Court: That includes the reservoir, does it not—the one you are speaking of?

"Mr. Platt: Yes."

I gather from the testimony that prior to the filing of the bill there was an inside fence built in the southern part of the tract, which, with the outside fence, practically inclosed a strip of land about four miles long belonging to the Golconda Cattle Company. It is very difficult to determine whether or not there were fences which completely encircled the reservoir referred to by the witnesses. Osborne, who had been foreman of appellant before July 1, 1911, was asked about a fence from a point marked "Gap" down to opening No. 6, encircling the reservoir. His reply was to the effect that a fence did encircle the reservoir and the flat above it and below it.

Counsel for the appellant lay stress upon the fact that west of a fence described in the bill as running from a point in section 21, township 39 north, range 47 west, in a southwesterly direction to a point described as opening No. 1, there was an inclosure of a field of about 1,600 acres, all belonging to the defendant company. But as this field is outside of the issues here in controversy, reference to it is merely helpful to a better understanding of the general situation of the tract directly involved and the fences thereon or thereabouts. The case cannot be affected by the fact that the company tied to one side of an inclosed tract belonging to it, if the fence on one side of such tract is shown to have been used as a link in a chain of fencing which operated to make an inclosure of the whole tract involved.

Special point is made with respect to opening No. 6 in the fence, about 3,400 feet, which was found by the lower court to be favorably and conveniently located for the passage of cattle drifting toward Rock Creek Mountains. It is said that this court misunderstood the exact character of this opening and of the country about it. I would not disturb the findings of the lower court as to the favorable and convenient location of gap No. 6 for the passage of cattle drifting toward Rock Creek Mountains, nor did we misplace the opening. The whole country in the vicinity of this gap, which is toward the foot of the mountains, where the country is rough, is hilly, although at the opening itself, and to the south of it, there is a little valley, with a ravine

near the point of the opening. Into this little valley cattle drift from the south and the east and may pass toward Rock Creek Mountains.

As to North's fence, referred to in the original opinion, the testimony sustains the expressions of the opinion, which I believe are in accord with the findings of the lower court and the evidence in the record.

It is argued that the evidence pertaining to the nature of the country shown upon the northeastern portion of the map was misunderstood. The evidence is clear, however, that the country in that immediate section is mountainous, rough, and broken. The witness Sheehan, called by the defendant, said he would call it a mountainous country. A witness named De Lano said it was much rougher up in this section than lower down; that it was a mountainous country, while the government's lands lying below might be called a foot hill country. The evidence shows that cattle drifted toward this mountain country in the summer time; but if the practical effect of maintaining fences up to the roughest parts of the country was, in conjunction with the rough country itself, to prevent free ingress and egress to and from the public lands lying in the foot hills southwest of Toejam Mountain, I think that the law of the case as discussed in the original opinion should control. The witness McClellan, when asked by the court whether the top of the ridge on the northeastern corner of the map was smooth, answered:

"Yes, sir; smooth. Of course, there are rocks there, a rocky ridge."

He was then asked whether it would be passable for wagons. His answer was:

"Well, it is pretty steep. I suppose a person, if they had teams enough, could pull up the ridge; but it is a tolerably steep ridge to get up from the creek up there. By starting out lower down, out on Siawappe creek, you might say about a mile to the southwest of the Nelson fence, you may work up there and get on top of that bench, and then follow the ridge right up and strike Willow creek below there, and work up this bench land, and go right up there until you strike the mountain; that is, about four miles east of the land shown on this plat."

Again this witness referred to one of the markings of barriers as a point where the canyon is narrow, with a pretty steep rocky bluff to go down to get on the creek from the south.

Flocker, special agent of the Land Office, said that from the end of the red line shown upon the map [here shown as a heavy black line] at the south of Toejam Mountain to North's fence there was a barrier, although it might be possible at one or two places to get over the barrier between that and the other fence. He described the barrier as an outcrop of rim rock, not very high in places and not very good as a barrier in places, saying that the barrier is not absolutely impassable; that cows and calves could get through, but the tendency would be for them not to go through. He had never been right up to the barrier itself, but had seen it from further down.

Upon the argument on the rehearing counsel dwelt upon the fact that the testimony showed that there was a road from below the reservoir toward Tuscarora, and that this road passed out toward Tuscarora

through the 300-foot opening designated as No. A, which is up toward the foot hills of Toejam Mountain. The evidence is very meager concerning this road, but it would appear as though it started on Willow creek below the reservoir and ran in a northeasterly direction over the government land to the point of exit already referred to. Whether or not it was in use does not appear. It also appears from the testimony of Osborne that there is another road to Tuscarora which comes from the "Tie Corral country" and passes the 3,400-foot opening, No. 6; but there is nothing definite concerning the character or location of this road. Nor is it shown that it was in use.

Flocker visited the tract found to be an inclosure on September 7, 8, and 9, 1910, again on April 10 and 11, 1911, and a third time on July 22 and 23, 1911. The bill was filed May 31, 1911. On his April visit he said he saw only four openings (in addition to three gates) in the entire inclosure, but in July he found several other openings which were not there on the first two visits. Osborne said he made openings No. 3 and No. 8 in June, 1911, upon orders from the president of the company, through one Petrie, who succeeded Osborne. The witness Willis, chairman of the board of county commissioners of Elko county, testified as to conversations he had had with Osborne respecting obstructions by the defendant company of the public roads with their fences. While it is true much of the testimony of Willis came in over objection, some of it being rejected by the lower court, I think sufficient appears to warrant the inference that the cattle company had notice in 1910 that their fences were obstructing free use of the road from Tuscarora to Midas.

When asked as to the purpose of the fence as shown on the map, Osborne said the object was not to keep anything out or anything in, but "one was to steer cattle up to the mountain, and the other purpose was the company's intention of fencing their own lands." Counsel for appellant say in their brief:

"The company was also engaged in the stock business, and it naturally desired, during the period of development of its properties, and prior to completely fencing them, to get the utmost good it could out of its rich creek bottoms. It hence placed its fences along the outside of these lands first before filling in the entire interior boundary line and completing the inclosure of the balance of the bottoms. These inclosures along the outside of its property performed the double purpose of confining the cattle to the grassy bottoms and steering them, as they drifted from lower to higher territory in the springtime, according to the universal custom of cattle in arid countries, up toward the rich, high, mountainous feeding grounds beyond the headwaters of the two creeks."

Conceding that the cattle which were inside the fences would be free to drift over the public lands up into the more mountainous section, where the summer feed is good, it is nevertheless clear that, if the fences would directly tend to confine cattle and to steer them as they drift, so would such fences directly tend to exclude cattle not on the inside. It is true, too, that some other cattle besides those belonging to appellant grazed upon the public land inside the fences, but in one instance such common use was under an agreement with another cattle company. In 1910 some bands of sheep were driven through.

It is earnestly urged that the fences built were but a part of a proposed scheme of inclosing all of the defendant's lands and that the construction was going on when the bill was filed. Osborne testified that all the company's lands were surveyed "to find out where such and such lands" were, that the surveying was all done in connection with the fencing, and that:

"It was the calculation of the Golconda Cattle Company, when they made them surveys, to fence all of their lands that was practical, in this here country, and any land they surveyed to make them into fields; to fence both sides of their land. I had orders from the Golconda Cattle Company to that effect."

He also said they had the posts and wire at Dutton ranch to make a field of the land running from a point near the letters "T 39 N R 47 E" on the map around to North's fence; that he bought that wire about two years ago; that his orders were to "fence the fields, from 40 to 5,000 acres of the company's land, to entirely close it"; that these fencing operations had gone on for four years while he was with the company, commencing in 1909, down to July 1, 1911, when he left the company; and that altogether he built somewhere near 11 miles of inside fencing. Of this inside fencing, that portion from opening No 1 to opening No. 8, about 3½ miles, was constructed after September 1910, and before April, 1911. The fence from opening No. 7 to opening No. 6 in the southern portion of the map, about 4 miles long, Osborne says he ordered built in April, 1911, though he hauled material up to build it in the fall of 1910. This fence has been referred to as an inside fence, but as a matter of fact, if the plat is correct, it is nearer the outside than the inside of the company's land. This fence and that around the reservoir (the record is not clear as to this) seem to have been in process of construction when the bill was filed, and had not been completed on July 1, 1911, when Osborne left the employ of the company. Just when the fence in the lower half of section 33 (around the 120-acre field) was constructed does not appear. The fence from opening No. 1 up to the figures "21," the east fence of the field of 1,600 acres of company land, Osborne says was built in 1909. While there is company land between this fence and the public lands, about 200 acres, judging it roughly from the plat, this is included in the fences denominated "inside" by appellant. Excepting this fence, then, and the fence on the inside of the 120-acre field in the south half of section 33, all of the inside fences were constructed after the special agent of the Land Office made his first inspection of the inclosure. This circumstance is of moment as bearing upon the weight to be attached to the statements of Osborne to the effect that the company was proceeding to inclose all of its own lands.

We may assume, however, that appellant was proceeding to inclose all of its own lands, and that it intended to build inside fences with diligence; still, considering the fences with the natural barriers in the northeast, the nine openings found by the District Court to have been present when the bill was filed were in number and kind not sufficient to exclude the case from the statute.

In a most earnest effort to reach a correct solution of the rights of

the parties, I have gone over the record with great care; and while the testimony of the witnesses is not always easy to apply to the plats in evidence, yet I think the findings of the District Court are well sustained and must be accepted as correct.

It would be reiteration to discuss the law. My interpretation of the statute involved is that, if an inclosure exists, the one who erects or maintains it violates the law, and injunction will run against him, without regard to his intent. Any other construction, it seems to me opens the way for mischiefs which the statute specially aimed to prevent. Moreover, the form of the decree of the lower court seems to have been based upon a determination to receive such further evidence as will assure free access to the public domain lying within the inclosure, and yet do so with due regard for the property rights of the appellant.

I would reaffirm, and so allow the case to go back to the District Court for further equitable orders.

SEYBOLD MACH. CO. v. FEEHAN.

(Circuit Court of Appeals, Sixth Circuit. May 15, 1914.)

No. 2424.

1. NEGLIGENCE (§ 136*) — CONTRIBUTORY NEGLIGENCE — WHEN QUESTION FOR JURY.

In an action for a personal injury based on the alleged negligence of defendant, where the evidence on the issue of contributory negligence is conflicting, it is a question for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. § 136.*]

2. MASTER AND SERVANT (§ 332*)—INJURIES TO THIRD PERSONS—LIABILITY—QUESTIONS FOR JURY.

Defendant sold certain paper cutting machines to be erected by it in a printing office in another city, and sent an agent to install the same. Almost as soon as the last machine had been set up the agent started to return, but before his train had left was sent for by the purchaser because plaintiff, who was to operate one of the machines, could not make it work properly. He returned, and the evidence as to what was done was in some conflict, but in explaining the operation of the machine to the foreman, the agent moved the lever, which caused the cutter to fall, and plaintiff's hand was caught and cut off. There was evidence for plaintiff that the machine had not been tested to its capacity, and was not in complete running order; that plaintiff was directed to do certain things, and that the agent himself made further adjustments. *Held*, that it was not error to submit to the jury the question whether, the agent, when he moved the lever, was acting for defendant, and not for the purchaser, and within his authority as defendant's agent.

[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 Western Division of the Southern District of Ohio; John E. Sater, Judge.

Action at law by Jerry A. Feehan against the Seybold Machine Company. Judgment for plaintiff, and defendant brings error. Affirmed.

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

Theodore Horstman, of Cincinnati, Ohio, for plaintiff in error.

R. G. Fitzgerald, of Dayton, Ohio, for defendant in error.

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

COCHRAN, District Judge. The plaintiff in error, the Seybold Machine Company, seeks reversal of a judgment against it in favor of the defendant in error, Jerry A. Feehan, for $6,000, for the loss of his right hand, claimed to have been caused by the negligence of its servant, Elmer G. Page. It is a manufacturer of paper cutters at Dayton, Ohio, and, the latter part of November, 1910, sold the Courier Journal Job Printing Company, operating a printing establishment at Louisville, Ky., two such cutters, for $1,750 in money and an old cutter. By the contract it was "to erect" them on the printing company's floor and the "terms of settlement," i. e., times of payment of the money consideration, were "to be agreed upon when the machines were erected." Pursuant thereto it shipped them, in unassembled parts, to Louisville, and sent Page there to erect them. He began Thursday, December 15, 1910. By Saturday evening he had one in operation, and by Monday morning, the other. Feehan was the servant of the printing company. He was to operate one of the cutters when erected, and assisted Page in his work on the cutter. After both were in operation, and before noon on Monday, Page sought and obtained from the printing company, acting through its general manager, F. P. Allen, a written statement addressed to the machine company in these words:

"Your Mr. E. G. Page has finished the installation of the two new 50-inch cutting machines. He seems to have been very careful and conscientious in his work and the machines seem to start all right."

Before giving the statement Allen inquired of the foreman as to the cutters, and was told by him that they appeared to be all right. After the noon recess Page returned to the establishment, but left shortly thereafter, i. e., about half past 1, to take a train for home, which left at 2:10 p. m. No "terms of settlement" had been agreed on before he left. After he left, and before his train departed, trouble arose in connection with Feehan's cutter. It had a safety device to prevent its knife repeating after a cut by locking it. Its brake band was loose, and this caused the knife to lock. The machinist refused to attempt to unlock it. Some one, probably Murray, the operator of the other cutter, attempted to do so and failed. It may be taken that the failure to unlock it was due to not carefully attending to the instructions on the cutter. Resort was had to Page to get rid of the trouble. The foreman went to the depot for him, and, finding him in his train, waiting its departure, brought him back. He at once unlocked the knife and put the cutter in operation again. He remained about it for some little time, and, whilst there, Allen, the general manager, approached him and inquired as to the cause of the trouble. Feehan was then engaged in putting paper on the table of the cutter and smoothing out the air between the sheets, preparatory to cutting it. In doing this, at times, his right hand would project under the knife.. Page, with his left hand on the lever, started to explain to Allen in answer to

his inquiry and, whilst so doing, turned the lever and put the knife in operation. In its descent it caught Feehan's hand and cut it off at the wrist.

So far the parties do not differ as to the facts of the case. In other particulars they do. Page alone testified for the machine company as to what happened at Louisville. He testified to the following additional facts: It was Feehan's cutter that was put in operation Saturday evening. It was then turned over to him to operate, and he operated it from the time work began Monday morning until the knife locked, except at the noon recess. In so operating it he allowed oil to get on the brake band, and this was what rendered it loose. He, Page, had nothing whatever to do with the cutter from the time he turned it over to Feehan, Saturday evening, until he returned from his train Monday afternoon. After putting it in operation again he had nothing to do with it except in his attempt to explain to Allen, in answer to his inquiry, the cause of the trouble. Before he moved the lever he warned Feehan to look out.

On the other hand Feehan testified as follows: It was the other cutter and not his which was put in operation Saturday evening. His was not so put until Monday morning. After all its parts had been assembled together Page directed him to oil it and to distribute the oil by exercising it. He then directed him to cut two small jobs on it to test it. The capacity of the machine was six inches. Each of these two jobs was an inch. The noon recess arrived when he had finished them. The cutter worked stiff and, at starting, after the noon recess, Page directed him to again oil it and to distribute the oil, and when he had done this, to wash off the bed and powder it up to make the paper slide. He had not finished oiling when Page left for the train. When he left he remarked:

"I think everything is all right. I believe I will go to the depot and go back to the factory. Everything seems to be all right."

It was when he pulled the lever after powdering that he found the knife locked. After Page returned and had put the cutter in operation again, he directed Feehan to fill it with paper to its capacity in order to test it. His words were:

"Go ahead; put as much paper as you can in this machine. I want to try this good before I go away from here any more."

It was pursuant to this direction that he was putting paper in the machine at the time of the accident. It then lacked 2 or 1½ inches of being full. He did not allow any oil to get on the brake band, and Page gave no warning before moving the lever. His testimony was corroborated to a certain extent by that of other servants in the establishment. Murray testified that Page in putting the cutter in operation after his return from the train tightened the brake band.

The negligence alleged was failure on Page's part to give Feehan warning before he put the knife in operation. The machine company denied that Page was thus negligent, and that he was then its servant, and pleaded contributory negligence, which in turn, was denied by Feehan. On the issues thus made the case went to the jury. The

errors assigned are the refusal, at the close of all the evidence, to instruct the jury peremptorily to find for the defendant, and certain portions of the charge to the jury, all of which rulings were duly excepted to.

[1] The stress of the argument is on the refusal to give the peremptory instruction. It is not urged that the question as to Page's negligence in not giving warning before turning the lever was not for the jury. The position is that the questions as to Feehan's contributory negligence, and as to Page being the machine company's servant at the time of the accident, particularly the latter, should have been decided as a matter of law adversely to the plaintiff. That, as to the former question, is based on Feehan's admission that he saw Page's hand on the lever before he put his hand under the knife. It is urged that ordinary care for his own safety required that he, seeing this, should not have put his hand thereunder. But it cannot be said, as a matter of law, that this fact by itself was such an indication of danger that he should have refrained from so doing. He knew that Page knew what he was doing, and, according to his testimony, he was doing it by Page's direction. The knife could not be put in operation without two movements of the lever. Page had hold of it with his left hand, and was pointing with his right hand down at the safety device and about to explain to Allen the cause of the trouble. In view of these several considerations it was for the jury to determine the question of contributory negligence.

[2] The position, as to the other question, is based on the view of the case presented by the testimony of Page, as to the particulars hereinbefore set forth, in connection with those as to which there is no dispute. It is urged that Page before he left the establishment for home had done all that the machine company had agreed, and that he had been sent to Louisville to do and had turned the cutter over to the printing company and Feehan, its servant, for operation. The cutter had been accepted and the printing company had given a statement to the effect that Page had finished his work. Thereafter the situation calling for any further action on his part arose out of the carelessness of the printing company's servants, that of Feehan, in allowing oil to get on the brake band, and that of the one, who attempted to unlock the knife, in not following the instructions on the cutter. Page's action, therefore, after his return from the train, in connection with the cutter, was not action for and as the servant of the machine company, but for and as the servant of the printing company. It is thus sought to bring this case within the decisions, a number of which are cited, holding that the services of one's general servant may be transferred from him to another as to a particular matter, and that in such a case, ad hoc, or pro hac vice, he becomes the servant of such other person. But this position, if otherwise sound, is subject to the criticism that it ignores the testimony on behalf of Feehan, in so far as it conflicts with that of Page as to those particulars. According thereto such is not the true view of the case. This made it for the jury to determine what was the true view thereof, unless, indeed, it can be said that under that testimony also Page, at the time of the accident, was the servant of the printing company, and not that of his general master, the machine company But this cannot be said.

By the contract of sale the machine company was "to erect" the cutters on the printing company's floor, and Page was sent to Louisville to carry out the contract. Webster defines "erect" as meaning "set up; hence, in machinery, to put together in position for use." To put machinery together in position for use is to put it in good running order. The employment of Page, therefore, called for his putting the cutters in question in good running order on that floor. It was in the course and within the scope of that employment for him to test them to their capacity to see if they had been put in good running order. And it was in and within such course and scope for him to explain to the printing company the cause of any trouble that might arise whilst he was erecting them and putting them in good order. Now, according to the testimony on behalf of Feehan, in the particulars wherein it conflicted with that of Page, the latter left the printing establishment without doing all that he might have done under his employment. Feehan's cutter was working stiff. It needed further oiling to make it operate smoothly. It called for washing and powdering, and had not been tested to its capacity. Possibly his desire to take the next train for home is what led him to do so. But the fact that he left sooner than he needed to have done gave no claim on him, on the part of the printing company, to return, if the locking of the knife of the cutter was not attributable to him. That testimony, considered by itself, permitted a finding that it was so attributable, in that he had not tightened sufficiently the brake band in the first instance. If such was the case the printing company did have such a claim on him, and his return was to do that which he was sent to Louisville to do, and which he had not theretofore done, to wit, put the cutter in good running order. In this view of the matter, not only his return and putting the cutter in good running order, but also his testing it to its capacity, and his attempt to explain to Allen the cause of the trouble, whilst waiting for the test, was action on his part as the servant of the machine company. The fact that the printing company gave him the written statement did not make it otherwise. It meant, not that Page had put the cutters in good running order, but that it appeared or seemed that he had.

But we would not be understood as holding that, to sustain the ruling now in question, it is essential that the cause of the brake band being loose was that it had not been sufficiently tightened in the first instance, and that it cannot be sustained on the basis that the cause thereof was that Feehan had allowed oil to get on the brake band. Apart from the consideration that, possibly, it may be true to say that in the oiling Feehan was acting for the machine company, it is sufficient to uphold the ruling that the printing company claimed that the trouble was due to Page's not having put the cutter in good running order, whatever may have been the fact as to that. Treating the case, therefore, as going no farther than presenting the fact that Page's return was to meet and satisfy such a claim, his action, thereafter, was for and as the servant of the machine company, and not for and as the servant of the printing company. Nor can it be said as a matter of law that such action in that contingency was not action in the course and within the

scope of his employment. It was at least a question for the jury to determine whether it was.

Assuming that at the time of the accident Page was acting for and as the servant of the machine company, and that his action was in the course of and within the scope of his employment, there can be no question as to its being liable for the consequences of his negligence. Necker v. Harvey, 49 Mich. 517, 14 N. W. 503; Crandell v. Boutell, 95 Minn. 114, 103 N. W. 890, 5 Ann. Cas. 122.

This brings us to the portions of the charge to the jury complained of. One of two of them is a general statement of law, and the other an application thereof to the case in hand. The first is in these words:

"The rule of law is that a master, an employer, is responsible for the torts of his servants, done with a view to a furtherance of the master's or employer's business, whether the same be done negligently or willfully, but within the line of the servant's duty, and the fact that the servant in committing the tort or wrong may have exceeded his actual authority, or even disobeyed his express instructions, does not alter the rule."

The other is in these words:

"If what Page did in showing Allen, the job-printing company's manager, what caused the trouble, and which he had just corrected, was done, with a view of furthering the defendant's business and within the line of Page's duties as the defendant's employé, and if Page, while he was showing Allen, was guilty of negligence which was the direct, proximate, and sole cause of the plaintiff's injury, then the defendant is liable, and even if Page in what he did in showing Allen exceeded the actual authority given him by the defendant as its agent, or even if he disobeyed the defendant's express instructions. But if what Page did in showing Allen was not done with a view of furthering the defendant's business and within the line or scope of Page's duty as defendant's employé, then the defendant is not liable, even though Page was guilty of negligence which caused the injury."

The only criticism of these portions of the charge which has been made is that the court should not have submitted to the jury the question whether Page, at the time of the accident, was acting in the line or scope of his duty, but should have held as a matter of law that he was not. But for the reasons heretofore given it could not properly have so held. The thought and wording thereof were evidently taken from the opinion in the case of Crandall v. Boutell, supra, and find justification therein, as well as in the cases cited therein, which include the cases of Philadelphia, etc., R. R. Co. v. Derby, 14 How. 468, 14 L. Ed. 502; Singer Mfg. Co. v. Rahn, 132 U. S. 518, 10 Sup. Ct. 175, 33 L. Ed. 440.

There are three other portions of the charge complained of. They all relate to the matter of the acceptance of the cutters by the printing company. Two of them put that question to the jury. They are in these words:

"It is for you to say, taking all the facts and circumstances together, everything that appears in this case touching the matter, whether or not there was an acceptance of these new machines, and whether the parties had proceeded to that point in which there was an acceptance."

And:

"It is proper for you to consider along with that also, as a part of this evidence—because you must look to it all—whether or not there had been

terms of settlement agreed upon as between the parties. Had they reached that stage? You must determine the question of acceptance of the machines from the evidence."

The other was to the effect that, in a certain contingency, the defendant was liable even if there had been an acceptance. It is in these words:

"There is one condition under which, even if there was an acceptance of the machines, the defendant may still be liable. If you find that Page went back from the train after the machine became locked, and took charge of it for the purpose of unlocking and putting it in running order, and that thereafter, in answer to Allen's question as to what was the cause of the trouble, he proceeded to show Allen, and that in doing all this he was acting in furtherance of his employer's business and within the scope of his authority, and if in showing Allen he was negligent, and that negligence was the direct, sole, and proximate cause of the plaintiff's injury, then the defendant is liable, whether the machines had been accepted or not. But if the machines had been accepted and Page was not back there for the defendant to unlock the machines, and was not showing Allen how the trouble occurred, in the furtherance of the defendant's business, or acting for it within the scope of his authority, and was guilty of negligence which directly and proximately caused the injury to this plaintiff, then the defendant is not liable."

No special criticism is made of these portions of the charge. We have nothing before us save that they were excepted to and have been assigned for error. Really, as the last of them recognizes, the matter of the acceptance of the cutters was an immaterial question in the case. The vital question therein, apart from those as to Page's negligence, and Feehan's contributory negligence, was as to whether Page, at the time of the accident, was acting in the course and within the scope of his employment, or to adopt the words of the court below "in the line of his duty," or "in the scope of his duty," or "in the scope of his authority," and, in this and the other portions of the charge quoted, this question was put to the jury, and it was told that it could not find for the plaintiff unless it was. No possible harm, therefore, came to the defendant in putting the question of the acceptance to the jury.

Finding no error in the proceedings below, the judgment is affirmed.

H. A. & L. D. HOLLAND CO. v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Ninth Circuit. May 18, 1914.)

No. 2332.

1. PUBLIC LANDS (§ 92*)—RAILROAD RIGHT OF WAY—TITLE AND RIGHTS UNDER CONGRESSIONAL GRANT.

Under a congressional grant of right of way for a railroad through the public lands, the land is acquired upon the implied condition that it be used for railroad purposes, and the rights of the company are limited to such use. It has no power to defeat the purpose of the grant by a voluntary alienation of the title, or by abandoning possession to an adverse claimant.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276–282; Dec. Dig. § 92.*]

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

2. PUBLIC LANDS (§ 92*)—GRANT OF RIGHT OF WAY—TITLE OF RAILROAD COMPANY.

Under the Northern Pacific Land Grant Act July 2, 1864, c. 217, § 2, 13 Stat. 365, which granted to the company right of way through the public lands to the extent of 200 feet in width on each side of the railroad, title to such right of way passed to the company on the filing of the map of the definite location of its road, subject to reversion for nonuse if the road was not constructed on such line, and where the line was located and built through an odd-numbered section of public lands, which subsequently passed to the company under section 3 of the grant, the company took title to the extent of the right of way under section 2, and not under section 3.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276-282; Dec. Dig. § 92.*]

3. PUBLIC LANDS (§ 92*)—RAILROAD RIGHT OF WAY—DEDICATION AS STREET.

The Northern Pacific Railroad Company laid out and platted an addition to the city of Spokane on an odd-numbered section of what was, when the road was built, public land, to which the company acquired title under the congressional grant. It designated on the plat a street named Railroad street extending along and on either side of its main track. *Held* that, having acquired title to all of the land embraced in the street as right of way under the grant, it could not by any act of dedication vest either the public or private persons with any interest therein which would prevent its use for any legitimate purpose connected with its railroad, and that it could not be enjoined from constructing an embankment through the street for the purpose of elevating its tracks in compliance with a city ordinance.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 276-282; Dec. Dig. § 92.*]

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

Suits in equity by the H. A. & L. D. Holland Company, by George Turner and wife, by H. J. Shinn and wife, and by W. H. Kiernan and wife against the Northern Pacific Railway Company. Decrees for defendant, and complainants appeal. Affirmed.

For opinion below, see 208 Fed. 598.

Turner & Geraghty and Post, Avery & Higgins, all of Spokane, Wash., for appellants.

C. W. Bunn, of St. Paul, Minn., and E. J. Cannon and Graves, Kizer & Graves, all of Spokane, Wash., for appellee.

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

DIETRICH, District Judge. The appellants are severally the owners of property in the city of Spokane, abutting on what is referred to in the record as "Railroad street," which is a strip of land 225.7 feet wide, occupied in part by the railroad tracks of the defendant company, and intersected by cross-streets. Upon February 6, 1912, by ordinance, the city required the defendant to separate its grade from the street grades, and this it proposes to do by means of a dirt fill, approximately 15 feet high and 85 feet wide, with retaining walls of stone or concrete. To prevent the creation of such an obstruction in front of their property in what they contend is a public street,

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

appellants have brought these suits. "Railroad street" is embraced in the north half of section 19, township 25 north, range 43 east, B M., and lies 100 feet upon the southerly side and 125.7 feet upon the northerly side of the center line of the defendant's main track. Title to the whole of section 19 was acquired under the provisions of the Northern Pacific Land Grant Act of July 2, 1864 (13 Stat. 365). By the first section of that act the Northern Pacific Railroad Company was created, with power to construct and operate a continuous line of railroad from Lake Superior to Puget Sound. The material parts of sections 2 and 3 are as follows:

"Sec. 2. And be it further enacted, that the right of way through the public lands be, and the same is hereby, granted to said 'Northern Pacific Railroad Company,' its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water stations; and the right of way shall be exempt from taxation within the territories of the United States. * * *

"Sec. 3. * * * That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office."

The railroad company duly signified its acceptance, and upon October 4, 1880, definitely located its line of road through this section 19, which was then unreserved public land subject to the grant, by filing a plat thereof in due form in the office of the Commissioner of the General Land Office, as required by law, and constructed its road upon the line so fixed. On January 20, 1881, it platted a part of the section as "Railroad addition to Spokane Falls," and filed a map thereof in the auditor's office of Spokane county. Upon this map most of the streets, both those parallel with and those crossing the railroad track, are shown to be 75 feet wide, but Railroad street, as already stated, 225.7 feet, with the exception of the easterly end, where it gradually widens out into an unplatted area. A single railroad track is delineated as extending along Railroad street and near the center thereof; also, two short side tracks and a depot or station building. The material part of the written dedication indorsed upon the plat is as follows:

"The width of streets and alleys and size of lots and blocks are as designated in the plat and explanation. The streets shown upon said plat are ded-

ıcated to be used by the public until lawfully vacated except the strip of land 225.7 feet in width designated as Railroad street which is reserved for the tracks and use of said railroad company."

Thereafter, lots were sold by reference to this plat, among which were those now owned by the plaintiffs, and by the purchasers buildings were constructed thereon. In 1896, through a judicial sale, the defendanc succeeded to all the property and franchises of the railroad company.

It is urged by the plaintiffs that the townsite plat, with its indorsements, constitutes a statutory dedication, but if insufficient for that purpose the actual use of the strip by the public, and the conduct and representations of the railroad company's agents and officers were such as to create a common-law dedication and an estoppel in pais. Upon the other hand, the defendant resists these contentions, and further asserts that the railroad company was incapable of divesting itself of title to the land, and that neither private persons nor the public could acquire any rights therein without the consent of Congress. It is conceded that the city could not legally authorize such exclusive occupancy of a street as would be required for the construction and maintenance of the proposed grade, and the controlling question therefore is whether the strip of land is a public street.

[1] 1. Our first inquiry relates to the nature of the railroad company's estate. If title vested in it by operation of section 3 of the grant, there is no room for controversy touching the extent of its rights, for upon that assumption it became clothed with full power of disposition, such as is ordinarily incident to unrestricted private ownership. But a different case is presented if the strip constitutes a part of the right of way granted by section 2. Lands falling within this provision are acquired upon the implied condition that they be used for railroad purposes, and the rights conferred are limited to such use. Generally speaking, it is not within the power of the grantee to defeat the designated purpose of the grant by a voluntary alienation of title, or by abandoning possession to an adverse claimant.

"Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose, one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." Northern Pacific Railway Co. v. Townsend, 190 U. S. 271, 23 Sup. Ct. 672, 47 L. Ed. 1044.

[2] That Railroad street is part of the right of way so acquired, we entertain no doubt. Physically it is embraced within the boundaries thereof; the grant was in præsenti, and was given precision by the filing of the map of definite location; the construction of the road was not a condition precedent to the transfer of title, but title passed upon the selection of a definite route, attended with notice to

the government of such selection, through the filing of the map of definite location. N. P. R. Co. v. Murray, 87 Fed. 648, 31 C. C. A. 183; Land Co. v. Griffey, 143 U. S. 32, 12 Sup. Ct. 362, 36 L. Ed. 64; Tarpey v. Madsen, 178 U. S. 215, 20 Sup. Ct. 849, 44 L. Ed. 1042; Missouri, etc., R. Co. v. Cook, 163 U. S. 491, 16 Sup. Ct. 1093, 41 L. Ed. 239; Railroad Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122; Van Wyck v. Knevals, 106 U. S. 360, 1 Sup. Ct. 336, 27 L. Ed. 201; Railroad Co. v. Baldwin, 103 U. S. 426, 26 L. Ed. 578. There is nothing to the contrary in Jamestown, etc., R. Co. v. Jones, 177 U. S. 125, 20 Sup. Ct. 568, 44 L. Ed. 698, or Stuart v. U. P. R. Co., 227 U. S. 342, 33 Sup. Ct. 338, 57 L. Ed. 535, or N. P. R. Co. v. Smith, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. Ed. 157. In the first and second of these cases it was decided only that the definite location of a route may, not must, be made by the actual construction of the road. In the Smith Case it was apparently the opinion of the court that the filing of the map of definite location did not necessarily exhaust the railroad company's power of selection, and that, under the circumstances there shown, it acquired a right of way along the line of the road as actually constructed, even though such line deviated from that exhibited upon the maps. But if we assume that in the absence of intervening private rights the railroad company might, with the approbation of the administrative officers of the government, change its route and make an effective selection of a new right of way by the construction of its road, without amending its map or filing a new one, it does not follow that the filing of the map of definite location is ineffective or fails to consummate the grant. If it be objected that the act provides for only one right of way, and the company cannot hold two, the answer is that a title acquired either by the filing of a map or the construction of the road reverts to the United States in case of abandonment, or of forfeiture through nonuser, and that therefore, where, as in the Smith Case, the right of way shown upon the map of definite location is not occupied by the road as actually constructed, it is to be deemed to have been abandoned and the title thereto lost. In the present case the route was never changed, and it is therefore held that title to the right of way 200 feet on either side of the center line of the railroad track, and including the strip in controversy, passed to the railroad company on October 4, 1880, the date its map was filed in the General Land Office.

We are unable to accept the view that, because the right of way at this place is in an odd-numbered section, the railroad company took the absolute title, unlimited by the implied condition of reverter attending the right of way grant. No substantial reason has been assigned, and clearly there is none, for assuming that Congress intended such an artificial and whimsical distinction. A strip of land 400 feet wide through the public domain was being withdrawn from private entry and dedicated as a right of way for a transcontinental railroad. The value of a right of way is dependent upon its continuity, and surely it could not have been contemplated that in case of reversion the government would get back only numerous disconnected fragments of that which it was granting as a continuous line. There is lit-

tle weight in the suggestion that Congress could not have intended a uniform status for the entire right of way, because it doubtless knew that any route which might be selected would here and there traverse private holdings, and that therefore the continuity of the grant would be broken. True, absolute continuity was not to be expected, but when we consider the vast stretch of public domain over which the road would pass, and the rarity and insignificance of the private holdings, it may readily be concluded that these interruptions were thought to be negligible, as affecting the value of the right of way as a whole.

In support of their position, appellants invoke the general rule that, where two titles relate back to the same point of time, there is a merger, and the greater title prevails from the beginning. It is conceded, however, that this doctrine, if the appellants' application of it be correct, would here come into conflict with the controlling principle that the granting act must be construed in such a manner as to give effect to the legislative intent, provided it be found that Congress intended that the right of way throughout should be held subject to the conditions and limitations declared in the Townsend Case. Such, we have no hesitation in finding, was the intent of Congress, and therefore it is not deemed necessary to consider the correctness of the assumptions upon which appellants' application of the rule necessarily rests, namely, that, as the terms are used in the learning upon the law of merger, the estate of the grant-in-aid is greater than that of the right of way grant, and that they both date from the same point of time.

[3] 2. It thus appearing that the railroad company acquired the strip of land in controversy as a part of its right of way, we next consider to what extent the limitation of the right of way grant controls the present issue. Conceding that under the doctrine of the Townsend Case the grantee's powers are greatly restricted, appellants contend that the incapacity does not necessarily extend to cases of dedication for a public street. Attention is directed to the fact that, while holding that ordinarily an individual is incapable of acquiring for private purposes any portion of the right of way, the court was careful to say that the grant is nevertheless "amenable to the police power of the state," and added by way of illustration that Congress must have assumed "that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy" might be justly imposed. In Northern Pacific Railway Co. v. City of Spokane, 64 Fed. 506, 12 C. C. A. 246, we sustained the dedication of such crossings. What then is the principle upon which exceptions are to be allowed to the general rule of limitation? It is true, as pointed out by appellants, that the concrete cases sanctioned in these decisions involve concessions to a public use; but it is not thought that the power to limit the railroad company's right to exclusive possession is dependent upon this condition alone. Public uses are of many kinds, and it would not do to say that the defendant may part

with its right of way, or the possession thereof, at its option, provided only that the disposition is for some public purpose. It must be borne in mind that the grant from the government was not for public purposes generally, but for a single designated public purpose, and an unnecessary diversion to a foreign use constitutes a violation of the conditions of the grant, in cases as well where such use is public as where it is private. Public use implies an underlying necessity, and the fundamental consideration, therefore, is that of superior need. But, as already suggested, the grant is not to be regarded as the source from which all public needs may be supplied. A public building is a public use, but surely the site therefor cannot for that reason alone be carved out of the right of way. The needs to which the railroad company's right to exclusive possession must yield are such only as arise out of, or are connected with, the maintenance of the right of way and the operation of a continuous line of railroad thereon. In other words, the railroad company is authorized to make, and may be compelled to make, reasonable provision for those needs only which it is instrumental in creating, or which inhere in the very nature of an unbroken right of way.

If by resort to probabilities we seek the legislative intent, to which, in so far as it may be discerned, all questions must be referred, we reach the same conclusion. Upon the one hand, the implication is clear that Congress intended that the right of way should be held and used exclusively for railroad purposes, and upon the other, it is fair to assume, it was not desired that the use be in disregard of the rights and convenience of those who should take up their abode along its course. It must have been contemplated that highway and other crossings would, in the very nature of things, be required, and in view of the self-evident need therefor, together with what must have been a common and well-understood practice of making provision for them in railroad operation, it is reasonable to suppose that the grant was made with the implied consent that ways of necessity, both public and private, might be laid out across the right of way at such places and under such conditions as would not unreasonably impair its usefulness for the purpose for which it was created.

But in no substantial sense do these considerations apply to the case of a street or other highway laid out along, instead of across, the right of way. Granting the need of a road running parallel or in the same general direction with the railroad, there is no necessity for imposing the burden thereof upon the right of way. It is hardly probable that the practice of so locating a highway was common at the time the act was passed, and, upon the whole, it is unreasonable to suppose that Congress anticipated that such a use would ever be made of the right of way. It imposes a much greater burden than a mere crossing, for it is practically exclusive of both possession and use by the railroad company, while a crossing only qualifies or temporarily interrupts such possession and use. We do not say that a case is inconceivable where, for a limited distance, some concession may not properly be made for this or an analogous purpose; but the necessity must be great and the conditions unusual in the extreme to

warrant it. Here manifestly no such conditions existed. No motive other than that of gain could have actuated the railroad company in attempting to utilize a part of its right of way for a street. It would have been entirely practicable to carve a street out of its aid land upon either side of, and contiguous to, the right of way, and the right of way was resorted to, not in consideration of any public need, but for reasons of private thrift alone. It may be that some discretion is vested in the railroad company to determine the existence of the requisite necessity upon which its right or duty to grant an easement is predicated, which, in doubtful cases, the courts will not review; but the instant case presents no ground for the exercise of such discretion. True, the defendant's predecessor may have entertained the view that the grant was in excess of its needs for railroad purposes, both present and prospective, but that was a question which was never committed to its judgment, and, whatever may have been its views in that respect, they could not serve to confer an authority which otherwise it did not possess.

"By granting a right of way 400 feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for public work of such importance." Northern Pacific Railroad Co. v. Smith, 171 U. S. 261, 275, 18 Sup. Ct. 794, 799 (43 L. Ed. 157).

"Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad, and title to it has vested in whomsoever chooses to occupy the same." Northern Pacific Ry. Co. v. Townsend, supra.

Congress has not authorized the disposition of unused portions of the right of way. The power of the railroad company to alienate, as well as the power of others to acquire, any part thereof, is measured, not by what can be spared from railroad uses, but by what is required to meet such needs of the public or of individuals as fall within the scope of the principle already discussed. Privileges conferred by revocable licenses are, of course, excluded; in such cases the railroad company never loses its right to possession and control.

It is to be added that there is little analogy between the case here presented and the facts in Chicago, R. I. & P. R. Co. v. Union Pacific Co. (C. C.) 47 Fed. 16; Id., 163 U. S. 564, 16 Sup. Ct. 1173, 41 L. Ed. 265. That case involved a consideration of the power of the Union Pacific Company to make a contract by which it was to let the Rock Island Company into such use of its bridge and tracks as it did not need for its own purposes. As observed by the Supreme Court, it was such a contract as is "frequently made between railroad companies. * * * By the contract the Pacific Company parted with no franchise, and was not excluded from any part of its property or the full enjoyment of it. What it agreed to do was to let the Rock Island into such use of the bridge and tracks as it did not need for its own purposes. This did not alien any property or right necessary to the discharge of its public obligations and duties, but simply widened the extent of the use of its property for the same purposes for which that property was acquired, to its own profit so far as that use was concerned, and in furtherance of the demands of a wise public policy."

To the suggestion that the Pacific Company might, if bound by the contract, become disabled in the future, through an increase of business, from performing the obligations of its franchise, the court responded that such a contingency was extremely remote, and added that, "should it happen, however, the courts are competent to relieve from the consequences of so radical a change of conditions."

Entertaining the foregoing views, we do not deem it necessary to consider the other questions discussed. If, as we hold, that part of the right of way embraced in Railroad street was, under the circumstances of the case, incapable of being diverted from the purpose for which it was granted, for use as a longitudinal street, it is quite unimportant to inquire into the acts and intent of the parties, or to determine what was really attempted to be done. Whatever the findings of fact might be upon those questions, the plaintiffs could not successfully invoke the doctrine of estoppel. Neither the acts nor the acquiescence of the grantee of the government grant can operate to defeat the will of the grantor. Whatever may be the equities in favor of the plaintiffs, we cannot give them place without violating the integrity of the grant. They can hardly be of greater dignity than those of the farmer, who, in good faith, has bought and paid for a portion of the right of way, and reduced it to cultivation; but it is not pretended that such conveyance could be sustained. In either case the hardship, unfortunate though it be, is but the result of a misapprehension of the law. The reasons for upholding a diversion from the purpose of the grant are no greater in one case than in the other. Taking cognizance of the existence of such equities, Congress has provided a measure of relief. By the act of April 28, 1904 (33 Stat. 538), conveyances theretofore made by the railroad company of portions of the right of way were validated; but with the proviso that no such conveyance should have the effect of diminishing the right of way to less than 100 feet upon either side of the center of the main track. Thus Congress has expressly reaffirmed its purpose that the right of way, now to a width of 200 feet, shall be held intact, and this purpose it is the duty of the courts to sustain.

Accordingly, the decree appealed from will be affirmed, with costs to the appellee.

ÆTNA LIFE INS. CO. v. HOPPIN et al.

(Circuit Court of Appeals, Seventh Circuit. January 12, 1914. Rehearing Denied May 12, 1914.)

No. 2023.

1. DESCENT AND DISTRIBUTION (§ 6*)—COMMON LAW—PRIMOGENITURE—CONDITIONAL FEE—FEE TAIL.

Since 1819 descent to surviving children and descendants in equal parts has been substituted for the English rule of primogeniture; the descendants of a deceased child taking the child's share in equal parts, as provided by Jones & A. Ann. St. Ill. 1913, par. 4202.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 28–32; Dec. Dig. § 6.*]

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

2. ESTATES TAIL (§ 2*)—CONDITIONAL FEE—FEE TAIL.

The statute de donis, a part of the English law adopted by Illinois, by which a conditional fee was converted into a fee tail, has been barred since 1827 from taking effect, and what would be a fee tail under the English law has been changed into a life estate in the donee, with remainder in fee to the next taker, as provided by Jones & A. Ann. St. Ill. 1913, par. 2237.

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

3. DEEDS (§ 129*)—ESTATE CONVEYED—HEIRS.

Where land is conveyed to A. and his heirs, or the heirs of his body, the word "heirs" is descriptive of the quality of the estate given to A., and in the absence of a contrary definition, clearly furnished by the donor, must be construed as intending an unending line of succession by inheritance, so that, though A. has a fee simple or fee tail, his capacity to enjoy the estate, if not alienated, is coterminous with his life.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 351, 360–365, 416–430, 434, 435; Dec. Dig. § 129.*]

4. DEEDS (§ 128*)—"HEIRS"—RULE IN SHELLEY'S CASE.

In Illinois, and in the United States generally, where the surviving children as tenants in common stand for the surviving eldest son, the word "heirs" may have different meanings, just as under the English law the singular form, "heir," might have different meanings, but, if there is no context, the word "heirs" must be held to indicate the indefinite succession by inheritance, and the rule in Shelley's Case applies; but a context may demonstrate that the word was used as a description of purchasers who would constitute a new stock of descent.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413–415, 419–421, 427; Dec. Dig. § 128.*

For other definitions, see Words and Phrases, vol. 4, pp. 3241–3265; vol. 8, pp. 7677, 7678.]

5. DEEDS (§ 133*)—"VESTED REMAINDER"—"CONTINGENT REMAINDER."

A remainder is vested when throughout its existence it stands ready to take effect in possession whenever and however the preceding estate determines, and is contingent when it is limited on an event which may happen before or after or at the time of or after the termination of the particular estate.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 368–371; Dec. Dig. § 133.*

For other definitions, see Words and Phrases, vol. 8, pp. 7305–7307, 7827–7829; vol. 2, pp. 1503–1506; vol. 8, p. 7615.]

6. DEEDS (§ 133*)—VESTED AND CONTINGENT REMAINDER—HEIRS OF BODY—CHILDREN.

A deed conveyed property to H. and to S., his wife, during their natural life and the life of the survivor, and at the time of the death of the survivor to the heirs of the body of S., their heirs and assigns. *Held*, that the remainder given to the heirs of the body of S. was not vested, because it did not stand ready throughout its existence to take effect in possession whenever and however the preceding estate determined. The words "heirs of the body," being intended to have their ordinary legal meaning, were not synonymous with "children"; and since the remainder to such heirs was contingent, an execution sale of the property under a judgment against them during the continuance of the life estate passed no title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 368–371; Dec. Dig. § 133.*]

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

7. CONSTITUTIONAL LAW (§ 93*)—VESTED RIGHTS—ESTATE CONVEYED—SUBSEQUENT LEGISLATION—RULES OF DECISION.

Where a deed, at the time it was executed, conferred on the heirs of the grantees a contingent remainder in fee simple under the law then in force, the right could not be impaired or destroyed by subsequent legislation or subsequent decisions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 176, 177, 181–185, 190–192, 194–200, 208, 213–224, 236; Dec. Dig. § 93.*]

In Error to the District Court of the United States for the Southern Division of the Southern District of Illinois; J. Otis Humphrey, Judge.

Ejectment by the Ætna Life Insurance Company against Franklin M. Hoppin and others. Judgment for defendants, and plaintiff brings error. Affirmed.

William Jack, of Peoria, Ill., for plaintiff in error.

Albert M. Kales, of Chicago, Ill., for defendants in error.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

BAKER, Circuit Judge. Plaintiff in error was plaintiff in this action of ejectment. The cause was submitted to the court, without a jury, on an agreed statement of facts. Judgment was for defendants.

In 1862 Fassett, owner in fee of land in Illinois, deeded it to "Franklin Hoppin and Sarah Hoppin, his wife, during their natural lives and the life of the survivor of them, and at the death of the survivor to the heirs of the body of said Sarah, their heirs and assigns."

Franklin died in 1865; Sarah, in 1908. In 1862, when the Fassett deed was made, defendants Hoppin and Garland, son and daughter of Franklin and Sarah, were in being; and they were the only children ever born to Sarah. Defendant Vangieson is tenant of his codefendants.

Plaintiff claims title under an execution sale on a judgment against defendants Hoppin and Garland. Judgment was rendered in 1874; execution was levied and sale was had in 1875; and deed thereon was made in 1877.

[1, 2] Ever since territorial days there has been a provision in Illinois (Ill. St. An. c. 28, § 1) that the common law of England and the general acts of Parliament in aid thereof, prior to 1606, shall be in force until repealed by legislative authority. Since 1819 for descent by primogeniture has been substituted descent to surviving children and descendants in equal parts, descendants of a deceased child taking the child's share in equal parts. Ill. St. An. c. 39, § 1. The statute de donis (a part of the English law adopted by Illinois), by which a conditional fee was converted into a fee tail, has been barred since 1827 from taking effect, and what would be a fee tail under the English law has been changed to a life estate in the donee and a remainder in fee simple to the next taker. Ill. St. An. c. 30, § 6.

If by the Fassett deed "the heirs of the body of Sarah" took a contingent remainder, plaintiff does not deny that the execution sale

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

was ineffective to pass any interest in the land. Baker v. Copenbarger, 15 Ill. 103, 58 Am. Dec. 600; Haward v. Peavey, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120; Ducker v. Burnham, 146 Ill. 9, 34 N. E. 558, 37 Am. St. Rep. 135; Hull v. Ensinger, 257 Ill. 160, 100 N. E. 513.

So the question is: What estate or estates were created by the Fassett deed in 1862 under the common law as modified in the two particulars named?

Ætna Life Ins. Co. v. Hoppin, 249 Ill. 406, 94 N. E. 669, is an exact precedent. That was an ejectment case between these parties, involving the same Fassett deed and the same execution sale. Plaintiff prevailed in the trial court. On appeal the judgment was reversed and the cause remanded for retrial. Thereupon plaintiff dismissed, and on appeal its right to do so was upheld. 255 Ill. 115, 99 N. E. 375. Though the decision has no force as an adjudication, it is, what cited authorities rarely are, a case squarely in point on the very language presented to us for construction. Exercising an undoubted right, plaintiff asks us to say whether that case was correctly decided.

[3] Shelley's Case has no application, and therefore section 6 of chapter 30 is to be disregarded. In a deed to A. and his heirs, or heirs of his body, the word "heirs" is descriptive of the quality of estate given to A. "Heirs," in the absence of a contrary definition clearly furnished by the donor, intends an unending line of succession by inheritance. Though A. has a fee simple or fee tail, his capacity to enjoy the estate, if not alienated, is coterminous with his life. So, when a conveyance to A. for his use during life and then to his heirs or heirs of his body came up for construction, it was held in Shelley's Case that the word "heirs" was a word of limitation, descriptive of A.'s estate, and not a word of purchase, descriptive of grantees in remainder; that the donor either actually intended A. to have an estate in fee, or, if his intent was that A. should take only a life estate, his failure to supply a new lexicography for "heirs" left his wish as one impossible of gratification, namely, that the law should not be enforced. In the present deed, however, the context displays the sense in which the grantor used the words "heirs of the body of Sarah." The context is "Sarah for life, then the heirs of her body, their heirs and assigns." He did not intend that Sarah should have a fee simple, for there is no limitation to her general heirs in unending succession. He did not intend that she should have a fee tail, for the words of limitation are not restricted merely to the stream of her blood so long as it shall continue. He intended, what he plainly said, that Sarah should have only a life estate; and since, therefore, the heirs of the body of Sarah were not to take from her by descent, he intended that they should take by purchase; and since the description of the purchasers is followed by the words of limitation "their heirs and assigns," he intended that those purchasers should take the remainder in fee simple. Such we believe is the natural reading of the deed, and such an interpretation is likewise required by the rule in Archer's Case, 1 Co. 66b, decided in 1597, when read with primogeniture in mind.

There the devise was to Robert Archer for life, and "afterwards to the next heir male of Robert, and to the heirs male of the body of such next heir male." If the devise had been to Robert for life, and then to his next heir male, the word "heir" could have been construed in a collective sense to denote an indefinite succession through Robert's blood in the male line, and so under Shelley's Case an estate in fee tail would have been created. But the added words, "and to the heirs male of the body of such next heir male," required attention to be given to the facts that the drafter of the instrument was using the plural form "heirs" when he intended an indefinite succession by inheritance; that the indefinite succession was to spring, not from Robert, but from the next heir male of Robert; and that the singular form, "next heir male of Robert," therefore, could not properly be taken as nomen collectivum, but was a description of that person who by primogeniture could at Robert's death answer as his next heir male. Consequently the holding was that the next heir male of Robert took by purchase and constituted a new stock of descent. Robert's next heir male became the first holder of a fee tail. If the added words of limitation had been to the general heirs of such next heir male, so that the next heir male as purchaser would have acquired a fee simple, as is the wording here, there would have been even less room for contending that Robert Archer was given a fee tail.

[4] Under the English law of primogeniture no ancestor could leave surviving him more than one heir. If he left sons, the eldest was his heir. If daughters only, they took as one heir as coparceners. So a deed to A. for life and then to the *heir* of his body might have different meanings. If there was no context, it was considered that the singular form was used collectively to indicate indefinite succession, and Shelley's Case applied. But a context might show that the singular form was employed to describe the person who by survival would become the heir of A.'s body, and that such heir should constitute a new stock of descent. But a deed to A. for life and then to the *heirs* of his body contained no ambiguity under English law. "Heirs" could not be taken as descriptive of the one person; it could only mean the indefinite succession from generation to generation. Therefore, in a deed to A. for life and then to the heirs of his body, *their heirs and assigns,* the added words were ineffectual to obviate the rule in Shelley's Case. "Heirs of the body," being usable only to create an estate in tail, could not be descriptive of coexistent persons who on the death of the donee for life could then answer as the heirs of his body, and whose estate would be defined by the added words "their heirs and assigns" as a remainder in fee simple. The application of the rule in Shelley's Case to this last supposed deed (Wright v. Pearson, 1 Ed. 119, Measure v. Gee, 5 B. & Ald. 910) is entirely consistent with the rule in Archer's Case where primogeniture prevails. Bayley v. Morris, 4 Ves. Jr. 788; Evans v. Evans [1892] 2 Ch. 173. But in Illinois, and in this country generally, where the surviving children as tenants in common stand for the surviving eldest son, "heirs" may have different meanings, just as under English law the

singular form "heir" might have different meanings. If there is no context, "heirs" must be held to indicate the indefinite succession by inheritance, and Shelley's Case applies. But a context may demonstrate that "heirs" was a description of purchasers who should constitute a new stock of descent. Ætna Life Ins. Co. v. Hoppin, 249 Ill. 406, 94 N. E. 669, where Archer's Case was relied on. And see, also, De Vaughn v. Hutchinson, 165 U. S. 566, 17 Sup. Ct. 461, 41 L. Ed. 827; De Vaughn v. De Vaughn, 3 App. D. C. 50; Daniel v. Whartenby, 17 Wall. 639, 21 L. Ed. 661; Dott v. Willson, 1 Bay (S. C.) 457; Lemacks v. Glover, 1 Rich. Eq. (S. C.) 141; McIntyre v. McIntyre, 16 S. C. 290; Jarvis v. Wyatt, 11 N. C. 227; Tucker v. Adams, 14 Ga. 548; Taylor v. Cleary, 29 Grat. (Va.) 448; Peer v. Hennion, 77 N. J. Law, 693, 76 Atl. 1084, 29 L. R. A. (N. S.) 945; Earnhart v. Earnhart, 127 Ind. 397, 26 N. E. 895, 22 Am. St. Rep. 652; Wescott v. Meeker, 144 Iowa, 311, 122 N. W. 964, 29 L. R. A. (N. S.) 947; Archer v. Brockschmidt, 5 Ohio N. P. 349; Hamilton v. Wentworth, 58 Me. 101; Canedy v. Haskins, 54 Mass. (13 Metc.) 389, 6 Am. Dec. 739; Findlay v. Riddle, 3 Bin. (Pa.) 139, 5 Am. Dec. 355.

[5] Did the purchasers who were described as the "heirs of the body of Sarah" take a vested or a contingent remainder?

A remainder is vested when throughout its existence it stands ready to take effect in possession whenever and however the preceding estate determines. A remainder is contingent when it is limited on an event which may happen before or after, or at the time of or after the termination of the particular estate. Williams, Real Prop. (21st Ed.) 356–358; Gray, Rule against Perp. § 134; Williams, Real Prop. (21st Ed.) 345; Gray, Rule against Perpetuities, § 101; Fearne, C. R. p. 3; Butler's Note to Fearne, C. R. p. 9; Challis, Real Prop. (3d Ed.) pp. 125–126; Leake, Digest of Land Law (2d Ed.) p. 233; Archer's Case, 1 Co. 66b; Bayley v. Morris, 4 Ves. Jr. 788; Plunket v. Holmes, 1 Lev. 11; Loddington v. Kime, 1 Salk. 224; Purefoy v. Rogers, 2 Saund. 380; Egerton v. Massey, 3 C. B. N. S. 338; Festing v. Allen, 12 M. & W. 279; Rhodes v. Whitehead, 2 Dr. & Sm. 532; White v. Summers, (1908) 2 Ch. 256; Doe v. Scudamore, 2 B. & P. 289; Price v. Hall, L. R. 5 Eq. 399; Cunliffe v. Brancker, 3 Ch. Div. 393; City of Peoria v. Darst, 101 Ill. 609; Haward v. Peavey, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120; Walton v. Follansbee, 131 Ill. 147, 23 N. E. 332; Mittel v. Karl, 133 Ill. 65, 24 N. E. 553, 8 L. R. A. 655; Temple v. Scott, 143 Ill. 290, 32 N. E. 366; Chapin v. Crow, 147 Ill. 219, 35 N. E. 536, 37 Am. St. Rep. 213; McCampbell v. Mason, 151 Ill. 500, 38 N. E. 672; Phayer v. Kennedy, 169 Ill. 360, 48 N. E. 828; Madison v. Larmon, 170 Ill. 65, 48 N. E. 556, 62 Am. St. Rep. 356; Golladay v. Knock, 235 Ill. 412, 85 N. E. 649, 126 Am. St. Rep. 224; Bond v. Moore, 236 Ill. 576, 86 N. E. 386, 19 L. R. A. (N. S.) 540; Ætna Life Ins. Co. v. Hoppin, 249 Ill. 406, 94 N. E. 669; Irvine v. Newlin, 63 Miss. 192; Bennett v. Morris, 5 Rawle (Pa.) 9; Stump v. Findlay, 2 Rawle (Pa.) 168, 19 Am. Dec. 632; Waddell v. Rattew, 5 Rawle (Pa.) 230; Redfern v. Middleton, Rice (S. C.) 459; Craig v. Warner, 5 Mackey (16 D. C.) 460, 60 Am. Rep.

381; McElwee v. Wheeler, 10 S. C. (Rich.) 392; Fabler v. Police, 10 S. C. (Rich.) 376; Watson v. Dodd, 68 N. C. 528; Watson v. Dodd, 72 N. C. 240; Abbott v. Jenkins, 10 Serg. & R. (Pa.) 296; Taylor v. Taylor, 118 Iowa, 407, 92 N. W. 71; Young v. Young, 89 Va. 675, 17 S. E. 470, 23 L. R. A. 642; Nichols v. Guthrie, 109 Tenn. 535, 73 S. W. 107; Henderson v. Hill, 77 Tenn. (9 Lea) 26; Roundtree v. Roundtree, 26 S. C. 450, 471, 2 S. E. 474; Blanchard v. Brooks, 12 Pick. (Mass.) 47.

[6] The remainder given to the "heirs of the body of Sarah" is not vested, because it does not stand ready throughout its existence to take effect in possession whenever and however the preceding estate determines. If before Sarah's death the life estate should terminate by forfeiture or merger or surrender, the remainder would not stand ready, according to its terms, to come into possession. The remainder is contingent, because it is limited on an event (the death of Sarah, when the heirs of her body can be ascertained) which may not happen until after the termination of the life estate, while it may be coincident with the termination of the life estate.

There is no escape from holding that the remainder is contingent, except by construing "heirs of the body of Sarah" as meaning her children living at the date of the deed and those subsequently born, instead of denoting such children and descendants as should survive her. But in our judgment this cannot be done. When it is found that Shelley's Case does not apply, and that the words "heirs of the body" are descriptio personarum of remaindermen who are given an estate in fee simple, the question whether the remainder, which is inevitably contingent according to the legal definition and the maxim that no one can be heir of the living, can be treated as a vested remainder in children alive or as born, must be determined by observing whether or not a definition contrary to the legal one has been furnished by the donor. In Archer's Case no extralegal definition was supplied, and the remainder was held to be, not a remainder that vested in Robert's eldest son when born, but a remainder that was contingent upon a person's surviving Robert who could then answer to the legal description. When the parties to the present controversy were before the Supreme Court of Illinois, that tribunal, after finding that Shelley's Case was inapplicable, ruled that:

"There is no ground whatever in this case for saying that the words 'heirs of the body' were intended to have any other than their ordinary definite legal meaning, for there are no words in the deed which in any way qualify them."

This accords with the general holdings that in the absence of a special context there is nothing to do but accept the legal definition. Bayley v. Morris, 4 Ves. Jr. 788; Canedy v. Haskins, 54 Mass. (13 Metc.) 389, 46 Am. Dec. 739; Hamilton v. Wentworth, 58 Me. 101; Frogmorton v. Wharrey, 2 Wm Black Rep. 728; Mudge v. Hammill, 21 R. I. 283, 43 Atl. 544, 79 Am. St. Rep. 802; Harvey v. Ballard, 252 Ill. 57, 96 N. E. 558; Thurston v. Thurston, 6 R. I. 296, 300; Mercer v. Safe Deposit Co., 91 Md. 102, 117, 45 Atl. 865; Kirby v. Brownlee, 7 Ohio Cir. Dec. 460, 463; Hanna v. Hawes, 45 Iowa,

437, 440; Zuver v. Lyons, 40 Iowa, 513; Crosby v. Davis, 2 Clark (Pa.) 403; Wood v. Burnham, 6 Paige (N. Y.) 513; Tallman v. Wood, 26 Wend. (N. Y.) 9; Jarvis v. Wyatt, 11 N. C. 227; Lemacks v. Glover, 1 Rich. Eq. (S. C.) 141; Tucker v. Adams, 14 Ga. 548; Sharman v. Jackson, 30 Ga. 224; Smith v. Butcher, L. R. 10 Ch. Div. 113; Lord v. Comstock, 240 Ill. 492, 88 N. E. 1012; Jones v. Rees, 6 Pennewill (Del.) 504, 69 Atl. 785, 16 L. R. A. (N. S.) 734; Johnson v. Jacobs, 74 Ky. (11 Bush) 646; Hall v. La France Fire Engine Co., 158 N. Y. 570, 53 N. E. 513; Putnam v. Gleason, 99 Mass. 454; Richardson v. Wheatland, 48 Mass. (7 Metc.) 169; Read v. Fogg, 60 Me. 479; Williamson v. Williamson, 57 Ky. (18 B. Mon.) 329; Fulton v. Harmon, 44 Md. 251, 264; Horsley v. Hilburn, 44 Ark. 458; In re Estate of Kelso, 69 Vt. 272, 37 Atl. 747; In re Wells' Estate, 69 Vt. 388, 38 Atl. 83; Hall v. Leonard, 1 Pick. (Mass.) 27; Morris v. Stephens, 46 Pa. 200; Winslow v. Winslow, 52 Ind. 8.

In the cases cited by plaintiff to support the contention that "heirs of the body" should be construed to mean "children alive or as born" there was either a special context or when the question of rights arose the "children" were in fact survivors answering to the description of heirs of the body. Doe v. Laming, 2 Burr. 1100; Doe v. Graff, 11 East, 668; Gretton v. Haward, 6 Taunt. 94; Crump v. Norwood, 7 Taunt. 362; Right v. Creber, 5 B. & C. 866; De Vaughn v. Hutchinson, 165 U. S. 566, 17 Sup. Ct. 461, 41 L. Ed. 827.

We therefore conclude that the Supreme Court of Illinois, when considering the deed now in question, correctly determined and applied the Illinois law as it stood in 1862; that is, the common law of England and the general acts of Parliament in aid thereof, prior to 1606, as modified by the Illinois statute of descent.

Plaintiff, citing no Illinois cases prior to 1862, insists that the Illinois decision between these parties is opposed to Butler v. Huestis, 68 Ill. 594, 18 Am. Rep. 589, decided in 1873, and has been virtually overruled by Moore v. Reddel, 259 Ill. 36, 102 N. E. 257, decided in June, 1913.

[7] Though there were no apposite Illinois decisions before 1862, the law of Illinois, a common-law state, is to be regarded as settled in 1862 in accordance with the settled common law. Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428. If this Fassett deed in 1862 conferred upon defendants a contingent remainder in fee simple under the law then in force, that right in real estate could not be impaired or destroyed by subsequent legislation or subsequent decision.

Moore v. Reddel, if it does conflict with Ætna Life Ins. Co. v. Hoppin, can be allowed no effect. On this writ the question is whether the trial court committed error in looking to the evidences of the Illinois law in force in 1862. Error cannot be predicated on the trial court's failure to foresee that the Supreme Court of Illinois would not merely overturn a rule of property as declared shortly before by the same judges, but would undertake to abrogate the common law—a right reserved by chapter 28, § 1, exclusively to the Legislature. Morgan v. Curtenius, 20 How. 1, 51 L. Ed. 823; Burgess

v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; Security Trust Co. v. Black River National Bank, 187 U. S. 211, 23 Sup. Ct. 52, 47 L. Ed. 147; Western Union Tel. Co. v. Poe (C. C.) 64 Fed. 9; King v. Dundee (C. C.) 28 Fed. 33.

This case is at an end, but it may perhaps be not unfitting to say that we believe plaintiff is mistaken in asserting a conflict between the cases named. In Butler v. Huestis, in Moore v. Reddel, and in the additional case of Winchell v. Winchell, 259 Ill. 471, 102 N. E. 823, the foundational finding was that a fee tail was created, on which section 6 of chapter 30 would operate. "As to limitations controlled by that section, the only use made of the rule [in Shelley's Case] is for the purpose of determining whether by the common law a fee tail would have been created." Winchell v. Winchell, supra. Construction of section 6 of chapter 30 was within the province of the Supreme Court of Illinois; and if, in interpreting the legislative will in abrogating the common law respecting entails, the court found that "heirs of the body" of the first taker was intended by the Legislature to mean "children alive or as born," such statutory construction throws no light on the meaning of "heirs of the body" at common law in an instrument where the rule in Shelley's Case fails to bring section 6 into play. This substantially was stated in Ætna Life Ins. Co. v. Hoppin. The court there recited the settled construction of section 6, citing the cases cited in Moore v. Reddel, and then proceeded to say that:

"These cases are not decisive of this case, which does not involve the application of the statute, but is merely a question of the construction of the conveyance without reference to any statute."

And the correctness of the position taken in Ætna Life Ins. Co. v. Hoppin with respect to the scope and meaning of section 6 was recognized in Moore v. Reddel. We perceive no conflict between the two lines of decisions, and we believe none was intended.

The judgment is affirmed.

SONA et al. v. ALUMINUM CASTINGS CO.

(Circuit Court of Appeals, Sixth Circuit. June 13, 1914.)

No. 2459.

1. CONTEMPT (§ 54*)—PROCESS OF ARREST—PRELIMINARY SHOWING.

In general process of arrest for contempt, not committed in the court's presence, can properly issue only on the filing of an affidavit stating the facts positively and in such a way as prima facie to show the commission of a contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 143–149; Dec. Dig. § 54.*]

2. CONTEMPT (§ 54*)—PETITION—FAILURE TO SERVE—EFFECT.

Failure to serve a petition for process to punish respondents for contempt on respondents or their counsel could at most only furnish ground for continuance.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 143–149; Dec. Dig. § 54.*]

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

3. CONTEMPT (§ 54*)—PETITION—WANT OF VERIFICATION—WAIVER.
Where a petition for process to punish respondents for contempt in violating a strike injunction, otherwise sufficient, was not sworn to, the lack of verification was not a jurisdictional defect and was waived by respondents' failure to object to it in limine before trial.
[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 143–149; Dec. Dig. § 54.*]

4. INJUNCTION (§ 230*)—VIOLATION—CONTEMPT—AFFIDAVIT.
An affidavit charging violation of an injunction is only material to procure a preliminary arrest, which cannot be followed by a conviction without further testimony to support the charge.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 502–516; Dec. Dig. § 230.*]

5. INJUNCTION (§ 101*)—STRIKES—PICKETING.
Laborers have an absolute right to quit the service of an employer and by peaceable methods persuade others to do so, but picketing, when accompanied by violence or any manner of coercion or intimidation to prevent others from entering or remaining in the employer's service, is unlawful and may be enjoined.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175; Dec. Dig. § 101.*
Restraining boycotts, strikes, and other combinations by employés interfering with commerce or business, see note to Shine v. Fox Bros. Mfg. Co., 86 C. C. A. 313.]

6. INJUNCTION (§ 230*)—PICKETING—VIOLATION OF STRIKE INJUNCTION.
Evidence *held* to sustain a finding that respondents, members of a trade union, during a strike were guilty, the one of assault on nonstrikers, the other of unlawful picketing in violation of a strike injunction.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 502–516; Dec. Dig. § 230.*]

In Error to the District Court of the United States for the Eastern District of Michigan; Alexis C. Angell, Judge.

Petition by the Aluminum Castings Company against George Sona and another for violating a restraining order, etc., issued as the result of a strike. There was a judgment finding defendants guilty and imposing punishment of imprisonment upon them, and they bring error. Affirmed.

W. H. Gallagher, of Detroit, Mich., for plaintiffs in error.

S. R. Williams, of Detroit, Mich., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Plaintiffs in error, herein called respondents, were each convicted of contempt in violating, the one a restraining order, the order the restraining order and preliminary injunction issued by the court below in a strike suit in which defendant in error was complainant and a local of the International Moulders' Union and several others including respondent Sudsinski, were defendants. Sona was not a party to the suit. The order under review, which was in a single entry, found: That Sona had notice of the issuance of the restraining order and that Sudsinski was served with both the restraining order and the injunction. That Sona, after such notice, assaulted a named

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

employé of complainant at a certain time and place "and did him serious bodily harm," and that "such conduct on the part of said Sona was a * * * contempt of this court." That Sudsinski, while guilty of committing no assault, had, with Sona and others to the court unknown, been from time to time prior to the date referred to "guilty of picketing, impeding, and obstructing the streets, alleys, and approaches of the premises of the complainant company in such a manner as to intimidate, threaten, impede, and obstruct the employés of said company," and that "his conduct * * * has been a contempt of the court, * * *" Each respondent received sentence of imprisonment.

The decisive questions are: First, whether the preliminary showing made was a sufficient basis for the order for arrest and for the writ issued thereon, and gave the court jurisdiction over the proceedings; second, whether the court erred in finding Sudsinski guilty upon the evidence submitted.

1. There was filed, as basis for the order for arrest, an unsworn petition of complaint, through its solicitors, charging both respondents with having assaulted four named employés of the petitioner and with "picketing," impeding, and obstructing the streets, alleys, and approaches of plaintiff's premises in such manner as to intimidate, threaten, impede, and obstruct petitioner's employés.

The acts charged in the petition were clearly forbidden by both the restraining order and the injunction. There was also filed with the petition the sworn affidavit of a detective that on a date named both respondents were walking back and forth in front of one of petitioner's plants in company with from 75 to 100 other strikers; and that almost daily since the strike was declared he had seen Sudsinski (whom affiant alleged to be one of the most prominent of the men who regularly did picket duty at this plant), usually accompanied by several other strikers in the vicinity of that plant, walking back and forth in front of it at about the same time the employés of the plant were coming to their work or leaving the factory for their homes. There was also filed at the same time and in the same connection the sworn affidavits of three of the employés alleged in the petition to have been assaulted by respondents, each of whom testified that he was assaulted when in company with the other three, and that each saw one or more of his companions assaulted at the same time and place. Neither of the four gave the names of the assailants, but each stated that he would recognize those who made certain of the assaults, although not knowing their names.

[1] Respondents contend that process of arrest for contempt, not committed in the court's presence, can properly issue only upon the filing of affidavit stating positively the facts and in such way as prima facie to show the commission of a contempt. This is the generally recognized rule, and, for the purpose of this opinion, we may assume, without deciding, that had objection to the sufficiency of the showing been made before going to trial, the objection would have been good. There was a motion to dismiss the proceedings because the petition was not served upon respondents or their counsel. The petition was in

fact actually filed, but seems to have escaped counsel's notice. The assignment relating to this point was not argued in respondent's brief, and we understand is not relied upon.

[2] Indeed, it could not well be, for the failure to serve could, at most, have been ground for continuance only, which was not finally insisted upon. But respondents did not challenge the jurisdiction of the court in any way before going to trial on the ground of an insufficient preliminary showing, or otherwise. Indeed, this objection is not raised by any assignment of error, and we can consider it only by virtue of our rule No. 11 (202 Fed. viii, 18 C. C. A. x), which permits, but does not require, the court to consider a "plain error not assigned."

[3] Had the petition been sworn to, the showing clearly would have been sufficient basis for the process of arrest of both respondents on both charges. Respondents contend, however, that the requirement of showing by sworn affidavit cannot be waived. The authorities cited in support of this proposition do not sustain it; in the case of several of them, no question of waiver is shown by the reported decision to have been in any way presented.[1]

In others it affirmatively appears that the sufficiency of the case made by the moving papers was seasonably challenged, although none of them involved the weight to be given an unsworn petition.[2] Respondents were unquestionably entitled to be informed of the charge made against them, and so clearly and definitely as not only to show prima facie a case against them, but that when arraigned they might know what answer to make and to enable them to prepare their defense. Gompers v. Buck's Stove & Range Co., 221 U. S. 446, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; U. S. v. Cruikshank,

[1] Ludden v. State, 31 Neb. 429, 48 N. W. 61; Hutton v. Superior Court, 147 Cal. 156, 81 Pac. 409; Otis v. Superior Court, 148 Cal. 129, 82 Pac. 853; Russell v. Wayne Circuit Judge, 136 Mich. 624, 625, 99 N. W. 864; Ward v. Arenson, 23 N. Y. Super. Ct. (10 Bosw.) 589.

[2] In Cooley v. State, 46 Neb. 603, 65 N. W. 799, the question of the "sufficiency of the order" to show cause and for arrest was raised "at every stage of the proceeding." In State v. Allen, 14 Wash. 684, 45 Pac. 644, where the judgment and sentence were reversed on appeal for failure in the affidavit to state facts sufficiently showing the commission of an offense, there had been motion to vacate proceedings on the ground of the insufficiency of the affidavit, and it is fairly inferable that such motion was made before the trial. In Wyatt v. People, 17 Colo. 252, 265, 28 Pac. 961, the court declined to consider whether the fact of insufficient affidavit could be waived or cured by answer or other subsequent proceedings; the fact appearing that the judgment was rendered upon pleadings upon which there had been motion to quash. In Early v. People, 117 Ill. App. 608, where judgment was reversed by reason of the insufficiency of the petition, defendants had demurred to the same; their demurrer had been overruled, and they were thereupon arraigned and pleaded not guilty. In State v. Gilpin, 1 Del. Ch. 25, the objection that the affidavit on which the attachment for contempt was issued did not show service of the writ of injunction was raised by an exception to an interrogatory by way of demurrer. In McConnell v. Sweet, 46 Ind. 298, exception was taken to "the sufficiency" of the affidavit, and it is to be presumed seasonably taken. In State v. Root, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568, respondent excepted at the outset to the jurisdiction of the court. In Cooper v. People, 13 Colo. 337, 373, 22 Pac. 790, 6 L. R. A. 430, respondents seasonably protested against the court's jurisdiction to proceed upon the affidavit for any matter stated therein.

92 U. S. 542, 23 L. Ed. 588. But we think it the rule, amply supported by authority, that by failing, before going to trial, to object to the preliminary showing made as insufficient, the alleged defect was waived.

In People v. Court of Sessions, 147 N. Y. 290, 41 N. E. 700, to an objection that the court obtained no jurisdiction to punish for contempt because the affidavit on which the order to show cause issued was made wholly on information and belief and for other insufficiencies, it was replied:

"The court undoubtedly obtained jurisdiction of the appellants when they appeared before it and were charged with the contempt. The only office of the order to show cause was to bring them before the court; and, if it was issued on an insufficient affidavit, they must now be deemed to have waived the defect by their personal appearance and answer."

In Aaron v. U. S. (C. C. A. 8th Cir.) 155 Fed. 833, 836, 84 C. C. A. 67, 70, it was held that an information in a proceeding for contempt is sufficient if it clearly apprises the defendant of the nature of the charge against him, and that no particular form is essential; the court saying:

"If the information for the writ was defective in matter of form, it should have been taken advantage of by the defendant in proper manner by motion before going to trial. Where the party charged with the contempt appears without objection to the sufficiency of the information and affidavits by appropriate motion, and answers and goes to trial, the objection is deemed as waived."

The petition in that case was attacked as insufficient, among other reasons for failing to recite the terms of the injunction order alleged to have been disobeyed, and it was said that, as the defendant was alleged to have been a party to the injunction order and appeared thereto, he was sufficiently advised of the provisions thereof.

In Morehouse v. Giant Powder Co. (C. C. A. 9th Cir.) 206 Fed. 24, 124 C. C. A. 158, the Aaron Case was cited to the proposition that, in the absence of an objection in limine, the papers are sufficient if they clearly apprise defendant of the nature of the charge.

In Re Deaton, 105 N. C. 59, 11 S. E. 244, it was said that proceedings as for contempt should be based on affidavits.

It was, however, said in Re Odum, 133 N. C. 250, 45 S. E. 569, that the failure to base such proceedings on affidavits is waived by contemnor being sworn and making answer to the contempt. See, also, In re Rice (C. C.) 181 Fed. 217.

[4] This rule, as applied to the facts here, worked no prejudice to respondents. The office of the affidavit was only to procure a preliminary arrest which could not be followed by conviction without further testimony, which was in fact heard by the District Judge in open court, and included the evidence of respondent Sona and another witness for respondents.

So far as concerns the charge of assault, the sworn affidavits lacked the identification of respondents as the assailants; the allegation of the petition, though unsworn, gave notice of complainant's claim of identification. Respecting the charge of intimidating and obstructing employés, the sworn affidavit lacked only: (a) An allegation that the

walking back and forth impeded and obstructed the streets, alleys, and approaches of complainant's premises; and (b) that the manner in which the marching was done was such as to intimidate, threaten, impede, and obstruct employés and those seeking employment. The failure to allege an obstruction would seem an informality in view of the statements of the acts done; and the alleged intimidating effect would largely depend upon inference to be drawn from the narration of the facts and circumstances. Both these defects, so far as they were such, were supplied by the formal language of the petition, and lack of oath as to part of the showing would be scarcely less matter of form than an oath on information and belief merely. We think it clear that the defect complained of was not so far a constitutional infirmity (like a trial by an unconstitutionally organized jury) that it was not subject to waiver. It follows that in our opinion the defect was waived.

As to the sufficiency of the proof to sustain conviction: As to the assault charged against Sona, no question of the sufficiency of the proof could well be made; there was direct testimony thereof. As to Sudsinski, the question, of course, relates only to the charge of obstructing and intimidating. Complainant concedes that the injunction was not intended to restrain peaceable picketing, and the District Judge rightly, as we think, so interpreted the order.

[5] The rule is too well settled to require extended citation of authority that laborers have the right to quit the service of an employer when they choose to do so, and may, by peaceable methods, persuade others to quit such service; but that picketing, when accompanied by violence or any manner of coercion or intimidation to prevent others from entering or remaining in the service of their employer, is unlawful. Union Pacific Railway Co. v. Reuf (C. C.) 120 Fed. 102, 106; Iron Molders' Union v. Allis-Chalmers Co. (C. C. A. 7th Cir.) 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315; Kolley v. Robinson (C. C. A. 8th Cir.) 187 Fed. 415, 417, 109 C. C. A. 247.

[6] The proof was express and undisputed that the plant in question had been regularly picketed for about a month, including the date of the alleged violations. A witness for respondents, who did picket duty, and who was present at the alleged assault, defined picketing as:

"Walking up and down and seeing—stopping and speaking to any strangers that are working in the shop or anybody that tries to go to them, so as to stop them, and speak to them and keep them away from there. We speak to them to have them keep away from the shop and not go in their employ."

There was express testimony that it was the regular practice for picketers to march back and forth in front of the plant for about an hour each morning and evening, including the time when employés were entering and leaving the plant; that Sudsinski was one of the regular and prominent picketers, usually walking with two or three and sometimes about a dozen picketers in a "bunch"; that the picketers marched either in single file or by twos; and that, during this picketing, there were in the immediate vicinity of the plant from 20 to 50 and sometimes 100 people, apparently largely strikers, walking back and forth. The controlling question was one of fact whether this picketing was peaceable or whether, on the other hand, it was cal-

culated to intimidate and obstruct employés. There was testimony tending to show a purpose to intimidate and obstruct. One of the witnesses testified that he had heard some of those so walking around or standing "hollering different things"; that he at one time heard them "call the other men cattle"; and that Sudsinski was in the crowd that particular evening. Respondent Sona, as a witness, admitted that he knew that "there had been a lot of trouble around there"; that he had heard that men had been assaulted on the street cars on their way to work and been pulled off street cars; that he had heard that the company had to protect its men by cooking and serving meals inside the works. (There was express testimony that the employés were boarded by the company after the strike was declared.) Sudsinski would not unnaturally be as familiar with those general conditions as was Sona. The latter and his associates in the alleged assault followed the employés alleged to have been assaulted from the works to the place where the collision occurred. Judge Angell, who presided at the hearing below and who saw and heard all the witnesses, was convinced, as shown by his finding, that the picketing in question was done in such a manner as to intimidate, threaten, and obstruct the employés of the company, and all persons seeking employment from it. In view of the testimony referred to, we cannot say, as matter of law, that the court was not justified in reaching the conclusion arrived at notwithstanding the absence of testimony of actual violence or disorderly conduct on Sudsinski's part. Upon a writ of error, only matters of law are considered. See Bessette v. W. B. Conkey Co., 194 U. S. 324, 338, 24 Sup. Ct. 665, 48 L. Ed. 997. We cannot pass upon the facts. The decision of the court below upon the facts is conclusive as to them, except in the absence of evidence to support the conclusion.

None of the errors assigned are, in our opinion, well taken.

The judgment of the court below is accordingly affirmed.

SOUTHERN RY. CO. v. SMITH.

(Circuit Court of Appeals, Sixth Circuit. June 2, 1914.)

No. 2447.

1. RAILROADS (§ 400*)—INJURY TO PERSONS ON TRACK—NEGLIGENCE.

Negligence with respect to injuries inflicted by railroad trains upon individuals can rarely, if ever, be absolutely defined as matter of law, but is a question of fact depending upon the given circumstances, all of which must be considered together.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365–1381; Dec. Dig. § 400.*]

2. RAILROADS (§ 400*)—ACTION FOR INJURY TO PERSON ON TRACK—QUESTIONS FOR JURY.

Plaintiff's intestate called at a station on defendant's railroad for some baggage and was directed by the agent to go to a freight shed diagonally across the tracks and across the tracks of another road and obtain a key from the porter. Along the side of the shed was a platform waist-high, with steps at the end, but the way to such steps was blocked by two cars standing on defendant's track. At a short distance from the

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

cars in one direction was an engine, and in the other direction was another car. The porter was on the platform opposite the space between the cars, which was 8 or 10 feet wide, and decedent passed through it to the edge of the platform. While there the engine crashed violently against the two standing cars, and as decedent attempted to jump back through the opening he was caught and crushed. The cars might have passed him in safety if he had stood still close to the platform. *Held*, that the questions of defendant's negligence in sending decedent, by its agent, to the shed without cautioning him with respect to the switching cars or warning the crew in charge of them of his presence or in the failure of such crew to observe and warn him before moving the cars, and of decedent's contributory negligence, were properly submitted to the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365–1381; Dec. Dig. § 400.*]

3. RAILROADS (§ 386*)—ACTION FOR INJURY TO PERSON ON TRACKS—CONTRIBUTORY NEGLIGENCE.

Whether plaintiff was entitled to invoke the rule which might excuse the action of decedent in attempting to escape between the cars, as one taken in a sudden emergency, depended upon whether decedent was negligent in standing where he did, and defendant failing in due care.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1295; Dec. Dig. § 386.*]

4. COURTS (§ 332*)—RULE OF STATE COURTS—CONTRIBUTORY NEGLIGENCE.

The rule of the federal courts is that contributory negligence to constitute a defense in an action for injury must have directly and proximately contributed to the injury, and a rule of state courts, adopted as a rule of evidence, that a less degree of negligence may be considered in mitigation of damages, is not binding on the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 911; Dec. Dig. § 332.*

Conclusiveness of judgment between federal and state courts, see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank v. City of Memphis, 49 C. C. A. 468; Converse v. Stewart, 118 C. C. A. 215.]

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

Action at law by C. L. Smith, administrator of the estate of W. E. Smith, deceased, against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. G. Timberlake, of Jackson, Tenn., for plaintiff in error.

J. E. Bell, of Memphis, Tenn., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. This writ is prosecuted to review a judgment in favor of the plaintiff for the alleged negligent killing of his intestate. At Grand Junction, Tenn., a small hamlet, the tracks of the Southern Railway Company and of the Illinois Central cross each other at right angles and at grade; those of the Illinois Central running north and south and those of the Southern extending east and west. The two roads maintain a joint passenger depot, which is on the northwest of the four corners. Diagonally opposite (south-

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

east) from the passenger depot was the covered freight shed, used for loading and unloading freight. Each road had two tracks; the Illinois Central main track adjoining the passenger depot on the south, the Southern main track on the east. The Illinois Central house-track ran in front of and close to the west end of the freight shed, the house-track of the Southern running close to and by the northerly side of that shed. There was a platform, about waist-high, north of the freight shed, between it and the Southern house-track. Steps from the west end of this platform reached the ground near the Illinois Central house-track. There was no walkway provided for pedestrians between the passenger depot and the freight shed; it being necessary, in going from one to the other, to cross both series of tracks.

Just before the accident, which occurred about noon, decedent drove to the passenger depot to get a piece of baggage for which he held the check. The testimony, while not altogether harmonious, tended to show that decedent was told by the station agent that the key of the baggage room was then in the possession of the porter, who was at the freight shed; that decedent was directed by the agent to apply to the porter, and left the passenger depot on that errand. At this time car switching was being done in connection with a local freight train. Two freight cars were standing on the Southern house-track, next to the platform of the freight shed, but extending some distance across the Illinois Central tracks, and so preventing direct access from the passenger depot to the steps of the freight shed. From 8 to 10 feet to the rear (east) of these two cars was a third car. Opposite the opening between these cars, and inside the open freight shed, was the porter referred to. Decedent, in order to reach the porter, was thus obliged either to go around the westerly end of the two freight cars, or around the easterly end of the single car, or through the opening between the cars, which was the shortest way. The engine was at the time somewhere from 100 to 300 feet west of the freight shed. Decedent passed through the opening between the cars and into contact with the edge of the platform. Just after he reached that point, and while speaking with the porter, a cut of cars was shoved by the engine with great force against the two cars, projecting them against the single car in the rear. The evidence supports an inference that decedent was frightened by the loud and sudden noise of the impact between the shoved cars and the two standing cars, tried to retreat through the opening through which he had come, and in doing so was caught and crushed. There was in fact room for a man to pass between the edge of the platform and the cars, and so beyond the shed, and had decedent remained where he was when frightened by the noise he would not have been injured.

Defendant's motion, at the close of the trial, for directed verdict was denied. The grounds of negligence principally relied upon by plaintiff are: (a) The act of the station agent in sending decedent, under the circumstances stated, to the porter at the shed, instead of going himself; (b) the failure to warn decedent of the approach of cars while he was transacting his business with the porter; and (c) shoving the cars attached to the engine with unnecessary violence

against the standing cars. The important question is whether the court was right in refusing the request for directed verdict; and this involves the question whether there was proof of actionable negligence on defendant's part, and, if so, whether decedent's contributory negligence conclusively appeared.

We think an issue of fact as to defendant's negligence was presented. The evidence tended to show that decedent went to the freight shed on defendant's invitation and on a lawful errand connected with its business. If defendant saw fit to send decedent on this errand, it was its duty to exercise reasonable care to prevent injury to him, conceding a lack of actionable negligence in merely sending him. The more important questions relate to what was, under the circumstances, reasonable care and whether such care was exercised.

Defendant urges that the place where the accident occurred was part of its switching yards; that (as in fact appears) decedent was a man of intelligence and mature years and familiar with the situation and surroundings; that it was obvious that switching operations were going on; that, as may be conceded, the statutory precautions relating to lookouts and whistle have no application to mere switching yards; that decedent was merely a licensee, and so crossed the tracks in question and assumed the position stated at the peril of injury from normal switching operations.

[1] If this place were merely a switching yard this contention would apply. But it was not merely a switching yard; it was also a freight shed; and, as the jury were at liberty to find, decedent was invited to transact business at this place while switching operations were going on. The case therefore presents features not found in the ordinary case of yard switching. Negligence with respect to injuries inflicted by railroad trains upon individuals is a question depending upon the given circumstances, and can rarely, if ever, be absolutely defined as matter of law; in determining the question of negligence all the circumstances must be considered together. Marcott v. Marquette, H. & O. R. R. Co., 47 Mich. 1, 5, 10 N. W. 53.

[2] There is force in the suggestion that the location of the three standing cars (especially the protruding of the two westerly ones across the Illinois Central tracks) furnished evidence that the latter cars at least were liable to be disturbed in the course of switching operations. On the other hand, at least one of these cars, as well as the single car, adjoined the freight shed platform, where cars are naturally loaded and unloaded; and in view of the blocking of the usual entrance to the freight shed, the opening left between the cars, the location of the porter, and the errand on which decedent was sent, we think it was open to the jury to find that decedent was impliedly invited to use the passageway between the cars for access to the freight shed, if that way appeared the more feasible. Either way involved crossing the track on which switching was being done, with more or less danger of injury, differing, at most, only in degree. Where a train is cut in two, to enable passengers or the public to cross the track for the purpose of taking trains, entering depot or merely traveling the highway, due warning is required before closing the gap.

Had the opening in question been a mere private way over which the public was regularly permitted to cross, the duty of reasonable care to prevent injuries to travelers whose presence was reasonably to be anticipated would have rested upon the railroad company. Felton v. Aubrey (C. C. A. 6th Cir.) 74 Fed. 350, 358, 20 C. C. A. 436; Tutt v. Illinois Central R. R. Co. (C. C. A. 6th Cir.) 104 Fed. 741, 744, 41 C. C. A. 320; New York, N. H. & H. R. R. Co. v. Kmetz (C. C. A. 2d Cir.) 193 Fed. 603, 606, 113 C. C. A. 471; Trivette v. C. & O. R. R. Co., 212 Fed. 641, 129 C. C. A. ——, decided by this court April 7, 1914. The situation here, though not identical, is not entirely destitute of analogy, if the fact of express or implied permission to cross the tracks at the place in question is found. We think it cannot be said, as matter of law, that defendant owed no duty of reasonable care in warning decedent that it was about to close the gap, or to refrain from moving the cut of cars so violently as to cause injury to decedent while using this passageway. We think it does not conclusively appear that due care was exercised in preventing injury. True, decedent, when standing next to the platform, was obscured from the view of the engineer by the presence of the two standing cars; but no conclusive reason appears why decedent should not have been in view of the fireman, if in the cab, or in view of the switching crew, if its members were in their proper places on the ground; and we cannot say that the mere automatic ringing of the bell throughout the entire period of switching operations (as testified to by the engineer) was sufficient warning that the two standing cars were about to be shoved across the opening. Moreover, we can scarcely say, as matter of law, that the station agent, in the circumstances stated, owed no duty of warning those engaged in switching operations to watch out for decedent; for there was room for an inference that the agent knew what the switching crew might not have known. Nor is it a conclusive answer that decedent was not in fact within striking distance of the car had he remained where he was, and that thus defendant's negligence did not directly cause the accident. The argument to this effect overlooks the liability (which it was open to the jury to find was reasonably to be anticipated) that decedent in the face of an apparent danger of collision, under the influence of fright and in the exercise of the instinct of self-preservation, would make just such movement as he did make. See Flower v. Witkovsky, 69 Mich. 371, 376, 37 N. W. 364. There was evidence that the impact of the shoved cars upon the two standing cars was so violent as to cause a rebound of 15 feet, and a very loud noise. So far as conclusively appears from the record, the margin of safety in decedent's position may have been narrow; and the jury may well have found that decedent reasonably failed to appreciate that he was safe where he was. In Southern Railway Co. v. Sutton, 179 Fed. 471, 103 C. C. A. 51, which was a case arising under the Tennessee Statutory Precautions Act, we held correct an instruction that the plaintiff did not pass "beyond striking distance," so long as he was still so close to the track, that having due regard for the instinct of self-preservation and the involuntary movements of the body, there was still a reasonable probability or likelihood that he might fall or be

thrown against the side of the engine or train as it passed him. We think the general principle there involved has more or less application here.

[3] It follows, we think, from what has already been said, that the decedent cannot be declared, as matter of law, guilty of negligence in going between the cars and the platform, nor in standing between the platform and the cars to deliver his message to the porter. Turning again to decedent's action in trying to escape by passing between the cars: It is of course true that unless defendant failed to exercise due care, or if decedent was negligent in standing where he did, the rule of conduct under emergency would not avail plaintiff. On the other hand, unless decedent was so negligent in standing where he did, and if defendant was negligent with respect to the movement of the cars, the emergency rule would apply. See Pioneer S. S. Co. v. McCann (C. C. A. 6th Cir.) 170 Fed. 873, 879, 96 C. C. A. 49. As said in Union Pacific R. R. Co. v. McDonald, 152 U. S. 262, 282, 14 Sup. Ct. 619, 626 (38 L. Ed. 434):

"Where human life or personal safety is involved, and the issue is one of negligence, the law will not lightly impute negligence to an effort, made in good faith, to preserve the one or secure the other, unless the circumstances, under which that effort was made, show recklessness or rashness."

In the case presented we think it was a question of fact for the jury whether decedent reasonably acted under the stress of such emergency. We therefore conclude that there was no error in refusing to direct verdict for defendant.

[4] The remaining errors discussed need little attention. We think there was no error in refusing to charge, in substance, that decedent's negligence, not proximately but only remotely contributing to the injury, must be considered in mitigation of damages. The rule to this effect which seems to pertain in Tennessee (Railway v. Haynes, 112 Tenn. 712, 735, 81 S. W. 374; Railroad v. Martin, 113 Tenn. 266, 87 S. W. 418) is not founded upon statute, but is merely a rule of evidence adopted by the courts of that state. It is not in harmony with the rules recognized by the federal courts, viz., that the test of contributory negligence is whether the want of care directly and proximately contributed to the injury. Coney Island Co. v. Dennan (C. C. A. 6th Cir.) 149 Fed. 687, 693, 79 C. C. A. 375; Toledo, St. L. & W. Ry. Co. v. Kountz (C. C. A. 6th Cir.) 168 Fed. 832, 840, 94 C. C. A. 244. In the cases cited the rule is applied to negligence in bar of an action; but the rule is the same as respects mitigation of damages, for the rule of comparative negligence is not, in the absence of statute, recognized in the federal courts. The rule of the Tennessee courts, not being founded on statute, is not binding on the courts of the United States. Illinois Central R. R. Co. v. Hart, 176 Fed. 245, 247, 100 C. C. A. 49.

We think the subject-matter of request No. 10 was sufficiently covered by the charge of the court. We have examined all the other assignments, and find no prejudicial error.

The judgment is, accordingly, affirmed, with costs.

PENNSYLVANIA CO. v. COLE.

(Circuit Court of Appeals, Sixth Circuit. June 15, 1914.)

No. 2463.

1. PLEADING (§ 430*)—INJURIES TO SERVANT—RAILROADS—COLLISION—NEGLIGENCE—EVIDENCE—VARIANCE.

Where, in an action for injuries to a brakeman in a rear end collision, failure of the operatives of the following train to observe the markers on the caboose of the preceding train was not definitely alleged as a ground of negligence, but evidence thereof was admitted without objection of variance or surprise, such proof was available as a ground of recovery, since, had objection been made that the testimony was not covered by the petition, an amendment could and should have been allowed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1438–1441; Dec. Dig. § 430.*]

2. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—RAILROADS—COLLISION—NEGLIGENCE—QUESTION FOR JURY.

Where plaintiff, a rear brakeman, while asleep in a caboose was injured in a collision with a following train which entered the block under caution signals and collided with the preceding train, though traveling at not more than five or six miles an hour, and there was evidence that markers were burning on the caboose of the preceding train, it could not be held as a matter of law that the operatives of the following train were not negligent in failing to discover the preceding train in time to avoid collision.

[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.*]

3. MASTER AND SERVANT (§ 228*) — INJURIES TO SERVANT — RAILROADS — EMPLOYERS' LIABILITY ACT.

Under Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), no degree of negligence on the part of an injured servant, however gross or proximate as a matter of law, can bar a recovery; the statutory direction that the diminution of plaintiff's recovery shall be in proportion to the negligence attributable to the employé being construed to mean that, where the causal negligence is partly attributable to the servant and partly to the carrier, the servant shall only recover an amount bearing the same proportion to the full amount as the negligence attributable to the carrier bears to the negligence attributable to both, it being impossible that plaintiff's negligence should equal the combined negligence of both plaintiff and defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.*]

4. TRIAL (§ 83*)—RULINGS ON EVIDENCE—OBJECTIONS—GROUNDS.

An objection to evidence not stating any ground is unavailable.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 193–210; Dec. Dig. § 83.*]

5. APPEAL AND ERROR (§ 1064*)—INSTRUCTIONS—DAMAGES.

Where, in an action for injuries to a railroad brakeman under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), the court charged that if plaintiff's negligence was as great as the negligence of defendant there might be an equality of negligence, and therefore no substantial recovery of any amount of damages could be had, defendant was not prejudiced by another instruction that plaintiff's recovery, if any, should be reduced by such an amount as the jury found the negligence attributable to him bore in proportion

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

to the negligence of defendant company, in that the latter might be construed to mean that if plaintiff was found twice as negligent as defendant he would recover one-half his damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221–4224; Dec. Dig. § 1064.*]

6. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—RAILROADS—EMPLOYERS' LIABILITY ACT—INSTRUCTION.

A request to charge, that in the exercise of ordinary care the employés of a following train that collided with the train on which plaintiff was employed resulting in his injury were entitled to presume and to act on the presumption that the employés on plaintiff's train would obey the company's rules by sending a flag back to protect the rear end of that train if it stopped on the main track, was properly refused because likely to be understood as meaning that conclusive reliance might be placed on such expectation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148–1156, 1158–1160; Dec. Dig. § 293.*]

In Error to the District Court of the United States for the Northern District of Ohio; William L. Day, Judge.

Action by Clarence J. Cole against the Pennsylvania Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. C. Boyle, of Cleveland, Ohio, for plaintiff in error.

D. F. Anderson, of Youngstown, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiff was rear brakeman and flagman upon defendant's east-bound freight train. While his train was standing at about midnight on the main track to take water, it was run into from the rear, by another train consisting of an engine and caboose, and the caboose in which plaintiff was asleep was set on fire and plaintiff thereby severely injured. The railroad was equipped with the block system by which the movement of trains was controlled by signals along the railroad. The accident occurred in the block between Hudson and M. B. Junction, near Ravenna, Ohio. The negligence charged against defendant in the petition, so far as material here, consisted in: (a) Permitting the second train to be operated in the block in question when those in charge of it knew or should have known by means of the block system of the situation of plaintiff's train; and (b) failing to warn the second train by flagman or signal of the situation of the train ahead. The defenses, so far as material here, were (1) a denial of defendant's negligence, and (2) the contention that plaintiff's action was barred by his alleged gross and proximate negligence in failing to observe a rule which required the flagman when the train is stopped, under circumstances such as existed here, to go back immediately with stop signals a sufficient distance to insure full protection. There was trial to a jury and verdict and judgment for plaintiff. The errors assigned relate to the denial of motion for directed verdict, to the admission and exclusion of evidence, and to the giving and refusing of instructions.

[1, 2] As to the motion to direct verdict: Plaintiff was an experienced brakeman. The testimony showed that the block signals were from 1,500 feet to a mile apart; that when the second train entered on the block it encountered a green light, which required caution in advancing and reduced speed; that the train, which was then running about 30 miles an hour, was slowed down until a red signal was reached which meant danger, and required a stop of a minute before proceeding; that this signal was obeyed, and a second red signal encountered, having the same meaning and requiring and causing similar action; that thereafter the train proceeded at but 5 or 6 miles an hour; that the caboose of the freight train was not discovered by those in charge of the second train until the former was within about 120 feet of the latter; and that the train could not be stopped, while under even the speed stated, within that distance, in time to avoid collision. It is conceded that no stop signals had been given by the standing freight. Defendant insists that there were no tail-lights or "markers" burning on the rear of the caboose of the freight train, as required by the rules of the company. If this were so, it would probably be difficult to see how, under the testimony, those operating the second train could be held negligent in running into the caboose of the forward train; but there was testimony from which the jury would be justified in finding that the lights were burning upon the caboose of the freight train at the time of the collision; and, as the night was clear and the track straight for a considerable distance, no conclusive reason is suggested for the failure to see the lights, if actually burning, in time to avoid the collision, assuming that the train was running at the limited speed stated and as required by the block signals. The failure to observe the markers on the caboose of the freight train was perhaps not definitely alleged as a ground of negligence, but the very first witness sworn in the case was called to testify to the existence of lighted markers upon the caboose; other witnesses gave testimony tending to the same effect, all without objection of variance or surprise. Had objection to this testimony been made on the ground that it was not covered by the petition, amendment could and should have been allowed. Pennsylvania Co. v. Whitney (C. C. A., 6th Cir.) 169 Fed. 572, 578, 95 C. C. A. 70; Law v. Ill. Cent. R. Co. (C. C. A., 6th Cir.) 208 Fed. 869, 870, 126 C. C. A. 27. In view of the testimony that the markers were burning, it cannot be said as matter of law that those in charge of the second train should not, by the exercise of reasonable care, have discovered the presence of the forward train in time to avoid the collision.

[3] But it is strongly pressed upon us that plaintiff's negligence in going to sleep in the caboose while on duty, and thus in failing to flag the following train, was negligence so gross and so proximate in its effect as to preclude all right of recovery. The danger to the interests of the traveling public from failure to enforce such rule is strongly urged. There can be no doubt, at the common law, such would have been the effect of plaintiff's alleged negligence; but the Employers' Liability Act expressly abrogates the common-law rule under which action was barred by the negligence of the plaintiff proximately con-

tributing to the accident and substitutes therefor the rule of comparative negligence. Under this act, no degree of negligence on the part of the plaintiff, however gross or proximate, can, as matter of law, bar recovery; for, as said in Norfolk & W. Ry. Co. v. Earnest, 229 U. S. 114, 122, 33 Sup. Ct. 654 [57 L. Ed. 1096], the direction that the diminution shall be "in proportion to the amount of negligence attributable to such employé" means that:

"Where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both."

To say that plaintiff's negligence equals the combined negligence of plaintiff and defendant is impossible. In Grand Trunk W. Ry. v. Lindsay, 201 Fed. 837, 844, 120 C. C. A. 166, 174, in passing upon the contention that the plaintiff's action was barred by his proximate negligence, the Circuit Court of Appeals for the Seventh Circuit said:

"It is only when plaintiff's act is the sole cause—when defendant's act is no part of the causation—that defendant is free from liability under the act."

This ruling was held correct by the Supreme Court. Grand Trunk W. Ry. Co. v. Lindsay, 233 U. S. 42, 49, 34 Sup. Ct. 581, 58 L. Ed. —. See, also, the decision of this court in Louisville & N. Ry. Co. v. Lankford, 209 Fed. 321, 126 C. C. A. 247.

[4] It follows that the court did not err in refusing to instruct verdict for defendant. It is proper to say that plaintiff claims that he lay down in the caboose with the permission of the conductor, and plaintiff's conclusion is that the latter was to "take the responsibility of the train on his shoulders"; but, in the view we take of the case, it is unnecessary to consider whether at all, or to what extent, plaintiff was relieved from the exercise of due care by the alleged permission given him by the conductor to lie down, both the fact and the claimed effect of which permission the defendant controverts. Defendant complains of the overruling of its objection to plaintiff's testimony of his conversation with the conductor, it being here urged that the conductor had no power to modify the rules. It would perhaps be enough to say that the objection indicates no ground on which it was made, and for that reason it cannot be considered. Pennsylvania Co. v. Whitney, supra, 169 Fed. at page 575, 95 C. C. A. at page 70; Robinson v. Van Hooser (C. C. A. 6th Cir.) 196 Fed. 620, 624, 116 C. C. A. 294. But the smallness of the verdict ($1,000) suggests that the jury took into account plaintiff's alleged negligence.

[5] By a supplemental brief, defendant complains of an instruction that plaintiff's recovery, if any, should be reduced "by such an amount as you find the negligence attributable to him bore in proportion to the negligence of the defendant company." It is urged that under this instruction, if plaintiff was found twice as negligent as defendant, he would recover one-half his damages. It is doubtful if this instruction, standing alone, should be so construed; but considered in connection with the instruction, elsewhere given in the charge, that "if the negligence of the plaintiff was as great as the negligence of the defendant,

there might be an equality of negligence, and therefore no substantial recovery of any amount of damages could be had"—it is clear defendant was not prejudiced.

The remaining assignments require little discussion. No prejudice could have resulted from sustaining the objection to the cross-examination of plaintiff's witness Moore. The answer could only have covered what was found in the company's book of rules which was afterwards admitted in evidence.

[6] The court was requested to charge that:

"In the exercise of ordinary care, the employés on the second train had a right to presume and to act on that presumption that the employés on the first train would obey the rules of the company by sending a flag back to protect the rear end of that train if it stopped upon the track."

This request would apparently have been proper if it is clear that it means only that, in determining the fact of ordinary care on the part of the operators of the following train, the jury would have the right to consider the natural expectation that the employés on the first train would send a flagman back to protect the rear end of their train in case it stopped. The request, however, was for an instruction that the employés on the second train had a right to "presume and act upon that presumption" that such flagging would be done. Such instruction would, we think, probably be understood by the jury as an instruction that conclusive reliance could be placed on that expectation, which, surely, cannot be the rule.

Other criticisms are made upon the proceedings below. We have considered them all, and it is our opinion that no error was committed to defendant's prejudice.

The judgment of the District Court is, accordingly, affirmed.

NEW YORK, C. & ST. L. R. CO. v. NIEBEL.

(Circuit Court of Appeals, Sixth Circuit. June 12, 1914.)

No. 2462.

1. MASTER AND SERVANT (§ 228*)—NEGLIGENCE (§ 101*)—INJURY TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—CONTRIBUTORY NEGLIGENCE—DAMAGES.

Under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), a railroad company is liable where through employés it is guilty of any causative negligence causing injury to an employé, no matter how slight the negligence is in comparison to the negligence of the injured employé; but the damages must be proportioned between the parties according to their respective fractions of the total negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. § 228;* Negligence, Cent. Dig. §§ 85, 163, 164, 167; Dec. Dig. § 101.*]

2. MASTER AND SERVANT (§ 286*)—INJURY TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

Whether an engineer of a freight train running into a train attempting to take a passing track causing the death of the flagman was guilty of

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

negligence in the management of his train *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. § 286.*]

8. MASTER AND SERVANT (§ 240*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

A rule of a railroad company required the flagman on a train so delayed that it might be overtaken by another train to go back immediately with danger signals without waiting for signals or instructions. Another rule provided for signals by the engineer for the flagman to go back and protect the rear of the train. A freight train was ordered to take a passing track at a station. The switch was blocked by snow, and there was a delay of more than ten minutes before the switch could be turned. As the train pulled into the passing track, a freight train ran into the rear cars, killing the flagman. The flagman did not go back and protect his train, nor did the engineer thereof give any signal for him so to do. He waited at least ten minutes before he took any steps to protect the train. *Held*, that the absence of signals by the engineer did not relieve the flagman from the charge of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 751–756; Dec. Dig. § 240.*]

4. NEGLIGENCE (§ 101*)—INJURY TO SERVANT—EMPLOYERS' LIABILITY ACT—DAMAGES.

In an action under the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) for the death of a flagman on a train delayed at a switch blocked with snow struck by a train following, the jury may consider all the circumstances characterizing the negligence of either party and fixing the quantity and quality of that negligence in relation to the sum total of the negligence of both parties, and, though the negligence of either appears, all circumstances of aggravation or of mitigation must be considered.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164, 167; Dec. Dig. § 101.*]

5. DEATH (§ 104*)—DEATH OF SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—MEASURE OF DAMAGES—INSTRUCTIONS.

In an action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]) for the death of an employé leaving a surviving wife and infant children, an instruction on the measure of damages to the wife which refers to the loss sustained by her by being deprived of her husband's companionship and association and the loss of home ties in a way to indicate the pecuniary importance thereof, and that the law attempted to be liberal with the victims of such an accident and did not direct the jury to distinguish support from companionship, was erroneous, necessitating a reversal, where the verdict at legal interest would make a permanent annuity reaching well toward the amount decedent out of his existing earnings would have devoted to the support of his wife and family as distinguished from his own.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 142–148; Dec. Dig. § 104.*]

6. APPEAL AND ERROR (§ 1140*)—REMISSION OF EXCESSIVE DAMAGES.

The error in an instruction on the measure of damages to be awarded for the benefit of the widow and infant children of one negligently killed, arising from the fact that it emphasized the wife's deprivation of her husband's companionship and association and the loss of home ties, cannot be cured by the court on appeal, for it cannot ascertain what portion of

the damages to the wife was for loss of society as distinguished from loss of support.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462–4476; Dec. Dig. § 1140.*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; John M. Killits, Judge.

Action by Emma Niebel, administratrix of Charles N. Niebel, deceased, against the New York, Chicago & St. Louis Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed, and remanded for new trial.

The deceased, Niebel, was rear brakeman and flagman on a freight train going east, on the night of November 13, 1911. Gulick was engineer of a freight following 10 minutes behind. Both trains were under a common order to take the passing track at Ashtabula and there meet an opposing train. A blizzard of extreme violence was in progress. Many signal lights were blown out, the air was full of snow, and the trainmen could not see very far. When the forward train arrived at the passing track, the switch was blocked with snow. There was a delay of more than 10 minutes before the switch could be turned. As the first train was pulling into the passing track, and while about 20 cars remained on the main track occupying it for 800 feet, the rear end was struck by Gulick's engine, and the two rear cars, including the caboose, were broken up. The caboose took fire, and the remains of Niebel and of the freight conductor were found among its ruins after the fire.

Rule 99 of the railroad provides that, when a train stops or is delayed by circumstances under which it may be overtaken by another train, the flagman must go back immediately with danger signals. It further specifies that if on a straight track and where the following train can be seen for a mile, he must go back 1,000 feet, and that if intervening curves or weather conditions obstruct the view he must go back at least one-half mile, and, when recalled, shall place torpedoes on the rail.

Niebel's administratrix brought suit under the Employers' Liability Act, her finally amended petition alleging, as the actionable negligence, that Gulick approached the siding at a speed of 25 to 30 miles an hour while bound to know that the first train might be wholly or partly on the main track; whereas he should have approached with his train under such control that he could have stopped after seeing the train ahead. Several other grounds of negligence were alleged, but they were withdrawn from the jury. The defense was that Niebel did not go back and protect his train as the rules required, and that his own negligence in this respect was the proximate cause of the collision. The jury found a verdict for the plaintiff; and, under the charge, this implied a finding that Gulick was negligent in the management of his train. The railroad company brings this writ of error, and claims that a verdict should have been instructed for defendant under the undisputed testimony, for the reason that the railroad company was not chargeable with any negligence except through Niebel's own act. It also claims error in the admission of evidence, and in the charge.

C. A. Seiders, of Toledo, Ohio, for plaintiff in error.

H. W. Fraser, of Toledo, Ohio, for defendant in error.

Before WARRINGTON and DENISON, Circuit Judges, and SESSIONS, District Judge.

DENISON, Circuit Judge (after stating the facts as above). [1] The jury was instructed that, as matter of law, upon the trial record, Niebel was guilty of contributory negligence; but that, under the Em-

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

ployers' Liability Act, his negligence and that of the railroad (if any) through other employés should be compared, and, if the other negligence was greater than his, a verdict should be rendered for plaintiff; the total actual damages being diminished in proportion to the relative negligence of the two parties. Since the case was tried, the Supreme Court, in Norfolk Co. v. Earnest, 229 U. S. 114, 121, 122, 33 Sup. Ct. 654, 57 L. Ed. 1096, and Grand Trunk Co. v. Lindsay, 233 U. S. 42, 47, 49, 34 Sup. Ct. 581, 58 L. Ed. —, has interpreted the act to mean that the defendant is liable, if through other employés it is guilty of any causative negligence no matter how slight in comparison to that of plaintiff, and that the total damages should be proportioned between plaintiff and defendant according to their respective fractions of the total negligence. In so far as the interpretation of the statute by the trial judge was not in accordance with these later decisions, the error was not prejudicial to defendant, and affords no ground for reversal.

[2] We agree with the trial court that plaintiff was entitled to go to the jury upon the issue whether Gulick was negligent. It is the railroad's contention that Gulick had the right and was charged with the duty to manage his train on the supposition that the employés on the train ahead would obey the rules, and in full reliance that if that train stopped on the main track a flagman would go back for its protection. Without accepting this contention at its extremest force, we may grant that Gulick had this right and carried this duty; but they constitute only the prima facie situation. The expectation that he would be duly flagged if the train ahead stopped on the main track was one of the things which Gulick rightfully had in mind in determining the handling of his train; but he could not close his mind and his eyes and his ears to everything else. He was bound to use due care in all respects. This precise problem is more fully considered in our opinion in Pennsylvania Co. v. Cole, 214 Fed. 948, 131 C. C. A. 244, this day filed. It is unnecessary to speculate what all the other elements may be which Gulick was bound not wholly to disregard or forget; and this is so because one sufficient to sustain the submission is found in Gulick's proximity, known and understood by him, to the switch which he was under orders to take. Regardless of any signals whatever, it was his duty to have his train under such control that he could stop before reaching the switch leading into the siding. He knew that he was under orders to take this siding; that the opposing train might be waiting on the main track just beyond the switch; and that Niebel's train might have been delayed in such a way as to leave it still on the main track. He knew that he could not depend upon seeing lights as usual, because many had been blown out, and such as were burning could be seen only a short distance. He knew also when he passed a point 1,600 feet from the switch. His own train was perhaps 1,400 feet long, carrying 33 loaded cars. Under these circumstances, the weather conditions intensified his duty to be running slowly and carefully when he was within 700 or 800 feet of the place where he must stop. Gulick fully recognized this duty; he testified that he knew just where he was and had slowed down to a speed slow enough to enable him to stop without difficulty at the switch. He does not state this speed, but

he says that, while he would have stopped before he reached the switch, he could not stop in the distance, which he estimates at 200 or 300 feet, at which he could and did see the lights on the caboose ahead. Is there any evidence to justify a jury in disbelieving Gulick's story as to his speed and his care at this point, and to indicate that, as plaintiff claims, Gulick was running at a speed which, at this point and under these circumstances, was recklessly great? Such evidence is found only in the details of what happened when the collision occurred. There were circumstances tending to show that the speed was as low as Gulick claimed or else different results would have followed the collision. Other circumstances tended to show that the speed was much higher—perhaps 30 miles an hour—or else some of the actual results of the collision could not have happened. This issue was peculiarly one for the jury; and we think the evidence raised an issue of Gulick's negligence proper to be submitted.

[3, 4] The only alleged error in the admission of evidence which justifies discussion is that relating to rule C-14, which reads:

"One long, followed by three short, blasts of the whistle is the signal for the flagman to go back and protect the rear of the train."

The engineer of Niebel's train gave no such signal. We need not consider whether Niebel could charge negligence against the company based on the failure to give this signal; because there was no such claim in the petition. We agree with the court below in its view that the absence of this signal could not have relieved Niebel from the charge of contributory negligence. It may well be, as urged, that when the train stopped for the switch, Niebel was under no instant duty to go back with his flag, because he could not know that the stop would be more than momentary and he could rightfully wait until he should see that there was an unusual delay; it may be that good practice required or permitted the head engineer to give the signal under C-14 as soon as he saw that the switch could not be turned, and so that there might not be even momentary delay in protecting the train; but Niebel waited at least 10 minutes, and such a delay cannot be excused by either or both the considerations just mentioned, when we take into consideration rule 241 which says:

"The rear brakeman, in cases where the rules require it, must immediately go back with danger signals, as provided by rule 99, without waiting for signals or instructions so to do."

It does not follow that rule C-14 and testimony of its meaning in practice are wholly inadmissible because its violation was neither declared upon as negligence nor could operate to justify wholly plaintiff's conduct. Under the rule of comparative negligence, the jury is entitled to consider all the circumstances which characterize the negligence of either party and which tend to fix the quantity and quality of that negligence in its relation to the sum total of the negligence of both parties. Even though the negligence of either party clearly appears, all circumstances of aggravation or of mitigation must be considered; and in view of some of the evidence found in the record regarding the proper practice under this rule, it cannot be said as matter of law that its

nonobservance could have no effect in lessening the quantum of Niebel's fault. For illustration, we may suppose that Niebel had not been killed and that the officers of the road were considering what punishment should be inflicted for his violation of rules 99 and 241. Doubtless, they would not entirely excuse him because his engineer had not signaled under rule C-14; but we cannot say that they would not take into consideration Niebel's claim that he supposed (though wrongfully) he would get a signal from his engineer, if it was necessary to send a flag back. If this excuse could be considered by the road officials in determining the ultimate character of his fault, we think it may also be considered by the jury. The rulings of the court on the admission of evidence and the charge to the jury on this subject are either beyond complaint in confining this rule to its proper effect, or can easily be so modified on another trial that there will be no just criticism.

[5] We find ourselves compelled to direct a new trial because of the measure of damages given to the jury. The parties beneficially interested were the widow and two small children. The case was tried before the decision of the Supreme Court in Michigan Central R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, and the charge, as given, disregarded, at least as to the widow, the distinctions pointed out between loss of support and maintenance and loss of companionship and association. We do not fail to observe that the loss of companionship and association was not put before the jury as an element of damages additional to the loss of support and maintenance quite as distinctly as had been done by the trial court in the Vreeland Case; but when we see that the references to the loss sustained by the widow's deprivation of her husband's companionship and association were repeated, that the loss of home ties was referred to in a way to indicate its pecuniary importance, that the jury was told that the law attempts to be liberal and not niggardly with the victims of such an accident and was not told to distinguish support from companionship, and when we see that the amount of the verdict would, at the legal rate of interest in Ohio, make a permanent annuity reaching well towards the amount which Niebel, out of his existing earnings, could have devoted to the support of his wife and family as distinguished from his own, we are convinced that the error in the charge on the subject of the widow's loss of association and companionship must be treated as prejudicial.

[6] We have seriously considered whether this error, although prejudicial, might be cured by permitting the plaintiff to remit a portion of the damages and thereupon affirming the judgment. We recognize the desirability of the shortening of litigation and lessening of expense which such a remittitur may accomplish. However, in the instances in which this practice has been followed by the Supreme Court (see Hansen v. Boyd, 161 U. S. 397, 411, 16 Sup. Ct. 571, 40 L. Ed. 746) and by this court (C. J. Huebel Co. v. Leaper, 188 Fed. 769, 110 C. C. A. 475; Mosby v. Printy, 194 Fed. 346, 116 C. C. A. 74), there has been mathematical basis by which it could be computed, or at least closely approximated, how much of the verdict was due to the erroneous element; and we have declined to permit such a remittitur

in a case where this computation could not be made (Chesbrough v. Woodworth, 195 Fed. 875, 887, 116 C. C. A. 465); and we are not aware of any instance where this practice has been adopted by a federal appellate court, and in which the elements of damage were of such indeterminate character that there was no criterion for segregation. In view of the manifest merit of the practice, we are not prepared to hold that it may never be adopted in any case where the verdict is based on these indeterminate elements; it may sometimes clearly enough appear from the whole record that the damages resting on the erroneous foundation cannot be more than a certain amount and that there can be no injustice in providing that the verdict may stand if the plaintiff will remit that amount. However this might be, we think the present case is not one of those where such a remittitur can be permitted. We would be compelled to estimate three fractions: First, what portion of the whole damages was represented by the verdict after a proportionate deduction on account of contributory negligence; second, what portion of the verdict was considered as damages to the widow; and, third, what portion of these damages to the widow was for loss of society as distinguished from loss of support. The problem would be one degree less difficult for us to solve if, as directed in Railway v. McGinnis, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785, damages had been apportioned among beneficiaries. As the record stands, to sanction a reduction in the judgment now and so to cure the error in the charge would require us either to find an unknown fraction of an unknown portion of an unknown whole, or else to allow so liberally for these uncertainties as to put upon the plaintiff a greater and more unjust burden than is imposed by the award of a new trial.

The judgment below is reversed, and the case remanded for a new trial pursuant to this opinion.

L. D. GEORGE LUMBER COMPANY, Inc., v. DAUGHERTY et al.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1914.)

No. 1218

1. EQUITY (§ 330*)—PLEADINGS—OBJECTIONS—WAIVER.

Where a decree enjoining creditors and appointing receivers for a corporation recited that defendants, having due notice, and appearing and not objecting to the decree, reserved the right to file such pleadings as might be advised by counsel and demur or answer the bill, and the answer subsequently filed was a plea to the merits without making any specific point that the court was without jurisdiction to appoint receivers, because of lack of an averment in the bill of an unsatisfied judgment against the corporation, such objection was waived.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 660–668, 671; Dec. Dig. § 330.*]

2. APPEAL AND ERROR (§ 193*)—SCOPE OF REVIEW—QUESTIONS NOT RAISED AT TRIAL.

Where defendants made no objections to the appointment of receivers at the trial, they could not successfully claim for the first time on appeal that the court had no jurisdiction to appoint receivers because of a

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

failure of the bill to aver an unsatisfied judgment against the corporation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226–1238, 1240; Dec. Dig. § 193.*]

3. CORPORATIONS (§ 581*)—CONSOLIDATION—INVALIDITY—LIABILITY OF ASSETS —ULTRA VIRES ACTS.

A Pennsylvania corporation desiring to consolidate with defendant organized under a Virginia charter, the president of each executed an agreement under the corporate names and seals providing for such consolidation. Thereafter financial statements were made to mercantile agencies and debts were contracted, and all business with the public was transacted as if the consolidation had been effected according to law, but it was illegal for lack of corporate action authorizing it, and for failure to comply in other particulars with the laws of both states. All the directors and stockholders of both companies, however, were present and participated in the attempted agreement for consolidation or afterwards acquiesced in it. *Held*, that though, as against the state of Virginia and creditors of the defendant company, its officers and stockholders could not convert its assets into assets of the Pennsylvania company in the prosecution of a joint enterprise under the latter's name, yet since the consolidation could have been lawfully effected under the laws of both states, and creditors had extended credit on the faith of the consolidation and statements made pursuant thereto, defendant for the benefit of its stockholders could not successfully claim that the consolidation was ultra vires and that its assets were not liable for the debts of the de facto consolidated company.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2322–2329; Dec. Dig. § 581.*]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Bill by L. L. Daugherty and another, partners, trading as Daugherty, McKey & Co., and others, against the L. D. George Lumber Company, Incorporated. From a decree directing that the assets of the defendant Lumber Company were liable for the debts of the Harding-Finley Company, pursuant to illegal consolidation proceedings, defendant appeals. Affirmed.

John A. Lamb, of Richmond, Va., and J. M. Turner, of Manchester, Va., for appellant.

Munford, Hunton, Williams & Anderson, of Richmond, Va., and Porter, Foulkrod & McCullagh and Sidney E. Smith, all of Philadelphia, Pa., for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. On January 29, 1912, W. H. Harding, president of Harding-Finley Lumber Company, a corporation doing business in Philadelphia under a Pennsylvania charter, and L. D. George, president of L. D. George Lumber Company, a corporation doing business at Penola, Va., under a charter from that state, executed an agreement under the corporate names and seals which provided for the consolidation of the two corporations. The contract stipulated, among other things, "the office of the L. D. George Lumber Company at Penola, Virginia, shall be maintained as a branch office" of Harding-

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

Finley Lumber Company. Thereafter statements were made to mercantile agencies, debts were contracted, and all business with the public was transacted as if the consolidation had been effected according to law.

The consolidation was illegal for lack of corporate action authorizing it, and for failure to comply in other particulars with the laws of both Pennsylvania and Virginia; but all the directors and stockholders of both companies were present and participated in the attempted agreement for consolidation, or afterwards acquiesced in it.

Harding-Finley Company afterwards became embarrassed, and on January 16, 1913, under a bill filed by creditors for that purpose, the District Court of the United States for the Eastern District of Pennsylvania appointed receivers of the corporate property. The bill alleged the entry of judgments against the company, the danger of its insolvency if its property should be sold under execution, and a surplus of assets over debts if the corporate affairs should be settled under the direction of the court. Thereafter, the same complainants, Daugherty, McKey & Co., and J. S. Moore & Co., filed this bill in the District Court for the Eastern District of Virginia, setting out the proceedings in the District Court for the Eastern District of Pennsylvania, the agreement for consolidation, the action of the corporation and its officers and stockholders thereunder, the making of debts to the complainants on the faith of the joint statement of the corporations that they had been merged and that the assets of both companies were available for the payment of the debts. On these allegations the complainants asked the court to hold that as to creditors there was a de facto consolidation, and that the assets of the George Company was a part of the assets of the Harding-Finley Company for the payment of debts; and to appoint as receivers of the property held by the George Company the receivers appointed by the District Court for the Eastern District of Pennsylvania.

Upon the preliminary hearing the District Judge for the Eastern District of Virginia issued the usual order of injunction and appointed the receivers; and afterwards upon the trial of the cause decreed:

"First. That said undertaking so entered into between them, as far as the assets and estate of the George Lumber Company is concerned, makes such assets liable in equity for the payment of the indebtedness contracted by the Harding-Finley Company, pursuant to such agreement, said indebtedness having been incurred on the faith and credit of the joint properties of the said two companies; second, that the property of said L. D. George Lumber Company, after first being applied to the debts of that company, if any it owed, should be applied along with the assets of the Harding-Finley Company, properly applicable thereto, to the liquidation, as far as necessary, of such joint indebtedness; third, that any balance remaining from the George Lumber Company assets shall belong to said company."

[1] The first point made by the appeal is that the court exceeded its jurisdiction in appointing receivers and in undertaking to administer the assets of the George Company, because the bill contained no allegation that judgments had been obtained and remained unsatisfied against that company. The defendant clearly waived and lost the right to avail itself of this objection. The decree enjoining creditors and appointing receivers recites:

"It appears to the court that the defendants have had due notice of such motion and the defendants, by their counsel, appearing and not objecting to this decree but reserving the right to hereafter file such pleadings as they may be advised by counsel and demur or answer to the bill herein filed in this cause."

[2] The answer afterwards filed was a plea to the merits of the case. It is true that it contains an allegation of solvency, but this was an appropriate plea to the merits of the cause, and was not understood by the court and could hardly have been intended, to make the specific point that the court was without jurisdiction to appoint receivers for lack of averment of an unsatisfied judgment. Not only does the record afford no indication that objection was made to the jurisdiction or power of the court on this ground, but it affirmatively appears that the defendants make no objection to the appointment of receivers. Under these conditions it is well settled that the objection comes too late in an appellate court. Reynes v. Dumont, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934; Hollins v. Briarfield, C. & I. Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113; Leary v. C. R. & P. S. Co. (C. C.) 82 Fed. 775.

[3] On the merits, the George Company contends that, since the attempted consolidation was unlawful, it is impossible that its assets should be liable for the debts of the Harding-Finley Company. This conclusion is not sound. The George Company, it is true, still exists as a separate corporation under the laws of Virginia and must respond to all the legal requirements of that state to which such corporations are subject. It still exists as to its creditors so far as its existence is necessary to their protection; and its assets are primarily liable to the payment of debts contracted in its corporate name.

As against the state of Virginia and the creditors of the George Company, the officers and stockholders could not convert its assets into assets of Harding-Finley Company in the prosecution of a joint enterprise under the former name. But when the president in the corporate name, with the co-operation of all stockholders, undertook to embark all the corporate assets in a business venture, and in the prosecution of that enterprise obtained credit or agreed that others engaged in it should obtain credit on the faith of the corporate property, equity will not allow the corporation in the interest solely of the stockholders to assert that the corporate property is not liable.

The expressions of the courts on the subject of ultra vires are not in entire accord, but we venture to think there is no material difference of judicial opinion on the point here involved. The state, creditors, and stockholders are interested in corporations keeping within the powers conferred on them by law. Acts done in the name of the corporation forbidden by the law of the state expressive of its public policy cannot be made valid by acquiescence, nor become binding on the corporation by estoppel. The law on this point is thus stated in De La Vergne Company v. German Savings Inst., 175 U. S. 40, 20 Sup. Ct. 20, 44 L. Ed. 65:

"The doctrine that no recovery can be had upon the contract is based upon the theory that it is for the interest of the public that corporations should not transcend the limits of their charters; that the property of stockholders

should not be put to the risk of engagements which they did not undertake; that if the contract be prohibited by statute every one dealing with the corporation is bound to take notice of the restrictions in its charter, whether such charter be a private act or a general law under which corporations of this class are organized."

This principle has been applied many times by the Supreme Court of the United States from Pearce v. Madison, etc., R. Co., 62 U. S. (21 How.) 441, 16 L. Ed. 184, to First National Bank v. Converse, 200 U. S. 425, 26 Sup. Ct. 306, 50 L. Ed. 537, where public service corporations undertook to make contracts affecting their public duties, and where corporations undertook to make contracts forbidden by statute, or contrary to public policy.

But the rule is also well established that an act not forbidden by law, but authorized to be done in a certain way, becomes binding on the corporation as far as it affects creditors and stockholders when they have consented to the irregular methods adopted by the corporate officers.

Referring to an effort at consolidation not carried out according to the statute, Judge Taft says in Farmers', etc., Co. v. Toledo, etc., R. Co. (C. C.) 67 Fed. 49:

"It is too well established to need discussion that both a de facto corporation and the persons exercising the rights of stockholders in such a corporation are estopped to assert its unauthorized existence as a corporation to avoid a debt incurred by it in the actual exercise of corporate franchises and the doing of corporate business."

In Zabriskie v. Cleveland, etc., R. Co., 64 U. S. (23 How.) 381, 16 L. Ed. 488, and Close v. Glenwood Cemetery, 107 U. S. 466, 2 Sup. Ct. 267, 27 L. Ed. 408, and other cases, the same rule is applied.

This principle governs the present case. The consolidation could have been lawfully effected under the laws of Virginia and Pennsylvania. The method of consolidation adopted was not in compliance with the statute law of these states, but the stockholders and officers of both corporations either participated in or afterwards ratified the plan adopted, and the complainants are creditors who extended credit on the faith of the consolidation and the statements made in pursuance of it. No creditors of George Lumber Company have objected to the relief granted, and the District Court has directed that they should be first paid from proceeds of sale. The decree of the District Court is in accordance with law and meets all the equities of the cause.

Affirmed.

RUSSELL v. CHAMPION FIBRE CO.

(Circuit Court of Appeals, Fourth Circuit. June 10, 1914.)

No. 1233.

1. MASTER AND SERVANT (§ 150*)—INJURIES TO SERVANT—DUTY OF FOREMEN.
A foreman, having charge of and controlling workmen, is presumed to observe the presence or absence of proper safety appliances and to know the danger of working at rapidly revolving machinery without such appliances, and it is his duty to warn those working under his direction and control of dangers not obvious to them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297, 299–302, 305–307; Dec. Dig. § 150.*]

2. MASTER AND SERVANT (§ 258*)—INJURIES TO SERVANT—NEGLIGENCE OF MASTER AND FOREMAN—JOINT TORT.
In an action for injuries to an employé while operating a barking machine, the complaint alleged that plaintiff, an employé of defendant corporation, while "in charge of" and "working under the directions" of defendant's foremen, owing to the negligence of defendant corporation and the foremen in failing to provide plaintiff with a reasonably safe place to work and reasonably safe and suitable machines, and in failing to give plaintiff proper warning and instruction as to the dangers, etc., while operating a machine not provided with a belt shifter, was injured, etc. *Held*, that the complaint alleged joint negligence on the part of the defendants, corporation, and the foremen.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816–836; Dec. Dig. § 258.*]

3. MASTER AND SERVANT (§ 189*)—INJURIES TO SERVANT—FELLOW SERVANT OR VICE PRINCIPAL.
Whether one in charge of other servants is a fellow servant or vice principal depends on whether those acting under his orders have just reason to believe that neglect or disobedience of orders will be followed by dismissal.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 427–435, 437–448; Dec. Dig. § 189.*

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.]

4. REMOVAL OF CAUSES (§ 36*)—DIVERSE CITIZENSHIP—JOINDER OF DEFENDANTS—FRAUDULENT JOINDER.
Where, in an action otherwise removable for diversity of citizenship, a resident defendant is joined with a nonresident, the joinder, though fair on its face, may be shown by a petition for removal to be a fraudulent device to prevent a removal, but the showing must consist of a statement of facts rightly engendering such conclusion; a mere traverse of the allegations on which the liability of the resident defendant is rested, or to apply the epithet "fraudulent" to the joinder, being insufficient.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

5. REMOVAL OF CAUSES (§ 47*)—RESIDENT DEFENDANTS—JOINDER—BAD FAITH.
Where a complaint, in a cause otherwise removable joins resident defendants, a statement of a cause of action against the defendants jointly is conclusive against the nonresident defendant's right to remove the cause as against a petition to remove containing no statement of facts from which the court can draw a conclusion that the joinder is not only in bad faith but without right.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 92; Dec. Dig. § 47.*

Fraudulent joinder of parties to prevent removal, see note to Offner v. Chicago & E. R. Co., 78 C. C. A. 362.]

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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 Western District of North Carolina, at Asheville; James E. Boyd, Judge.

Action by R. E. Russell against the Champion Fibre Company. Judgment for defendant, and plaintiff brings error. Reversed.

R. R. Williams, of Asheville, N. C. (Jones & Williams, of Asheville, N. C., and J. Bat Smathers, of Canton, N. C., on the brief), for plaintiff in error.

Alf. S. Barnard, of Asheville, N. C., for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. In this action, brought in the superior court for Buncombe county, N. C., against Champion Fibre Company, W. S. McReary, and Erastus Cook, for the loss of a hand in a barking machine while plaintiff was in the employment of the Fibre Company, the state court on petition of the Fibre Company granted a motion to remove the cause to the District Court of the United States for the Western District of North Carolina. A motion was afterwards made in the District Court by counsel for plaintiff to remand the cause to the state court on the ground that the complaint alleged a joint tort by the Champion Fibre Company, an Ohio corporation, and W. S. McReary and Erastus Cook, residents of the state of North Carolina. This motion was refused, and on the trial the District Judge directed a verdict for the defendant.

The first assignment of error brings up the refusal of the District Judge to remand the cause to the state court. The complaint contains: First, the general allegation of the injury to the plaintiff, an employé of the defendant corporation, while "in charge of" and "working under the directions" of McReary and Cook as foremen, owing to the negligence of the defendant corporation and McReary and Cook, its foremen, in failing "to provide for him a reasonably safe and suitable place in which to work, and reasonably safe and suitable machines, instrumentalities, and appliances, and to give him proper warning and instructions as to the dangers to which he was subjected"; second, the more definite allegation that, a wood-barking machine, which plaintiff was operating in the course of his employment, having become choked, it was his duty to clean it out; that he was inexperienced in such work and did not know the danger and had never been warned of it; that in order to stop the machine to clean it, he shifted the belt from the tight pulley to the loose pulley with an ordinary long-handled wrench, the only appliance provided by the defendants for the purpose; that the belt suddenly shifted from the loose pulley to the tight pulley on account of the failure of the defendants to provide the belt with a shifter to hold it in place; that the machine, thus suddenly started, caught and cut off plaintiff's hand.

[1-3] The important inquiry is whether the complaint alleges a joint tort under the laws of North Carolina. This is denied in the petition for removal filed by the Fibre Company, the averment being that the duty to provide proper appliances and the duty to warn the plaintiff of the danger was on the company and not on its foremen, that the complaint contains no allegation that the foremen knew of the defect in

the machine, or could have discovered it by reasonable care, or that it was their duty to inspect the machine or repair it, or that the plaintiff was working at the machine in obedience to an order of either of the foremen named. It is true that the allegations of breach of duty on the part of the foremen are not very definite. But a foreman having charge of and controlling workmen is presumed to observe the presence or absence of proper safety appliances and to know the danger of working at rapidly revolving machinery without such appliances; and it is his duty to warn those working under his direction and control of dangers which are not obvious to them. The allegations of the complaint must therefore be held to charge the foremen with actionable negligence in failing to warn the plaintiff of the danger. The facts alleged, if proved, will also make a case of joint negligence of the Fibre Company and its foremen, for the Fibre Company also owed the duty to warn the plaintiff of dangers not obvious to him; and evidence that the plaintiff as an employé of the Fibre Company was in charge of the foremen and working under their direction and control might well extend to the point of showing that he had just reason for believing that disobedience of orders of the foremen would be followed by dismissal, thus showing that the foremen were the representatives of the Fibre Company. In decisions too numerous for citation the Supreme Court of North Carolina has laid down the rule of representation as follows:

"The test of the question whether one in charge of other servants is to be regarded as a fellow servant or vice principal is whether those who act under his orders have just reason for believing that neglect or disobedience of orders will be followed by dismissal." Turner v. Lumber Co., 119 N. C. 387, 26 S. E. 23; Beal v. Champion Fibre Co., 154 N. C. 147, 69 S. E. 834.

If the foremen were the representatives of the Fibre Company through whom the plaintiff had a right to expect the warning of danger, then it could not be argued that there was not a joint liability for failure to give the warning.

[4] The motion to remand the cause to the state court was refused on the additional ground that it appeared from defendant's petition for removal to the federal court that the plaintiff joined McReary and Cook as defendants without any real purpose to prosecute his demand against them, but for the purpose of fraudulently avoiding the federal statute and defeating the defendant's right of removal to the federal court. The sum of the numerous decisions of the Supreme Court is so clearly stated in Chesapeake & O. R. Co. v. Cockrell, 232 U. S. 146, 34 Sup. Ct. 278, 58 L. Ed. ——, that it is unnecessary to go back of that case:

"A civil case, at law or in equity, presenting a controversy between citizens of different states and involving the requisite jurisdictional amount, is one which may be removed by the defendant, if not a resident of the state in which the case is brought; and this right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy. * * * So, when in such a case a resident defendant is joined with the nonresident, the joinder, even although fair upon its face, may be shown by a petition for removal to be only a fraudulent device to prevent a removal; but the showing must consist of a statement of facts rightly engendering that conclusion. Merely to traverse the allegations upon

which the liability of the resident defendant is rested, or to apply the epithet 'fraudulent' to the joinder, will not suffice; the showing must be such as compels the conclusion that the joinder is without right and made in bad faith." Wecker v. National Enameling Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757; Chicago, etc., Ry. v. Schwyhart, 227 U. S. 184, 33 Sup. Ct. 250, 57 L. Ed. 473.

[5] It thus appears that it is incumbent on the nonresident defendant to show that the joinder of resident defendants is not only in bad faith but without right. As we have seen, the complaint states a cause of action against the defendants jointly, and that is conclusive of the issue, since the petition for removal contains no statement of facts from which the court could draw a contrary conclusion. The statements in the petition that there was no right of joinder, and that the foremen were made parties for the purpose of fraudulently defeating the defendant's right of removal, are mere legal inferences and cannot affect the question.

It follows that the motion to remand the cause to the superior court for Buncombe county should have been granted.

Reversed.

McBRIDE et al. v. NEAL.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1914.)

No. 2066.

1. APPEAL AND ERROR (§ 216*)—RIGHT OF REVIEW—QUESTIONS NOT RAISED AT TRIAL.

Assignments that the court erred in failing to construe the contract sued on as a matter of law and to instruct the jury that they were bound by the court's construction, were unavailable in the absence of a request therefor at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216.*]

2. APPEAL AND ERROR (§ 216*)—RIGHT OF REVIEW—QUESTIONS NOT RAISED AT TRIAL.

No binding instruction that under the evidence plaintiff had made a full settlement of his demands against defendants up to a specified date having been requested at the trial, the court's failure to so charge was not reviewable on a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216.*]

3. NEW TRIAL (§ 6*)—MOTION—DISCRETION.

A motion for a new trial is addressed to the discretion of the trial judge, and, in respect to the sufficiency of the evidence on disputed questions of fact, is addressed to him as a thirteenth juror.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 9, 10; Dec. Dig. § 6.*]

4. APPEAL AND ERROR (§ 977*)—REVIEW—DENIAL OF NEW TRIAL.

No error is assignable on the action of a trial judge in overruling a motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3865; Dec. Dig. § 977.*]

5. APPEAL AND ERROR (§ 237*)—ASSIGNMENTS OF ERROR—SUFFICIENCY OF EVIDENCE—OBJECTIONS AT TRIAL.

If assignments of error are to be based on the legal sufficiency of the evidence to support a verdict, motions to that end must be made at the

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

conclusion of the evidence and exceptions preserved to adverse rulings thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1302½; Dec. Dig. § 237.*]

6. APPEAL AND ERROR (§ 883*)—AGREEMENT OF PARTIES—ESTOPPEL TO ALLEGE ERROR.

Where plaintiffs in error agreed at the trial that the jury should be directed to return a verdict for defendant in error for some amount under the pleadings and evidence, an objection on appeal that defendant in error had failed to introduce any evidence proving a joint liability was unavailable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3611; Dec. Dig. § 883.*]

7. COURTS (§ 356*)—FEDERAL COURTS—STATUTES—CONFORMITY ACT.

Rev. St. § 914 (U. S. Comp. St. 1901, p. 684), providing for conformity of proceedings in federal courts to the rules of procedure in the courts of the state, applies only to practice on the law side of the federal trial courts and has no reference to the prosecution of a common-law writ of error prevailing in federal appellate procedure.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 937; Dec. Dig. § 356.*

Conformity of practice in common law actions to that of state court, see notes to O'Connell v. Reed, 5 C. C. A. 594; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 392.]

8. COURTS (§ 334*)—FEDERAL COURTS—RULES OF DECISION—STATUTES.

Rev. St. § 721 (U. S. Comp. St. 1901, p. 581), providing that the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of United States in cases where they apply, refers only to substantive law and has no application to procedure in federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 899, 909, 910; Dec. Dig. § 334.*

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.]

9. APPEAL AND ERROR (§ 722*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

While the Court of Appeals will disregard technical questions regarding the form or sufficiency of an assignment of error if it can be deemed sufficient to apprise the defendant in error of the ground asserted for reversal and it will note a substantial error, whether properly assigned or not or even if there is no assignment, yet no reversal can be had unless the record discloses proceedings at the trial which can be made the basis of an assignment of error in support of a common-law writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2990–2996; Dec. Dig. § 722.*]

In Error to the District Court of the United States for the Eastern District of Illinois; Francis M. Wright, Judge.

Action by William E. Neal against W. C. McBride and the Silurian Oil Company. Judgment for plaintiff, and defendants bring error. Affirmed.

George T. Buckingham, of Chicago, Ill., for plaintiffs in error.

J. E. McGaughey and G. W. Lackey, both of Lawrenceville, Ill., for defendant in error.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

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

PER CURIAM. This was an action at law by defendant in error against plaintiffs in error upon a written contract. Verdict and judgment were for plaintiff.

[1] In support of the writ of error 16 assignments of error have been filed.

The first five assignments are based on the failure of the court to construe the contract and to instruct the jury that they were bound by the court's construction. There was no request by plaintiffs in error to have the court construe the contract as a matter of law and to charge the jury that they were bound by such construction. On the contrary, the court, without objection and exception by plaintiffs in error, submitted the contract to the jury for them to determine its meaning in accordance with their understanding of the English language.

[2] The sixth, seventh, and eighth assignments are based on the failure of the court to give the jury a binding instruction that defendant in error, under the evidence in the case, had made a full settlement of his demands against plaintiffs in error up to June 1, 1912. No binding instruction to this effect was requested by plaintiffs in error. The court gave all of their requested instructions on the general propositions of law relating to accord and satisfaction, and they failed to ask more specific instructions on this subject than were given.

[3-5] Assignments from 9 to 15, inclusive, embody matters which were proper to incorporate, and which were in fact incorporated, in a motion for a new trial. But a motion for a new trial is addressed to the discretion of the trial judge; and, in respect to the sufficiency of the evidence on disputed matters of fact, is addressed to him as the thirteenth juror. No error is assignable on the action of the trial judge in overruling a motion for a new trial. If assignments of error are to be based upon the legal sufficiency of the evidence to support a verdict, motions to that end must be made at the conclusion of the evidence and exceptions preserved to adverse rulings thereon. Missouri Pac. Railway Co. v. Chicago & Alton Railroad Co., 132 U. S. 191, 10 Sup. Ct. 65, 33 L. Ed. 309; Condran v. Chicago, Milwaukee & St. Paul Railway Co., 67 Fed. 522, 14 C. C. A. 506, 28 L. R. A. 749; Bidwell v. Douglas Trading Co., 183 Fed. 93, 105 C. C. A. 385.

[6] By the thirteenth assignment plaintiffs in error assailed the verdict and judgment on the ground that defendant in error had failed to introduce any evidence proving a joint liability on the part of plaintiffs in error. Prior to the return of the verdict this matter was not called to the attention of the trial court by motion, or by a request for a binding instruction on that ground, or in any other way. At the conclusion of the court's charge to the jury the court said:

"I understand it is conceded that a certain amount is due to the plaintiff."
Mr. Gee: "Yes."
The Court: "There is no question that the plaintiff is entitled to recover some amount and that amount is for the jury to determine from the evidence."

Not only was no question raised, but this quotation proves that plaintiffs in error agreed that the jury should be directed to return a verdict for defendant in error for some amount under the pleadings and evidence in the cause.

The alleged error set forth in the sixteenth assignment was cured by the charge of the court directing the jury to disregard the said testimony. The court said:

"The language of the contract is to be taken just for what it says in view of all the facts surrounding the case. No one party has the right to say what it means. If any party has stated to you what it means that should be disregarded. The contract must speak for itself and alone for itself."

[7] Section 914 of the federal statutes (U. S. Comp. St. 1901, p. 684), usually known as the Conformity Section, has reference only to practice on the law side of the trial courts. It has nothing to do with the prosecution of the common-law writ of error which prevails in federal appellate procedure. Chateaugay Iron Co., Petitioner, 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508.

[8] Section 721 of the federal statutes (U. S. Comp. St. 1901, p. 581), which provides that the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply, has reference only to substantive law and has no application to the procedure in the federal courts.

[9] An assignment of errors is the pleading of the party seeking a reversal; and this court is always disposed to disregard any technical questions regarding the form or sufficiency of such a pleading, if it can be deemed sufficient to apprise the adversary of the grounds of reversal that are intended to be presented to the court; and we are also always disposed to note a substantial error which has entered into the judgment, whether it has been properly assigned or not, and even if there is no assignment. But the trouble here is that the record discloses no grounds of reversal in the course of the trial which could be used as the basis of any assignment of errors in support of the common law writ of error. For there is no error available to the defeated party if the court conducts the trial to his entire satisfaction and he has made no objection and preserved no exception to any matter whatever that arose prior to the rendition of the verdict. After verdict, the disposition of the motion for a new trial, as already stated, is a matter for the sound discretion of the trial judge. And after the motion for a new trial is overruled, judgment inevitably follows in accordance with the verdict.

This case must therefore be affirmed for lack of objections during the trial on which to found any assignments of error; and it is so ordered.

WIGGAINS v. UNITED STATES.†

(Circuit Court of Appeals, Eighth Circuit. May 18, 1914.)

No. 3888.

1. COUNTERFEITING (§ 16*)—UNISSUED BANK NOTES—OBLIGATION IN SIMILITUDE OF OBLIGATION OR SECURITY ISSUED UNDER AUTHORITY OF UNITED STATES—INDICTMENT.

An indictment charged that defendant had in his possession, with unlawful intent to use the same, what purported to be a $5 note of the national bank currency issued by the German National Bank of Northern Kansas at Beloit, the note being set out in full carrying on its face a statement that it was "national currency secured by United States bonds or other securities," signed by the Treasurer of the United States and Register of the Treasury, and reciting that the German National Bank of Northern Kansas at Beloit would pay the bearer on demand $5, and complete, except that the spaces for signatures of the president or cashier of the bank were blank. *Held*, that the instrument was calculated to deceive an unsuspecting person of ordinary prudence and incline him to accept it as good money though unexecuted, and hence the indictment was not demurrable on the ground that it was not after the "similitude" of an obligation or other security issued under authority of the United States as required, by Pen. Code, § 150 (Act March 4, 1909, c. 321, 35 Stat. 1116 [U. S. Comp. St. Supp. 1911, p. 1632]).

[Ed. Note.—For other cases, see Counterfeiting, Cent. Dig. §§ 23–37; Dec. Dig. § 16.*]

2. COUNTERFEITING (§ 2*) — UNISSUED BANK NOTES — "OBLIGATION OR SECURITY."

Act June 20, 1874, c. 343, 18 Stat. 123 (U. S. Comp. St. 1901, p. 3454), requires every national bank to keep on deposit in the United States treasury an amount equal to 5 per cent. of the bank's outstanding circulation as a special fund to redeem such circulation. By Act July 28, 1892, c. 317, 27 Stat. 322 (U. S. Comp. St. 1901, p. 3491), the act was amended so as to provide that the provisions of the Revised Statutes for the redemption of national bank notes shall apply to all such notes that have been or may be issued to or received by any national bank, notwithstanding they may have been lost by or stolen from the bank and put in circulation without the signature or upon the forged signature of the president or vice president and cashier. *Held* that, since national bank notes put in circulation without the signature of the president and cashier are redeemable by the treasury, such notes constituted an obligation or security within Pen. Code, § 150 (Act March 4, 1909, c. 321, 35 Stat. 1116 [U. S. Comp. St. Supp. 1911, p. 1632]), providing that whoever shall have in his possession, except, etc., any obligation or other security made or executed after the similitude of any obligation or security issued under authority of the United States, with intent to sell or otherwise use the same, shall be fined.

[Ed. Note.—For other cases, see Counterfeiting, Cent. Dig. §§ 1–4; Dec. Dig. § 2.*

For other definitions, see Words and Phrases, vol. 6, p. 4886.]

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

James P. Wiggains was convicted of having in his possession an obligation or other security after the similitude of an obligation or other security issued under the authority of the United States with intent to sell or otherwise use the same, and he brings error. Affirmed.

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

† Rehearing denied August 3, 1914.

W. E. Barton, of Houston, Mo., for plaintiff in error.

Thad B. Landon, of Kansas City, Mo. (Francis M. Wilson, of Platte City, Mo., on the brief), for the United States.

Before HOOK, ADAMS, and SMITH, Circuit Judges.

ADAMS, Circuit Judge. James Wiggains, the plaintiff in error, was indicted and convicted in the District Court for violating the provisions of section 150 of the Penal Code of the United States, which enacted that:

"Whoever shall have in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same * * * shall be fined," etc.

The specific charge against Wiggains was that he had in his possession with the unlawful intent denounced by the act what purported to be a $5 note of the national bank currency issued by the German National Bank of Northern Kansas at Beloit. The note was set out in full in the indictment. It carried on its face with the usual conspicuous display the following: "National Currency Secured by United States Bonds or other securities"—signed by the Treasurer of the United States and by the Register of the Treasury, thus: "Ellis H. Roberts, Treasurer of the United States. J. W. Lyons, Register of the Treasury." Then followed: "The German National Bank of Northern Kansas at Beloit will pay to the bearer on demand five dollars. Beloit, Kansas, Mar. 24, 1903. ———, Cashier. ———, President"—no names appearing in the blank spaces.

Neither the evidence nor any of the other proceedings taken at the trial are brought here for our consideration. All we have is the indictment, a demurrer to the indictment, an order overruling the demurrer, a verdict of guilty, and the judgment on the verdict.

The defendant prosecutes this writ of error.

His only available assignment of error challenges the action of the trial court in overruling his demurrer to the indictment, and this presents the only question for our present consideration.

It is argued that the indictment was insufficient for two reasons; First, because the absence of any signatures as president and cashier of the German National Bank conclusively established that there was no such similitude to an obligation or security issued under the authority of the United States as would bring the note within the condemnation of the act; and, second, because the absence of those signatures conclusively demonstrated that the note in the possession of Wiggains did not purport to be an obligation or other security, the possession of which was denounced by the act.

[1] The indictment definitely enough charges that the instrument in the possession of the defendant was made in part after and in similitude of an obligation or security issued under the authority of the United States of America; and probably for the purpose of the demurrer the allegation touching similitude should be treated as true,

but as the note is set forth in the indictment we may properly enough say that in our opinion its contents and display afford ample evidence for submission to the jury of the question whether it was calculated to deceive an unsuspecting person of ordinary prudence and incline him to accept it as good money, notwithstanding the fact that no president's or cashier's name appeared upon it. If that question be answered in the affirmative, the similarity would be sufficiently established within the meaning of the law. United States v. Kuhl (D. C.) 85 Fed. 624, and cases cited. Certainly the court could not on a demurrer say that there was no evidence of such similarity. In any view of the matter we are of opinion that the demurrer assailing the indictment on the ground that it did not appear that the instrument found in the possession of the defendant was made in whole or in part after the similitude of an obligation or other security issued under the authority of the United States was not well taken.

[2] But it is contended that the absence of any name as president or cashier at the foot of the note showed that it did not purport to be an "obligation or security" within the meaning of the Penal Code, and that as a result its possession by Wiggains for any purpose was not in violation of the act. There is considerable authority for the proposition that prior to 1892 the absence of some names purporting to be officers of the bank issuing the note would have been fatal to its character as such an "obligation or security." United States v. Williams (D. C.) 14 Fed. 550; United States v. Sprague (D. C.) 48 Fed. 828; United States v. Barrett (D. C.) 111 Fed. 369. But, by an act of Congress approved July 28, 1892, 27 Stat. 322, the following amendment to the national banking act was made:

"Be it enacted," etc., * * * "that the provisions of the Revised Statutes of the United States, providing for the redemption of national bank notes, shall apply to all national bank notes that have been or may be issued to or received by, any national bank, notwithstanding such notes may have been lost by or stolen from the bank and put in circulation without the signature or upon the forged signature of the president or vice-president and cashier."

By the Act of June 20, 1874, 18 Stat. 123, every national bank was required to keep on deposit in the treasury of the United States a sum of money equal to 5 per cent. of its outstanding circulation as a special fund for the redemption of that circulation, and when any of its notes should be presented for redemption the same were paid by the treasurer, and the amount so paid charged to the banks issuing them. This provision of the law probably contemplated the redemption of only such notes as had been actually executed and issued by the national banks; but the amendment of 1892, for reasons satisfactory to Congress, obviously sought still further to protect circulation by requiring the treasurer to redeem all national bank notes once issued by the Comptroller of the Currency to a national bank, whether they had ever been signed by the president or vice president and cashier of that bank or not. Inasmuch as the redemption is made from funds deposited by the bank to which the notes were issued, the effect of the amendment is that an unsigned note of a national bank secures to the holder the same rights of redemption as if it had been signed

by the proper officers of the bank in the usual way, and creates a valid obligation against the bank for its ultimate payment. Such being the case, it is impossible to say that the note in question did not purport to be some obligation or security.

It is also argued that the indictment was defective because it contained no averment that the German National Bank of Northern Kansas was an incorporated bank. In view of other averments of the indictment, the absence of that particular averment did not, in our opinion, render the indictment obnoxious to a demurrer.

Finding no error in the action of the trial court, its judgment is affirmed.

STOREY v. STOREY.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1914.)

No. 2009.

1. CONTRACTS (§ 42*)—EXECUTION—"DELIVERY."
"Delivery," as an essential element of the execution of a written contract, is a composite act, consisting of both a manual transfer, actual or constructive, and an operation of minds intending to enter into the contract. In the law of commercial paper between the original parties the animus contrahendi is the predominant element.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 207–214; Dec. Dig. § 42.*
For other definitions, see Words and Phrases, vol. 2, pp. 1958–1970; vol. 8, p. 7632.]

2. EVIDENCE (§ 462*) —PAROL EVIDENCE — WRITTEN CONTRACT — BILLS AND NOTES.
Gen. Code Ohio, § 8121, provides that every contract on a negotiable instrument is incomplete and revokable until delivery, and as between the immediate parties the delivery, in order to be effectual, must be made either by or under the authority of a party making, drawing, accepting, or indorsing, as the case may be, and in such case the delivery may be shown to have been conditional or for a special purpose, and not to transfer the property in the instrument. *Held*, that such section is but a codification of the general law; and hence, where a father sued his son on certain notes, the son was entitled to prove by parol that the notes were not delivered with intent to create a debt in favor of the father, but merely to evidence advancements made by the father to the son to enable him to secure a medical education.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2134–2139; Dec. Dig. § 462.*]

3. CONTRACTS (§ 42*)—DELIVERY—POSSESSION OF WRITTEN INSTRUMENT.
Want of intent to make a contract in presenti deprives the physical possession of the paper of its prima facie force as evidence of a legal delivery; and, if there is a secondary condition on the performance of which the writing is to become a contract, that fact is immaterial except as it may obviate the effect of the primary condition.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 207–214; Dec. Dig. § 42.*]

4. GIFTS (§ 47*)—TRANSFER FROM FATHER TO SON.
Transfers of money from a father to a minor son cannot create debts. and a transfer from a father to an adult son may, but only by an ex-

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

press agreement to that effect, create a debt; the presumption being that such transfers are irrevocable gifts, either never to be accounted for or as advancements.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 81–86; Dec. Dig. § 47.*]

5. GIFTS (§ 49*)—BY PARENT TO CHILD—EVIDENCE.

Where, in a suit by a father against his son on certain notes, the son denies delivery of the paper as a binding obligation, proof or an admission by the son that on the date of the paper the father paid to him a sum of money equal to that named in the paper raises no inference of an intent to create the relationship of debtor and creditor between them.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95–100; Dec. Dig. § 49.*]

In Error to the District Court of the United States for the Western District of Wisconsin; Arthur L. Sanborn, Judge.

Action by William Storey against Carroll L. Storey. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions.

Ole J. Eggum, of Whitehall, Wis., and L. W. Storey, of Toledo, Ohio, for plaintiff in error.

Gustavus Ohlinger, of Toledo, Ohio, and S. T. Swansen, of Madison, Wis., for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. Defendant in error, plaintiff below, alleged that he was the owner and holder of 22 promissory notes, past due and unpaid, executed by defendant.

Defendant answered, in substance, that he is a son of plaintiff; that in 1900 at his father's home in Ohio they entered into an agreement that his father should give him a medical education by making from time to time as requested gifts of money as advancements in anticipation of his share of his father's estate and that upon receiving the advancements he should give into the possession of his father papers in the form of promissory notes for the special and sole purpose of evidencing the amount of the advancements, and that his father should receive and hold and use the papers only as such evidence; that from time to time sums of money were given by his father and accepted by him as advancements, and not otherwise; and that he gave and his father received the manual possession of the papers, sued on as promissory notes, for the purpose of evidencing the amount of said advancements and not otherwise.

[1] Plaintiff's demurrer to this answer was sustained, and judgment for $3,520 followed.

Judgment was rendered by applying to the admitted facts the rule that parol evidence is inadmissible in an action at law to contradict the terms of promissory notes as written contracts of debt. As the parol evidence rule is indisputable, the error was in the application. And probably nowhere is the basis of the error more clearly and simply stated than in Pym v. Campbell, 6 El. & Bl. 370:

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

"The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."

Delivery is an act. Whether the act has been accomplished cannot be told by reading the paper. Therefore, when a declaration on a written contract is met by a plea of no contract, the application of the rule against varying the terms of a written contract by parol to the inquiry whether there is a contract, is a plain begging of the question, is a tour de force assumption of the very issue to be solved.

Delivery is a composite act. There must be both a manual transfer, actual or constructive, and an operation of minds intending to enter into the contract. In the ages-old strife for predominance between objective or external and subjective or internal measurements of conduct, evolution has been away from symbolism toward the inner truth. And in the law of commercial paper, between the original parties, the animus contrahendi has become the predominant element. This is shown by a provision of the Uniform Negotiable Instruments Act, which as been adopted in nearly all of the states.

[2] Section 16 of that act, in force in Ohio since January 1, 1903 (Ohio Code, § 8121), reads as follows:

"Every contract on a negotiable instrument is incomplete and revokable until delivery of the instrument for the purpose of giving effect to it. As between immediate parties, and as regards a remote party, other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of a party making, drawing, accepting, or indorsing, as the case may be. In such case, the delivery may be shown to have been conditional, or for a special purpose, and not for the purpose of transferring the property in the instrument. But when the instrument is in the hands of a holder in due course, a valid delivery of it by all parties prior to him, so as to make them liable to him, is conclusively presumed."

Plaintiff by his demurrer admits that in truth the pretended notes are "incomplete" because there was no "delivery for the purpose of giving effect" to them as contracts of debt, and because the manual transfer was "for a special purpose and not for the purpose of transferring the property in the instruments."

Several of the papers were signed and manually transferred prior to January 1, 1903. But we apply the same rule to them all, for in our opinion section 16 of the Negotiable Instruments Act is merely a codification of the general law in that respect as established by preponderant and sound authority. Burke v. Dulaney, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698; Michels v. Olmstead, 157 U. S. 198, 15 Sup. Ct. 580, 39 L. Ed. 671; White v. Kahn, 103 Ala. 308, 15 South. 595; Alabama Coke & Coal Co. v. Gulf Coal & Coke Co., 165 Ala. 304, 51 South. 570; Scaife v. Byrd, 39 Ark. 568; Drinkwater v. Hollar, 6 Cal. App. 117, 91 Pac. 664; Denver Brewing Co. v. Barets, 9 Colo. App. 341, 48 Pac. 834; Schindler v. Muhlheiser, 45 Conn. 153; McFarland v. Sikes, 54 Conn. 250, 7 Atl. 408, 1 Am. St. Rep. 111; Hartman Stock Farm v. Henley, 8 Ga. App. 255, 68 S. E. 957; Dowden v. Wood, 124 Ind. 233, 24 N. E. 1042; Hager v. Sidebottom, 130 Ky. 687, 113 S. W. 870; Leppoc v. National Union Bank of Mary-

land, 32 Md. 136; Whitaker v. Salisbury, 32 Mass. (15 Pick.) 534; Ruggles v. Swanwick, 6 Minn. 526 (Gil. 365); Barrett v. Davis, 104 Mo. 549, 16 S. W. 377; Roberts v. Jackson, 1 Wend. (N. Y.) 418; Juillard v. Chaffee, 92 N. Y. 529; Reynolds v. Robinson, 110 N. Y. 654, 18 N. E. 127; Waters v. Security Life & Annuity Co., 144 N. C. 663, 57 S. E. 437, 13 L. R. A. (N. S.) 805; Morris v. Faurot, 21 Ohio St. 155, 8 Am. Rep. 45; Hudson v. Wolcott, 39 Ohio St. 618; Branson v. Oregonian Ry. Co., 11 Or. 161, 2 Pac. 86; Koester v. Northwestern Port Huron Co., 24 S. D. 546, 124 N. W. 740; Wheeler & Wilson Mfg. Co. v. Briggs (Tex.) 18 S. W. 555; McCartney v. McCartney, 93 Tex. 359, 55 S. W. 310; Webster v. Smith, 72 Vt. 12, 47 Atl. 101; Curry v. Colburn, 99 Wis. 319, 74 N. W. 778, 67 Am. St. Rep. 860.

Many of the foregoing authorities have to do with other purported written contracts than promissory notes; but, inasmuch as we believe that the rules peculiar to commercial paper are concerned only with the travel of negotiable instruments along the ways of commerce as "couriers without luggage," we conclude that all the cases are applicable between the original parties in support of the plea of no contract when alleged promissory notes are counted on, as fully as when other forms of contract are involved.

Plaintiff argues that, because the answer discloses that the papers in the form of promissory notes were to have some effect, the notes must be given effect according to their terms. That assumes that the purported notes are in fact notes, and is merely another way of begging the same question. The answer shows that the papers were passed with the mutual intent and for the sole purpose of being held as evidence of the amounts of advancements. Receipts are not contracts.

[3] While plaintiff ultimately concedes that there may be cases where the truth respecting delivery of a purported written contract may properly be discovered by parol evidence, the contention is made that this is permissible only where the manual transfer was on condition that the writing should become effective on the happening of some event. And Burke v. Dulaney, supra, is instanced as of that class. But in Michels v. Olmstead, supra, the paper of Olmstead alone was signed by him and manually transferred on condition "that in no event should the (alleged) contract bind Olmstead individually." A plea of no contract is a negative defense. It is not necessary for the defender to show affirmatively what was the purpose of the manual transfer, except possibly as corroborative evidence of the primary condition that the transfer was "not for the purpose of transferring the property in the instrument." That primary condition of want of intent to make a contract in presenti deprives the physical possession of the paper of its prima facie force as evidence of a legal delivery. If there is a secondary condition on the performance of which the writing is to become a contract, that fact is immaterial, except as it might obviate the effect of the primary condition, for the reason that the holder would then be relying on something more than the initial possession and its prima facie consequences. His rights, if any ever accrued, would date

and flow from the subsequent transaction. The only way to escape the universality of the right between the original parties to establish by parol the facts respecting legal delivery, is, as was suggested in Burke v. Delaney, supra, to hold:

"That the mere possession of a written instrument, in form a promissory note, by the person named in it as payee, is conclusive of his right to hold it as the absolute obligation of the maker."

This matter of advancements, in which papers in the form of promissory notes were given and received merely to evidence the amounts, is not new. In every such case the primary condition was that the papers were never to come into existence as contracts of debt. And there was no secondary condition through which they could ever have life. Peabody v. Peabody, 59 Ind. 556; Harris v. Harris, 69 Ind. 181; Bragg v. Standford, 82 Ind. 234; Buscher v. Knapp, 107 Ind. 340, 8 N. E. 263; Brook v. Latimer, 44 Kan. 431, 24 Pac. 946, 11 L. R. A. 805, 21 Am. St. Rep. 292; Hicks v. Hicks, 29 Ohio Cir. Ct. R. 628, affirmed without opinion in 76 Ohio St. 575, 81 N. E. 1187; Garner v. Taylor (Tenn.) 58 S. W. 758. In Weaver v. Fries, 85 Ill. 356, and Schmidt v. Schmidt's Estate, 123 Wis. 295, 101 N. W. 678, a contrary result was reached by assuming the point at issue, namely, legal delivery, and then saying that the written contracts could not be contradicted by parol.

[4, 5] These advancement cases are merely instances of the general rule. While the rule, as a rule, is the same between father and son as between strangers, the application of it ought to be much easier for the triers of fact and for the court in instructing them. Transfers of money from father to minor son cannot create debts. Transfers from father to adult son may; but only by an express agreement to that effect. Presumptively such transfers are irrevocable gifts, either never to be accounted for or only as advancements. So when a father sues his son on an alleged promissory note, and the son denies the delivery of the paper as a binding obligation, proof or an admission by the son that on the date of the paper the father turned over to the son a sum of money equal to that named in the paper raises no inference of an intent to create the relationship of debtor and creditor.

In this case the facts pleaded in the answer constitute a defense of no contract. Three aspects are apparent, but they all merge into the one defense. No contract, because no legal delivery. Nothing but a nudum pactum, because an irrevocable gift cannot, by a one-sided intent and act, be converted into the consideration for a contract of debt. And if plaintiff's original intent is to be gauged by his present attitude, even the physical possession of the paper was obtained by fraudulent representations.

The judgment is reversed for further proceedings consentaneous to this opinion.

SEAMAN, Circuit Judge. I concur in the conclusion for reversal, but would rest the decision upon these grounds: First, that the Ohio statute referred to is controlling as to all the notes issued thereunder

and authorizes the defense set up by the defendant; second, that the decisions in Burke v. Dulaney and Michels v. Olmstead, supra, are applicable to sanction the defense in respect of the notes in suit issued prior to January 1, 1903, and require like ruling in the case at bar.

UNITED STATES v. PETKOS.

(Circuit Court of Appeals, First Circuit. June 24, 1914.)

No. 1038.

HABEAS CORPUS (§ 111*)—DETENTION AND EXCLUSION OF IMMIGRANTS—PROCEEDINGS AND REVIEW—DISCHARGE.

Questions of fact as to the admissibility of an alien immigrant 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), are to be determined by the immigration officers and not by the courts, and, when a court in habeas corpus proceedings has found that the petitioner has been ordered excluded without having been given a fair hearing on such a question, while it cannot reverse the decision and remand the case, it may and should make its order of discharge conditional, to become effective only in case the examining board fails to give the petitioner another and a fair hearing on competent evidence within a reasonable time.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 100; Dec. Dig. § 111.*]

Appeal from the District Court of the United States for the District of Massachusetts; Jas. M. Morton, Judge.

Habeas corpus by Felix Petkos. From an order discharging petitioner, the United States appeals. Reversed.

For opinion below, see 212 Fed. 275.

Asa P. French, U. S. Atty., of Boston, Mass. (William C. Matthews, Special Asst. U. S. Atty., of Boston, Mass., on the brief), for the United States.

Thomas E. Flanagan, of Boston, Mass., for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

DODGE, Circuit Judge. As the result of their hearings on February 8 and 10, 1913, the immigration officers at Boston voted on the latter date to exclude Petkos, "(1) as likely to become a public charge, and (2) as being afflicted with a physical defect which will affect his ability to earn a living." On appeal to the Secretary of Commerce and Labor, this decision was affirmed March 8, 1913, and an order of deportation issued.

Under section 2 of the Immigration Act as amended March 26, 1910 (36 Stat. 263), the second of these findings could have been made only upon a certificate to that effect by the examining surgeon. There was no such certificate then before the examining board. In the only medical certificate then before them, dated February 8, 1913, the examining surgeon had certified nothing more than that Petkos "had psoriasis, a chronic noncommunicable skin disease, which will cause

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

him to seek treatment from time to time." He had not certified that the disease would in any way affect the alien's ability to earn a living.

The record submitted to us consists only of the Immigration Commissioner's record, filed in the District Court March 18, 1913, the day the hearing on the order to show cause issued on Petkos' petition for a writ of habeas corpus. But the opinion of the learned judge of the District Court distinctly states that at the hearing on this order to show cause the petitioner offered uncontradicted testimony as to the nature and probable effects of Petkos' disease. Except as its substance is given in the opinion, this evidence is not before us. The record does not show who the witnesses who testified were, nor what the testimony of each was.

There is also reason to doubt whether the Immigration Commissioner's record, which is all that there is before us, really contains all the proceedings before the immigration officers. It shows that after Petkos had appealed from the excluding decision on February 11th, and after a letter from the examining surgeon, dated February 16th, had been forwarded in compliance with a request for further information made by the secretary to whom the appeal lay, the secretary granted a request by Petkos, made February 19th, "for permission to have a competent physician make an examination" of him. There is nothing in the record to show whether this examination was made and its result communicated to the secretary before he affirmed the excluding decision on March 8th, or whether Petkos failed to avail himself of the permission granted, so that the secretary acted in view of such failure.

The Immigration Commissioner's record, however, does show that the first of their findings above stated, viz., that Petkos was likely to become a public charge, was founded upon their mistaken assumption, unsupported by any lawful evidence, that his disease necessarily affected his ability to earn a living. In their decision of February 10th, they held it "a well-known fact among laymen that the odor of this particular disease at times is so annoying" as to make it difficult to get employment where other men might be working in close proximity to him. At a rehearing on February 11th, they affirmed their excluding decision "for previous reasons except it is the opinion the appearance of the disease rather than the odor will be offensive." If at the hearing on the petition for the writ it appeared without contradiction, as the court found, that the disease is attended with no odor, does not appear on exposed parts of the body save in rare cases, and does not disable the person afflicted by it from working, we think it might properly be said that the above erroneous assumptions, made in the absence of the statutory certificate referred to, had prevented a fair hearing by the immigration officers. We are therefore unable to find sufficient ground in the record before us for holding that the District Court erred in issuing the writ. The petition for the writ did not, it is true, allege any failure to give a fair hearing. But this objection does not appear to have been raised before the District Court in opposition to the issuance of the writ, and we cannot regard it as now available to the appellant.

In ordering the writ to issue on April 18, 1913, the District Court directed that there be a hearing before it on the merits. On April 26th, the District Court ordered that Petkos be released from custody, reciting that the cause had been set down for hearing and fully heard by the court. No opinion accompanied this order. The return on the writ showed that Petkos was produced in court as directed. Except that Petkos was personally present, the hearing on the merits, so far as is disclosed by the record before us, was upon the same evidence as was before the court at the hearing on the issue of the writ, without more, i. e., the record of the Immigration Commissioner. But, as above explained, it is difficult to believe that this was all the evidence upon which the court acted, either in issuing the writ or in ordering Petkos' discharge.

If the District Court was right in trying on its merits the question of fact whether or not Petkos was likely to become a public charge, we find nothing in the record which will justify us in reversing its result.

But, under the Immigration Act, the question was one which ought to have been decided, not by the District Court, but by the immigration officers after a fair hearing; and, as has repeatedly been held, their decision upon such a question is not to be reviewed by the court on habeas corpus. If, when a question of citizenship is involved, the District Court may properly undertake to determine the alien's right to enter the country, as in Chin Yow v. U. S., 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, it does not follow that when, as here, citizenship is not claimed and only a question of fact is involved, the alien is entitled to have the District Court determine, instead of those officers, whether or not he belongs to a class excluded by statute. Clearly the District Court ought not to assume their duties unless no other course can reasonably be taken; and no such situation is created by the mere fact that they have once undertaken to act upon a hearing which the court could not consider fair. If the court, not having power to reverse decisions of the immigration officers, had no power to remand the case to them, it did have the power to make its order of discharge not final but conditional, and to be effective only in case those officers should fail to give the alien the fair hearing on lawful evidence required by the Immigration Act within a reasonable time. We think this course should have been adopted as the one best calculated to secure proper administration of the legislative provisions applicable.

The judgment of the District Court is reversed, and the case is remanded to that court for further proceedings in accordance with this opinion.

ROGERS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 16, 1914.)

No. 3966.

1. CRIMINAL LAW (§ 700*)—MISCONDUCT OF DISTRICT ATTORNEY—REQUEST FOR REMAND OF WITNESS.

That the assistant district attorney, while a witness was testifying for the government, stated to the court in the presence of the jury, "I would like to have this witness remanded to the custody of the marshal," was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1658, 1659; Dec. Dig. § 700.*]

2. INDICTMENT AND INFORMATION (§ 180*)—DESCRIPTION OF PERSONS BY DIFFERENT NAMES—VARIANCE.

Defendant was indicted for disposing of liquor to one "John Lumby," an Indian, and, though he testified that his name was "John Lombard," his brother testified that his name was Sylvester "Lumby," and the other witnesses referred to the prosecuting witness as "Lumby." *Held*, that either "John Lombard" and "John Lumby" were one and the same, or a clerical error was made in the entry of the name "John Lombard," and hence there was no variance.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 551–556; Dec. Dig. § 180.*]

Sanborn, Circuit Judge, dissenting.

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

Granville Rogers was convicted of illegally selling liquor to an Indian, and he brings error. Affirmed.

John A. Remy, of Guthrie, Okl. (Milton Brown, of Guthrie, Okl., on the brief), for plaintiff in error.

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

Before SANBORN and SMITH, Circuit Judges, and POPE, District Judge.

SMITH, Circuit Judge. The plaintiff in error, Granville Rogers, hereafter called the defendant, was indicted charged with disposing of liquors to John Lumby, a member of the Osage Tribe of Indians, to whom no allotment was made prior to May 8, 1906. The defendant was tried, convicted, and sentenced.

The assignments of error are substantially:

(1) The court erred in permitting the assistant United States district attorney in the presence of the jury to request the court to remand John Lumby and Sylvester Lumby to the grand jury.

(2) The court erred in overruling the defendant's motion to instruct the jury to return a verdict finding the defendant not guilty when all the evidence had been introduced.

[1] It is conceded that in the first assignment of error there is a mistake. No motion was ever made as to John Lumby, and no such

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

motion was made as to Sylvester Lumby. It does appear from the testimony of Mr. Sylvester Lumby, a witness for the government, that he and four others went into a restaurant across the street from the butcher shop, where it is claimed defendant disposed of beer in question and there had a lunch composed of beef tongue, cheese, and crackers, and then went over to the butcher shop and got beer, paying nothing for it except what had been paid for the lunch. The assistant attorney claimed, at least inferentially, that the testimony of the witness was in conflict with that given by him before the grand jury, and the record shows:

"Mr. Herod: I would like to have this witness remanded to the custody of the marshal.

"Mr. Remy: We object to a play of that kind in the court here.

"Mr. Herod: I want it understood I want no such language as that used. This is no play at all.

"The Court: Counsel for the defendant will make no comment whatever about the action sought of the court. The district attorney asks to have the witness remanded. That is his motion and the court will sustain it for the time being until the matter can be investigated. That order will be made—finish your examination.

"Q. That's all.

"The Court: In case the district attorney makes the request at the conclusion of the testimony of the witness. It will not be made at this time."

It thus appears that not only did the prosecuting attorney not request the court to remand John Lumby to the grand jury, and did not request that Sylvester Lumby be remanded to the grand jury, but to the marshal. For what purpose was not suggested, whether for contempt or to await the action of the grand jury, or what, does not appear. It thus appears that there is nothing in the record tending to sustain any part of the assignment of errors. The record here, as elsewhere, is probably binding on us, while it seems probable that it is erroneous. But if the assignment had been correctly made that the court erred in permitting the assistant United States attorney in the presence of the jury to request that said Sylvester Lumby be remanded to the custody of the marshal, still error would not appear. If such a motion, applied, not to the defendant, but to a witness for the government, were in and of itself misconduct, then in every instance the United States Attorney must determine at his peril whether the motion was well taken or not, as if made and not well taken it would result in a new trial. It was here made without comment, and there was no possible prejudice to the defendant. There was no exception at the time and is no assignment of error to the language of the court, and that is left in such uncertainty by the form in which it appears that it is not the subject of consideration by this court. The motion was in effect overruled, and there is nothing reflecting upon the defendant in the ruling in reference to a government witness.

[2] Under the second assignment it is claimed that the name of the Indian to whom liquor was disposed was "John Lombard" and not "John Lumby" as stated in the indictment. This matter seems to have never been called to the attention of the court below, but the record shows:

"John Lumby called as a witness for the government, being duly sworn, testified as follows, questioned by Mr. Herod:
"Q. State your name to the jury. A. John Lombard. * * *
"Q. What's your brother's name? A. Sylvester Lombard."

Aside from this there is nothing to indicate the man's name was Lombard.

Sylvester Lumby was called as a witness, and, upon being interrogated by Mr. Herod, testified:

"Q. Your name is Sylvester Lumby? A. Yes, sir."

The witness Matt Williams swears that the two Lumby boys were together at the place and names John Lumby as one of them.

Jim Burns testified that he knew the two Lumbys. The record shows that John Lumby was recalled by the government. The defendant testified:

"Q. You did have this conversation with John Lumby about the beer? A. No, I never said anything like he said I did.
"Q. You didn't? A. No, sir.
"Q. How come you to be talking to him about it? A. Well, after the other boys got to drinking, he just mentioned beer, or he just got me some beer out of the barrel," etc.

He frequently refers to this man John Lumby and says he went to school with him. It is manifest either that John Lombard and John Lumby were one and the same, or that a clerical error was made in the entry of the name John Lombard.

It is true that the jury might have found the defendant not guilty under the evidence, but it found him guilty, and we think there is sufficient evidence to sustain that verdict.

No error is found, and the judgment is affirmed.

SANBORN, Circuit Judge, dissents.

KRYPTOK CO. v. UNITED BIFOCAL CO. et al.

(Circuit Court of Appeals, Second Circuit. May 25, 1914.)

No. 278.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—LENSES FOR EYEGLASSES.

The Borsch patent, No. 637,444, for a bifocal lens for eyeglasses, and the Borsch, Jr., patent, No. 876,933, for an improvement on the same, both *held* not anticipated, valid, and infringed on motion for preliminary injunction.

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

This cause comes here upon appeal from an order of the District Court, Western District of New York, granting preliminary injunction. The suit is on two patents for improvements in bifocal lenses,

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

No. 637,444, granted November 21, 1899, to John L. Borsch, and the other, No. 876,933, granted January 21, 1908, to John L. Borsch, Jr.

The following is the opinion of the District Court by

HAZEL, District Judge. This action was brought for infringement of letters patent, No. 637,444, granted to John L. Borsch, Sr., November 21, 1899, and No. 876,933, granted to the complainant as assignee of John L. Borsch, Jr., both owned by the complainant and relating to improvements in bifocal lenses. In the Borsch, Sr., patent the bifocal lens was formed of two pieces of glass of dissimilar indices of refraction and of different size, the smaller being mounted in a recessed portion of the larger and exposed upon one side thereof. In the Borsch, Jr., patent two lenses of different indices of refraction were united, the smaller to the larger, by welding or fusing to make an integral lens. The complainant claims that in this respect its lenses are constructed upon a new principle differing from that of prior structures with the result that the bifocals, though of different indices of refraction, are made integral, which imparts to them a smoothness of surface and desired invisibility of jointure.

The defenses are invalidity, prior use, and noninfringement. But none of such defenses is thought supported with such persuasiveness and cogency as to deter the granting of a preliminary injunction. It appears that both patents in suit were adjudicated and sustained after careful consideration by Judge Van Valkenburgh in the Western District of Missouri after a full and fair hearing at which a large number of prior patents claimed to anticipate and limit the claims in suit were examined and differentiated, and the invention adjudged to be novel and useful, and the claims valid. Kryptok Co. v. Stead Lens Co. (D. C.) 207 Fed. 85. Such adjudication concededly carries with it a presumption in favor of the patents which must be overcome by satisfactory evidence. To this end reliance is principally placed upon the contention that the single claim of patent No. 637,444, if held valid, should have only a narrow construction. But this contention was before the court in the prior litigation, as indeed were all the prior patents and publications to which the defendants here attach importance, save the Dallmeyer patent, No. 61,812, which is claimed to be anticipatory of the Borsch, Sr., patent, but an examination of it convinces me that it has little bearing thereon. The Dallmeyer lenses are for use in photography, and are formed of two lenses of crown or plate glass with a flint glass lens cemented between them. Patents similar to the Dallmeyer patent were discussed by Judge Van Valkenburgh in his opinion, and further discussion in relation thereto is unnecessary. It would appear from Dr. Thompson's address before the American Ophthalmological Society that disclosure of the Borsch, Sr., patent was made anterior to the date of the application for patent, but as specific allusion was made in the address to the patentee as the inventor of the lens, it might perhaps aptly be claimed that such allusion supports complainant's claim that Borsch, Sr., made his invention in suit some time before Dr. Thompson's address, and that the patent may be antedated.

The defense to the Borsch, Jr., patent is that, in view of the disclosures of the prior art, i. e., the patents to Kokocinski, Lazarus, and Newton, there was a lack of invention in fusing two pieces of glass together, but this question was also fully considered in the prior litigation, and nothing said in argument is conducive to additional consideration of such defenses at this time.

It is also claimed that both inventions were in use prior to the patents in suit, and affidavits have been read in support of such claim, but as there has been no opportunity to cross-examine the affiants, such affidavits are entitled to little weight on this motion.

Infringement is shown prima facie by the fact that the defendants manufacture from lens blanks and sell bifocal lenses formed of two pieces of glass, the major portion recessed to receive the smaller portion, and secured together by fusing or grinding to produce an integral lens; each piece of glass or lens, according to the proofs, having different indices of refraction, and the exposure of the small-sized lens being identical with complainant's as

specified in claim 1 of patent No. 637,444, and also responding to claim 3 of patent No. 876,933. Therefore, in view of the circumstances, and without deeming it desirable to further discuss the various contentions, I think that a temporary injunction as prayed for ought to be granted, and a decree granting the same may be entered. So ordered. January 29, 1914.

Howard P. Denison, of Syracuse, N. Y. (Eugene A. Thompson and Drury W. Cooper, both of Syracuse, N. Y., of counsel), for appellants.

William M. Stockbridge, of New York City (William Houston Kenyon, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The patents were fully considered on a full record at final hearing by Judge Van Valkenburg in the Western District of Missouri; both were sustained and infringement found. Kryptok Company v. Stead Lens Company, 207 Fed. 85.

In granting the injunction now appealed from Judge Hazel followed the opinion in that cause as to the position of the patents in the art. That cause was appealed to the Circuit Court of Appeals for the Eighth Circuit (214 Fed. 368, 131 C. C. A. 144) and we have now received from the clerk of that court a certified copy of the opinion, in all respects affirming the opinion of Judge Van Valkenburg. In these circumstances we deem it our duty to affirm the order.

With the decisions of the District Court and of the Circuit Court of Appeals in their favor the presumption of the validity of the patents is too strong to be overcome, especially upon a motion for a preliminary injunction and upon a record substantially similar to the one in the Eighth Circuit.

Should a different conclusion be reached it should only be after a full consideration at final hearing.

The order is affirmed with costs.

IMPERIAL MACH. CO. v. N. R. STREETER & CO.

(District Court, W. D. New York. May 1, 1914.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—MACHINE FOR PEELING VEGETABLES.

The Robinson patent, No. 809,582, for a machine for peeling vegetables, *held* not anticipated, valid, and infringed on a motion for preliminary injunction.

2. PATENTS (§ 303*)—SUIT FOR INFRINGEMENT—TITLE OF COMPLAINANT.

In an infringement suit by an assignee, the defendant cannot raise technical objections to the title of complainant on a motion for preliminary injunction, where the validity of the assignment is not questioned by the assignor.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 496–498, 502, 503; Dec. Dig. § 303.*]

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

In Equity. Suit by the Imperial Machine Company against N. R. Streeter & Company. On renewed motion for preliminary injunction. Motion granted.

H. S. MacKaye, of New York City, for complainant.
J. William Ellis, of Buffalo, N. Y., for defendant.

HAZEL, District Judge. [1] The original motion for preliminary injunction in this case was denied but without prejudice to renew, and this renewal of the motion is based on additional affidavits in answer to the affidavit of defendant's expert witness Shoemaker, who substantially testified that the highest part of the elevation or cutting surface in the Lehman patent, which defendant claims anticipates the patent in suit, was in the middle, and that the sides sloped away therefrom forming a rounded agitator. Such description of the patent, in view of the fact that no expert for the defendant was sworn in the case of this complainant against Smith & McNell similarly describing the Lehman device, induced the belief that the prior case was not sufficiently presented. But such testimony is now strongly controverted by complainant's expert witnesses Brenizer and Byrne, who testify that the drawing and description of the elevated part in the Lehman patent are insufficient to indicate that the raised portion sloped downward to a disk having a slope towards the center, or that its construction was such as to throw the vegetables back towards the center; and it is also affirmed by them that the elevated part has a sharp edge towards the middle which holds the potatoes moving outward by centrifugal force and cuts them.

In view of the fact that the evidence accords with the analysis of the Lehman patent by Judge Hough, who sustained the Robinson patent in suit in the case against Smith & McNell, and also with that of Judge Lacombe, who considered the Lehman patent and the description of it by defendant's witness Shoemaker on a motion for a preliminary injunction which came before him, I conceive that I must now give greater weight to the decision of Judge Hough, which of course raises a strong presumption in favor of the validity of the Robinson patent, and which I ought not to ignore at this time when the defendant's attack upon the validity of the patent is weakened by the complainant's present showing, a showing which if made before me on the former motion would no doubt have resulted in my granting the application. That the rotary disk described in claim 1 of the patent in suit is embodied in defendant's machine and is operated in substantially the same way is not thought in doubt.

[2] As to the objection that the complainant has no legal title to the patent in suit on the ground that the assignment was not specifically authorized by a majority of the surviving trustees of the Robinson Machine Company, it is sufficient to say that the presumptions are in favor of the validity of the assignment, and in any event, as the assignor has not raised the question of invalidity, it is not thought that a third party, an asserted infringer, is in a position to inject this ques-

tion in a collateral proceeding. Kansas City Hay-Press Co. v. Devol, 81 Fed. 726, 70 C. C. A. 679.

The motion of the Imperial Machine Company for an injunction pendente lite as to claim 1 is granted.

UNITED STATES v. INTERNATIONAL HARVESTER CO. et al.

(District Court, D. Minnesota. August 12, 1914.)

1. MONOPOLIES (§ 12*)—ANTI-TRUST ACT—CONSTRUCTION—COMBINATION IN RESTRAINT OF TRADE.

A combination may be one in restraint of interstate trade and commerce, or to monopolize a part of such trade and commerce, in violation of Sherman Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), although such restraint or monopoly may not have been attempted to any harmful extent, but is potential only.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

2. MONOPOLIES (§ 12*)—RESTRAINT OF TRADE—COMBINATION.

The elimination of competition between competing concerns, if illegal, is equally so, whether effected by an agreement or by a consolidation.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

3. MONOPOLIES (§ 12*)—COMBINATIONS IN "RESTRAINT OF TRADE."

Suppression of competition by means of a combination, where the parties to it control a large portion of the interstate or foreign commerce in the article, and where there is no obligation to form the combination arising out of the fact that they are losing money or the like, is an undue "restraint of trade."

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*

For other definitions, see Words and Phrases, vol. 7, pp. 6185, 6186.]

4. MONOPOLIES (§ 14*)—COMBINATION IN RESTRAINT OF INTERSTATE COMMERCE.

Defendant International Harvester Company was a consolidation of five harvester companies, which together produced from 80 to 85 per cent. of all the harvesting machinery sold in the United States. Some or all of them were prosperous, and there had previously been keen competition between them. One of the combining companies, of which defendant owned all the stock, was changed in name and made the sole selling agent for all of the products of the several plants. Defendant was not overcapitalized, and its methods of doing business were in general fair to competitors. It purchased all of the stock of another large harvester company, but permitted it to continue to do business and to advertise as an independent and competing concern. *Held*, that defendant was organized to eliminate competition between the combining companies, and was from the beginning a combination in restraint of interstate commerce, and to monopolize such commerce in harvesting machinery, and illegal, as in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 11; Dec. Dig. § 14.*]

Sanborn, Circuit Judge, dissenting.

In Equity. Suit by the United States against the International Harvester Company and others. On final hearing. Decree for complainant.

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

The Attorney General and Edwin P. Grosvenor, Sp. Asst. Atty. Gen., for the United States.

John P. Wilson, of Chicago, Ill., Wm. D. McHugh, of Omaha, Neb., and Edgar A. Bancroft, of Chicago, Ill. (Philip S. Post and Victor A. Remy, of Chicago, Ill., of counsel), for defendants.

Before SANBORN, HOOK, and SMITH, Circuit Judges.

SMITH, Circuit Judge. The petition in this case was filed April 30, 1912, under section 4 of "An act to protect trade and commerce against unlawful restraints and monopolies," generally known as the "Sherman Law." Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200).

Under that section the Circuit Court was vested with jurisdiction of such suits, but the Circuit Court was abolished by Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1167 [U. S. Comp. St. Supp. 1911, p. 243]) § 289, and by section 291 the jurisdiction under section 4 of the Sherman Law passed to the District Court. The Attorney General having, under Act Feb. 11, 1903, c. 544, 32 Stat. 823 (U. S. Comp. St. Supp. 1911, p. 1383), filed with the clerk of the District Court a certificate that this case is of general public importance the same came on for hearing before the Circuit Judges named, notwithstanding the abolishment of the Circuit Court. Ex parte United States, 226 U. S. 420, 33 Sup. Ct. 170, 57 L. Ed. 281.

The petition makes defendants the International Harvester Company, the International Harvester Company of America, the International Flax Twine Company, the Wisconsin Steel Company, the Wisconsin Lumber Company, the Illinois Northern Railway Company, the Chicago, West Pullman & Southern Railroad Company, Cyrus H. McCormick, Charles Deering, James Deering, John J. Glessner, William H. Jones, Harold F. McCormick, Richard F. Howe, Edgar A. Bancroft, George F. Baker, William J. Louderback, Norman B. Ream, Charles Steele, John A. Chapman, Elbert H. Gary, Thomas D. Jones, John P. Wilson, William L. Saunders, and George W. Perkins.

All of these defendants made answer. The case was tried and has been submitted to the court for a decree. As the pleadings are elaborate, covering more than 130 pages of printed matter, and as no questions have been raised as to the sufficiency of any of them, we will state the facts as shown, contenting ourselves with saying that all of the facts found by the court are either expressly covered by the allegations of the pleadings or are within the necessary implications thereof. In their argument defendants' counsel say:

"This case is one of fact, not of controverted questions of law."

It will be necessary, therefore, to review the facts fairly, fully, but not elaborately, as there are 18 volumes and nearly 10,500 printed pages in the record.

Agricultural implements may be divided into five classes:

(1) Tillage implements, such as plows, harrows, and other instruments used in keeping the soil in good condition.

(2) Seeding implements, such as corn planters, drills, and seeders.
(3) Harvesting implements, such as harvesters, mowers, reapers, rakes, and the like.
(4) Threshing machines.
(5) Implements for general agricultural use, such as wagons, manure spreaders, gas engines, cream separators, tractors, and certain similar tools and instrumentalities.

The defendant the International Harvester Company, hereafter called the International Company, was organized on August 12, 1902, under the laws of New Jersey. The objects for which it was organized, as stated in the articles of incorporation, were:

"To manufacture, sell, and deal in harvesting machines, tools, and implements of all kinds, including harvesters, binders, reapers, mowers, rakes, headers, shedders, machinery, engines, wagons, motor vehicles, and vehicles of all kinds; agricultural machinery, tools, and implements of all kinds, binder twine, and all devices, materials, and articles used or intended for use in connection therewith, and all repair parts and other devices, materials, and articles used, or intended for use, in connection with any kind of harvesting or agricultural machines, tools, or implements, or any gasoline, electric, or other vehicles.

"To engage in the manufacture or production of, and to deal in, any materials or products which may be used in, or in connection with, the manufacture of harvesting or agricultural machines, tools, and implements."

Prior to that time the principal manufacturers of harvesting implements in the United States had been:

First. The McCormick Harvesting Machine Company, a corporation, of Chicago, Ill., founded about 1849;

Second. D. M. Osborne & Co., a New York corporation, with a plant or plants at Auburn, N. Y., founded about 1860;

Third. The Warder, Bushnell & Glessner Company, an Ohio corporation, with its manufacturing plant at Springfield, Ohio, and its offices at Chicago, Ill., which manufactured under the name of the Champion, founded about 1869;

Fourth. The Deering Harvester Company, a copartnership, of Chicago, Ill., founded about 1875;

Fifth. The Milwaukee Harvester Company, of Milwaukee, Wis.; and

Sixth. The Plano Manufacturing Company, of West Pullman, Ill.

While these were the leading manufacturers of harvesting machines, they had other, but not general, lines of manufacture of agricultural implements.

On June 24, 1902, P. D. Middlekauff secured, in his own name, an option on the stock and plant of the Milwaukee Harvester Company, for $3,123,691.90. He did this in fact as agent, though it does not clearly and certainly appear who his principal was, whether J. P. Morgan & Co., George W. Perkins, or the McCormick Harvesting Machine Company. He did it, however, at the direct instance of the McCormick Harvesting Machine Company, but whether it was acting as principal or agent is left in some slight doubt.

On June 25, 1902, Mr. Middlekauff went to New York with a letter from an officer of the McCormick Company, authorizing him to assign this option to J. P. Morgan & Co., of which George W. Perkins was a

member, or to any one they might designate, and reciting that the option had been obtained "for us." Mr. Middlekauff remained in New York until July 30, 1902, aside from being absent a small portion of the time in Philadelphia and Washington on business for Mr. Perkins.

On August 11, 1902, a new contract was made for the purchase of the Milwaukee Harvester plant by Mr. Middlekauff, and on the same day he assigned his contract to Mr. William C. Lane, a New York banker and then president of the Standard Trust Company.

In July, 1902, the representatives of the McCormick, the Deering, the Warder, Bushnell & Glessner, and the Plano were all in New York, but stopping at different hotels and not seeing one another. They were all seeing, however, Mr. George W. Perkins. On July 28, 1902, they met and gave separate contracts to William C. Lane, heretofore referred to, and his assigns, to sell all their tangible property and specified portions of their bills receivable. These agreements all contained a recital that the purchaser, upon his acquisition of the property, intended to transfer the same to a corporation to be organized under the laws of Illinois, or some other state, called the "purchasing company." It was in each case, except that of the Warder, Bushnell & Glessner Company, stipulated that the entire purchase price should be paid in fully paid nonassessable stock of the purchasing company.

On August 11, 1902, the companies all signed an agreement for the immediate delivery of their plants and property, without waiting for any appraisement theretofore stipulated for in each instance.

On August 12, 1902, the very day of the organization of the International Harvester Company with a total capital of $120,000,000, Mr. Lane appeared before the board of directors and offered to sell the Milwaukee Harvester Company plant as a going concern, including its bills receivable and the plants of the McCormick Harvesting Machine Company, the Deering Harvester Company, the Plano Manufacturing Company, and the Warder, Bushnell & Glessner Company, and to furnish $60,000,000 of working capital, to be represented by accounts and bills receivable of the McCormick Harvesting Machine Company, the Deering Harvester Company, and the Plano Manufacturing Company, or in cash, for the $120,000,000 of the capital stock of the company, and on August 13, 1902, this proposition was accepted. The property turned in was of greater value than the stock issued for it. This case, therefore, involves no question of overcapitalization.

In pursuance of this agreement there was turned over to the company $40,000,000 of the bills receivable of the McCormick Harvesting Machine Company, the Deering Harvester Company, and the Plano Manufacturing Company, guaranteed by them, respectively. In all Mr. Lane did in this matter he was acting upon the suggestion of his counsel, Messrs. Guthrie, Cravath & Henderson. He was compensated, but there never was any idea upon his part that he owned any of the properties. He was a mere conduit or instrumentality in the transaction.

The International Company shortly acquired all the stock of the Milwaukee Harvester Company, as it had already acquired the plant. It reduced the capital of the Milwaukee Harvester Company to $1,-

000,000, and changed the name to the International Harvester Company of America, hereafter called the America Company. It was for a considerable time officered by the same men who held the offices in the International Company. A contract was entered into between the International Company and the America Company by which the former contracted to sell to the latter its entire output and the latter undertook the responsibilities of reselling the same. The America Company, in addition to buying the manufactured products of the International, bought from outside parties some threshers, wagons, plows, etc., and resold them; but the dealing in all property not the product of the International Company only amounts to about 2½ per cent. of its business. All the stock of the America Company is still the property of the International Company.

The two defendant railroads are switching roads to the factories of the International Company; one acquired in the consolidation mentioned, and one constructed by the new company. The International Flax Twine Company, the Wisconsin Steel Company, and the Wisconsin Lumber Company are auxiliary companies of the International Company, and the personal defendants are officers and directors of the last-named company.

It is alleged in the petition that these five companies produced over 85 per cent. of all harvesting machinery sold in the United States, and it is admitted in the answer that said companies produced approximately 80 to 85 per cent. of the binders, mowers, reapers, and rakes.

In January following the consolidation of the five companies, the International Company acquired the D. M. Osborne & Co. stock, and the companies thus combined manufactured a still greater percentage of the harvesting machinery used in the United States and nearly the whole of that exported from the United States. The five companies except the Milwaukee Company all took stock in the new company, and with the exception of the Warder, Bushnell & Glessner Company took stock for the entire amount of property turned over by them, and this amounted to $93,400,000 of the $120,000,000 capital of the new company. $6,600,000 of the capital of the new company was paid to J. P. Morgan & Co., of which $3,148,196.66 was for the Milwaukee Harvester Company's property and business, and $3,451,803.34 was for services and expenses in connection with the organization of the International Company. Thus $100,000,000 of the capital of the new company was clearly covered, without any new or additional working capital. By agreement among all the parties who were to receive shares of stock in the International, all the stock except enough to qualify directors was vested in voting trustees, namely, George W. Perkins, Cyrus H. McCormick, president of the McCormick Harvesting Machine Company, and Charles Deering, of the Deering Harvester Company. These voting trustees were maintained for ten years.

The day of the transfer to the International Harvester Company of the five plants, Cyrus H. McCormick, Harold F. McCormick, Stanley McCormick, all of the McCormick Harvesting Machine Company, and Cyrus Bentley, the Chicago attorney of the company, Charles

Deering, William Deering, James Deering, and Richard F. Howe, all of the Deering Harvester Company, John J. Glessner, of the Warder, Bushnell & Glessner Company, and William H. Jones, of the Plano Manufacturing Company, were all chosen directors of the International Harvester Company and constituted the majority of the board.

When the D. M. Osborne & Co. purchase was made, while the International bought all the stock, it permitted the Osborne Company to continue to appear to be independent. It is claimed that this was done to enable the Osborne to collect its bills receivable, which were not acquired by the International. There was commercial advantage in claiming not to be associated with the International. Many persons were opposed to buying from it, and for two years the Osborne Company persistently advertised that it was independent.

While under the old-time law of warranty it might be justifiable for the Osborne Company to conceal its relations with the International, there can be no excuse for the affirmation upon its part that it was independent after it had been acquired by the International.

"The seller may let the buyer cheat himself ad libitum, but must not actively assist him in cheating himself." 1 Parsons on Contracts (9th Ed.) page 615.

The International had bought all the stock of the Osborne Company, and it had been transferred to a trustee for it, and there was, in the fact that the Osborne Company might better collect its bills receivable, no basis to justify the International in making a contract under which the Osborne Company could continue to advertise falsely that it was an independent concern, when it had in fact been merged with the International. It is safe to say that from January, 1903, the competition of the Osborne Company was in name only and did not exist in fact.

What has been said of the Osborne purchase is true in principle of purchases made by the International of the Keystone Company, the Minnie Harvester Company, and the Aultman-Miller plant.

Prior to the consolidation the first five companies were in fierce competition for trade, and especially was this true of the McCormick and the Deering Companies, and this competition extended, not only to price, but to the granting of expert assistance and numerous free items with machines. The result of the combination was that all this competition at once wholly ceased, except within the limitation of agents' commissions.

The defendants claim that the objects of the organization were:

First, to build up the foreign trade;

Second, by the combination to secure more capital to enable them to continue the battle in the foreign market;

Third, by enlarging the scope of the business so as to include other lines of agricultural implements to make an all the year around business;

—and that it was not the intention to oppress the domestic market, and that they have not done so.

It does appear that since the combination the foreign trade has been greatly increased. This trade of all the combining companies was

$10,400,000 in 1902, and has grown under the defendants' management to $50,000,000 in 1912. This vast growth is to the credit of the energy and enterprise of the defendants. But the growth of the trade of the companies who formed the combination was at the time of the consolidation very recent, and the trade was rapidly increasing just prior to the combination. With the knowledge that the foreign trade was making such a remarkable growth at the time of the consolidation, whether the separate companies would have increased their business as much as the defendants have done is a mere matter of speculation, on which we can venture no opinion.

It is claimed that the consolidation brought $60,000,000 of available cash to the new company with which to expand the foreign trade. This is not true. The government claims that not more than $10,000,000 of new cash was furnished, but in no event did it exceed $20,000,000. Forty million dollars of this so-called working capital was furnished in bills receivable of the old companies, just as available to the old companies as to the new; and $60,000,000 was issued for the tangible property of the old companies and the expenses of J. P. Morgan & Co. in connection with the organization of the new company, and for the Milwaukee Company.

Soon the International began buying and constructing plants to extend its business from the prior one of the manufacture of harvesting machinery to the manufacture of all of the five classes of agricultural implements heretofore referred to. Consequently a distinction is drawn in argument between what are called the old lines and the new.

It is contended by the government that the International used its prior monopoly of the old lines to impose its new lines upon dealers and it includes this among numerous charges of oppression upon purchasers.

While the evidence shows some instances of attempted oppression of the American trade by the International and the America Companies, such cases are sporadic, and in general their treatment of their smaller competitors has been fair and just, and if the International and America Companies were not in themselves unlawful there is nothing in the history of the expanding of the lines of manufacture, so as to make an all the year around business, that could be condemned.

[1] The real question is whether the combination of the companies was illegal in the beginning, or became so with the additions subsequently made.

This court is clearly of the opinion that the process by which it was made to appear that the properties were sold to Lane was merely colorable.

Parts of sections 1 and 2 of the Sherman Law are as follows:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part

of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor."

The question is whether the combination was illegal under this statute.

This statute must be construed in the light of reason. Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; United States v. American Tobacco Co., 221 U. S. 106, at page 180, 31 Sup. Ct. 632, 648 (55 L. Ed. 663).

In the latter case the Supreme Court said:

"Coming then to apply to the case before us the act as interpreted in the Standard Oil and previous cases, all the difficulties suggested by the mere form in which the assailed transactions are clothed become of no moment. This follows because although it was held in the Standard Oil Case that, giving to the statute a reasonable construction, the words 'restraint of trade' did not embrace all those normal and usual contracts essential to individual freedom and the right to make which were necessary in order that the course of trade might be free, yet, as a result of the reasonable construction which was affixed to the statute, it was pointed out that the generic designation of the first and second sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that in view of the general language of the statute, and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute."

[2] No weight is attached therefore to the means by which the combination was formed if a combination within the purview of the statute was created. That it was a combination of five companies is clear. The fact that this combination took the form of a new corporation is immaterial. United States v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663; United States v. E. I. Du Pont De Nemours & Co. (C. C.) 188 Fed. 127.

Was this combination in restraint of trade? It substantially suppressed all competition between the five companies, and the restraint of competition between combining companies is as illegal as destruction of competition between them without combining.

In United States v. E. I. Du Pont De Nemours & Co., 188 Fed. 127, in an able opinion by Lanning, Circuit Judge, in behalf of Circuit Judges Gray, Buffington, and himself, it is said:

"A number of bills were introduced in the Fiftieth Congress (in August and September, 1888), designed to make unlawful every combination 'to prevent competition' and 'to prevent full and free competition' in the sales of articles transported from one state to another. None of them was enacted into law. On December 4, 1889, Mr. Sherman introduced into the Senate of the Fifty-First Congress a bill which declared unlawful every combination 'to prevent full and free competition' in such sales. After much debate the bill was, on March 27, 1890, referred to the committee on judiciary, and on April 2, 1890, that committee reported it back to the Senate with an amendment, drawn by the late Senator Hoar, striking out all after its enacting clause and substituting therefor the act as we now have it. As enacted, it does not condemn every combination 'to prevent competition.' What it condemns is every combination in restraint of trade or commerce among the several states, etc.

When the bill went from the Senate to the House, the latter body amended it by inserting a provision extending the scope of the act to all agreements entered into for the purpose of 'preventing competition' either in the purchase or sale of commodities; but the amendment was disagreed to. While there is a 'general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body' (United States v. Freight Association, 166 U. S. 318, 17 Sup. Ct. 540, 41 L. Ed. 1007), that rule 'in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law; that is, the history of the period when it was adopted' (Standard Oil Co. v. United States, 221 U. S. 50, 31 Sup. Ct. 512, 55 L. Ed. 619 [34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734], decided May 15, 1911).

"There is a distinction between restraint of competition and restraint of trade. The latter expression had, when the Anti-Trust Act was passed, a definite legal signification. Not every combination in restraint of competition was, in a legal sense, in restraint of trade. Two men in the same town engaged in the same business as competitors may unite in a copartnership, and thereafter, as between themselves, substitute co-operation for competition. Their combination restrains competition, and if their town is located near the line between two states, and each has been trading in both states, their combination restrains competition in interstate trade. But it does not necessarily follow that such restraint of competition is a restraint of interstate trade and commerce. The determination of whether it be so must depend upon the facts and circumstances of each individual case. It is undoubtedly the policy of the statute that competitive conditions in interstate trade should be maintained wherever their abolition would tend to suppress or diminish such trade. But this being true does not read into the statute a denunciation of all agreements that may restrain competition without regard to their purpose or direct effect to restrain 'trade or commerce among the several states.' To what extent the Anti-Trust Act condemns combinations that restrain full and free competition in interstate trade is a question that has been much debated. For a dozen years, at least, it has been settled that it does not condemn combinations which only indirectly, remotely, or incidentally restrain interstate trade.

"The recent decisions of the Supreme Court in Standard Oil Co. v. United States, and American Tobacco Co. v. United States, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, make it quite clear that the language of the Anti-Trust Act is not to receive that literal construction which will impair rather than enhance freedom of interstate commerce. As we read those decisions, restraint of interstate trade and restraint of competition in interstate trade are not interchangeable expressions. There may be, under the Anti-Trust Act, restraint of competition that does not amount to restraint of interstate trade, just as before the passage of the act there might have been restraint of competition that did not amount to a common-law restraint of trade. This fact was plainly recognized in United States v. Joint Traffic Association, 171 U. S. 505, 567, 19 Sup. Ct. 25, 31, 43 L. Ed. 259, where Mr. Justice Peckham said:

"'We might say that the formation of corporations for business or manufacturing purposes has never, to our knowledge, been regarded in the nature of a contract in restraint of trade or commerce. The same may be said of the contract of partnership. It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade. We are not aware that it has ever been claimed that a lease or purchase by a farmer, a manufacturer, or merchant of an additional farm, manufactory, or shop, or the withdrawal from business of any farmer, merchant, or manufacturer, restrained commerce or trade within the legal definition of that term.'

"While all this is true, the recent decisions of the Supreme Court make it equally clear that a combination cannot escape the condemnation of the Anti-Trust Act merely by the form it assumes or by the dress it wears. It matters not whether the combination be 'in the form of a trust or otherwise,' whether it be in the form of a trade association or a corporation, if it arbitrarily uses

its power to force weaker competitors out of business, or to coerce them into a sale to or union with the combination, it puts a restraint upon interstate commerce, and monopolizes or attempts to monopolize a part of that commerce, in a sense that violates the Anti-Trust Act."

In United States v. E. C. Knight Co., 156 U. S. 1, 16, 15 Sup. Ct. 249, 255 (39 L. Ed. 325), Chief Justice Fuller said:

"Again, all the authorities agree that in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition."

And this was reiterated in Addyston Pipe Co. v. United States, 175 U. S. 211, 237, 20 Sup. Ct. 96, 44 L. Ed. 136.

In Northern Securities Co. v. United States, 193 U. S. 197, 331, 24 Sup. Ct. 436, 454 (48 L. Ed. 679), it is said:

"We will not incumber this opinion by extended extracts from the former opinions of this court. It is sufficient to say that from the decisions in the above cases certain propositions are plainly deducible and embrace the present case. Those propositions are: * * * That railroad carriers engaged in interstate or international trade or commerce are embraced by the act; that combinations, even among *private* manufacturers or dealers, whereby *interstate or international commerce* is restrained, are equally embraced by the act; that Congress has the power to establish *rules* by which *interstate and international* commerce shall be governed, and, by the Anti-Trust Act, has prescribed the rule of free competition among those engaged in such commerce."

In United States v. Reading Co., 226 U. S. 324, 370, 33 Sup. Ct. 90, 103 (57 L. Ed. 243), it is said:

"Whether a particular act, contract, or agreement was a reasonable and normal method in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as by the method which was used. Of course, if the necessary result is materially to restrain trade between the states, the intent with which the thing was done is of no consequence. But when there is only a probability, the intent to produce the consequences may become important. United States v. St. Louis Terminal Association, 224 U. S. 383, 394 [32 Sup. Ct. 507, 56 L. Ed. 810]; Swift & Co. v. United States, 196 U. S. 375 [25 Sup. Ct. 276, 49 L. Ed. 518].

"In the instant case the extent of the control over the limited supply of anthracite coal by means of the great proportion theretofore owned or controlled by the defendant companies, and the extent of the control acquired over the independent output which constituted the only competing supply, affords evidence of an intent to suppress that competition, and of a purpose to unduly restrain the freedom of production, transportation, and sale of the article at tide-water markets.

"The case falls well within, not only the Standard Oil and Tobacco Cases, [221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663], but is of such an unreasonable character as to be within the authority of a long line of cases decided by this court. Among them we may cite: Northern Securities Co. v. United States, 193 U. S. 197 [24 Sup. Ct. 436, 48 L. Ed. 679]; Swift & Co. v. United States, 196 U. S. 375 [25 Sup. Ct. 276, 49 L. Ed. 518]; National Cotton Oil Co. v. Texas, 197 U. S. 115 [25 Sup. Ct. 379, 49 L. Ed. 689]; United States v. St. Louis Terminal Association, 224 U. S. 383 [32 Sup. Ct. 507, 56 L. Ed. 810]; and the recent case of United States v. Union Pacific Railway, 226 U. S. 61 [33 Sup. Ct. 53, 57 L. Ed. 124]."

In United States v. American Tobacco Co., 221 U. S. 106, 179, 31 Sup. Ct. 632, 648 (55 L. Ed. 663), it is said:

"Applying the rule of reason to the construction of the statute, it was held in the Standard Oil Case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held, not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret, which inevitably arose from the general character of the term 'restraint of trade' required that the words 'restraint of trade' should be given a meaning which would not destroy the individual right to contract and render difficult, if not impossible, any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect. The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt. Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required in order to give effect to the remedial purposes which the act under consideration contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade, which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us. In truth, the plain demonstration which this record gives of the injury which would arise from and the promotion of the wrongs which the statute was intended to guard against, which would result from giving to the statute a narrow, unreasoning, and unheard of construction, as illustrated by the record before us, if possible, serves to strengthen our conviction as to the correctness of the rule of construction, the rule of reason, which was applied in the Standard Oil Case, the application of which rule to the statute we now, in the most unequivocal terms, re-express and reaffirm."

In Nash v. United States, 229 U. S. 373, 376, 33 Sup. Ct. 780, 781 (57 L. Ed. 1232), referring to the Standard Oil and American Tobacco Co. Cases, it is said:

"Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent *or the inherent nature of the contemplated acts*, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."

In United States v. Freight Association, 166 U. S. 290, 339, 17 Sup. Ct. 540, 558 (41 L. Ed. 1007), the court said:

"The claim that the company has the right to charge reasonable rates, and that, therefore, it has the right to enter into a combination with competing roads to maintain such rates, cannot be admitted. The conclusion does not follow from an admission of the premise. What one company may do in the way of charging reasonable rates is radically different from entering into an agreement with other and competing roads to keep up the rates to that point. If there be any competition, the extent of the charge for the service will be seriously affected by that fact. Competition will itself bring charges down to what may be reasonable, while in the case of an agreement

to keep prices up, competition is allowed no play; it is shut out, and the rate is practically fixed by the companies themselves by virtue of the agreement, so long as they abide by it."

In Shawnee Compress Co. v. Anderson, 209 U. S. 423, 28 Sup. Ct. 572, 52 L. Ed. 865, the Supreme Court held a certain lease valid so far as the mere power to execute it was concerned, but that it became invalid when it tended directly and in a substantial manner to suppress competition under the common law, the Sherman Anti-Trust Law and the laws of Oklahoma. The decision was upon the sole ground of the undue suppression of competition.

[3] Suppression of competition, where the parties to a combination control a large portion of the interstate or foreign commerce in the article, and where there is no obligation to form the combination arising out of the fact that the parties to the same are losing money, or the like, has been held an undue restraint of trade. See Continental Wall Paper Co. v. Voight & Sons Co., 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486; Id., 148 Fed. 939, 78 C. C. A. 567, 19 L. R. A. (N. S.) 143; Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518; Addyston Pipe Co. v. United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; United States v. Addyston Pipe Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; Chattanooga Foundry v. Atlanta, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241; City of Atlanta v. Chattanooga Foundry, 127 Fed. 23, 61 C. C. A. 387, 64 L. R. A. 721; Montague v. Lowrey, 193 U. S. 38, 24 Sup. Ct. 307, 48 L. Ed. 608.

In the United States v. Standard Oil Co. (C. C.) 173 Fed. 177, 184, Sanborn, Circuit Judge, in behalf of himself, Van Devanter, then Circuit Judge, now a Justice of the Supreme Court, and Adams, Circuit Judge, said:

"The purpose of this statute was to keep the rates of transportation and the prices of articles in interstate and international commerce open to free competition. Any contract or combination of two or more parties, whereby the control of such rates or prices is taken from separate competitors in that trade and vested in a person or an association of persons, necessarily restricts competition and restrains that commerce. * * * Agreements of competitive manufacturers and traders not to compete in the purchase or sale of articles in interstate commerce, or to buy or to sell them at prices fixed by a mutual agent or association, * * * are alike declared to be illegal by this law. In the construction and enforcement of this statute, corporations are persons, they are legal entities distinct from their stockholders, and the combination of two or more of them in restraint of trade is as unlawful as the combination of individuals."

In United States v. Addyston Pipe Co., 85 Fed. 271, 282, 29 C. C. A. 141, 151 (46 L. R. A. 122), Taft, Circuit Judge, speaking for Circuit Justice Harlan, the writer of the opinion, and Lurton, Circuit Judge, late a Justice of the Supreme Court, in an opinion exhaustive in its review of foreign and state decisions, quotes with approval from the opinion of Chief Justice Tindal in Horner v. Graves, 7 Bing. 735, the following:

"We do not see how a better test can be applied to the question whether this is or not a reasonable restraint of trade than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the

interests of the public. Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy."

In the United States v. American Tobacco Co. (C. C.) 164 Fed. 700, 702, 703, in an opinion by Lacombe, Circuit Judge, on behalf of himself and Coxe and Noyes, Circuit Judges, it is said:

"What benefits may have come from this combination, or from the others complained of, it is not material to inquire, nor need subsequent business methods be considered, nor the effects on production or prices. The record in this case does not indicate that there has been any increase in the price of tobacco products to the consumer. There is an absence of persuasive evidence that by unfair competition or improper practices independent dealers have been dragooned into giving up their individual enterprises and selling out to the principal defendant. * * *

"During the existence of the American Tobacco Company new enterprises have been started, some with small capital, in competition with it, and have thriven. The price of leaf tobacco—the raw material—except for one brief period of abnormal conditions, has steadily increased, until it has nearly doubled, while at the same time 150,000 additional acres have been devoted to tobacco crops and the consumption of the leaf has greatly increased. Through the enterprise of defendant and at large expense new markets for American tobacco have been opened or developed in India, China, and elsewhere. But all this is immaterial. Each one of these purchases of existing concerns, complained of in the petition, was a contract and combination in restraint of a competition existing when it was entered into, and that is sufficient to bring it within the ban of this drastic statute."

In State v. International Harvester Co., 237 Mo. 369, 394, 141 S. W. 672, 677, the court said:

"In the case at bar we are to take the acts of the parties and judge their purpose by the consequence that would naturally result. When men deliberately and intelligently go to work and acquire power that will enable them to control the market, if they choose to exercise it, there is no use for them to say that they did not intend to control the trade or limit competition, nor when the legality of their act of acquisition is in question is it any use for them to say, 'We have not used the power to oppress any one.'"

[4] We think it may be laid down as a general rule that if companies could not make a legal contract as to prices or as to collateral services they could not legally unite, and as the companies named did in effect unite the sole question is as to whether they would have agreed on prices and what collateral services they could render, when their companies were all prosperous and they jointly controlled 80 to 85 per cent. of the business in that line in the United States. We think they could not have made such an agreement. Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U. S. 227, 29 Sup. Ct. 280, 53 L. Ed. 486; Id., 148 Fed. 939, 78 C. C. A. 567, 19 L. R. A. (N. S.) 143; Addyston Pipe Co. v. United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518.

If the five companies which formed the International had been small, and their combination had been essential to enable them to compete with large corporations in the same line, then their uniting would, in the light of reason, not have been in restraint of trade, but in the furtherance of it; but when they constituted the largest manufacturers of

their articles in America, if not in the world, and held jointly about 80 to 85 per cent. of the trade, and two at least of the companies forming the combination were prosperous, their combining was, when similarly viewed, an unreasonable restraint of trade. If the business of the separate companies combining was unsuccessful, it could be claimed that their combination was reasonable, in view of the rule of reason as proclaimed by the Supreme Court; but it is conceded that the McCormick and the Deering Companies "had established reasonably successful and prosperous businesses," so that question is eliminated.

There is no limit under the American law to which a business may not independently grow, and even a combination of two or more businesses, if it does not unreasonably restrain trade, is not illegal; but it is the combination which unreasonably restrains trade that is illegal, and if the parties in controversy have 80 or 85 per cent. of the American business, and by the combination of the companies all competition is eliminated between the constituent parts of the combination, then it is in restraint of trade within the meaning of the statute, under all of the decisions.

The International is not only a great manufacturing company, but by the America Company is a great dealer in agricultural implements in interstate and foreign commerce, and so the case comes more nearly within the ruling in Addyston Pipe Co. v. United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, than United States v. Knight, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325.

It seems proper to call attention to the fact that all commerce is classified as intrastate, interstate, or foreign; both the first and second sections of the Sherman Law treat interstate and foreign commerce as separate and distinct entities. Foreign commerce is as distinct from interstate commerce as interstate commerce is distinct from intrastate commerce. Each is a unit. While intrastate commerce is within the control of the states, interstate and foreign commerce are both within the control of the United States, but as separate entities or units. The Congress has condemned any combination in restraint of either the foreign or the interstate trade, and if the International Harvester Company was in restraint of either the interstate or foreign trade it was unlawful. It would not be lawful to restrain the interstate trade in order to build up the foreign trade. The International, by suppressing all competition between the five original companies, was in restraint of trade as prohibited in the first section of the Sherman Law, and it tended to monopolize within the meaning of the second section of the same law, and this restraint and this monopoly were the direct and immediate effect of the consolidation, and were not incidental and uncertain in their effect.

In Standard Sanitary Manufacturing Co. v. United States of America, 226 U. S. 20, 49, 33 Sup. Ct. 9, 15 (57 L. Ed. 107), the court said:

"The Sherman Law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained.

"This court has had occasion in a number of cases to declare its principle. Two of those cases we have cited. The others it is not necessary to review or to quote from except to say that in the very latest of them the comprehensive and thorough character of the law is demonstrated and its sufficiency to pre-

vent evasions of its policy 'by resort to any disguise or subterfuge of form.' or the escape of its prohibitions 'by any indirection.' United States v. American Tobacco Co., 221 U. S. 106, 181 [31 Sup. Ct. 632, 649 (55 L. Ed. 663)]. Nor can they be evaded by good motives. The law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and it may be of some good results. United States v Trans-Missouri Freight Ass'n, 166 U. S. 290 [17 Sup. Ct. 540, 41 L. Ed. 1007]; Armour Packing Co. v. United States, 209 U. S. 56, 62 [28 Sup. Ct. 428, 52 L. Ed. 681]."

We conclude that the International Harvester Company was from the beginning in violation of the first and second sections of the Sherman Law, and that this condition was accentuated by the reorganization of the America Company and by the subsequent acquisitions of competing plants, and that all the defendant subsidiary companies became from time to time parties to the illegal combination, and the defendant companies are combined to monopolize a part of the interstate and foreign trade. It will therefore be ordered that the entire combination and monopoly be dissolved, that the defendants have 90 days in which to report to the court a plan for the dissolution of the entire unlawful business into at least three substantially equal, separate, distinct, and independent corporations, with wholly separate owners and stockholders, or in the event this case is appealed, and this decree superseded, then within 90 days from the filing of the procedendo or mandate from the Supreme Court the defendants shall file such plan, and in case the defendants fail to file such plan within the time limit the court will entertain an application for the appointment of a receiver for all the properties of the corporate defendants, and jurisdiction is retained to make such additional decrees as may become necessary to secure the final winding up and dissolution of the combination and monopoly complained of, and as to costs.

HOOK, Circuit Judge (concurring). I concur in the foregoing opinion. The International Harvester Company is not the result of the normal growth of the fair enterprise of an individual, a partnership or a corporation. On the contrary, it was created by combining five great competing companies which controlled more than 80 per cent. of the trade in necessary farm implements, and it still maintains a substantial dominance. That is the controlling fact; all else is detail. No one who has studied with an open mind the history of the Sherman Act and the atmosphere in which it was framed can reasonably doubt that it was not born of a mere concern over prices in dollars and cents, but that it was also directed at the creation of artificial barriers across the avenues of industry, deemed destructive of the opportunity, initiative and independence of those who come after, and therefore against the common good. And the remedy prescribed was prohibition. It may be, as is said, that there is a growing recognition of the need of great concentrated resources for trade and commerce, even though secured by combination of independent, competing concerns. But that is not the Sherman Act. And a statute must be taken by the courts as a true estimate of that preponderance of public opinion which calls for legislative expression. It is not for them to question whether that

opinion was rightly weighed or interpreted, whether it is wise or unwise or whether it has since changed. The intent of a statute at its passage must continue. It does not automatically adjust itself to the variations of the public pulse, and a judicial adjustment would be an usurpation. In our national government such things are for Congress alone.

It is but just, however, to say and to make it plain that in the main the business conduct of the company towards its competitors and the public has been honorable, clean, and fair. Some petty dishonesties were tracked in at the start, mostly by subordinates who had been in the service of the old companies, but they were soon gotten rid of. In this connection it should also be said that specific charges of misconduct were made in the government's petition, which found no warrant whatever in the proof. They were of such a character and there was so much of them, apparently without foundation, that the case is exceptional in that particular.

SANBORN, Circuit Judge (dissenting). It is the opinion of the majority of the court that the property and the foreign and interstate business of the International Company must be divided into at least three substantially equal and independent parts, or placed in the hands of a receiver under a decree of this court, because in 1902 five companies theretofore engaged in the manufacture and sale of harvesting machinery, controlling about 85 per cent. of the interstate and foreign trade therein, combined in the International Company, ceased and have not since resumed competition among themselves. With profound respect for their judgment, I find myself forced to dissent from it: (1) Because it seems to me to give insufficient consideration to the trade conduct of the defendants at the time this suit was commenced in April, 1912, and for seven years before that date; (2) because the crucial issue in this case is not whether or not in 1902 or 1903 the defendants or their predecessors, by reason of the suppression of competition between five or more companies, made a combination or an attempted monopoly in restraint of trade, but it is whether or not ten years afterwards, in 1912, when the complaint in this suit was filed, the International Company and the other defendants were then unduly or unreasonably restraining or monopolizing interstate or foreign trade, or threatening so to do; and (3) because the evidence in this case has forced upon my mind the deep and abiding conviction that, for at least seven years before the commencement of this suit, the defendants had not been, and then were not, either so doing or threatening so to do.

1. Conceding, but not admitting, that if the combination of 1902 and 1903 had been challenged in 1903 or 1904, before the actual effect of the conduct of its business by the defendants upon interstate and foreign trade had been demonstrated by the actual trial of it from 1905 to 1912, a court might have presumed that the defendants were violating the Anti-Trust Law, and have so found on the theory that those who have power to violate a law are presumed to do so, yet the demonstration by actual trial, which the evidence seems to me to present, that at the time this suit was commenced the defendants were, and for

at least seven years before that time had been, conducting the business of the International Company and their business without unduly restraining or monopolizing interstate or foreign trade ought to, and in my opinion must, far outweigh that questionable presumption. I say questionable presumption, because while it was invoked to sustain the view of the majority of the Supreme Court in that case in which they declared that the prohibition of the Anti-Trust Law was not limited to restraints of and attempts to monopolize interstate and foreign trade that were deleterious to the public and unreasonable, but embraced every direct restraint, whether beneficial or injurious to the public, and whether reasonable or unreasonable (Northern Securities Co. v. United States, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 679; Harriman v. Northern Securities Co., 197 U. S. 244, 291, 25 Sup. Ct. 493, 49 L. Ed. 739), and while it has been since cited in some cases, doubtless in deference to its citation in that case, it flies in the face of the basic principle of civil government and the indispensable and indisputable rule of law and of action that all persons are presumed to obey the laws and to discharge their legal and moral duties until the contrary is proved (Cole v. German Savings & Loan Society, 124 Fed. 113, 119, 59 C. C. A. 593, 63 L. R. A. 416; American Bridge Co. v. Seeds, 144 Fed. 605, 609, 75 C. C. A. 407, 11 L. R. A. [N. S.] 1041), and it is contrary to the universal experience of mankind, for persons who acquire the power to violate laws, whether against murder, or arson, or larceny, or undue restraints of trade, or unreasonable monopolies, or other forbidden acts, generally obey those laws and fail to exercise their power to violate them. This alleged presumption never seemed well founded or reasonable to me, and now that the rule of reason must be applied to the interpretation of the Anti-Trust Law and to its application to the facts of each particular case, as well as to other laws and to the facts of other cases (Standard Oil Co. v. United States, 221 U. S. 1, 64, 67, 68, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734; United States v. American Tobacco Co., 221 U. S. 106, 179, 31 Sup. Ct. 632, 55 L. Ed. 663), I think this alleged presumption should be deemed functus officio.

2. The controlling issue in this case is not what combination or monopoly was made in 1902, 1903, or 1904, nor whether or not that combination was violative of the Anti-Trust Law. It is: Were the defendants in 1912 doing or threatening to do acts which so unreasonably restrained or monopolized interstate or foreign trade that it is the duty of this court of equity to enjoin and prevent their future performance? Sections 1 and 2 of the Anti-Trust Law forbid combinations and monopolies in undue restraint of interstate or foreign trade, and prescribe punishment by fine or imprisonment, or both, for any violation thereof; and section 725 of the Revised Statutes (U. S. Comp. St. 1901, p. 583) bars any prosecution under these acts for such violations three years after they are committed. 26 Stat. 209, c. 647, §§ 1, 2, and 4; Rev. St. § 1044 (U. S. Comp. St. 1901, p. 725); 3 Comp. St. 3200 and 3201; 1 Comp. St. 725, § 1044. If, therefore, a combination or monopoly, in unreasonable restraint of trade, was made in

1902, 1903, or 1904, the proceedings to punish for the making thereof were barred many years before this suit was commenced.

Section 4 of the act gives jurisdiction to this court "to prevent and restrain violations of this act," but it grants this court no power to punish past violations thereof. This suit is not a proceeding to punish the defendants for deeds done in the past. It is a suit in equity under section 4 to prevent and restrain future violations of the Anti-Trust Law. It looks to the future, not to the past, and this court is not only without jurisdiction to punish defendants for past violations of this law, but persons who at some past time combined to unreasonably restrain or monopolize interstate or international trade were not thereby deprived of their right thereafter and now to conduct such trade in obedience to the law. New York, New Haven & Hartford R. R. Co. v. Interstate Commerce Comm., 200 U. S. 361, 404, 26 Sup. Ct. 272, 50 L. Ed. 515; United States v. Standard Oil Co. (C. C.) 173 Fed. 177, 190, 191. This suit, therefore, is nothing more than an appeal to the consciences of the members of this court of equity to prevent and enjoin future violations of this law by the defendants, and under familiar principles of equity jurisprudence no such restraint, injunction, or other relief may be lawfully granted here, unless the particular facts proved in this individual case clearly show that the defendants were violating or threatening to violate this Anti-Trust Act when this suit was commenced.

3. The particular facts proved in this individual case not only fail to show that the defendants were unduly or unreasonably restraining or attempting to monopolize interstate or foreign trade, or threatening so to do at the time this suit was commenced and for seven years before that time, but they establish the converse.

That the Anti-Trust Law is but the embodiment and application to interstate and foreign trade of the ancient English rule of public policy against undue and unreasonable restraints of trade and unreasonable monopolies, that it does not forbid all restraints upon such trade or all attempts to monopolize it, nor all restrictions of competition therein, but those only which are unreasonably injurious to the public, that the reason for and the purpose of the Anti-Trust Act are the same as the reason for and the purpose of that English rule of public policy, that the test and standard by which to determine whether or not the defendants in any case are unreasonably restraining or monopolizing interstate or foreign trade is the same which had been applied under the English rule of public policy for years before this Anti-Trust Act was enacted, and that, as Chief Justice White said, "the statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint," are now rules of interpretation and application of this law conclusively established by the repeated decisions of the highest judicial tribunal in the land. Standard Oil Co. v. United States, 221 U. S. 1, 60, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A.

(N. S.) 834, Ann. Cas. 1912D, 734; United States v. American Tobacco Co., 221 U. S. 106, 179, 31 Sup. Ct. 632, 55 L. Ed. 663. Trade is the making and enforcing of contracts. And it necessarily follows, from the rule laid down in the excerpt just quoted from the opinion of the Chief Justice, that the Anti-Trust Act evidenced the intent not to restrain, and that it does not restrain, the trade or business of the defendants, "whether resulting from combination or otherwise," unless that trade or business is conducted by methods which constitute an interference which is an undue restraint of interstate or foreign commerce.

It is equally well established that the reason for the prohibition by the English rule of public policy and by the statute under consideration of unreasonable restraints of and attempts to monopolize trade was and is that, by unduly restricting competition, they are injurious to the public in that (1) they raise the prices to the consumers of the articles they affect, (2) limit their production, (3) deteriorate their quality, and (4) decrease the wages of the labor and the prices of the materials required to produce them. Standard Oil Co. v. United States, 221 U. S. 1, 52, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734. Undue injury in the ways just stated to the public (that is to say, to the consumers and makers of the articles produced or sold) is the basis and reason for the prohibition and the test of undue or unreasonable restraint or attempt to monopolize. And if in any individual case the weight of the evidence fails to prove that the defendants' conduct of their business is so restricting or threatening to restrict competition in the articles they make or sell as to unduly injure the public by (1) raising the prices of the articles to the consumers, or (2) limiting their production, or (3) deteriorating their quality, or (4) decreasing the prices paid for the labor or materials required to produce them, or (5) by unfair and oppressive treatment of competitors, neither undue nor unreasonable restraint of competition, nor of trade, nor undue attempt to monopolize is established. The reason for the rule and for the prohibition in the law does not exist, and the law is inapplicable. "Cessante ratione, cessat ipsa lex." Green v. Liter, 8 Cranch, 229, 249, 3 L. Ed. 545. Such a case the evidence in this case seems to me to present.

Counsel for the government recognize the fact that it was essential to the grant of the relief they sought that they should plead and prove that, at the commencement of this suit, the defendants were committing, and threatening to commit, the acts constituting undue restriction of competition, undue restraint of trade, and undue attempt to monopolize trade which have been recited, and they alleged that they were committing them in their complaint. The main charge in their pleading was that the defendants between 1903 and April 30, 1912, had, by means of the International Company, unduly restricted competition in the manufacture and sale of harvesting machinery, drawn to itself the business therein, excluded other manufacturers and dealers therefrom, and that they threatened to continue so to do. The evidence, however, seems to me to have established the following facts, which in my judgment prove the contrary:

The amount of the domestic sales of the old lines claimed to have been monopolized (that is to say, of the harvesting machinery) by the five companies whose business was acquired by the International Company in 1902 was $46,142,158.64 in that year. The amount of the domestic sales of like machinery by the International Company in 1903 was $37,763,858.55, a decrease of 18.16 per cent.; in 1904 it was $32,337,917.32, a decrease in the two years of 29.92 per cent.; in 1905 it was $30,999,632.59, a decrease in the three years of 32.82 per cent.; and in 1912 it was only $39,062,455.36, which was 15.34 per cent. less than the amount of the domestic sales of the combining companies in 1902.

The average yearly acreage and production of small grain in the United States during the ten years prior to 1913 was greater than during the nine years prior to 1903. But the yearly average domestic sales of the International Company of all agricultural machinery, including both the old lines charged to have been monopolized and the new lines, such as harrows and cultivators, during the ten years prior to 1913, was $46,810,067, which was more than a million dollars less than the domestic sales of the vendor companies in 1902.

In 1903 the International Company sold 98.15 per cent. of the binders sold in the United States; in 1912 only 85.04 per cent. thereof. In 1903 the International Company sold 92.05 per cent. of all the mowers sold in the United States; in 1912 only 72.98 per cent. thereof. In 1903 the International Company sold 84.91 per cent. of the rakes sold in the United States; in 1911 it sold 67.79 per cent. thereof.

The average number of binders sold in the United States yearly by the five combining companies during the five years prior to 1902 was 152,364; the average number sold yearly by the International Company during the first ten years of its existence was 91,465.

In 1903 the International Company had five competitors, who in that year sold in the United States 1,960 binders, while in 1912 these competitors sold 15,631 binders and three new competitors sold 3,979. In 1903 eight competitors of the International Company sold in the United States 17,985 mowers, and in 1912 these and six other competitors sold 60,816. In 1903 ten competitors of the International Company sold in the United States 27,753 rakes, and in 1911 these and five other competitors sold 42,723, while the International Company sold 157,160 in 1903 and only 89,912 in 1912. In 1901 and 1902, in the section of Nebraska south of the Platte river, the combining companies sold substantially all the binders, but in 1912 the evidence tends to show that their competitors sold about one-half the binders sold in that country.

During all of the ten years prior to 1913, the International Company has had active and successful competitors in the manufacture and sale of harvesting machines, and during those years new competitors have established themselves in the business and become successful. Among its competitors in the manufacture and sale of harvesting machinery are the Acme Company, which entered the field in 1907 or 1908, which makes harvesting machinery only, which conducts a growing and successful business, and which sold in the United

States 11,400 harvesting machines in 1908 for $779,672 and 31,000 harvesting machines in 1912 for $2,100,000; Deering & Co. with an issued capital stock of over $50,000,000, which sold 490 mowers in 1906 and 7,314 in 1911; the Johnston Harvester Company with an issued capital stock of $1,800,000 whose sales of binders increased from 1,002 in 1903 to 3,027 in 1911, whose sales of mowers increased from 2,527 in 1903 to 7,026 in 1911, whose sales of corn binders increased from 528 in 1903 to 3,150 in 1911, and whose sales of rakes increased from 1,855 in 1903 to 5,200 in 1911; the Independent Harvester Company, which entered the field with the manufacture of 954 mowers and 135 binders in 1910 and increased its output to about 2,700 mowers and about 1,900 binders in 1912; the Wood Mowing & Reaping Company and several others, while the J. I. Case Threshing Machine Company, with an issued capital stock of $20,000,000, was constructing, when this suit was commenced, a large plant to manufacture a binder to be sold in competition with those of the International Company. The foregoing facts portray the course of the business in the old lines. In the new lines scores of companies and tens of millions of dollars of capital were and are engaged in active and successful competition with the International Harvester Company. The facts which have been recited, and other facts and circumstances to the same effect, seem to me to establish the conclusion that, during the ten years of the operation of the International Harvester Company, neither it nor the defendants were, nor are they, drawing to it its competitors' share of the interstate trade in harvesting machinery, or excluding them therefrom, and that, on the other hand, the International Company's proportion of this trade has been decreasing and that of its competitors increasing.

Counsel for the government charged that the defendants bought factories and failed to operate them in order to restrain and monopolize the trade, but the proof was that they operated every factory they purchased. And the purchase of factories and the organization and operation of subsidiary companies to produce or prepare the raw materials needed for the manufacture of their machines, or to manufacture new lines of implements, was a just and lawful method of conducting their business and tended not to restrain but to promote trade and competition.

If competition is desirable, the entry of a new competitor into any line of manufacture or trade is ordinarily lawful and must be generally beneficial.

The government charged that the defendants systematically bought up patents on and inventions of harvesting machinery in order to make or perpetuate a monopoly in the trade in it. But the proof was that the defendants have no patents upon any parts of any of their harvesting machines, and that any manufacturer is free to make and sell any or all parts of them in competition with them.

Counsel for the government alleged that the defendants reduced the prices of its machines in certain localities in order to drive competitors out of the trade, and increased their prices in other localities to make up the loss, and that it committed many oppressive and un-

just acts to restrict competition and monopolize trade. Volumes of evidence were taken regarding these averments. The conduct of the business of the defendants for years in all parts of the land were searched and proved. Among the innumerable acts of the defendants and their agents in conducting their vast business for a decade, the government found some that were unfair to competitors, but they were either unauthorized acts of subordinate agents or sporadic and exceptional instances. The weight of the evidence of the officers and agents of their competitors who came in large numbers to testify, and of all the witnesses upon the subject, is so overwhelming that the general conduct and the almost universal practice of the defendants and their agents was and is free from all methods and acts either unlawful, unfair, or oppressive towards their competitors, that it has left no doubt that the consistent and persistent purpose, policy, rule of action, and practice of the defendants has been and is to avoid and prevent all acts and methods unfair, unjust, or oppressive towards their competitors, to leave competition with them free, to give to them full and fair opportunities to secure shares of the trade and business in which they are all engaged, and to carry on their own trade honestly, justly, and fairly.

During the ten years from 1902 to 1912 there was a general and substantial rise in the prices of machinery and commodities of nearly all kinds in the United States. Harvesting machines were improved and made more durable and efficient. But their prices to the consumers remained nearly stationary, and increased far less than the prices of other agricultural machinery the trade in which was not claimed to have been restrained or monopolized. The chief harvesting machine was the binder. Its price advanced about 5 per cent. during some of the intermediate years, but was substantially the same in 1912 for a better machine that it was for a poorer machine in 1902, while the prices of cultivators, wagons, and plow goods, which were certainly not monopolized, advanced from 10 to 30 per cent.

The government charged that the defendants monopolized the trade in binder twine and increased its price to the consumers, but the proof was that in 1912 the inmates of two state's prisons and fourteen other competitors were selling binder twine; that one of them, the Plymouth Cordage Company, sold 100,000,000 pounds of it in that year, while the International Company sold only 112,000,000 pounds in the United States and 22,000,000 pounds in Canada; and that the price of binder twine decreased from 11 cents a pound in 1902 to 7¼ cents a pound in 1912. Meanwhile the cost of the raw material required to make harvesting machines advanced and the wages of the labor required to construct them increased from 20 to 30 per cent.

So it is that the evidence has convinced me that at least for seven years before this suit was commenced, and at that time, the defendants were neither unduly restricting competition in the manufacture or sale of the machinery and articles in which they were dealing or drawing to themselves an undue share of the business therein, or excluding other manufacturers and dealers therefrom, or practicing acts unjust or unfair to, or oppressive of, their competitors, or threatening

so to do; that they were not injuring the public by raising the prices to the consumers of the articles in which they dealt, or limiting the production thereof, or deteriorating their quality, or decreasing the wages of the laborers employed to make them, or the prices paid for the materials required to construct them, or threatening so to do; but that they were doing the opposite of these things. And the acts of the defendants and the proved effect of their acts during at least seven years before this suit was commenced, to my mind, demonstrate the fact that they were neither unduly nor unreasonably restraining or attempting to monopolize interstate or foreign trade in the articles they made and sold, and that they and their case fall far without the prohibition of the Anti-Trust Law and the reason for it.

4. The only reason for the prevention or restraint of acts of defendants in a suit under the fourth section of the statute is, as we have seen, that they are or threaten to be unduly injurious to the public. If they are not thus injurious, or if they are beneficial, and such restraint or prevention of their acts would be injurious to the public, they should not be restrained or prevented. The defendants claim that the main purpose of the combination of 1902 and 1903 was to develop the foreign trade in American harvesting machines; that that development could not be successfully made without a much larger capital than any of the combining companies possessed; and that the cessation of competition among the combining companies was merely incidental to the acquisition of the capital requisite to accomplish that purpose. The facts in this case are so clear that the purpose and intent of the defendants are not material. The prevention or restriction of their acts by the decree of a court of equity is always a matter within the sound judicial discretion of the chancellor or chancellors composing the court, and, while in exercising this discretion the rules of law and the facts already stated seem to me to be decisive, the following are not altogether unworthy of consideration. The proof is that during the ten years preceding 1913 the International Company at great expense taught the people of foreign countries the use of American harvesting machinery, and developed the foreign trade therein in such a way that, while in 1902 the sales in foreign trade of machines, repairs, and twine by the companies whose business was acquired by the International Company amounted to about $10,400,000, the sales of the International Company in the foreign trade gradually increased until in 1912 they amounted to $50,896,000, and so that, while in 1903 the domestic sales of that company were 76.5 per cent., and its sales in the foreign trade were 23.5 per cent., of its total sales, in 1912 its domestic sales were 55.7 per cent., and its sales in the foreign trade 44.3 per cent., of its total sales. The employment of the necessary American laborers and salesmen at the increasing wages the defendants have paid and are paying to make and to sell in other lands these machines and the purchase at the increasing prices paid of the materials to construct this vast volume of machinery unavoidably tends to increase the wages of the laborers and the prices of the materials, and hence to benefit the public, and any receivership or subdivision of the property and the business of

these defendants cannot fail to tend to cripple and diminish this business, to restrain the advance, or to decrease the wages of the laborers and the prices of the materials required to carry it on, and thereby to inflict injury upon the public.

Again, the combination denounced and the International Company, in which it was embodied, have been in existence, and that company and the other defendants had been conducting their business, for almost ten years before this suit was commenced. If the making of that combination was originally a violation of the Anti-Trust Act, the prosecution of the defendants at law under sections 1 and 2 of the Anti-Trust Act for that violation was barred many years before this suit was commenced. It is a general rule of equity jurisprudence that the courts of chancery will apply the doctrine of laches in analogy to the limitation of like actions at law. Conceding that this rule does not control this suit because mere delay does not bar a sovereignty from sustaining a suit in equity to maintain and enforce its equitable rights, nevertheless, when a sovereignty submits itself to a court of equity and prays its aid, its claims and rights are, and ought to be, judicable by the general principles and rules of equity applicable to the claims and rights of private parties under like circumstances. State of Iowa v. Carr, 191 Fed. 257, 266, 112 C. C. A. 477, and cases there cited. It is a maxim of equity jurisprudence that, as Lord Camden said in Smith v. Clay, 3 Brown's Chancery, 639: "Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence." The business of the International Company gradually increased during nearly ten years after the formation of the combination assailed until that business reached the vast volume indicated at the time this suit was commenced. Its business was conducted openly without legal challenge or attack, so far as this record shows, during all these years, and it is not improbable that many parties hold stock of the International Company which they purchased during these ten years in reliance upon these facts, the value of which a decree against the defendants will greatly depreciate. So it is that in any event this suit does not appeal to the conscience of a chancellor with the force it might have had in 1903 or 1904 before the actual conduct of the business of the defendants had demonstrated its innocuous effect and no parties had been induced to act in reliance upon its freedom from attack.

5. The evidence in this suit seems to me to present a new case under the Anti-Trust Law. No case has been found in the books, and none has come under my observation, in which the absence of all the evils against which that law was directed at the time the suit was brought, and for seven years before, was so conclusively proved as in this suit, the absence of unfair or oppressive treatment of competitors, of unjust or oppressive methods of competition, the absence of the drawing of an undue share of the business away from competitors and to the defendants, the absence of the raising of prices of the articles affected to their consumers, the absence of the limiting of the product, the absence of the deterioration of the quali-

ty, the absence of the decrease of the wages of the laborers and of the prices of the materials, the absence, in short, of all the elements of undue injury to the public and undue restraint of trade, together with the presence of free competition which increased the share of the competitors in the interstate trade and decreased the share of the defendants. Neither the Standard Oil Co. Case, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, nor the American Tobacco Co. Case, 221 U. S. 106, 108, 31 Sup. Ct. 632, 55 L. Ed. 663, nor any other authority cited, seems to me to rule this case, because in none of them was there such affirmative and, to my mind, conclusive evidence that for years before the suits were commenced the defendants had practiced no acts and pursued no methods which constituted an undue restraint of trade or an unreasonable attempt to monopolize it.

And because in this suit this court is without power to punish past violations of the Anti-Trust Law, and the limit of its jurisdiction is to prevent and enjoin future acts violative thereof, because the making of the combination of 1902 and 1903, whether violative of the Anti-Trust Law or not, did not deprive the defendants of their right thereafter and now to conduct their business in obedience to that law, because the question in this case is not whether or not the combination of 1902 and 1903 was violative of that law, but it is whether or not in April, 1912, when this suit was commenced, the defendants were unduly or unreasonably restraining or attempting to monopolize interstate or foreign trade, because it was not the effect of the Anti-Trust Law, nor was it the intent of the Congress which passed it, to prohibit all restriction of competition or all restraints of interstate or foreign trade, or all attempts to monopolize parts of it, but only those restraints and attempts to monopolize which are unduly injurious to the public by (1) raising the prices to the consumers of the articles they affect, (2) limiting their production, (3) deteriorating their quality, (4) decreasing the wages of the laborers and the prices of the materials required to produce them, or (5) practicing unfair and oppressive treatment of competitors, because the evidence has convinced me that for at least seven years before this suit was commenced, and at that time, the defendants were not injuring the public by unduly or unreasonably restricting competition in the manufacture or sale of the machinery or articles which they were making and selling, or by drawing to themselves an undue share of the business therein, or by excluding other manufacturers or dealers therefrom, or by practicing acts unjust or unfair to, or oppressive of, their competitors, that they were not injuring the public by raising the prices to the consumers of the articles they made or sold, or limiting their production, or deteriorating their quality, or decreasing the wages of the laborers employed to make them, or the prices paid for the materials required to construct them, that they were not threatening to do these things, but they were doing the opposite of these things to the substantial benefit of their competitors, of the consumers of their products, of the laborers who make them, the men who furnish the material for

them, and the public in general, because the acts of the defendants during these seven years do not constitute that undue or unreasonable restraint of or attempt to monopolize interstate or foreign trade forbidden by the Anti-Trust Act, and because, in my opinion, the prevention or restraint of these acts or this business of the defendants, or the splitting of their business and property into three or more independent parts, or the seizure of it by a receiver, by virtue of a decree of a court of equity, would not tend to prevent undue restraint of, or undue attempts to monopolize, interstate or foreign trade, but, on the other hand, would tend to produce or foster the very evils at which the Anti-Trust Act was leveled, to wit, the restriction or lessening of competition, the increase of the prices of the machinery and articles affected, the deterioration of their quality, the limitation or reduction of the product and the diminution of the wages of the laborers making them and of the prices of the materials required to produce them to the substantial injury of the public, I am unable to concur in the opinion or the decree against the defendants in this case. In my opinion, a decree should be rendered that the complaint in this suit be dismissed without prejudice to the right of the United States to bring another suit of like character against any of the defendants whenever any of them is found to be engaged in the commission of any acts in violation of the anti-trust statute.

In re MARTIN.

(District Court, W. D. Texas, Austin Division. June 17, 1914.)

In Bankruptcy. No. 593.

BANKRUPTCY (§ 399*)—EXEMPTIONS—BUSINESS HOMESTEAD—WAIVER.

Where an owner of a business homestead assigned all his property for the benefit of creditors, and the assignee entered into possession and conducted the business, and the owner for nearly two years, until he was adjudged a bankrupt, did not engage in any business in which the premises would have been useful to him as a place of business, and he had no reasonable basis for a belief that the business would be returned to him, he could not claim the property as exempt as a business homestead.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. § 399.*]

In Bankruptcy. In the matter of John Martin, bankrupt. From an order of the referee affirming an order of the trustee, refusing to set aside property claimed by the bankrupt as a business homestead, the bankrupt and his wife appeal. Affirmed.

The question before the court arises upon a petition filed by the bankrupt to review the order of the referee, Dudley K. Woodward, Jr., by which he declined to disturb the order of the trustee in refusing to set aside certain property claimed by the bankrupt as a business homestead.

The facts are fully set forth in the following findings of the referee:

"Findings of Fact.

"During the month of December, 1909, John Martin acquired the property in question, being a lot 60 by 90 feet out of the northeast corner of block 9

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

of Fulcher's addition to the town of Brady in McCulloch county, Tex., together with the improvements thereon, for a recited consideration of $15,000, he being at that time a resident citizen of the town of Brady.

"On January 12, 1911, the bankrupt executed an application for a loan in the sum of $10,000, offering as security therefor a deed of trust upon the property in question, together with other real estate owned by him at the time. This application was evidenced by two instruments executed and acknowledged by the bankrupt, true copies of same being hereto attached and marked 'Exhibits A and B,' respectively. On February 21, 1911, pursuant to the application aforesaid, a loan in the sum of $10,000 was made by the John Deere Plow Company to the bankrupt, and a deed of trust lien was duly executed by the bankrupt and his wife and recorded the same day. A true copy of said deed of trust, marked 'Exhibit C' is hereto attached and here referred to for all pertinent purposes.

"There was serious conflict of testimony as to whether or not the bankrupt was occupying the premises in question as a business homestead at the date of the execution of the deed of trust referred to, but that question is not deemed material to the decision of this case, and no finding is here made regarding it.

"On May 1, 1911, the bankrupt and his brother, P. J. Martin, conducting a general mercantile business, moved into the building in question, a portion of which prior to that time had been occupied by the bankrupt as a moving picture theater.

"In the fall of 1911 the bankrupt, still doing business with his brother in the premises aforesaid, negotiated a sale of the entire business, including the building in question, to certain parties living in Hill county, Tex., who, pursuant to such trade, went to Brady and temporarily took charge of the business and building in which the same was located. Shortly thereafter these prospective purchasers made default in the trade and turned back to the bankrupt and his brother the properties of which they had taken possession with a view of closing the trade.

"Very shortly thereafter, on October 16, 1911, P. J. Martin sold his interest in the business to the bankrupt, who became by such purchase the sole owner of same, and who continued to conduct such business in the building in question until the 18th day of December, 1911, at which time he executed an instrument in the nature of an assignment of all of his property, including the building in question, to one A. B. Reagan for the benefit of his creditors. The original of said assignment marked 'Exhibit D' is hereto attached and here referred to for all purposes.

"Immediately after the execution and delivery of the assignment to Reagan the latter entered into possession of the business of the bankrupt, which had previously thereto been conducted in the premises in question, and proceeded under the terms of said assignment to manage, operate, and control said business until December 7, 1912. On the latter date the bankrupt executed a further instrument in favor of A. B. Reagan, amplifying the terms of the original assignment, a true copy of said instrument of date December 7, 1912, being attached hereto and marked 'Exhibit E,' and here referred to for all purposes.

"After the execution of the supplemental transfer dated December 7, 1912, as aforesaid, Reagan continued in full control and management of said business until the February term, 1913, of the district court of McCulloch county, at which time upon a suit filed by Reagan to have the assignment aforesaid construed, judgment was entered relieving Reagan from his trust, and Coke Martin, a son of the bankrupt, was appointed by the court as Reagan's successor. The order of appointment fixed the bond of the said Coke Martin at $5,000, but it does not appear that he ever qualified by giving such bond.

"However, from the entry of the judgment aforesaid until the entry of a judgment at the September term of the district court of McCulloch county in 1913, the said Coke Martin continued in charge and control of the business which had formerly belonged to the bankrupt, and which was conducted in the premises in question. By the judgment entered at the September term of the district court of McCulloch county in 1913, Coke Martin was removed

from the trusteeship aforesaid, and one T. J. Wood was appointed by the court as trustee.

"Upon the appointment of Wood as trustee the bankrupt became dissatisfied with the arrangement and proceeded immediately to have the business closed, and to execute his voluntary petition in bankruptcy, which was filed here on October 10, 1913, and upon which he was duly adjudicated a bankrupt.

"In the petition filed by the bankrupt the property in question is claimed by him as exempt to him as a business homestead under the Constitution and laws of the state of Texas.

"At the first meeting of creditors of the bankrupt, held at the office of the referee, after due notice given, the bankrupt, upon examination by the trustee, stated in open court that he did not intend to contest the deed of trust above referred to in favor of John Deere Plow Company, which had been given in good faith and constituted a valid lien in excess of the value of the property in question.

"On the same day, after the adjournment of the first meeting of creditors, the trustees filed the report on exemptions which is excepted to by the bankrupt and his wife for the reason that the same fails to set aside the business property in question as a portion of the homestead of the bankrupt. The exceptions by the bankrupt and his wife were duly filed and a hearing had thereon on February 11, 1914.

"For the purpose of this decision we may assume that on December 18, 1911, the premises in question constituted the business homestead of the bankrupt. Upon that date the assignment to Reagan was executed, and pursuant thereto Reagan went into actual possession, management, and control of the business formerly owned by the bankrupt and conducted in said premises, and proceeded thereafter to conduct the same under the terms of said assignment for the benefit of Martin's creditors. With the changes above indicated in the instrument under which Reagan held, and as affected by the several judgments of the district court of McCulloch county, the business formerly owned by the bankrupt was conducted by trustees for the benefit of his creditors continuously from the 18th day of December, 1911, until the doors were closed in contemplation of the filing of the bankrupt's petition herein.

"During the interval from December 18, 1911, up to the adjudication of the bankrupt, he was engaged at various times in the occupation of government sheep inspector, as part owner of a collection agency, and as a deputy sheriff, in neither of which callings he used or occupied any portion of the premises in question. At no time during that period was he engaged in any business in which the premises in question would have been useful to him as a place of business. He is still deputy sheriff in McCulloch county.

"During the interval following the assignment to Reagan up to the time of his adjudication he exercised no management or control of the business, and had no active connection with it. He testified that without charge to the business he made a few collections, and for a brief period during Coke Martin's term as trustee, while the latter was ill, he stayed in the store. He testified that this service was rendered as a matter of assistance of his son.

"The bankrupt testified, further, that when live stock was offered in trade to the business during the interval following the appointment of Reagan he customarily passed upon the value of same, as he was experienced in that line of work.

"The bankrupt never at any time subsequent to the assignment to Reagan collected or attempted to collect rent for the use of the premises in question, and never at any time made demand upon Reagan, or either of his successors in trust, for the possession of the premises in question.

"The bankrupt testified upon the hearing that he considered the business his at all times subsequent to the assignment to Reagan, and that he expected it eventually to be redelivered to him; that he intended at some future date to resume or re-enter business in the building in question, but that he had not made or attempted to make any arrangements to do so, nor had he determined what business he would take up.

"There was no reasonable basis for the belief by the bankrupt at any time

after the assignment to Reagan that the business would be returned to him. It was hopelessly insolvent at the time of the assignment, and remained so continuously until the filing of the petition in bankruptcy and to pay the debts of the business pursuant to the terms of the assignment made to Reagan for the benefit of Martin's creditors would have required the sale of all of the property described in the assignment, including the premises in question.

"Aside from the unsupported statement of the bankrupt to that effect there is no testimony tending to show that he intended to re-enter business in the premises in question.

"I find as a fact that the bankrupt had not at the date of the adjudication any bona fide intention of resuming any business in the building in question.

"Conclusions of Law.

"On the law of the case I conclude that the bankrupt has not used or occupied the premises in question as a principal place of business since December 18, 1911, at which time he abandoned same as a business homestead.

"I further conclude that the expressed intention of the bankrupt to go into business in the premises in question, unsupported by other testimony and without any testimony as to the nature or character of business contemplated, or of arrangements made therefor, or in contemplation, is sufficient to impress the premises in question with homestead claim in favor of the bankrupt.

"The questions of law presented by this record have arisen frequently in Texas, and, in spite of some apparent conflict, seem now to be well settled by authoritative opinions of both state and federal courts. They are as follows:

"First. Did John Martin, by the assignment of December 18, 1911, and his subsequent conduct, abandon his business homestead?

"Second. If abandonment had not taken place prior to the date of adjudication, had the bankrupt at such date that character of intention, coupled with present or prospective ability to re-enter business, which would enable him to hold the premises in question as a business homestead?

"In the case of In re Flannagan, 117 Fed. 695, 9 Am. Bankr. Rep. 140, under facts very similar to those in the case at bar, it was decided by the District Court of the United States for the Western District of Texas, Waco Division, that the bankrupt was not entitled to the exemption claimed as to his business homestead. The facts in the present case are stronger than in the case cited, and the conclusion there reached is decisive here.

"The leading cases are collected in that opinion, and, as there has been no departure from them since it was handed down, it is not necessary to cite additional authorities here.

"It is earnestly contended by counsel for bankrupt and his wife that the conduct of the business by Reagan and his successors was the conduct by Martin of his business through Reagan and his successors as agents or representatives of Martin, by reason of which the homestead character of the property was never lost. The proposition seems to me unsound. The conveyance to Reagan was not different from the ordinary assignment for creditors, the result of which is to deprive the assignor of title to and possession of the property conveyed, for the purpose of applying the proceeds of same to payment of his debts.

"Such transfers are ordinarily made upon insistence of creditors, and because they are not content that the assignor continue to operate the business. The very purpose and invariable effect of such conveyances is to divest the assignor of title to and control over the business, and to vest same in the assignee, who thereafter conducts same, not as the business of the assignor, but as the business of the creditors represented by himself as trustee. That the conduct of such a business by an assignee for a period of nearly two years without objection to that course during the interval by the assignor, and without any claim by the assignor during that period to the right to use the premises for the conduct of his own affairs, is inconsistent with any claim to said premises by such assignor as a business homestead seems to my mind

clear, and I therefore conclude that any claim which the bankrupt may theretofore have had to such premises as a business homestead was abandoned by him in executing the assignment to Reagan and suffering the business to be thereafter conducted in the premises in question in the manner hereinbefore set out.

"I, therefore, conclude that the exceptions filed by the bankrupt and his wife to the report of the trustee should be in all things denied and overruled, and that the report of the trustee upon exemptions should be in all things approved and confirmed."

Shropshire & House, of Brady, Tex., and Caldwell & Caldwell, of Austin, Tex., for bankrupt and wife.

Etheridge, McCormick & Bromberg, of Dallas, Tex., for William Butterworth, a creditor.

Fiset, McClendon & Shelley, of Austin, for Trustee.

MAXEY, District Judge (after stating the facts as above). The order of the referee in this case is affirmed on the authority of In re Flannagan (D. C.) 117 F. 695. The decision in Flannagan's Case was based upon Shryock v. Latimer, 57 Tex. 674, and other authorities therein cited. The case of Shryock v. Latimer was decided in 1882. In Alexander v. Lovett, 95 Tex., at page 664, 69 S. W., at page 69, decided in 1902, it was said by the court that:

"The decision, in the case of Shryock v. Latimer has never been overruled, nor the principles there stated modified, and it controls this case."

And it may be said that it is controlling in the case now before the court.

Order of referee affirmed.

CHRISTY, County Treasurer, et al. v. ATCHISON, T. & S. F. RY. CO.

(District Court, D. Colorado. June 11, 1914.)

No. 6180.

1. JUDGMENT (§ 460*)—VACATION—EQUITY JURISDICTION—FRAUD—ACCIDENT—MISTAKE—LACHES.

Though equity has jurisdiction to vacate a judgment obtained through fraud, accident, or mistake, the defendant in the law action seeking such relief must show, on the face of his bill, that he had a good defense on the merits to the law action, which he was prevented from availing himself of by fraud, accident, or mistake, unmixed with negligence of himself or his agents, and that he was not guilty of laches.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 879, 880, 882–891; Dec. Dig. § 460.*]

2. JUDGMENT (§ 460*)—VACATION—EQUITY SUIT—MERITS.

Where a bill to set aside a judgment alleged that the same was recovered by virtue of an improper stipulation entered into by complainant's former attorney without authority, but did not show that complainant had a good defense on the merits to the claim on which the judgment was recovered, it was fatally defective.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 879, 880, 882–891; Dec. Dig. § 460.*]

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

8. JUDGMENT (§ 456*)—VACATION—EQUITY JURISDICTION—LACHES.

On March 4, 1908, defendant railroad company instituted an action at law against P. county to recover $16,686.61 for alleged excessive taxes paid under protest. The case was tried on September 9, 1911, and judgment recovered by the railroad company on which the county treasurer on October 15, 1912, paid an installment of $1,010.63. The tax in question was for the year 1905, and no steps were taken to set aside the judgment until September, 1913, when complainant sued in equity for the vacation of the judgment. The amended bill showed that complainant had knowledge of the judgment as early as April or May, 1912. *Held*, that complainant was barred from equitable relief by laches.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 863–866; Dec. Dig. § 456.*]

In Equity. Suit by R. L. Christy, as County Treasurer of the County of Prowers, Colo., and the Board of County Commissioners, against the Atchison, Topeka & Santa Fé Railway Company. Judgment for defendant.

Allen M. Lambright, of Las Animas, Colo., for plaintiffs.

Henry T. Rogers and Rogers, Ellis & Johnson, all of Denver, Colo., for defendant.

LEWIS, District Judge. On March 4th, 1908, the Atchison, Topeka & Santa Fé Railway Company (defendant here) instituted in the Circuit Court for this district an action at law against Prowers County to recover $16,686.61, which amount the railway company claimed to have been collected from it as in excess of the taxes justly due by it to said county for the year 1905. The complaint alleged that two of the plaintiff's engines had been seized under distraint warrant on a claim that the plaintiff in that case owed in taxes $25,130.85, and that in order to obtain the release of said engines it was compelled, under protest, to pay the amount demanded, when as a matter of fact only the sum of $8,444.24 was justly due from it as its taxes for that year. As a basis for recovery the railway company alleged in that complaint that its property in Prowers County had been greatly overvalued for the purpose of making the tax levy, that all other property in the county which was assessed for that year was greatly undervalued, and that the officers of the county who had to do with making the levy knowingly and purposely omitted from levy and taxes for that year property in the county of the value of at least $1,000,000. It thus set forth that the burden of taxation had been placed unequally, that under the system and methods adopted and followed by the county and its officers the county had violated the State Constitution and statutes and the railway company was entitled to recover back the excess which had been placed against its property and which it was compelled under protest to pay.

The defendant in that case filed its answer on May 5th, 1910. On August 8th, 1911, a stipulation in writing, signed by the attorneys for the plaintiff and by the attorneys for the defendant in that action was filed, in which was set forth the facts, in so far as they were agreed upon between the parties, reserving, however, the right to each party to introduce evidence if they so desired. This stipulation set forth the

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

aggregate value of the stock and bonds issued and then outstanding by the railway company, the value of other property of the railway company and the amount which should be deducted from the value of its plant ascertained on the stock and bond basis, thus leaving the net value of its plant ascertained on that basis for the purpose of taxation, its total mileage and its mileage within Prowers County. These were material and necessary facts for the purpose of arriving at the value of the segment of the railway in Prowers County under the plan of taxation of such property as prescribed by the Colorado Statute. The stipulation then set forth that other property was undervalued and under-assessed and did not exceed twenty-six per cent. of its full cash value. The stipulation then proceeded to work out and set forth in detail the excess value placed on the railway property within the county for that year as compared with the value placed on other taxable property within the county, and led up to the conclusion, without stating it in figures, the amount of the excess burden that had been placed on the railway company for that year.

The case came on for trial on September 9th, 1911, a jury was waived in writing, and the Circuit Court entered this judgment:

At this day comes the plaintiff, by Henry T. Rogers, Esq., its attorney, and the defendants, by William A. Merrill, Esq., their attorney, also come.

And this case comes on now to be tried to the court without a jury, pursuant to a written stipulation thereto herein filed.

And the court having heard the evidence produced herein and the arguments of counsel, doth find the issues herein joined in favor of the plaintiff, and doth hereby assess the plaintiff's damages at the sum of fifteen thousand four hundred and thirty-seven dollars and five cents ($15,437.05).

Wherefore, it is considered by the court that the plaintiff do have and recover of and from the defendants the sum of fifteen thousand four hundred and thirty-seven dollars and five cents ($15,437.05), its damages by it sustained by occasion of the premises in its complaint herein set forth and alleged, in form aforesaid assessed, together with its costs by it in this behalf laid out and expended to be taxed.

On October 15th, 1912, the County Treasurer of Prowers County sent his check to the clerk of the court for $1,010.63 as part payment on the judgment, and it was applied, and that amount, less small items for clerk's cost, was turned over to the plaintiff on October 17th, 1912.

On September 15th, 1913, the complainants in this case filed their bill against the railway company for the purpose of having the judgment in the law action set aside and vacated.

The defendant answered the bill and embodied in the answer a demurrer or motion to dismiss, which coming on first to be heard the complainants thereupon sought and obtained leave to file an amended bill, and to the amended bill the defendant has filed a motion to dismiss, which presents the matter for present consideration.

The amended bill sets out the substance of the complaint in the law action. This is followed with the substance of the answer in the law action, which latter admitted the distraint of the two engines and the demand for the payment of the $25,130.85 taxes, interest and penalties for the year 1905, admitted the payment of the last-named sum and the release of the engines thereupon, but denied that any part of that

amount was illegal or not due and payable as taxes by the railway company; denied that the tax was excessive as compared with the tax laid against other property in the county; averred that the railway property was not assessed at more than twenty-five per cent. of its actual cash value for the year 1905; averred that the assessor of the county did not undervalue other property in the county as compared with the value placed on railway property, and further sets out denials contained in the answer in the law action of the material allegations in that complaint, and allegations that the assessment and taxes against the railway property as compared with other property in the county were fair, equitable and legal.

The amended bill then sets forth the substance of the stipulation of facts filed in the law action, and alleges on information and belief that the railway company will not be able to prove it was entitled to the deductions granted by the stipulation from the value of the system reached on the stock and bond basis; that the stipulation agreed on 9269.1 miles as the total mileage of the railway company for the purpose of ascertaining the average value per mile of the mileage in Prowers County, whereas 8119.04 miles were declared by the Court of Appeals of this Circuit (A. T. & S. F. R. Co. v. Sullivan, 173 Fed. 456, 97 C. C. A. 1) to be the total mileage of the defendant's railway for the year in question, and its value per mile for the purpose of taxation for that year $52,663.92, and that applying these findings of the Court of Appeals the defendant's property in Prowers County was not excessively valued and taxed by the assessor for the year 1905.

The amended bill alleges that when the law action was called for trial it was submitted on the stipulation alone, that no other testimony was offered and that the attorneys for the respective parties advised the court that under the stipulation, judgment should go for plaintiff in that action in the sum of $15,437.05, which was accordingly entered. That the facts admitted in the stipulation in the law action were in contradiction of the averments and denials in the answer in that action; that plaintiffs have stated to their solicitor in this suit what they believe to be the evidence that will be produced in support of the answer in the law action as well as what they believe will be the plaintiffs' evidence in said action, and are advised that they had a good and meritorious defense in said former action; that they offer to prove that the attorneys for the defendant in the law action had no authority to enter into said stipulation; that in fact they were not authorized by the defendants in the law action to enter into any stipulation nor to admit or agree to any of the facts therein stated.

It is alleged that the defendants in the law action did not know that judgment had been taken in that action until about the month of April or May, 1912; that they thereupon inquired of the attorney who had signed the stipulation for the defendants and that he advised the defendants not to concern themselves about the judgment, that it would be settled for a few hundred dollars and not to exceed $2,000; that two of the county commissioners went out of office in January, 1913, and were succeeded by two of the present members of the board, and

when the new board was organized they instructed their attorney to ascertain by what means the judgment had been taken in the law action, and that the present commissioners first ascertained on May 18th, 1913, that the stipulation in the law action had been entered into, and that they did not learn until July, 1913, that none of the commissioners in office, when the stipulation was made, had agreed to it or authorized the attorney, who appeared for the county, to sign it.

The prayer is that the stipulation be set aside and the judgment in the law action be vacated, and that the present commissioners of the county be substituted in the law action as defendants instead of those who were commissioners when that action was brought.

The defendant moves to dismiss the bill on the ground that it does not show that the plaintiffs are entitled to any equitable relief.

[1] It is a generally recognized principle that a court of equity has jurisdiction to vacate and set aside a judgment in an action at law obtained through fraud, accident or mistake. The defendant in the law action, when he comes into equity for that purpose must, however, show on the face of his bill that he had a good defense on the merits to the law action which he was prevented in availing himself of by fraud, accident, or mistake, unmixed with negligence of himself or his agents and that he was not guilty of laches. Knox County v. Harshman, 133 U. S. 152, 154, 10 Sup. Ct. 257, 33 L. Ed. 249; White v. Crow, 110 U. S. 183, 187, 4 Sup. Ct. 71, 28 L. Ed. 113; Life Association v. Lohmiller, 74 Fed. 23, 20 C. C. A. 274; Town of Andes v. Millard (C. C.) 70 Fed. 515; Phillips v. Negley, 117 U. S. 665, 675, 6 Sup. Ct. 901, 29 L. Ed. 1013; Village of Celina v. Bank, 68 Fed. 401, 15 C. C. A. 495; Young v. Sigler (C. C.) 48 Fed. 182; Denton v. Baker, 93 Fed. 46, 35 C. C. A. 187; Kimberly v. Arms (C. C.) 40 Fed. 548, 558; Marshall v. Holmes, 141 U. S. 589, 596, 12 Sup. Ct. 62, 35 L. Ed. 870.

The foregoing authorities amply sustain the principle announced, and we turn again to the amended bill. It does not allege or even intimate that either fraud or collusion was practiced in entering into the stipulation, nor does it allege that any mistake or accident, in the sense required was made or fallen into by both or either of the parties or their counsel. Indeed, counsel for complainant did not claim any of these grounds for equitable relief in argument on the motion. Neither does the bill allege facts which show that the defendants in the law action had a good defense in that case on the merits. It is true that it is alleged that complainants here do not believe that the plaintiff in the law action would have been able to sustain its complaint, that complainants have told counsel the facts that they believe they could prove in defense in the law action and that he advises that they have a good defense to that action, and that they are able to bring evidence to establish the facts set up in the answer in that case; but this is far from showing on the face of the bill facts from which the court can conclude, if the facts thus alleged be established, that the defendants in the law action had a good defense on the merits in that case. The bill instead of setting out facts which would show that the defendants

had a good and meritorious defense to the law action, has plead only the belief and conclusions of the complainants and their counsel. The nearest approach to a statement of anything that would indicate a meritorious defense are the allegations in reference to what was found by the Court of Appeals in the Sullivan Case; but the bill does not allege that those conclusions were the true facts, nor that they can be established.

The exhibit which was offered in evidence in the Sullivan Case, and from which the Court of Appeals reached its conclusion as to the total mileage of railway, has been examined in the files in that case, and it is true that on certain pages of the exhibit the mileage stated in the opinion of the Court of Appeals is set forth as being the number of miles owned by the railway company, but on other pages of the same exhibit is found additional mileage of lines which were controlled by the railway company during that year by ownership of stock and bonds in such other companies, which additional mileage added to the mileage stated in the opinion of the Court of Appeals makes substantially the mileage agreed upon in the stipulation. It is not necessary to inquire which of the two mileages—the one stated by the Court of Appeals and the other in the stipulation—is the correct mileage under the requirements of the state statute for purposes of taxation; and we make no inquiry as to that, but it clearly appears from the exhibit what the basis was on which counsel in the law action reached the total mileage as set forth in the stipulation. This difference in mileage, and the further fact that the stipulation conceded certain deductions in the value of property owned by the railway company not a part of its system and not taxable and not to be considered in reaching a value of the mileage within the state for 1905, obviously renders the mileage value found in the Sullivan Case far in excess of the value that could be reached from the agreed facts in the stipulation. And in addition to that, this suit is between different parties from the one with which the Court of Appeals had to deal. So that the allegations of the bill, as to the conclusions that may have been reached in the Sullivan Case, are wholly irrelevant to this inquiry.

[2] But counsel for complainant says that the case made by the amended bill is on an entirely different principle from the one established by the authorities above cited; that it is rested on the allegations that the attorneys for the defendant in the law action entered into the stipulation without any authority to do so from their client, and thus denied the defendant in that case an opportunity to make its defense. There are several answers to this: (1) If it be conceded that the stipulation were void for the reason that no express authority had been given counsel to make the stipulation, that alone would not be sufficient to call forth equitable power to annul the judgment. The same conclusion and the same judgment might again follow in the law action, if it were vacated, and thus the necessity of it appearing from the bill that the defendants in that action had a good defense on the merits. (2) In Village of Celina v. Bank, supra, the Court of Appeals for the sixth circuit, through Judge Severens, said (68 Fed. 403, 15 C. C. A. 497):

"A court of chancery has jurisdiction upon a bill filed for the purpose of setting aside a judgment and furnishing an opportunity for another trial where the judgment has been suffered by a clear mistake into which the party against whom the judgment was rendered has fallen without any fault on his part. But in such case 'a litigant is required to have exercised the greatest degree of watchfulness over the progress of his suit in court.' 1 Black, Judgm. § 387; Truly v. Wanzer, 5 How. 142 [12 L. Ed. 88]; Crim v. Handley, 94 U. S. 652 [24 L. Ed. 216]; 3 Pom. Eq. Jur. § 134, and note; 2 Story, Eq. Jur. § 887. * * * We do not think that the allegation in the petition that the petitioner 'could not with reasonable diligence have discovered the fact,' is supported by the facts there alleged."

The Court of Appeals for the seventh circuit, in considering this subject, in Life Association v. Lohmiller, supra, applies the announcement of the Supreme Court in Creath's Administrator v. Sims, 5 How. 192, 204 (12 L. Ed. 111), thus:

"That whosoever would seek admission into a court of equity must come with clean hands; that such a court will never interfere in opposition to conscience or good faith; and again, and in intimate connection with the principles just stated, that it will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence."

In Brown v. County of Buena Vista, 95 U. S. 157, 159 (24 L. Ed. 422), it is said:

"The power of a court of equity to relieve against a judgment, upon the ground of fraud in a proceeding had directly for that purpose, is well settled.

"The power extends also to cases of accident and mistake. But such relief is never given upon any ground of which the complainant, with proper care and diligence, could have availed himself in the proceeding at law. In all such cases he must be without fault or negligence. If he be not within this category, the power invoked will refuse to interfere, and will leave the parties where it finds them. Laches, as well as positive fault, is a bar to such relief. Duncan v. Lyon, 3 Johns. Ch. (N. Y.) 351 [8 Am. Dec. 513]; Marine Insurance Co. v. Hodgson, 7 Cranch. 332 [3 L. Ed. 362]; Story, Eq. Jur. §§ 894–896; Bigelow on Estoppel, 151; Freeman on Judgments, §§ 486, 489, 490, 495."

And again on page 160 of 95 U. S. (24 L. Ed. 422):

" 'Nothing can call forth'—a court of equity—'into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced and, therefore, from the beginning of this jurisdiction there was always a limitation of suits in this court.' (Citing cases.)

"The law of laches, like the principle of the limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the life and memory of witnesses, the muniments of evidence and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose and welfare of society. A departure from it would open an inlet to the evils intended to be excluded."

[3] Applying these principles I think the bill discloses that the defendants in the law action were clearly guilty of laches. The tax in question in that case was for the year 1905; the judgment was rendered in September, 1911, and the bill to vacate it was not filed until September, 1913. Nine years have now passed since the levy and assessment were made. Much of the property in Prowers County, in the year for which the tax was levied, has been disposed of, values have

changed, some of the witnesses who were familiar with values at that time cannot now likely be had, and those that can be had will necessarily recall with difficulty conditions and values at that time. And it is reasonable to believe that the plaintiff in the law action cannot, with the same convenience and readiness, establish the facts now that it could have established at that time. The county recognized and approved the rendition of the judgment by paying $1010.63 on it in October, 1912, and the amended bill shows that it knew as early as April or May, 1912, that the judgment had been rendered. These facts convince that it was guilty of laches and negligence in delaying to challenge the judgment until the fall of 1913; and (3) Counsel who signed the stipulation were employed to defend the case. This gave them full authority to conduct the trial and for that purpose to investigate as to what the real facts were in the controversy, and after having ascertained the facts, to dispense with the cost and necessity of calling witnesses, by admitting such facts. The stipulation on the facts served this purpose. In Oscanyan v. Arms Co., 103 U. S. 261, at page 263, (26 L. Ed. 539), it is said:

"In the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof. And if in the progress of a trial, either by such admission or proof, a fact is developed which must necessarily put an end to the action, the court may, upon its own motion, or that of counsel, act upon it and close the case."

See, also, Wilson v. Spring, 64 Ill. 14, and Taylor v. Mortgage Co., 106 Ga. 238, 32 S. E. 153.

The motion to dismiss the bill will be sustained.

It is so ordered.

PATENTS SELLING & EXPORTING CO. ACTIESELSKABET v. DUNN.

(District Court, S. D. New York. April 7, 1914.)

PATENTS (§ 90*)—PRIORITY OF INVENTION—FOREIGN PATENTS.

Where two joint domestic inventors filed an application for a patent while an application for the same invention by a foreign inventor was pending, and a patent issued first to the foreign inventor, upon proof of the publication in the United States of a foreign patent on the invention to the foreign inventor before the date of filing of the application of the joint domestic inventors, *held*, that the invention by the foreign inventor antedates the patent to the domestic inventors.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 113-120; Dec. Dig. § 90.*]

Case reopened for introduction of further evidence.

See, also, 213 Fed. 40, 129 C. C. A. ——.

T. D. Merwin, of New York City, for plaintiff.

No appearance for defendant.

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

Pursuant to mandate of the Circuit Court of Appeals, the following proceedings were had 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.

END OF CASES IN VOL. 214

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