National Reporter System—United States Series

THE

FEDERAL REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 215

PERMANENT EDITION

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND DISTRICT COURTS OF THE UNITED STATES

SEPTEMBER—OCTOBER, 1914

ST. PAUL
WEST PUBLISHING CO.
1914

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(215 FED.)

CONSTRUCTION OF RULES

OF THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

SIXTH CIRCUIT

In re GENERAL EQUITY RULE 75.[1] In re OUR RULE 15.

October 14, 1914

PER CURIAM. Motions recently decided and others now pending involving these rules justify a formal statement of our conclusions.

Rule 75 fixes no time within which the statement of evidence must be settled and filed in order to "become a part of the record for the purposes of the appeal." Undoubtedly, the better practice is to complete this step before claiming, or, at least, before perfecting the appeal, and if the term expires before the final statement of evidence is filed, to enter an order carrying this matter into the next term; but where appeals are required within thirty days, or even within ten days, the time may be wholly insufficient to perfect the record in this respect, and the expiration of the term may very commonly be forgotten, particularly as it has never been a matter of importance in equity appeals. It is said that the completing of this statement of evidence corresponds to the settling of a bill of exceptions at law, and the familiar rule is invoked that a purported bill of exceptions which was not settled within the trial term or pursuant to a reservation during the trial term is a nullity and will be stricken from the record. We are not satisfied that the analogy is close enough to justify the incorporation of this harsh rule into the practice pursuant to rule 75, which must have been adopted with due consideration of the existing practice by which appeals were claimed and perfected regardless of the expiration of terms; and we conclude that the trial court has power to approve and direct the filing of the statement of evidence, although the term has expired when the decree was rendered, and although no order was entered carrying the subject-matter over until the next term.

The same general view leads also to the conclusion that the perfecting of an appeal by the approval of a bond and the signing of cita-

[1] For General Equity Rule 75, and Equity Rule 15 for the Sixth Circuit, see 202 Fed. ix, 118 C. C. A. xi.

tion does not deprive the trial court of jurisdiction to settle the evidence. It is true that for general purposes, jurisdiction over the cause is thereby ended, and that the shaping of this statement of evidence involves the decision by the judge of disputed claims; but, upon the whole, the proceeding is rather ministerial, and it sufficiently pertains to the making of the return to the appeal so that we think a statement of evidence so approved and filed cannot, for that reason alone, be stricken from the record.

Instances occur where rule 75 is wholly disregarded, and the return to the appeal includes the evidence in full, in accordance with the old practice, and we are asked to dismiss appeals where the record is so made up, or to strike out the statement of evidence, thereby leading to an affirmance. To send the record back for correction in this respect involves delay and the exercise of uncertain power; while, to dismiss the appeal or to strike all the evidence from the record may cause the loss of substantial rights through the blunder in practice by counsel. This drastic remedy may prove to be necessary in some cases, but we are reluctant to apply it now. The enforcement of both rules rests, primarily, upon the district judges, whose obligation we pointed out in Pittsburgh, etc., R. Co. v. Glinn, 208 Fed. 989, 126 C. C. A. 77; and we have no doubt that they will observe the new practice when approving a statement of evidence or bill of exceptions; but in equity appeals, if counsel overlook the rule and follow the old practice, the matter may not come to the attention of the trial judge. If such cases occur, the clerk who makes return to the appeal should not include the evidence in full, and his due attention will usually prevent informality in this respect. In those instances, however, where the record reaches this court containing the evidence in full, we think general equity rule 76 provides a remedy which, at least during the transition in the general practice, will be sufficient. The reference in rule 76 to "any kindred rule" quite clearly applies to rule 75. It is true that the offending solicitor in this situation is the solicitor for appellant, and that appellant pays, in the first instance, the entire cost of printing, so that if he is unsuccessful in this court, no disposition of the costs of printing can operate as a penalty, but if he is successful, he can be denied the recovery of such costs; and the further affirmative costs, contemplated by rule 76, might, in a proper case, be imposed upon the offending solicitors.

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[1] Appointed September 30, 1914.
[2] Resigned June 1, 1914.
[3] Appointed August 12, 1914, to succeed George Gray.
[4] Appointed July 21, 1914.

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[5] Died August 22, 1914.
[6] Appointed October 5, 1914, to succeed David D. Shelby.
[7] Appointed July 21, 1914.
[8] Died July 12, 1914.
[9] Appointed August 29, 1914, to succeed Horace H. Lurton.

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[10] Appointed October 16, 1914.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

In re HOWELL.

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

No. 228.

1. BANKRUPTCY (§ 76*)—INVOLUNTARY PETITION—PERSONS ENTITLED TO FILE OR JOIN IN PETITION.

Under Bankruptcy Act, July 1, 1898, c. 541, § 59b, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3445), providing that three or more creditors having provable claims against any person, amounting in the aggregate, in excess of the value of securities held by them, if any, to $500 or more, may file a petition to have him adjudged a bankrupt, each creditor joining in the petition must be the owner of a demand, or claim provable against the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 50, 56, 97, 99, 100; Dec. Dig. § 76.*]

2. CORPORATIONS (§ 579*) — REORGANIZATION — LIABILITIES OF INDORSER OF CORPORATION'S NOTES.

In a stockholders' suit a receiver was appointed to report a plan of reorganization. The creditors entered into a reorganization agreement, and a committee of the creditors intervened in the stockholders' suit, asking a sale of the corporate assets. The reorganization plan contemplated the purchase by the committee of the assets and turning them over to a new company in exchange for its capital stock, to consist of $1,575,000 preferred stock and $3,150,000 common stock. The old stockholders were not to participate in the new company except as they might subscribe for stock on terms less favorable than those made to outsiders, but the creditors were to receive 25 per cent. of their claims in preferred stock and 75 per cent. in common stock, or 25 per cent. in cash for the new stock to which they were entitled. The offer of the committee to pay $870,000 was accepted by the court. Of this sum a dividend of 21.2 per cent. was available for distribution to creditors, and the creditors had the option of accepting such dividend or of receiving new stock, or 25 per cent. of their claims under the reorganization agreement. *Held*, that the sale amounted to a levy of execution on behalf of the creditors, fixed the value of the property transferred, and resulted in the payment of claims to the extent of the dividends realized, and no more, notwithstanding the price in stock at which the property was transferred by the committee to the new company; and a holder of the corporation's notes, after applying the amount of the dividend thereon, could hold an indorser for the

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

balance, where the reorganization agreement provided that the creditors did not waive any rights against any indorser or person secondarily liable.

[Ed. Note.—**For other cases, see Corporations, Cent. Dig. §§ 2307, 2309, 2313–2318; Dec. Dig. § 579.***]

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

This cause comes here on appeal from a final order and decree made in the District Court of the United States for the District of Connecticut on August 5, 1913 (207 Fed. 973), adjudging that George D. Howell is not a bankrupt, and that the petition for involuntary bankruptcy against him be dismissed. Reversed and remanded.

White & Case, of New York City (Walter C. Noyes, Joseph M. Hartfield, and Irving S. Olds, all of New York City, of counsel), for appellants.

William F. Henney, of Hartford, Conn. (William E. Curtis, Henry A. Stickney, and Cornelius C. Webster, all of New York City, of counsel), for respondent.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. [1] This was a petition in involuntary bankruptcy. The Bankruptcy Act in section 59b provides as follows:

"Three or more creditors who have provable claims against any person which amounts in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt."

Under this provision it has been held to be absolutely necessary that each creditor joining in the petition should be the owner of a demand or claim "provable" against the bankrupt within the provisions of the act. In re Crafts-Riordon Shoe Co. (D. C.) 185 Fed. 931.

The petition in involuntary bankruptcy was filed against George D. Howell by the Mechanics & Metals National Bank, a corporation having its place of business in New York City, and the Corn Exchange National Bank, having its place of business in the city of Philadelphia, Pa., and the Franklin National Bank, likewise having its place of business in Philadelphia, all of which corporations are organized under the provisions of the National Bank Act. The petitioners are creditors of Howell, a resident of Hartford, Conn. Each of the petitioners claims to be the bona fide holder of a separate promissory note for $5,000 taken before maturity and for value and executed by the McCrum-Howell Company and indorsed by Howell before delivery, the aggregate of their claims amounting to $15,000.

The act of bankruptcy charged against Howell was that while insolvent he made, together with one Lloyd G. McCrum, a general assignment for the benefit of his creditors and for the benefit of the creditors of the said McCrum, to Oscar L. Telling, of Pittsburg, Pa.,

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

as trustee. A demurrer was interposed on the ground that the assignment to Telling was not a general assignment for the benefit of creditors, and did not purport to be such by its terms and expressions, and that the property conveyed was not alleged to be all or a large portion of all of the property of Howell, and that it was not alleged to be for the benefit of all the creditors of Howell. The demurrer was overruled, and an answer was filed. The answer denies that the respondent had made a general assignment. It alleges that the transfers and conveyances complained of transferred and conveyed only a part of his property, and that he continues possessed of a considerable and substantial amount of his property. It also avers that he was not insolvent at the date of the conveyances, nor at any time subsequent. It contains a schedule of the property conveyed and its value as well as of the property not conveyed, and its value. It avers that the petitioners and other creditors of the McCrum-Howell Company had availed themselves of a plan and agreement for reorganization of that company and thereby had received payment in full of their debts as upon a settlement made by them through their agents, the creditors' committee, direct with the principal debtor, and that those creditors holding notes of the McCrum-Howell Company indorsed by him have no claim upon him for any part of such notes, as by such settlement and payment the petitioners have released and discharged him from his contingent liability as an indorser.

The court below did not undertake to determine whether the assignment was or was not a general one, and therefore an act of bankruptcy. Its attention was confined to a consideration of the question whether the liability of the respondent as an indorser of the notes held by the petitioning creditors any longer existed. As the court came to the conclusion that it did not, the petition was dismissed on that ground. It was not alleged or claimed that the petitioning creditors had in any way recognized or assented to the assignment, or had in any way participated in it so as to be estopped by the election between their rights under the assignment and those under the bankruptcy law.

[2] The sole question which is presented to this court on this appeal is whether the respondent was released as an indorser of the notes of the McCrum-Howell Company by the action of the creditors under the reorganization agreement. And in order to answer that question it becomes necessary to examine the facts somewhat in detail.

The McCrum-Howell Company was a Connecticut corporation, which had its main office and headquarters in New York City. It carried on an extensive business throughout the United States. In 1910 it had a capital stock of $7,000,000, one-half preferred and one-half common. Its factories were in Connecticut, Pennsylvania, and Wisconsin. But the largest amount of its property and assets were in Pennsylvania. On March 13, 1912, a stockholders' bill was filed in the United States District Court at Philadelphia asking for the appointment of a receiver of the company. The bill stated that in the then condition of trade it was impossible to convert the assets into money to meet outstanding commercial paper about to mature. The bill also alleged

that the company was solvent, but that the appointment of the receivership was necessary to preserve the assets; and it farther asserted that it would be necessary "to formulate and adopt a plan of reorganization or continuation under some general agreement." The District Court made an order appointing receivers and authorized them, among other things, "to report to the court such plan of reorganization or resumption of business by the corporation as may be satisfactory to the said creditors and stockholders."

The creditors entered into a creditors' agreement on April 10, 1912, which was intended to promote the reorganization of the company. It provided that the holders of claims might deposit their claims with the Bankers' Trust Company in New York City, designated as the depositary. The depositary was to issue to the depositors certificates which were to be treated as negotiable instruments. A creditors' committee was to formulate a plan and agreement for the reorganization of the company and the readjustment of its obligations. And if after the committee had agreed upon a plan of reorganization any holder of a certificate of deposit disapproved it, he was to be at liberty to surrender his certificate and withdraw his deposit claim. And all holders of certificates who did not withdraw before a given date were to be bound by the agreement.

Thereafter and on September 11, 1912, the creditors' committee intervened in the suit in the United States District Court at Philadelphia "for the purpose of facilitating the reorganization," filing a cross-bill, in which they asked for a sale of the assets of the company. It was set forth that the allegations contained in the original bill that the corporation was solvent, and that its quick assets were worth more than its indebtedness, were untrue, that the receivers could not successfully carry on the business, and that a prompt sale of the assets was the only way in which the creditors could realize anything upon their claims. The prayer of the cross-bill was for an adjudication that the corporation was insolvent, that a sale of the assets was necessary, and that the receivers should be directed to make such sale upon terms and conditions to be prescribed by the court. The corporation, the receivers, and the complainant in the stockholders' suit all filed answers to the cross-bill, admitting its material averments.

The value of the assets was variously estimated. The estimate of the expert accountants was $2,900,989.65. The receivers scaled this down to $2,662,967.88, and the creditors' committee reduced it to $2,400,000. But these figures were exclusive of patents, patent rights, trade-marks, and good will; in acquiring which the company was understood to have expended large sums of money. Subsequently the receivers reduced still further, their estimate of the assets and fixed the amount at $2,179,361.02, still excluding patents, patent rights, trade-marks, and good will. The liabilities of the company amounted to over $2,600,000 upon $2,229,935.30 of which the respondent Howell was liable as an indorser.

A plan and agreement for the reorganization of the company, was made which contemplated the purchase by the creditors' committee, "at judicial sale or otherwise," of the assets of the corporation and the

turning over of the assets to a new company in exchange for its capital stock consisting of $1,575,000 preferred stock and $3,150,000 common stock. The committee was to distribute the stock so received in part to the creditors of the corporation and to sell a portion to obtain cash for the expenses of the receivership and reorganization, and to provide working capital necessary for the new company. Under this agreement the stockholders of the old corporation were to have no participation in the new company except that they might subscribe for the stock which it was necessary to sell, but the terms on which they might subscribe were less favorable than those made to outsiders. There was to be reserved $700,000 of preferred stock and $2,275,000 of common stock for the purpose of distribution to the creditors of the McCrum-Howell Company, the distribution to be made on the following basis: 25 per cent. of the face of their claims in preferred stock, and 75 per cent. in common stock. Creditors who might be unwilling to accept securities of the new company could receive 25 per cent. of the face of their claims in cash for the transfer of the new securities to which they were entitled. Subsequently application was made to the District Court for an order for the sale of the assets, and after due notice and at the hearing upon the application the creditors' committee presented to the court an offer to purchase the property for the sum of $870,000. The court entered a decree nisi, directing a sale of the assets as a whole and the acceptance of the offer made by the creditors' committee unless at a time fixed for a further hearing after giving proper notice to all, and some ten days later, there should be presented a higher bid, or some better plan, or unless other good cause should be shown why the decree should not be confirmed. At the time fixed for such further hearing, November 13, 1912, the court made a final decree directing the receivers to transfer and convey all the assets to the creditors' committee for the sum of $870,000 "upon the conditions set forth in said written bid, heretofore ordered filed in this case," and it went on to recite that the bid "was and is the best bid obtainable for said property, assets, claims, and effects; and that it was and is for the best interest of said creditors, stockholders, and other persons interested in said the McCrum-Howell Company that said bid be accepted." The decree also provided that meetings of the stockholders and directors of the company should be called for the purpose of acting upon the proposed sale and of authorizing the execution of such conveyances as might be necessary to vest in the purchaser the legal title to the property and assets of the company. A stockholders' meeting was held after due notice to all stockholders, and by a unanimous vote the execution of the conveyances was directed. A directors' meeting was in like manner held after due notice, and by a unanimous vote the execution of the conveyances was also authorized. The creditors' committee having designated the Richmond Radiator Company as its nominee, the conveyances were executed directly to it by the receivers and the old company. The Richmond Radiator Company was a new company organized under the laws of Delaware, and brought into existence for this purpose.

On the final accounting of the receivers it was found and adjudged that there was available for distribution to creditors $562,964.07, which made a dividend of 21.2 per cent. on proved claims.

On the facts stated and under the creditors' agreement it seems to be agreed that there were three courses open to a creditor of the McCrum-Howell Company: (1) He could file his claim in court and receive the first and final dividend of 21.2 per cent.; (2) he could deposit his claim with the creditors' committee and authorize the committee to use his dividend in acquiring securities of the new company, and then dispose through the committee of such securities for 25 per cent. of his claim in cash; or (3) in lieu of the dividend to which he was entitled, he could decree the committee to purchase securities of the new company, receiving 25 per cent. of the face value of his claim in preferred stock and 75 per cent. of the face value in common stock.

The court below was of the opinion that the sale of the property in the United States District Court for the Eastern District of Pennsylvania was a mere step in the plan of reorganization, and that it did not fix the value of the property transferred. In this view we are unable to concur. That sale was a sale upon a creditors' bill, and amounted to a levy of execution on behalf of the creditors. It resulted in a payment of the claims to the extent of the dividends realized and no more. The proceedings for the sale of the property were regularly taken after due notice to all concerned. The testimony shows that the receivers in advising the court to accept the bid had no intention that acceptance should be qualified upon the plan of reorganization becoming effective. On the contrary, the creditors who had not deposited their claims with the creditors' committee were not lost sight of, and the receivers had in mind that it was their duty to obtain for the creditors who never became parties to the creditors' agreement the highest possible dividend. The reorganization was something with which the court had nothing whatever to do. It was the voluntary agreement of the parties in interest.

The decrees provide for a sale and make no reference to any plan of reorganization. The fact that a reorganization was to follow cannot alter their nature or effect. They were not mere consent decrees, and at the time of the hearing of the motion to sell the properties but 85 per cent. of the claims were represented by the creditors' committee. It is impossible to regard the final decree of sale as a mere incident in the plan of reorganization, and it must be regarded as finally determining the value of the property of the McCrum-Howell Company. The purchase price, after payment of expenses, was sufficient to permit a dividend of 21.2 per cent. to creditors, including the creditors who held the notes indorsed by the respondent. The petitioners as the holders of such notes should apply this dividend payable out of the estate of the McCrum-Howell Company, the principal debtor, to the payment of the notes, and then look to the respondent as the surety on those notes for the difference.

In this connection it is proper to observe that the creditors who entered into the creditors' agreement expressly reserved their claim

against the respondent. The agreement contained the following provision:

"Eleventh: The depositors do not assign to the committee any claim against any party other than the company, and do *not waive or release any rights or claims against any indorser or guarantor of or person otherwise secondarily liable upon any of the claims deposited hereunder.*"

The respondent, however, asserts that the creditors have received full payment of their claims because after the sale of the property of the McCrum-Howell Company, the new company organized by the creditors to take over the property placed a value of $4,725,000 upon the assets which they received. He relies upon the decision of the Supreme Court in Northern Pacific Railway Co. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931 (1913). In that case the court held that where the stockholders of a corporation transferred its property to a new corporation, in which they were likewise the stockholders, the claims of creditors were not cut off even though the transfer took the form of a reorganization and judicial sale. And the court held that the fact that property of great value belonging to an insolvent corporation was bid in by the reorganization committee at the upset price fixed by the court at a judicial sale could not be used as evidence to disprove the recital as to its actual and far greater value when subsequently transferred by the reorganization committee. The rule laid down must be interpreted in the light of the facts then before the court. We do not understand that the court was laying down a rule to be applied to such a case as that now before us. The facts in that case were so different from the facts in this case that the two cases are to be distinguished. In the Boyd Case the reorganization was a stockholders' and not a creditors' reorganization, and the particular decision in that case was directed against the evil of permitting stockholders to reorganize and retain their property to the injury of creditors. In the case at bar the stockholders of the old corporation did not become stockholders in the new company except as they were permitted to subscribe on terms less favorable than those accorded to outsiders. In so far as the respondent might have been interested as stockholder and indorser he had a full and fair opportunity to protect his interests, and did nothing. In the Boyd Case the stockholders who purchased the property at the foreclosure sale were the purchasers of a trust fund, charged primarily with the payment of the creditors. They were in the position of a mortgagor buying at his own sale, and it is settled law that any arrangement the stockholders enter into by which their subordinate rights and interests are attempted to be secured at the expense of the prior and superior rights of the creditors cannot avail as against the latter. See Louisville Trust Co. v. Louisville Ry., 174 U. S. 674, 19 Sup. Ct. 827, 43 L. Ed. 1130 (1899).

The order is reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

CŒUR d'ALENE LUMBER CO. v. THOMPSON.

(Circuit Court of Appeals, Ninth Circuit. May 11, 1914.)

No. 2326.

1. NEGLIGENCE (§ 39*)—DANGEROUS PREMISES—CARE AS TO TRESPASSING CHILDREN.

The owner of premises upon which there is something dangerous and at the same time attractive to children of tender years, who knows that the place is, or because of its location is likely to be, frequented by them, owes a duty to exercise care to so safeguard it as to prevent their injury, and is liable for the death or injury of a child which the performance of such duty would have prevented.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 55; Dec. Dig. § 39.*]

2. NEGLIGENCE (§ 111*)—ACTION—SUFFICIENCY OF COMPLAINT.

In the complaint in an action to recover for the death of a child, who was drowned by falling into a well or pool on defendant's premises, which had been used in connection with a sawmill, and had been left unguarded when the mill was removed, it was not necessary to allege specifically between what dates the mill was operated, or the length of time the dangerous conditions had existed.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 182–184; Dec. Dig. § 111.*]

3. PLEADING (§ 417*)—DEMURRER—WAIVER.

Although, under a state statute, a demurrer is not waived by filing an answer at the same time, it is waived by a defendant, where on the trial, without objection on his part, the complaint is amended by eliminating the allegations on which the demurrer was based.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1401, 1402; Dec. Dig. § 417.*]

4. APPEAL AND ERROR (§ 959*)—PLEADING (§ 236*)—REVIEW—FEDERAL COURTS —DISCRETION TO ALLOW AMENDMENTS.

Under Rev. St. § 954 (U. S. Comp. St. 1901, p. 696), authorizing amendments of pleadings in the federal courts, the allowance of amendments is within the discretion of the court, and is reviewable only for an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825–3831; Dec. Dig. § 959;* Pleading, Cent. Dig. §§ 601, 605; Dec. Dig. § 236.*]

5. NEGLIGENCE (§ 126*) — DANGEROUS PREMISES — LIABILITY OF OWNER FOR DEATH OF CHILD.

In an action to recover for the death of a child, who fell into a well on defendant's premises and was drowned, it is immaterial that the well was made by others for use in connection with a sawmill built under a contract with defendant, where, after removal of the mill, defendant permitted it to remain without any safeguards to prevent children from falling into it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 245–247; Dec. Dig. § 126.*]

6. NEGLIGENCE (§ 136*)—DANGEROUS PREMISES—ACTION FOR DEATH OF CHILD —QUESTIONS FOR JURY.

Defendant, which owned timber land adjoining a town in which plaintiff resided, contracted with a partnership to build a sawmill on the premises and saw the timber. To procure water for the mill, the contractors dug a well five feet deep over a spring, the overflow from which passed

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

away through a channel. This channel became obstructed by sawdust, forming a pool several feet across and a few inches deep, covering the well, which, by reason of the discoloration of the water, could not be seen. On completion of the contract and removal of the mill, the well was left in that condition, and plaintiff's son, a child seven years old, who, with other boys, was playing in the sawdust and wading in the pool, stepped into the well and was drowned. Plaintiff testified that he had no knowledge of the existence of the well, but there was evidence to the contrary. *Held*, that the questions of defendant's negligence and plaintiff's contributory negligence were properly submitted to the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

In Error to the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Action at law by O. J. Thompson against the Cœur d'Alene Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

O. J. Thompson, the plaintiff in the court below, is a citizen of the state of Idaho. The Cœur d'Alene Lumber Company, the defendant in the court below, is a corporation organized and existing under and by virtue of the laws of the state of Washington. In the complaint of the plaintiff, as originally filed, it was alleged that for some time prior to the 1st day of June, 1911, the defendant had owned, operated, and maintained a sawmilling and woodworking plant, located upon its lands in the city of St. Maries, in the state of Idaho; that as part of the plant the defendant had caused to be excavated a certain cistern or well, which was used by it for the storage of water in connection with its milling plant; that some months prior to the 1st day of June, 1911, the defendant caused all of its buildings, machinery, and appliances to be moved from its lands in the city of St. Maries, but carelessly and negligently failed to fill up or cover the cistern or well excavated by it, and carelessly and negligently permitted the cistern or well to remain open up to and including the 1st day of June, 1911; that on that date the cistern or well had become filled with water to a depth of about 10 feet, and had become extremely dangerous to children of tender years and to others who had occasion to go upon the premises, either for business or for pleasure, and the lands maintained as aforesaid by the defendant had become and were dangerous premises; that for many months prior to the 1st day of June, 1911, the minor son of the plaintiff, Bernarr Thompson, with numerous other children living in the city of St. Maries, had frequently and habitually gone upon, over, and across the lands and premises of the defendant to the vicinity of the cistern or well for the purpose of play and amusement, all of which was known by the defendant, or could have been known by it in the exercise of reasonable care, and ought to have been and was anticipated by it and its agents and servants; that the dangerous condition of the premises of the defendant, and the danger of small children falling into its cistern or well and becoming drowned, and the habitual use of the premises by Bernarr Thompson and other companions and children of tender years, was open and notorious up to the time of the death of said Bernarr Thompson, and was well known to the defendant; that on account of the tender years of Bernarr Thompson he did not know or appreciate the dangerous condition of the premises of the defendant; that on the 1st day of June, 1911, Bernarr Thompson, in company with other children, were playing in, about, and upon the premises of the defendant, and close to and in the immediate vicinity of the cistern or well excavated by it, which at that time was filled with water up to and on a level with the ground; that said Bernarr Thompson, while so playing therein and thereabout, accidentally and inadvertently fell into the cistern or well and was drowned; that the negligence and carelessness on the part of the defendant in failing and neglecting to fill up or cover the cistern

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

or well which had been excavated by it was the proximate and sole cause of the death of Bernarr Thompson.

The defendant demurred to the complaint, on the grounds that it did not state facts sufficient to constitute a cause of action against the defendant; that it was uncertain, unintelligible, and ambiguous, in that it was not alleged therein, and did not appear therefrom, how long prior to the 1st day of June, 1911, the defendant had owned, operated, and maintained the sawmilling and woodworking plant mentioned in the complaint; that it did not appear in the complaint how long prior to the 1st day of June, 1911, the defendant had caused all of the buildings, machinery, and appliances mentioned in the complaint to be removed from its lands; and that it did not appear from the complaint in what manner the defendant had recklessly, negligently, and carelessly maintained the well and cistern mentioned in the complaint. The demurrer was overruled by the court below.

In the answer filed by the defendant all of the allegations of the complaint were denied, and as matter of affirmative defense the defendant alleged that at all of the times mentioned in the complaint it had been the owner of the N. E. ¼ of the N. E. ¼ of section 27, township 45 N., range 2 W., Boise meridian, in Kootenai county, in the state of Idaho; that on the 14th day of September, 1907, the defendant entered into a written contract with a certain copartnership doing business under the firm name of Schmidt Bros., to manufacture into timber and lumber for the defendant all of the logs then being on the lands above described and owned by the defendant; that thereupon Schmidt Bros. erected a sawmill on the lands of the defendant, and engaged in manufacturing lumber for the defendant, pursuant to the terms of the contract, up to and including the month of October, 1908; that in the operation of the sawmill by Schmidt Bros., and without the knowledge of the defendant, sawdust accumulated in piles adjacent to the sawmill; that back of the sawmill there was a small ravine, which sloped from a hillside toward the millsite of Schmidt Bros.; that water flowed through the ravine and terminated at the piles of sawdust into a small pool or sink, forming a pond about 25 or 30 feet long and about 12 or 15 feet wide; that the pool or pond was off and out of the way of any public highway; that at all times mentioned in the answer the pool or pond remained open, uninclosed, and uncovered, and that it was caused by Schmidt Bros. leaving upon their millsite piles of sawdust, against which the waters in the ravine flowed, stood, and remained; that, if any well was dug by Schmidt Bros. upon the premises, the defendant had no knowledge thereof. The defendant further alleged in its answer that the plaintiff knew of the existence of the pool or pond of water, and knew that his minor son was in the habit of going upon the premises, and that the carelessness and negligence of the plaintiff in failing to exercise due care, control, and supervision over his minor son, and in omitting to restrain and prevent him from entering upon the premises of the defendant, were the proximate causes of the death of his son.

At the close of the plaintiff's testimony the defendant moved the court for a judgment of nonsuit in its favor and against the plaintiff. The motion was based upon the grounds that the evidence was insufficient to warrant or justify a verdict in favor of the plaintiff and against the defendant, that the testimony in the case failed to prove that the minor son of the plaintiff was drowned by reason of any negligence or carelessness on the part of the defendant, and that the testimony showed that the plaintiff was guilty of contributory negligence in permitting his minor son to play in and about the sawdust piles, and the well or pool of water, on the defendant's land. The motion for a nonsuit was denied.

At the close of the testimony the defendant renewed its motion for a nonsuit, together with a motion for a directed verdict in its favor, on the grounds theretofore urged by it in support of its motion for a nonsuit made at the close of the plaintiff's testimony, and in addition thereto on the further grounds that the testimony showed that the well or cistern was not dug by the defendant, but was dug by Schmidt Bros., as independent contractors, that at the time the well or cistern was dug the contractors were operating a sawmill of their own upon the premises described in the complaint, and that

the defendant had no interest in the ownership of the plant and did not participate in the operation thereof. The motions for a nonsuit and for a directed verdict were denied.

The jury returned a verdict in favor of the plaintiff for the sum of $2,500. From the judgment entered thereon the defendant sued out a writ of error from this court.

McFarland & McFarland, of Cœur d'Alene, Idaho, and Charles L. Heitman, of Spirit Lake, Idaho, for plaintiff in error.

W. H. Plummer and Joseph J. Lavin, both of Spokane, Wash., and Whitla & Nelson, of Cœur d'Alene, Idaho, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] 1. The defendant has assigned as error the order of the trial judge overruling the demurrer interposed by it to the complaint of the plaintiff. By section 4228 of the Code of Civil Procedure of the state of Idaho, it is provided that "a demurrer is not waived by filing an answer at the same time." It is contended that under this statute the filing of an answer in the United States court did not waive the objection to the complaint raised by the demurrer. The objection was that the complaint did not state facts sufficient to constitute a cause of action: First, because it was alleged in the complaint that the dangerous condition of the premises of the defendant, and the danger of small children falling into the well or cistern and being drowned, and the habitual use of the premises by the minor son of the plaintiff, and other children of tender years, was open and notorious up to the time of the death of the plaintiff's son; second, because the complaint was uncertain, unintelligible, and ambiguous, in that it was not therein alleged how long prior to the 1st day of June, 1911, the defendant had owned, operated, and maintained the sawmilling and woodworking plant mentioned in the complaint, and, further, that it did not appear from the complaint how long prior to the 1st day of June, 1911, the defendant had caused all of the buildings, machinery, and appliances mentioned in the complaint to be removed from its premises.

The allegations of the complaint were, in our opinion, sufficient to state a cause of action against the defendant. In Shearman & Redfield on the Law of Negligence, § 705, the broad rule applicable to cases of this character is stated as follows:

"The owner of land, where children are allowed or accustomed to play, particularly if it be unfenced, must use ordinary care to keep it in a safe condition, for they, being without judgment and likely to be drawn by childish curiosity into places of danger, are not to be classed with trespassers, idlers, and mere licensees."

In Thompson's Commentaries on the Law of Negligence, § 1030, the rule is stated as follows:

"We now come to a class of decisions which hold the landowner liable in damages in the case of children injured by dangerous things suffered to exist unguarded on his premises, where they are accustomed to come with or without license. These decisions proceed on one or the other of two grounds: (1) That where the owner or occupier of grounds *brings* or *artificially creates*

something thereon which from its nature is especially *attractive to children*, and which at the same time is dangerous to them, he is bound, in the exercise of social duty and the ordinary offices of humanity, to take reasonable pains to see that such dangerous things are so guarded that children will not be injured by coming in contact with them. (2) That although the dangerous thing may not be what is termed an *attractive nuisance*—that is to say, may not have an especial attraction for children by reason of their childish instincts—yet where it is so *left exposed* that they are liable to come in contact with it, and where their coming in contact with it is obviously dangerous to them, the person so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them from its being so exposed, and is bound to take reasonable pains to guard it so as to prevent injury to them. In respect of the first class of cases, that of *attractive nuisances*, it is to be observed that it would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instincts, might run into it and be killed, and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed or maimed for life."

In Railroad Company v. Stout, 84 U. S. (17 Wall.) 657, 21 L. Ed. 745, commonly called the "Turntable Case," and being one of the first cases in the United States Supreme Court in which the doctrine of attractive nuisances was announced, Mr. Justice Hunt said:

"It is well settled that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. While it is the general rule in regard to an adult that to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case."

In the case of City of Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114, the defendant maintained upon its lands, which was separated from the adjoining streets by fences with large gaps in them, a pit of deep water on which were floating planks. The owner was aware that the place was attractive to children of tender years. The Supreme Court of Illinois, in holding that the failure of the owner to use reasonable care to drain such pit, or to keep children out of it, constituted negligence as against children of tender years, even though they were technically trespassers, said:

"The general rule is well settled that the private owner or occupant of land is under no obligations to strangers to place guards around excavations upon his land. The law does not require him to keep his premises in safe condition for the benefit of trespassers, or those who come upon them without invitation, either express or implied, and merely to seek their own pleasure and gratify their own curiosity. * * * An exception, however, to this general rule exists in favor of children. Although a child of tender years, who meets with an injury upon the premises of a private owner, may be a technical trespasser, yet the owner may be liable, if the things causing the injury have been left exposed and unguarded, and are of such a character as to be an attraction to the child, appealing to his childish curiosity and instincts. Unguarded premises, which are thus supplied with dangerous attractions, are regarded as holding out implied invitations to such children. * * * Where the land of a private owner is in a thickly settled city, adjacent to a public

street or alley, and he has upon it, or suffers to be upon it, dangerous machinery, or a dangerous pit or pond of water, or any other dangerous agency, at a point thereon near such public street or alley, of such a character as to be attractive to children of tender years, incapable of exercising ordinary care and he is aware or has notice of its attractions for children of that class, we think that he is under obligations to use reasonable care to protect them from injury when coming upon said premises, even though they may be technical trespassers. To charge him with such an obligation under such circumstances is merely to apply the well-known maxim, 'Sic utere tuo ut alienum non lædas.' It is true, as a general rule, that a party guilty of negligence is not liable if he does not owe the duty which he has neglected to the person claiming damages. Williams v. Railroad Co., 135 Ill. 491, 26 N. E. 661 [11 L. R. A. 352, 25 Am. St. Rep. 397]. But, although the private owner may owe no duty to an adult under the facts stated, the cases known as the 'Turntable Cases' hold that such duty is due from him to a child of tender years."

In Bjork v. City of Tacoma, 135 Pac. 1005 (1913), the Supreme Court of Washington, in holding that the doctrine laid down in the "Turntable Cases" was entirely applicable to the case under consideration by it, the facts of which were very similar to the case which we are now considering, said:

"The turntable and machinery cases, however, are in no just sense sui generis. They rest, as it seems to us, upon the one broad principle common to all cases of injury from dangerous premises and all cases of so-called 'attractive nuisances'—that there is always a duty due to society upon the owner of premises to take reasonable care to so use his own as not to injure another, a failure to observe which is negligence. 1 Thompson, Negligence (2d Ed.) §§ 1033 and 1036; Hydraulic Works v. Orr, 83 Pa. 332; Bransom's Adm'r v. Labrot, 81 Ky. 638, 50 Am. Rep. 193; Union Pac. Ry. Co. v. McDonald, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434; Biggs v. Consolidated Barb-Wire Co., 60 Kan. 217, 56 Pac. 4, 44 L. R. A. 655."

In Tucker v. Draper, 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321, the Supreme Court of Nebraska said:

"If I know that there is an open well upon my premises, and know that children of such tender years as to have no notion of their danger are continually playing around it, and I can obviate the danger with very little trouble to myself, and without injuring the premises, or interfering with my own free use thereof, I owe an active duty to those children; and if I neglect that duty, and they fall into the well, and are killed, it is through my negligence. I cannot urge their negligence as a defense, even though I have never invited or encouraged them expressly or impliedly to go upon the premises."

We are aware that in many cases the rule laid down in the cases from which we have cited has not been adhered to. There are numerous authorities of high repute in support of the rule that if a child trespasses upon the premises of another, and is injured in consequence of something that befalls him while so trespassing, he cannot recover damages, unless the injury was wantonly inflicted. Among these is the late case of City of Shawnee v. Cheek, 137 Pac. 724, to which our attention has been directed by a supplemental brief filed by the defendant. The cases in support of the two rules are hopelessly in conflict. We have only to say that we prefer to follow the more humane rule, rather than the rule that an owner of land cannot be held responsible for injuries to children unless the same were wantonly inflicted. The latter rule is—

"a cruel and wicked doctrine, unworthy of a civilized jurisprudence, which puts property above humanity, leaves entirely out of view the tender years and infirmity of understanding of the child, indeed his inability to be a trespasser in sound legal theory, and visits upon him the consequences of his trespass just as though he were an adult, and exonerates the person or corporation upon whose property he is a trespasser from any measure of duty towards him which they would not owe under the same circumstances towards an adult." Thompson's Commentaries on the Law of Negligence, § 1026.

[2] 2. With respect to the other objections—that the complaint was uncertain, unintelligible, and ambiguous—it need only be said that it was not incumbent upon the plaintiff to allege specifically between what dates the mill had been operated upon the premises. The negligence of the defendant consisted in allowing the pool or well to remain on its premises unguarded and uncovered after the mill had ceased to be operated, and on the date that the minor son of the plaintiff was drowned therein, and the exact length of time during which these conditions had existed was immaterial.

[3] 3. It is contended that the demurrer should have been sustained, for the reason that the complaint alleged that the dangerous and unsafe condition of the premises "was open and notorious up to the time of the death of said Bernarr Thompson, and was well known to said defendant"; that is to say, that, being "open and notorious," it was known to the plaintiff, and, being known to the plaintiff, it was negligence on his part to allow the child to wander to such a place. Conceding that under the Idaho statute the demurrer was not waived by the filing of the answer, it was nevertheless competent for the defendant to waive the objection to the complaint upon the trial of the case, and this the defendant actually did. The plaintiff was permitted to testify without objection that he lived about 6½ blocks from the place where the child was drowned, and that he had never been at the place prior to the accident, and, being asked, "Had you ever known your boy to go up there and play?" the plaintiff answered 'No." The objection was then made that it was alleged in the complaint that the dangerous condition of the premises and the danger of small children falling in the well or cistern and becoming drowned, and the habitual use of the premises by said Bernarr Thompson and other companions and children of tender years, was open and notorious up to the time of the death of said Bernarr Thompson, and was well known to the defendant. This allegation of the complaint, after discussion, was amended by leave of the court; the amendment consisting in striking out the words "was open and notorious up to the time of the death of said Bernarr Thompson." To this amendment the defendant's counsel objected. The court allowed the amendment, but upon the following conditions:

"The Court: I think I shall do this: I shall permit you to do this, upon these conditions: You may strike out entirely the words in the eighth paragraph, 'was open and notorious up to the time of the death of said Bernarr Thompson and,' upon the condition that if the verdict should be in favor of the plaintiff, and the defendant shall thereupon make a showing that they produced proof contrary to the implication of this language, that a new trial will be granted, and that, in case a new trial is granted, that you pay the costs of this trial."

The plaintiff's counsel accepted the conditions. The defendant's counsel appears to have interposed an exception, but when the court asked the parties, "Do you accept those conditions?" the plaintiff's counsel announced his acceptance, and the defendant's counsel remained silent. The taking of testimony proceeded. We think this silence (if there was a silence) was, under the circumstances, an acceptance of the conditions. If it was the purpose of defendant's counsel to object, he should have said so, and placed his objection clearly and distinctly on the record. Failing to do that, he was bound by the conditions under which the complaint was amended, and, being so amended, there was an actual waiver of the demurrer.

[4] But, aside, from any implied assent on the part of the defendant to this and other amendments made to the complaint to conform to the evidence, we think the amendments were properly allowed by the court under the statute of the United States providing for such amendments. Section 954 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 696) provides as follows:

"* * * Any court of the United States * * * may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall, in its discretion and by its rules, prescribe."

In Bamberger v. Terry, 103 U. S. 40, 26 L. Ed. 317, the plaintiff, at the close of the testimony, had asked for, and against the objection of the defendant had obtained, leave to amend his declaration so as to avoid a variance between the pleadings and the proof. Mr. Chief Justice Waite, delivering the opinion of the Supreme Court of the United States, and referring to section 954 of the Revised Statutes, said:

"By section 954, Revised Statutes, the trial court may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall in its discretion, or by its rules, prescribe. This clearly authorizes the allowance of amendments during the process of a trial in furtherance of justice."

In Mexican Central Railway v. Pinkney, 149 U. S. 194, 201, 13 Sup. Ct. 859, 862 (37 L. Ed. 699), Mr. Justice Jackson said:

"It is well settled that mere matters of procedure, such as the granting or refusing of motions for new trials, and questions respecting amendments to the pleadings, are purely discretionary matters for the consideration of the trial court, and, unless there has been gross abuse of that discretion, they are not reviewable in this court on writ of error."

In McDonald v. State of Nebraska, 101 Fed. 171, 176, 41 C. C. A. 278, 283, Caldwell, Circuit Judge, said:

"The right and duty of the federal courts to allow amendments does not rest on state statutes only. It is conferred on them by the Judiciary Act of 1789. That act was framed by the great statesmen and lawyers who had actively participated in the struggle to establish the political independence of their country. When this object had been achieved, and the Constitution adopted, they framed an act for the organization and government of the national courts, which has remained for more than a century a monument to their great wisdom, foresight, and sense of justice. The thirty-second section of that act (now section 954 of the Revised Statutes) was designed to free the administration of justice in the federal courts from all subtle, artificial, and technical rules and modes of proceeding in any way calculated

to hinder and delay the determination of causes in those courts upon their very merits. This act emancipated the judicial department of the government from the shackles of artificial and technical rules, which had theretofore been interposed to obstruct the administration of justice, as completely as the Revolution had emancipated the political department of the government from foreign domination. This was done by investing the federal courts with plenary power to remove by amendment all such impediments to the attainment of justice."

See, also, Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800; Gormley v. Bunyan, 138 U. S. 632, 11 Sup. Ct. 453, 34 L. Ed. 1086.

In the present case the record shows that the amendments were permitted by the trial judge in the exercise of his sound discretion, and we will not interfere with his ruling in that regard.

[5] 4. It appears from the testimony that on the 14th day of September, 1907, the defendant entered into a written agreement with a copartnership doing business under the firm name of Schmidt Bros., wherein and whereby the latter agreed to saw and manufacture into timber and merchantable lumber logs to be furnished to them by the defendant herein, and to be cut from fractional section 27, township 46 N., range 2 W. of Boise meridian, for a stipulated price particularly set forth in the agreement. Schmidt Bros. were to begin the work of manufacturing the timber for the defendant by the 15th day of October, 1907, if it was possible for them to have their mill set up by that time. It was further agreed between the parties that the timber was to be sawed at all times under the direction of the defendant herein, its agent or manager.

It further appeared from the testimony that pursuant to this agreement the mill was built by Schmidt Bros., and operations therein were begun about November 1, 1907; that Schmidt Bros. continued to operate the mill in the performance of their contract with the defendant for about a year, completing their contract at that time, although the mill was not removed from the premises of the defendant until the year 1910. It further appeared from the testimony that, for the purpose of obtaining water for the operation of their mill, Schmidt Bros. dug a well at a point on the defendant's land near the mill where there was a small spring in a ravine or gulch. The well was about 5 feet deep, and about 4 feet wide and 6 feet long. It was dug in such manner that the spring was right in the bottom thereof and constituted the source of supply of water for the well. The sides of the well were curbed with 2-inch planking which extended up to, but not above, the surface of the ground. When the mill was not being operated and water not being drawn from the well, it filled up and overflowed through a drain extending down the ravine or gulch. In the operation of the mill sawdust was deposited in piles in the vicinity of the well, and at the time of the death of the minor son of the plaintiff the drain or outlet had become clogged with sawdust, causing the waters of the well to back up and accumulate above the top of the well proper, forming a pond or pool about 8 or 10 feet wide and about 18 or 20 feet long. The pool or pond thus formed consisted of a rim of shallow water 6 or 8 inches deep, terminating abruptly in the well which it surrounded.

The testimony also tended to show that by reason of the muddy condition of the water, and the sawdust surrounding the pool and floating thereon, the well at the bottom thereof was not visible.

The defendant contends that inasmuch as the undisputed testimony showed that the well or pond in which the plaintiff's son was drowned was made by Schmidt Bros., independent contractors, and that at the time it was dug Schmidt Bros., as independent contractors, held a contract with the defendant and were operating upon the premises a sawmill of their own, and that the defendant had no interest or ownership in the plant, and did not participate in the operation thereof, it could not be held liable, and that the court erred in overruling the motions for a nonsuit, based upon these grounds, made at the close of the plaintiff's testimony and also at the close of all of the testimony in the case. But this contention of the defendant, and the reasons upon which it is based, are not applicable to this case. With the questions as to who dug the well and who permitted the sawdust to accumulate around the same causing the formation of a pond, we are not concerned. We have only to consider in this case the condition of the premises of the defendant at the time of the death of the minor son of the plaintiff. The negligence of the defendant consisted in permitting the pool and well to remain upon its premises, uncovered, unguarded, and in a condition dangerous to the safety of children of tender years who might go to the vicinity thereof to play, after the termination of the contract with Schmidt Bros. for the cutting of its timber, and after the removal of the latter's mill. The defendant was in sole possession of the premises at the time the son of the plaintiff was drowned, and it alone was accountable for and chargeable with any negligence in the use, operation, or condition thereof.

[6] 5. The record discloses abundant testimony to support the verdict rendered by the jury in favor of the plaintiff and against the defendant. Bernarr Thompson, the son of the plaintiff, was seven years of age and lived with his mother and father at St. Maries; Idaho. It appeared from the testimony of Kenneth Warner, a lad of nine years and a companion of Bernarr Thompson, that on the morning of the day on which the latter was drowned the witness, together with Bernarr Thompson and another lad named Russell Moore, went out into the hills surrounding the town of St. Maries to play; that after playing in the hills for a period they went over to the sawdust pile on the defendant's land to continue their games; that they ate their lunches on the sawdust pile, and afterwards took off their shoes and stockings and went in wading in the pool of water in the center of the sawdust pile; that the water in which they waded was about five or six inches deep; that there was nothing to indicate that there was a deep hole or well in the center and at the bottom of the pool; that after wading around in the shallow water for a while, Bernarr Thompson and Russell Moore took off the rest of their clothes and again went into the water to swim; that Bernarr Thompson could not swim, and immediately sank down into the well at the bottom of the pool; that while trying to rescue Bernarr Thompson from the deep water of the well, and pull him back to the shallow water surrounding it, Russell Moore

was himself pulled into the well, and then and there both of the lads drowned.

There was some testimony tending to show that the plaintiff in this case had been upon the premises of the defendant and was familiar with the dangerous condition thereof. But the plaintiff denied that he had ever been upon the defendant's land, and denied that he had ever been informed, either directly or indirectly, of the condition of the premises with respect to the well or any other dangerous instrumentalities.

The questions of the negligence of the defendant, and contributory negligence on the part of the plaintiff presented by the conflict in the testimony, were submitted to the jury, and the defendant does not assign, nor do we find, any objection to the instructions given on either of these questions.

The judgment of the lower court is affirmed.

BELLAMY et al. v. MISSOURI & N. A. R. CO.

(Circuit Court of Appeals, Eighth Circuit. April 24, 1914.)

No. 3336.

1. CARRIERS (§ 12*)—STATE REGULATION OF RATES—CONFISCATORY RATES.
Where a railroad company incorporated under the laws of a state has built and economically operates its line of road, it is entitled to earn at least sufficient to pay operating expenses, and a law of the state which will not permit it to do so is confiscatory.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. § 12.*]

2. CARRIERS (§ 18*)—STATE REGULATION OF RATES—PRELIMINARY INJUNCTION.
The granting of a preliminary injunction restraining the enforcement of a state law fixing passenger rates with respect to a railroad company complainant *held* within the discretion of the court, where, on the showing made, complainant put the statutory rate into effect, and, although operating its road economically, was unable to earn operating expenses.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 13, 16-18, 20, 24; Dec. Dig. § 18.*]

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Suit in equity by the Missouri & North Arkansas Railroad Company against George W. Bellamy and others. From an order granting a preliminary injunction, defendants appeal. Affirmed.

Joseph M. Hill, of Ft. Smith, Ark., for appellants.

W. B. Smith, of Little Rock, Ark., for appellee.

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

CARLAND, Circuit Judge. This is an appeal from an order granting a temporary injunction restraining the Railway Commission of Arkansas from enforcing as to appellee the two cent per mile passen-

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

ger rate established by the order of the Commission May 15, 1907, to carry out the provisions of an act of the Legislature of the state of Arkansas approved February 9, 1907, entitled "An Act to amend section 6611 of Kirby's Digest of the Statute of Arkansas, by fixing passenger rates in this State, and for other purposes." Laws 1907, p. 9. The order appealed from was granted December 4, 1909, and the appeal allowed January 1, 1910. The appeal, however, was not presented to this court for argument until the present term, the delay being caused as we understand it by reason of the pendency of cases in the Supreme Court involving similar questions. The order was granted upon the bill and supporting affidavits. Appellants filed what is termed a response to the motion, but no answer or plea to the bill was filed. The response was composed largely of legal argument. It denied no material facts relied upon in the bill for relief. The principal allegation of the response was as follows:

"(4) Respondents further say that complainant is not entitled to any equitable relief herein nor to an injunction against the said law prescribing a maximum passenger rate of 2 cents per mile, because its said railroad is practically an experiment, a new line just finished, constructed mostly through a rough, hilly and mountainous country, where the cost of building was great and the country unproductive and not developed, all of which was known to it at the time of such construction, that it has not been completed long enough for the revenues derived from its operations and the cost thereof to constitute a fair test of the reasonableness or unreasonableness of the rate complained of, * * * and because at least two-thirds of its mileage in the state, 178 miles from Leslie to Helena, was constructed long after the said act of February 9, 1907, reducing the passenger rate on lines of railroad over 85 miles in length from 3 to 2 cents per mile, and it knew at the time of such construction that it would not be permitted to charge more than said rate of 2 cents per mile so prescribed by said act and should not be permitted in the preliminary hearing to have an injunction in effect nullifying a law of the state of Arkansas, which was made before the construction of its line and by such construction thereafter and thereunder by it accepted as a reasonable rate and has been applied for the little time such road has been in operation."

We think therefore that all material facts which were well pleaded in the bill for the purpose of the motion stood as admitted. It is proper to observe also that the action has not been tried nor has it ever been in form for trial. The motion was addressed to the sound legal discretion of the trial court, guided by well-established principles of law and practice. The question for decision was not whether the appellee was entitled to a final decree as prayed for, but whether in the sound legal discretion of the court the two cent passenger rate should be suspended until the case could be heard upon its merits. It was necessary, of course, that the bill should state a case for equitable relief, and that great caution should be exercised by the court in granting a temporary injunction. With these principles in view let us examine the allegations of the bill.

The bill alleged that appellee was a corporation organized under the laws of the state of Arkansas, owning and operating a line of railroad extending from Joplin, Mo., to Helena, Ark. The history of the development of appellee was stated as follows:

"(4) Your orator avers: That the Missouri & Arkansas Railroad Company was incorporated under the laws of the state of Missouri regulating the or-

ganization of railroad corporations on September 21, 1880, and it constructed a line from Seligman, Mo., in the county of Barry, to the state line between the states of Missouri and Arkansas, a distance of 8.15 miles. That the Eureka Springs Railway Company was incorporated under the general laws of the state of Arkansas governing the organization and incorporation of railroad companies on the 26th of June, 1880, for the purpose of constructing a line of railroad from the state line between the states of Missouri and Arkansas to Eureka Springs in Carroll county, Ark. That during the year of 1882 the Missouri & Arkansas Railroad Company and the Eureka Springs Railway Company entered into an agreement of consolidation, and the two roads were, under proper resolutions of the boards of directors and the stockholders, consolidated under the name of the Eureka Springs Railway Company, and articles of consolidation of the two companies were filed in the offices of the Secretary of State of Missouri and Arkansas during the year 1883, and thereafter the property and rights of the Missouri & Arkansas Railroad Company passed to and were owned by the Eureka Springs Railway Company. The Eureka Springs Railway Company constructed an extension of the line of the Missouri & Arkansas Railroad Company from the state line between the states of Missouri and Arkansas to Eureka Springs, a distance of 10.35 miles, and operated the line of road from its completion in the year 1883 from Seligman, Mo., to Eureka Springs, Ark., and until it sold and transferred its line to the St. Louis & North Arkansas Railroad Company, which company was incorporated on the 25th of May, 1899, under the general laws of the state of Arkansas governing the organization and incorporation of railroad companies. The latter company acquired all of the property and rights of the Eureka Springs Railway Company and extended the line from Eureka Springs, Ark., to Harrison, in Boone county, Ark., a distance of approximately 50 miles; and thereafter extended the line from Harrison, in Boone county, Ark., to Leslie, in Searcy county, Ark., which extension was completed on September 11, 1903, and the said St. Louis & Arkansas Railroad Company thereafter, and until the extensions southeast as hereinafter set out were made by the Missouri & North Arkansas Railroad Company, operated a continuous line of railroad from Seligman, Mo., in the county of Barry, to Leslie, Ark., in the county of Searcy, a distance of 126.16 miles. That said St. Louis & North Arkansas Railroad Company was bonded for $3,065,500, said bonds representing $25,000 per mile for 122.62 miles, the distance between Seligman, Mo., and Leslie, Ark., including the spur from Freeman, Ark., to Berryville, Ark., said bonds being used in the payment of the purchase price of the Eureka Springs Railroad Company, and the construction of the extension from Eureka Springs to Leslie. Said bonds were dated March 1, 1900, running 50 years to maturity, and bearing 5 per cent. interest payable semiannually on the 1st days of January and July of each year. The Eureka Springs Railway Company, operating a mileage of only 18.50 miles under tariffs of freight and passenger constructed by it without regulation by any state authority, operated up to the time of its transfer to the St. Louis & North Arkansas Railroad Company at a profit to the stockholders above the payment of operating expenses and fixed charges. That the extension from Eureka Springs to Leslie passed through a virgin country sparsely settled, with the export business entirely undeveloped; the country was hilly and mountainous, and the grades and curves on the line were heavy, so as to make the cost of maintenance and operation large in proportion to the revenues derived therefrom. That the extension as hereinbefore alleged was completed on September 11, 1903, and thereafter the company, operating under freight tariffs prescribed by the Railroad Commission of Arkansas and charging a three cent passenger rate as then applicable under the statutes of the state of Arkansas and the orders of the Railroad Commission of said state, did not earn sufficient from intrastate and interstate business, above operating expenses, to pay the interest on its bonded indebtedness. That this bonded indebtedness of $25,000 per mile represented approximately the actual cost of construction. That the earnings did not increase in proportion to the increase of mileage. As a result, the company was unable to pay its semiannual interest accruing upon its bonds for January and July, 1905, and

January, 1906, the company having made a floating loan to meet the semiannual interest maturing July 1, 1904. As a result, the holders of its outstanding bonds instituted foreclosure proceedings in the United States Circuit Court for the Harrison Division of the Western District of Arkansas to foreclose the lien of the deed of trust given to secure the bonds, and in said proceeding a sale of said property was made on the 16th day of June, 1906, to * * * a committee representing the bondholders, who on the 4th day of August, 1906, reorganized the company under the name of the Missouri & North Arkansas Railroad Company, under and in pursuance of the statutes of the state of Arkansas regulating the reorganization by the purchasers of any railroad purchased at judicial sale under a mortgage or deed of trust under the provisions of the acts of the General Assembly of the state of Arkansas of July 23, 1868 (Laws 1868, p. 290), and December 9, 1874 (Laws 1874–75, p. 57).

"Your orator avers: That the bondholders of the St. Louis & North Arkansas Railroad Company became the owners of the road under purchase of the committee representing them at the foreclosure sale as aforesaid, and reorganized the property under the corporate name of the Missouri & North Arkansas Railroad Company in an effort to save their investment, and in aid thereof, during the latter part of the year 1906, projected an extension of the line of road from Seligman, Mo., in a northwesterly direction to Joplin, a distance of approximately 60 miles, where it would connect with several trunk lines of road, to wit, the Kansas City Southern, St. Louis & San Francisco, the Missouri Pacific, and the Missouri, Kansas & Texas railway companies, and an extension from Leslie, Ark., in a southeasterly direction to Helena, Ark., on the left bank of the Mississippi river, a distance of approximately 178 miles, where it would connect with the Illinois Central and the St. Louis, Iron Mountain & Southern railway companies. That said extension of the line from Seligman, Mo., to Neosho, Mo., was completed and put in operation on March 1, 1908. That the extension southeast was completed and put in operation in sections, the line from Leslie to Shirley being put in operation on June 18, 1908, and within a few months thereafter to Miller, Ark., and from Miller to Georgetown about December 1, 1908, and from Georgetown to Helena, March 1, 1909."

It is then alleged: That the Legislature of the state of Arkansas on February 9, 1907, enacted a law which fixed a rate of two cents per mile for the carriage of passengers on all railroad lines in the state over 85 miles in length, which included appellee. That on May 15, 1907, the Railroad Commission of Arkansas made and promulgated an order to the same effect. That, prior to the enactment of said statute and the making of said order, appellee had charged three cents per mile for the transportation of passengers within the state of Arkansas, but that, on account of the heavy penalties prescribed by law for the violation of said statute or the order of the Commission, appellee reduced its rate for the carriage of passengers in the state of Arkansas to two cents per mile, and continued to charge that rate until the issuance of the temporary injunction in this case—a period of over two years. That appellee has at all times operated its trains in the state of Arkansas, with as great a degree of economy as was compatible with the comfort of passengers, safe and efficient service to the public, and the maintenance and preservation of its property. That all the earnings of appellee from intrastate transportation of freight and passengers in the state of Arkansas during the period that said two cent rate has been in force have not been sufficient to pay operating expenses and the cost of maintenance and fixed charges properly chargeable to said business. That the total earnings from the trans-

portation of passengers between the stations in the state of Arkansas during the fiscal year ending June 30, 1909, were $73,247.25; that the total earnings for such fiscal year from the transportation of freight between stations in said state were $84,315.44; that the earnings from the transportation of mail, express, and all other transportation sources and the nontransportation revenue of the company upon its intrastate business for the same period amounted to $15,863.86—making the total revenue from intrastate business for the fiscal year ending June 30, 1909, $173,426.55. That the total expense of operation solely incident to said business including all charges except interest charges, apportioned between interstate and intrastate business was $176,852.-23. That the total expense of operation solely incident to said passenger business in said state for the year ending June 30, 1909, including all charges except interest charges, was $73,843.13.

That the total revenues derived, which includes revenues from all sources, upon intrastate and interstate business of its entire line in operation for the fiscal year ending June 30, 1909, was..	$486,371 23
That the total operating expenses for said year were..........	$470,596 72
Taxes accrued and paid for the year..........................	19,274 78
Hire of equipment, net amount paid...........................	7,043 68
Rental of joint facilities, net amount paid.....................	6,606 47
	$503,521 65
	486,371 23
Showing the net loss in operation for the year to be..........	$ 17,150 42

It is true that the expense of operation apportioned between intrastate and interstate business is upon a revenue basis, which has been held not to be an accurate way standing alone of determining the operating expense as between intrastate and interstate business; but we apprehend that where such an apportionment shows no earnings whatever above operating expense that a different mode of apportionment would not materially affect the question at issue. St. Louis & Hannibal Railroad Co. v. Knott, 230 U. S. 508, 33 Sup. Ct. 976, 57 L. Ed. 1572; Chicago Great Western Railroad Co. v. Knott, 230 U. S. 508, 33 Sup. Ct. 976, 57 L. Ed. 1572; Minnesota Rate Cases, 230 U. S. 470, 33 Sup. Ct. 729, 57 L. Ed. 1511.

The bill also contains the usual allegations as to the numerous severe penalties that will be imposed upon appellee in case it shall violate the law of Arkansas and the order of the Railroad Commission in the premises, and also that a multiplicity of suits for the recovery of penalties will arise. We think that the admitted facts present a case where appellee is not asking to earn anything for its stockholders, but simply to be allowed to earn operating expenses. The road must be operated or its charter surrendered; and we have no question here of the amount of income that appellee is entitled to earn upon the value of its property, as by the showing made there are no earnings and none are claimed above operating expenses. It is alleged, and not denied, that the business of appellee is economically administered; but it is claimed that the whole trouble arises from the extending of new and

extensive lines into undeveloped and sparsely settled country where the expense is exceedingly great. The cases of Covington & Lexington Turnpike Road Co. v. Sandford, 164 U. S. 578, 17 Sup. Ct. 198, 41 L. Ed. 560, San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 23 Sup. Ct. 571, 47 L. Ed. 892, and Simpson v. Shepard, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, are cited to support the proposition that, if the amount of the actual investment by a railroad company has been reckless or improvident, a loss may be sustained which the community does not underwrite. It must be observed, however, that the Supreme Court in the cases cited was speaking with reference to the amount of revenue or income to which the stockholders of a corporation would be entitled over and above legitimate operating expenses. For illustration, in Covington & Lexington Turnpike Road Co. v. Sandford, supra, it was said:

"If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public."

[1] When under the laws of the state of Arkansas individuals become incorporated for the purpose of building a railroad, and, having built the same are operating the same economically, it would seem that they would be entitled to earn operating expenses, and that a law which would not permit them to do so would be confiscatory. But the trial court was not obliged to determine finally the grave questions presented by the bill. It had no authority or power to do so in the absence of pleading and evidence, unless by agreement the case was finally submitted upon the bill alone. The trial court, upon the issue made, granted a temporary injunction upon condition that appellee execute a bond in the sum of $25,000, subject to be increased at any time upon the application of the defendants and conditioned that appellee should issue to each person purchasing a ticket or paying cash fare upon the train from one point in the state of Arkansas to another point in the same state, and confined exclusively to intrastate travel, a certificate or coupon showing the amount paid by such passenger for such ticket and the date thereof, which said certificate or coupon should be prima facie evidence of the amount paid and the time of payment, and if it should eventually be decided that the order granting the temporary injunction should not have been granted, that appellee would refund to owners and holders of the certificates and coupons issued by it the excess charges as shown by the same with interest at six per cent. per annum.

[2] If the evidence which the Supreme Court criticized in Hannibal Railroad Co. v. Knott, 230 U. S. 508, 33 Sup. Ct. 976, 57 L. Ed. 1572, Chicago Great Western Railroad Co. v. Knott, 230 U. S. 508, 33 Sup. Ct. 976, 57 L. Ed. 1572, and Minnesota Rate Cases, 230 U. S. 470, 33 Sup. Ct. 729, 57 L. Ed. 1511, was sufficient to authorize a permanent injunction, then the showing in this case ought to authorize a temporary injunction, as in each of the cases cited a net revenue over operating expenses was earned. In the case of M. & St. L. Ry. Co., the per cent. of net earnings was for the year 1907, 4.14, for 1908, 3.5, for 1909, less than 3.7.

We can come to no other conclusion but that the legal discretion confided to the trial court was properly exercised.

The order appealed from must be affirmed. And it is so ordered.

GIBSON v. CHESAPEAKE & O. RY. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1914.)

No. 2465.

1. REMOVAL OF CAUSES (§ 86*)—DIVERSITY OF CITIZENSHIP—RESIDENT DEFENDANTS—FRAUDULENT JOINDER—REMOVAL PETITION.

A removal petition, alleging diversity of citizenship between plaintiff and the petitioning defendant and charging that the three codefendants whose citizenship was the same as that of plaintiff were fraudulently joined solely to prevent removal; that all the allegations of negligence made against such codefendants were untrue, were known to be untrue by plaintiff at the time the suit was brought, and were fraudulently made for the purpose stated; that the petitioning defendant was in sole control, charge, and operation of the line at the time of the injuries complained of under lease from the resident corporation defendant; and that neither of the individual defendants had anything whatever to do with the accident, etc., was sufficient.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166–179; Dec. Dig. § 86.*

Fraudulent joinder of parties to prevent removal, see note to Offner v. Chicago & E. R. Co., 78 C. C. A. 362.]

2. RAILROADS (§ 134*)—LEASE OF LINES—LIABILITY OF LESSOR—INJURIES TO SERVANT OF LESSEE.

Where a railroad company validly leases its lines to another railroad, the lessor company is not liable as an employer for injuries caused to employés of the lessee company by the latter's negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 423–433; Dec. Dig. § 134.*]

3. REMOVAL OF CAUSES (§§ 89, 107*)—PETITION TO REMOVE—ALLEGATIONS—BURDEN OF PROOF.

Where plaintiff denies the allegations of a petition to remove, the burden is on the removing defendant to substantiate them, but a mere motion to remand, in absence of such denial, amounts only to a demurrer to the petition admitting the facts for the purposes of the motion, and this though the petition to remove was not sworn to by an officer of the removing defendant but by its attorney.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 162, 165, 178, 189, 192–195, 197, 200, 201, 225–232, 234; Dec. Dig. §§ 89, 107.*]

4. MASTER AND SERVANT (§ 177*)—INJURIES TO SERVANT—FELLOW SERVANTS—EMPLOYERS' LIABILITY ACT.

Prior to the passage of federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), a servant of a railroad company could not recover for injuries sustained through the negligence of a fellow servant though in different departments of labor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 307, 352, 353; Dec. Dig. § 177.*]

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

5. Appeal and Error (§ 1078*)—Assignments of Error—Waiver—Failure to Argue.

Assignments of error not alluded to in the brief of plaintiff in error may be regarded as waived.

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

6. Removal of Causes (§ 86*)—Petition to Remove—Motion to Remand—Denial—Leave to Answer.

A nonresident defendant having moved to remove the cause and alleged a fraudulent joinder of resident defendants to prevent removal, plaintiff moved to remand without taking or offering to take issue upon the petition to remove. The motion to remand was overruled, as was also a motion to reconsider the order overruling that motion, whereupon defendants on October 19, 1908, jointly and severally demurred to the petition as not stating a cause of action against all or either of the defendants, and 16 days later plaintiff, pending such demurrer, asked leave to answer the petition for removal filing with the motion her proposed answer. On the day the demurrer was submitted for decision, which was 55 days after the denial of the motion to reconsider the refusal to remand, the case was specially set for trial at a date ten days later; the application for leave to answer having been made without giving any reason for the delay. *Held*, that an order denying such leave was not an abuse of discretion.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. § 86.*]

In Error to the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Action by Emma Gibson, as administratrix of the estate of James Gibson, deceased, against the Chesapeake & Ohio Railway Company and others. Judgment for defendant, and plaintiff brings error. Affirmed.

Robert C. Simmons and Byrne & Read, all of Covington, Ky., for plaintiff in error.

Worthington, Cochran & Browning, of Maysville, Ky., for defendant in error.

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

KNAPPEN, Circuit Judge. Plaintiff in error, as administratrix (she being a citizen of Kentucky), brought suit in a court of that state against the Chesapeake & Ohio Railway Company, a Virginia corporation (defendant in error here), the Chesapeake & Ohio Railway Company of Kentucky, a corporation of the latter state, and two individual defendants, both citizens of Kentucky, for the recovery of damages resulting from the death of plaintiff's husband. The petition alleged, in substance, that the Kentucky corporation was at the time of the alleged injuries engaged in the operation of a railroad over the same lines as the other corporation defendant, and was consolidated with the latter and a part of its system, having the same officers and employés; that the intestate, while in the employ of defendant in error as conductor, in spotting cars, received the injuries from which he died, through being struck by a rail thrown upon the car by the two

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

individual defendants, as agents and employés of the corporate defendants.

Defendant in error filed petition for removal, on the ground of diversity of citizenship, alleging that its three codefendants were fraudulently joined for the sole purpose of preventing removal; averring that all the allegations of negligence made against its codefendants were untrue, were known to be untrue by the plaintiff up to and at the time of bringing her suit, and fraudulently made for the purpose stated. It is further alleged that defendant in error was in the sole control, charge, and operation of the line at the time of the injuries complained of under lease from the Kentucky corporation; that the terms of this lease were known to plaintiff before and at the time of bringing suit; and that neither of the individual defendants had anything whatever to do with the accident, it being alleged that one of them was not even present when it occurred, and the other, while in the employ of defendant in error, had no part or parcel in the accident. The state court made the order of removal, and the cause was duly docketed in the court below. In due time plaintiff moved to remand, without taking or offering to take issue upon the allegations in the petition for removal. The motion to remand was overruled, as was also a motion to reconsider the order overruling that motion. Thereupon defendants, on October 19, 1908, jointly and severally demurred to plaintiff's petition, as not stating a cause of action against all or either of the defendants. Sixteen days later plaintiff asked leave to answer the petition for removal, filing with the motion her proposed answer. The motion was denied, and the cause continued, either generally or for preparation, from time to time until the demurrer was sustained, and the cause dismissed on plaintiff's failing to amend. Error is assigned upon the overruling of the motion to remand and the motion to reconsider that motion, the denial of motion to file answer to the petition for removal, to the sustaining of demurrer to plaintiff's petition and to the dismissal thereof.

[1-3] It is clear that if the court below properly exercised its discretion in refusing leave to answer the petition for removal the judgment should be affirmed. Cause for removal was stated on the face of the petition therefor, through the express allegations of fraudulent joinder. Wecker v. National Enameling, etc., Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757; Hunter v. Illinois Central R. R. Co. (C. C. A. 6th Cir.) 188 Fed. 645, and cases cited at page 648 of 110 C. C. A. 459. If the Kentucky corporation was really a lessor merely, as alleged in the petition to remove, no right of action existed as to it. Swice's Adm'x v. Maysville & B. S. Ry. Co. et al., 116 Ky. 253, 257, 75 S. W. 278. Had plaintiff denied the allegations in the petition to remove, the burden would have been upon the removing defendant to substantiate them. Trivette v. C. & O. Ry. Co. (C. C. A. 6th Cir.) 212 Fed. 641, 643, 129 C. C. A. 177. The motion to remand, in the absence of such denial, amounted merely to a demurrer to the petition, admitting the facts for the purposes of the motion. Kentucky v. Powers, 201 U. S. 1, 33, 34, 26 Sup. Ct. 387, 50 L. Ed. 633, 5 Ann. Cas. 692; Hunter v. Illinois Central R. Co., supra, 188 Fed. at page 649, 110 C. C. A. 459, and cases there cited; Enos

v. Kentucky Distilleries & W. H. Co. (C. C. A. 6th Cir.) 189 Fed. 342, 345, 111 C. C. A. 74. The fact that the petition to remove was not sworn to by an officer of the defendant in error, but only by its attorney, does not alter the situation. Hunter v. Illinois Central R. Co., supra, 188 Fed. at pages 648, 649, 110 C. C. A. 459. As the record stood, the motion to remand, as well as the motion to reconsider the order thereon, were properly overruled.

[4, 5] If the case was removable, judgment was properly entered for defendant in error, against which defendant alone the writ of error and citation were made to run. The accident having occurred before the passage of the federal Employers' Liability Act, the rule prohibited recovery for the negligence of fellow servants, although in a different department from that of the injured servant; for in the federal courts the departmental theory is rejected. No. Pacific R. R. Co. v. Dixon, 194 U. S. 338, 343–346, 24 Sup. Ct. 683, 48 L. Ed. 1006; Texas & Pacific R. R. Co. v. Bourman, 212 U. S. 536, 541, 29 Sup. Ct. 319, 53 L. Ed. 641; Illinois Central R. R. Co. v. Hart (C. C. A. 6th Cir.) 176 Fed. 245, 247, 100 C. C. A. 49. We may add that the assignments relating to the overruling of demurrer and entry of judgment thereon might all be treated as waived, through failure to allude to them in brief (there being no oral argument). American Fibre-Chamois Co. v. Buckskin Fibre Co. (C. C. A. 6) 72 Fed. 508, 18 C. C. A. 662.

[6] We are thus brought to the question whether it should be held that discretion was improperly exercised by the court below in denying leave to answer the allegations of fact in the petition for removal. In Hunter v. Illinois Central R. Co., supra, we declined to overrule the discretion exercised by the trial court in denying a similar application. The facts in the Hunter Case were not identical with those presented here, for in that case the application was made "only on the eve of trial," while in this case the leave to file was asked for within a little over two months after the denial of the motion to reconsider the refusal to remand; and, as it turned out, the demurrer was not finally disposed of until about three years later. But the circumstances presented a case for the exercise of discretion by the District Court. Upon the day that the demurrer was submitted for decision (which was 55 days after the denial of the motion to reconsider the refusal to remand) the case was, by order of the court, specially set for trial at a date ten days later. Two days before the expiration of this period the cause was, by consent of the parties, "continued for preparation" generally; that is to say, without fixing the date when it would be taken up. The application for leave to answer was made without giving any reason for the delay or for the requested indulgence.

In these circumstances, we cannot say that the court improperly exercised its discretion. There must be somewhere a limit beyond which the court is not bound to extend indulgence in entertaining applications of this nature, especially where, as here, no special reason therefor is shown. It is the abuse of discretion, not its proper exercise, that can be reviewed. Such discretion cannot be said to be improperly exercised even if, looking backward, we should think that in the same circumstances we might have exercised discretion differently. True,

taking an ex post facto view, it may be said that the long delay in deciding the demurrer to plaintiff's petition shows that no harm could have resulted from granting the application in question; but the court's discretion must be judged by the situation at the time it was exercised. If its exercise was then proper, it cannot become improper from the mere fact of delay in ultimately disposing of the case itself. Indeed, not only would it seem unlikely that such delay was then contemplated, but the record shows that the cause was continued from time to time by order of the court—twice by consent of the parties, once on their joint motion, once because neither appeared at the term, and later on the plaintiff's motion.

The judgment of the District Court is accordingly affirmed, with costs.

LUSE v. MARTIN.

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

No. 3988.

CONTRACTS (§ 176*)—CONSTRUCTION—QUESTIONS FOR JURY.

A contract by which plaintiff agreed to sell to defendant certain securities to be paid for in cash and stock of a railroad company "as soon as" 100 miles of the road of such company should have been built by defendant and his associates held so uncertain on its face as to whether the sale itself or only the time of payment was conditioned on the building of such road as to justify the court, in an action to recover the purchase price of the securities after the building of the road had been abandoned, in submitting the question to the jury on evidence of the relations of the parties and the surrounding circumstances.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 767–770, 917, 956, 979, 1041, 1097, 1825; Dec. Dig. § 176.*]

In Error to the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Action at law by Jesse F. Luse against John E. Martin. Judgment for defendant, and plaintiff brings error. Affirmed.

George S. Grimes, of Minneapolis, Minn. (George L. Davis, of Kansas City, Mo., on the brief), for plaintiff in error.

David F. Simpson, of Minneapolis, Minn. (Robert G. Morrison, Wm. A. Lancaster, and Milton D. Purdy, all of Minneapolis, Minn., on the brief), for defendant in error.

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

HOOK, Circuit Judge. Luse sued Martin upon a contract embraced in an accepted written proposition the material part of which is as follows:

"I (Luse) hereby make you (Martin) the following proposition for immediate acceptance regarding my interests in the Southwestern Traction Company, and in the other property mentioned herein: You to pay me seventy-five thousand ($75,000.00) dollars in cash, and fifty thousand ($50,000.00) dollars par value of the stock of the Kansas City & Kansas Southwestern

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

Railway Company, the cash to be paid and the stock to be delivered as soon as that part of the Kansas City & Kansas Southwestern Railway, 100 miles in length from Independence, Kansas, north, shall have been built by yourself and associates, or if you should sell your interest in said road—sale to be made subject to this proposition, it being understood that Independence, Kansas, shall be a point on the said railway line. I agree, however, that should the said stock be held in escrow for construction company purposes, or for any other similar reasons be impossible of delivery as above called for, to waive such delivery for a reasonable time, pending the termination of such escrow or other arrangement. For the above consideration, I agree to turn over at once to yourself or to whomsoever you may direct, property assigned and transferred, and to take any action necessary to perfect the title in you the following property."

Following the above were a description of certain notes, bonds, stocks, etc., and some details which need not be set forth here. The venture in which the railroad was to be built failed, and no part of the hundred miles of road was constructed. The action was for $125,000, being $75,000 in cash and $50,000, the par value of the stock in the railway company named. The trial court was of opinion that upon the face of the contract there was a reasonable doubt whether the sale and purchase of the securities was intended to be absolute or conditioned upon the building of the 100 miles of railroad, and it submitted the question to a jury upon evidence of the relations of the parties and the surrounding circumstances, and also the further question whether, if so conditioned, the defendant did all a reasonable man should do to bring the condition about. The jury found for the defendant, the court gave judgment in his favor, and the plaintiff prosecuted this writ of error.

The contention of the plaintiff is that the terms of the contract are so definite, certain, and unambiguous as to preclude construction; that they disclose an unconditional sale of his securities and an obligation of the defendant to pay the price upon, or at the end of a reasonable time for, the completion of the hundred miles of railroad; and therefore the trial court should have so declared as matter of law and should have neither received extrinsic evidence nor submitted the questions to a jury. We think, however, the court was right. The case is unlike those in which an existing debt or obligation to the plaintiff is recited the payment of which is postponed to a future event for the benefit or convenience of the defendant. In such cases the debtor is held to bring the event about, or failing to do so, then to pay within a reasonable time. It would be unreasonable to put the very existence of a conceded debt or obligation to the hazard of a contingency except upon clearest words to that effect and sufficient consideration. But here there was no debt, obligation, or consideration preceding the undertaking of the defendant. All there was of that nature first arose with the other terms and provisions of the contract, and it is not clear from the face of the contract whether the contingency, the construction of the railroad, conditions the sale itself or merely relates to the time for payment. Manifestly the parties did not employ the customary terms to indicate an absolute sale, and their omission in this particular is not wholly explained by the expectation of a final, formal contract embodying the same provisions. From the plaintiff's side the proposition was one "regarding my interests," and it stated "that the sale if

effected" of certain of the specified securities also carried others. The cash and stock were to be paid and delivered by defendant "as soon as" the hundred miles of railroad "shall have been built by yourself and associates, or if you should sell your interest in said road—sale to be made subject to this proposition." The plaintiff contends that by the contract made by his proposition and defendant's acceptance the latter did "assume the obligation to build the railroad" within a reasonable time. If this were so, the undertaking of the defendant was in the nature of a guaranty, since the work contemplated involved the cooperation of his associates. Had the parties so intended, the simple, effective course would have been to add express words to that effect to the clause relating to the building of the railroad. There are no such words in the contract. The contention therefore is that they are implied, but extending a contract beyond its express terms by drawing implications is the very essence of construction, and when construction is resorted to, as must be in the case before us, other things should be considered, such as the matters about which the parties were dealing and their relations to them and to each other. Those things were in their minds when they made their contract, and a court should be as well informed when called upon to go beyond their express provisions and to construe and apply them. There is no more reason for inserting in the contract by implication a guaranty by the defendant that he and his associates would build the railroad than there is for implying a mere undertaking by him that he would use his best endeavors to have the work done. On the very face of the contract there is a suggestion that plaintiff's rights were to run with the venture. It is expressly provided that if defendant sold his interest in the road the sale should be subject to the contract.

A case quite in point is Bradley v. Packet Company, 13 Pet. 89, 10 L. Ed. 72, the doctrine of which was recently affirmed and applied in Lowry v. Hawaii, 206 U. S. 206, 221, 27 Sup. Ct. 622, 51 L. Ed. 1026. November 19, 1831, Bradley made the following written proposition to the Packet Company:

"I agree to hire the steamboat Franklin until the Sydney is placed on the route, to commence to-morrow, 20th inst. at $35.00 per day clear of all expenses other than the wages of Captain Nevitt."

On the same day the president of the company replied in writing accepting the proposition and restating the terms proposed including the words: "Use of the steamboat Franklin until the Sydney is placed on the route." These writings made the contract by which Bradley hired the steamboat of the company until his own was put in commission. Fifteen days later, December 5th, Bradley discontinued the use of the boat he hired, saying that navigation was closed by ice and that he had commenced carrying the mail, which was his occupation, by land. The company refused to accept the discharge of its boat and brought suit. Bradley offered to prove at the trial that for several years immediately preceding the contract he had been and still was the contractor for carrying the mail from Washington to Fredericksburg, that the customary route was from Washington to Potomac Creek, thence by land to destination, that passengers also were usually transported by

that route, that during all the time he had used a steamboat of his own and had also kept an establishment of horses and stages for use by land when navigation was stopped by ice, and had been obliged for a considerable portion of every winter to use the stages and horses all the way by land meanwhile laying up his steamboat, that just before the date of the contract his own boat usually employed had been disabled, and he was at the time about completing a new boat called the Sydney, which was then at Baltimore in the hands of workmen, and various other facts connected with his stopping the use of the Franklin; also, that it was known and understood by the company when the contract was made that as soon as navigation was closed by ice the mail would have to be transported all the way by land, and that then the Franklin would not be required by him and could not be used. The trial court excluded the proffered evidence, but the Supreme Court held its exclusion was erroneous. It said the case was within the rule:

"Which admits extrinsic evidence for the purpose of applying a written contract to its proper subject-matter," which "extends beyond the mere designation of the thing on which the contract operates, and embraces within its scope the circumstances under which the contract concerning that thing was made, when without the aid of such extrinsic evidence, such application of the written contract to its proper subject-matter could not be made."

In United States v. Hartwell, 6 Wall. 385, 396 (18 L. Ed. 830), it was said of a statute:

"If the language be clear it is conclusive. There can be no construction where there is nothing to construe."

The rule is equally applicable to contracts. But reasonable differences of opinion as to their scope and meaning frequently occur with statutes as with contracts. In a case of the former it is the common course to look at the conditions out of which the legislation grew and to have recourse to other extrinsic aids to construction. In the case of a contract there is no surer guide to the intention than "to let in the light of the surrounding circumstances—to see as the parties saw, and to think as they must have thought, in assenting to the stipulations by which they are bound." Scott v. United States, 12 Wall. 443, 444, 20 L. Ed. 438. In the case at bar the question of the intention of the parties in respect of a definite feature of their contract involved a consideration of extrinsic facts and circumstances, and it was proper to submit them to a jury under appropriate instructions. The parties contracted with reference to the construction of the railroad as well as the sale and purchase of plaintiff's securities. The former was a part of the subject of the contract, and it was vital to know whether it was the intention that defendant should guarantee the construction in the absence of express words to that effect.

In the admission of evidence the court permitted a wide latitude, but we do not think that, considering the nature of the case and the dealings of the parties in view of which their contract was made, its discretion in that respect was abused. There was substantial evidence supporting the finding of the jury that it was intended that plaintiff's sale of his securities should depend upon the construction of the railroad which defendant did not absolutely undertake or guarantee, and

that the latter did all a reasonable man could do in that direction. In brief and most general outline the jury may well have found that the plaintiff and the defendant had been for some years prior to the contract associated in unsuccessful attempts to promote the building of interurban railroads in Southeastern Kansas, and the plaintiff's securities in question were the outgrowth of those attempts and were of doubtful value; that any considerable value depended upon the success of a new venture in which another party of men were jointly associated with them and into which their old interests were to be turned; and that the new venture in turn depended upon the sale of an issue of $10,000,000 of bonds, largely in Europe, as to which they had no assurance upon which a business man would reasonably rely; that the $75,000 cash mentioned in the contract represented the amount plaintiff had put into the old ventures and interest, and the $50,000 of stock a proportion, by way of profit, in a new venture, of the stock that would be left for the promoters or the construction company; and that the immediate occasion of the contract sued on was the mutual conviction that because of differences which had developed between the plaintiff and defendant in another business the new project would be better served if one or the other retired from active participation and was no longer able to speak authoritatively in its affairs. The details shown by the evidence and applied to this general situation made the intention of the parties almost as clear as in Bradley v. Packet Company, supra. And the long silence of the plaintiff was consistent with the finding of the jury. He did not assert a claim under the contract until nearly four years after its date and nearly two years after it became apparent that the enterprise had failed. A question is made about the return of the securities in their original form. It was contemplated by both parties that in effect they should be used or covered into the new venture to clear the way. We do not think there is anything else in the assignments of error sufficient to disturb the judgment.

The judgment is affirmed.

WASHINGTON & BERKELEY BRIDGE CO. v. PENNSYLVANIA STEEL CO.

(Circuit Court of Appeals, Fourth Circuit. May 19, 1914.)

No. 1215.

1. INDEMNITY (§ 9*)—CONTRACTS—CONSTRUCTION—BUILDING CONTRACT.

A contract by which plaintiff company agreed to construct for defendant company the steel portion of a bridge for which defendant was general contractor, provided that plaintiff should indemnify defendant "against all liability of damage on account of accidents, whether occasioned by the omission or negligence of itself, its agents or its workmen or otherwise." *Held*, that the accidents referred to were those caused by the negligence of plaintiff or its servants or workmen, or for which it would for some other reason be responsible, and that the provi-

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

sion could not be construed to cover accidents caused by the negligence of defendant or its servants or workmen.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 16, 17; Dec. Dig. § 9.*]

2. INDEMNITY (§ 14*)—JUDGMENT AGAINST INDEMNITEE—PERSONS CONCLUDED.

Plaintiff contracted to construct the steel superstructure of a bridge for which defendant was general contractor, to be placed on concrete piers provided by defendant. While doing the work, one of the piers fell, and an injured employé recovered a judgment against plaintiff. Plaintiff notified defendant of the pendency of the action, and that defendant would be held liable for any recovery therein. *Held*, that in an action over the judgment was conclusive against defendant only as to such matters as were necessary to the recovery of the workman against plaintiff, unless it appeared from the record that the negligence which rendered plaintiff liable was necessarily due to defendant's negligence in failing to provide a pier of sufficient strength, and that evidence was admissible on the part of defendant to show that plaintiff knew that the concrete of the pier had not yet hardened, and that it was negligent in the manner of placing the steel thereon.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. § 41; Dec. Dig. § 14.*]

In Error to the District Court of the United States for the Northern District of West Virginia, at Martinsburg; Alston G. Dayton, Judge.

Action at law by the Pennsylvania Steel Company against the Washington & Berkeley Bridge Company. Judgment for plaintiff, and defendant brings error. Reversed.

For opinion below, see 194 Fed. 1011.

Forrest W. Brown, of Charleston, W. Va., and Charles D. Wagaman, of Hagerstown, Md. (Brown & Brown, of Charleston, W. Va., and Wagaman & Wagaman, of Hagerstown, Md., on the brief), for plaintiff in error.

Henry H. Keedy, Jr., of Hagerstown, Md. (Lane & Keedy, of Hagerstown, Md., and Faulkner & Walker, of Martinsburg, W. Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP and WOODS, Circuit Judges.

WOODS, Circuit Judge. This suit in which the Pennsylvania Steel Company recovered a judgment against the Washington & Berkeley Bridge Company for $15,192.66 arose in this way: The bridge company having undertaken to construct a bridge across the Potomac river near Williamsport, Md., contracted with the steel company to furnish and put in position the steel girder spans. Under a contract similar in terms, Elmore & Hamilton Contracting Company undertook to furnish the material and construct the concrete piers or abutments. Mason D. Pratt, as engineer, agreed with the bridge company to supervise, inspect, and take charge of the construction of the bridge as its representative. On December 16, 1908, pier No. 10 fell while the workmen of the steel company were placing on it the steel superstructure, killing some of its men and injuring others. Frank L. Benning, one of the workmen who was seriously injured, sued the steel company in the circuit court for Washington county, Md., claiming

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

damages for his injuries, on the allegation of negligence that the steel company knew or by the exercise of reasonable care could have known that the pier was "green, weak, defective, and of insufficient strength to carry the weight for which it was intended." The steel company gave the bridge company written notice of the pendency of the suit and of its intention to hold the bridge company responsible for any recovery in favor of Benning. Benning recovered judgment for $13,500 against the steel company.

After paying the judgment the steel company brought this action alleging that it was the duty of the bridge company to see that the piers were safe for the placing of the steel superstructure, that the work was done under the direction of its engineer, and that the defendant knew, or by the exercise of reasonable care and caution could have known, that the pier was green, defective, and of insufficient strength to carry the weight, and that nevertheless the defendant authorized and directed the employés of the steel company to proceed with the work of placing the steel superstructure on pier 10. On this allegation of negligence the plaintiff asks for judgment against the defendant for the amount of the judgment in favor of Benning together with interest and costs.

There was a demurrer to the declaration, and it was stipulated by counsel that in passing upon it the District Judge might consider the entire record, including the contract and other evidence offered in the case of Benning against the steel company. The demurrer was overruled. On the trial, after all the evidence had been taken, plaintiff's demurrer to the evidence, in which the defendant joined, was sustained, and judgment was accordingly entered in favor of the plaintiff for the amount claimed.

[1] 1. The only ground argued by defendant's counsel, in support of the demurrer to the declaration, is that under the following clause of its contract the steel company as the party of the second part agreed to indemnify the bridge company as the party of the first part against all liability for accidents, including accidents due entirely to the negligence of the bridge company itself:

"As, according to the terms of the accompanying specifications, which form a part of this contract, the party of the second part is to indemnify the party of the first part against all liability of damage on account of accidents, whether occasioned by the omission or negligence of itself, its agents, or its workmen or otherwise during continuance of this agreement, it is hereby agreed that the party of the second part shall be promptly and duly notified in writing by the party of the first part of the bringing of any such suit or suits, and shall be given the privilege of assuming the sole defence thereof. The party of the second part is to pay all judgments recovered by reason of accidents in any such suit or suits against the party of the first part, including all legal costs, court expenses, and other like expenses."

The presumption is exceedingly strong against an undertaking by any one except an indemnity company to be responsible for the negligent acts of another. But no reasoning nor analysis is necessary to make plain that the phrase, "the omission or negligence of itself," means the omission or negligence of the person undertaking, that is, the steel company; and that the word, "otherwise," under the principle

of ejusdem generis, means accidents for which the steel company would for some other reason than that expressed be responsible.

2. The ground upon which the plaintiff's demurrer to the evidence was sustained is not stated in the order, and the matter will therefore require consideration in several aspects. The defendant contends that there was really no evidence before the jury tending to support the allegation of negligence, since the plaintiff offered nothing except the record including the testimony in the Benning case, and that that was introduced for the exclusive purpose of showing the identity of the cause of action in this case with that in the Benning case. It is true that the evidence in the Benning case was first offered and admitted for that limited purpose, although defendant's counsel insisted that it should be admitted for all purposes according to stipulation; but it appears from the following statement, made by the District Judge in the course of the trial without objection from counsel, that afterwards the evidence was considered as introduced for all purposes as if the witnesses were before the court testifying in this case:

"This testimony is being introduced to you, gentlemen of the jury, under stipulation of counsel. It is the testimony of both sides. The understanding is that such parts of it as the plaintiff desires to rely upon will be construed as its testimony, and such parts of it as the defendant relies upon will be considered as its testimony."

[2] 3. It is perfectly clear that plaintiff's demurrer to the evidence could not be sustained on the ground that a judgment in the case of Benning against the steel company was conclusive of the liability of the bridge company to the steel company under the notice to the bridge company that it would be held responsible for any recovery in favor of Benning. That judgment was conclusive as to all matters necessary to Benning's recovery—the negligence of the steel company as a proximate cause of the injury in failing to furnish Benning a reasonably safe place to work; the absence of contributory negligence on the part of Benning, and of any act of a stranger as an intervening cause of the injury; the correctness of the verdict as an estimate of the damages suffered by Benning. But under the general rule the judgment was not conclusive as to matters not necessary for Benning to prove as a condition of his recovery against the steel company. Note to Baltimore & O. R. Co. v. Howard County, 40 L. R. A. (N. S.) 1172.

The rule, however, extends the conclusiveness of such a judgment to this point: If the record in the Benning case had shown that the negligence of the steel company in failing to perform its nondelegable duty of using due care to provide a reasonably safe place for Benning to work was necessarily due solely to negligence of the bridge company in not exercising due care to furnish a pier strong enough to bear the superstructure, and could not have been due to any independent breach of duty on the part of the steel company, then the judgment in the Benning case would be conclusive of the actionable negligence of the bridge company and of its liability to the steel company. This is the principle upon which Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712, and a number of other cases were decided.

The obligation of the bridge company to use due care to furnish the steel company with a pier strong enough to bear the superstructure is plain; it was necessarily implied in the contract between the parties, taken in connection with the presence of a supervising engineer representing the bridge company. But this obligation must be viewed in the light of the knowledge of the steel company that the pier would be unsafe until the cement had dried. The judgment in the Benning case therefore did not preclude the inquiry in this case whether the steel company ought to have known from what was said by the assistant engineer of the bridge company or otherwise that the pier in question was green and unsafe when the spans were placed thereon, and whether it did not negligently weaken the pier by the manner of placing the spans.

On this last point there was error in excluding the testimony offered by the defendant tending to show that the steel company used a battering ram to force the girder to its proper place on pier 10, and that such a process on a pier made of cement not fully dry was unsafe. This testimony, taken in connection with that introduced tending to show that the steel company had such warning as to require at least caution in placing the steel span on pier 10, was clearly competent on the issue as to who was responsible for the fall of the pier. The merits of the demurrer to the evidence should not be passed on by this court until the District Court has considered it in the light of this competent and material evidence of which the defendant did not have the benefit.

In this connection it seems well to say that the court is inclined to the view, though not deciding the point in anticipation, that counsel are in error in treating as controlling the statute of West Virginia construed in Barrett v. Raleigh Coal & Coke Co., 55 W. Va. 395, 47 S. E. 154, and other cases determining the effect and office of a demurrer to the evidence; and that under the principle laid down in Indianapolis, etc., R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898, and St. Louis, etc., Ry. Co. v. Vickers, 122 U. S. 360, 7 Sup. Ct. 1216, 30 L. Ed. 1161, in the federal courts the common-law rule as to the effect and office of a demurrer to the evidence must be applied as set out in Slocum v. N. Y. Life Ins. Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879.

The judgment must be reversed, and the cause remanded for a new trial.

Reversed.

MEMPHIS ST. RY. CO. v. HUGGINS et al.

SAME v. HUGGINS.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1914.)

Nos. 2475, 2476.

1. CARRIERS (§ 287*) — LIABILITY FOR INJURY TO PASSENGER — STREET RAILROADS—SUDDEN STARTING OF CAR.
A street railroad company is liable for an injury to a passenger who is actually thrown and injured by the sudden starting of a car while boarding it in the exercise of due care and before he is safely on the platform, and it is immaterial whether the car was started intentionally or unintentionally through negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1154–1159, 1161–1166; Dec. Dig. § 287.*]

2. APPEAL AND ERROR (§ 1064*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.
The giving and refusal of instructions, in an action by a passenger to recover from a street railroad company for an injury caused by the sudden starting of a car while plaintiff was boarding it, considered and *held* without prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4523; Dec. Dig. § 1064.*]

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

Actions at law by Estella Huggins and Albert Huggins, her husband, and by Albert Huggins against the Memphis Street Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Sam P. Walker, of Memphis, Tenn., for plaintiff in error.

Ike W. Crabtree, of Memphis, Tenn., for defendants in error Huggins.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. These actions were brought to recover damages resulting from injuries sustained by Estella Huggins while boarding a car of plaintiff in error in the city of Memphis. In No. 2475 recovery is sought on account of her personal injuries. No. 2476 is brought by her husband for the loss of her service. The gist of the charge in the declaration in each case is that while Mrs. Huggins (whom we shall call the plaintiff) "was in the act of boarding said car, and before she had time to reach a seat therein, the defendant" negligently and suddenly started the car, whereby she was thrown violently against an iron rod on the platform; and that after the car had been so started and she so thrown, and before she could regain her balance and reach a seat, the car was negligently brought to a sudden stop, whereby she was again violently thrown against the back of the platform. The plea in each case denied defendant's negligence, and alleged contributory negligence on plaintiff's part. The causes were consolidated and tried to a jury, and verdict was rendered and judgment entered against the defendant in each case.

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

The undisputed evidence shows that plaintiff, accompanied by two children (3 and 8 years old) and a niece, sought to board the car at a certain crossing. The car ran by the crossing to a switch, where it stopped, and the doors of the car (which was of the pay-as-you-enter kind) were opened for the admission of passengers. Plaintiff testified that just as she "stepped on that bottom step and steps up on the platform," with the younger child on her arm and a suit case in her hand, the car made a sudden jerk; as again expressed, "I was just making—I had done stepped one foot upon the platform and this other foot had done got up and had not stepped" when the jerk was made; that she was thus thrown against the back of the car, saw her other child and niece "fastened up in the gates," and called to the conductor to stop the car; that the conductor did so by the bell signal, and so suddenly that she was thrown against the platform rod; that as the result of one or the other of the jerks her child and suit case dropped to the floor. The niece testified that after plaintiff "had got on the car, just about to get up on the platform," and the niece had put the older child on the bottom step, the car started off, shutting the gates on the niece's arm, thus compelling her (to avoid being thrown) to go with the car about 15 feet down the track until it stopped; that both the starting and the stopping were sudden. The niece did not know how far her aunt had progressed except that "she was on the platform enough for me to get the little girl on the bottom step." A fellow passenger testified that the car started suddenly and with a jerk when plaintiff was "getting on the car, at least after she had got on the car, just got on the platform, with a child in one hand and a suit case in the other." As to the manner of the accident, defendant presented but two witnesses, the motorman and the track foreman, who testified in effect that, as the motorman was trying to turn the switch, the car started and moved only three or four feet, until the brakes were again set by the motorman; the start occurring because the brakes had been released too much (the car was on a slight downgrade) and (as testified by the motorman) without the use of current. Both testified that the car was neither started nor stopped with a lurch, although both admitted that its movement was unexpected, the motorman testifying that the stop was made to throw the switch and to let some passengers get on, and the track foreman that the start occurred after one of the women had gotten on and while the other was helping a child in at the gates, leaving the other woman standing on the ground, and that the gates did not close before the car moved. Neither the motorman nor the track foreman seem to have known that any one was injured, although the foreman sent in a report of the starting of the car, which resulted in the calling of the motorman "to the office" a few days later for inquiry about the facts.

The court charged the jury that plaintiff's testimony tended to show that the car suddenly started "when she stepped on the lower step and then was mounting to the platform," and that she was thrown, the car suddenly stopped, and she again thrown, substantially as we have before stated. The court added that plaintiff's testimony tended to support the allegations in the declaration, and, "if you believe that,"

the defendant is liable. The jury were then told that defendant's testimony tended to show that:

"When the car arrived at the point where this accident is said to have occurred, the motorman stopped the car and released the brake and opened the doors to receive passengers, and this woman went aboard, and when she arrived on the platform the car started of its own momentum, being upon an incline, and he applied the brakes. If you believe that to be true, and that this plaintiff, in that movement of the car, of its own motion, was thrown against the end of the car, or against the upright stand on the platform, and was hurt, then the defendant company is liable."

Adding:

"I charge you that, as matter of law, a railroad company that stops its cars to receive passengers on such part of its track as will permit the car to start of its own motion, and while passengers are entering the car starts, is guilty of negligence, and it will be liable for any injury to the passenger resulting therefrom. That is to say, gentlemen, if you believe either the testimony of the plaintiff or the testimony of the defendant as to how this accident occurred, the company would be liable for the injury she sustained. And it is immaterial whether the car went 15 feet or 5 feet, if in point of fact the company was guilty of negligence in starting or stopping it, and as a result of that negligence a passenger was hurt, the company would be liable. If you do not believe either the plaintiff or the defendant as to how this accident occurred, why then you will return a verdict in favor of the defendant."

Defendant contends that the jury was thus in effect erroneously instructed that defendant would be liable if it started the car while plaintiff was still on the platform, and regardless of whether the start or stop was made with an unusual or violent jerk.

[1] The theory of plaintiff, submitted as ground of recovery, was that she was in the act of mounting the platform, not that she was actually stationed upon it, when the start was made. No question of obligation to delay starting until plaintiff was seated was involved in that theory. Under the settled rule, if the car was suddenly started while plaintiff was really in the act of boarding the car, before she was safely and securely upon the platform, and she was thereby actually thrown and injured while in the exercise of due care, defendant would be liable. Nellis on Street Railways (2d Ed.) § 301; Beattie v. Detroit United Ry. Co., 158 Mich. 243, 122 N. W. 557; Normile v. Traction Co., 57 W. Va. 132, 49 S. E. 1030, 68 L. R. A. (N. S.) 901; Norfolk, etc., Co. v. Morris, 101 Va. 422, 423, 429, 44 S. E. 719. There was thus no error in instructing that defendant was liable if plaintiff's testimony was believed.

The only other theory upon which recovery was allowed was that of defendant, urged in its exoneration. If the car was started before plaintiff was safely upon the platform, we think it immaterial whether the start was made in the usual or in an unusual manner, provided plaintiff, while in the exercise of due care, was directly injured thereby; and this because, under the case presented, the car should not have been started at all while the condition stated existed. Nellis on Street Railways, § 294; Pfeffer v. Buffalo Ry. Co., 4 Misc. Rep. 465, 24 N. Y. Supp. 490, 494. And see City Pass. Ry. Co. v. Baer, 90 Md. 97, 107, 44 Atl. 992; Railroad Co. v. Klein, 8 App. D. C. 75, 81. (The testimony fairly presents no question of contributory negligence.) It

is, however, the generally accepted rule that it is not negligence to start a street car (if done in the ordinary manner and without unusual jerk) without waiting for passengers to reach seats (provided they are safely and securely upon the platform), unless there is some special and apparent reason for adopting a different course. Ottinger v. Detroit United Ry. Co., 166 Mich. 106, 131 N. W. 528, 34 L. R. A. (N. S.) 225, Ann. Cas. 1912D, 578.

[2] Assuming that the case is to be judged as if the car was started by the express volition of either the conductor or the motorman, the question thus is whether, under the charge that defendant is liable on its own showing as to "how this accident occurred," provided plaintiff was thrown and hurt, recovery was permitted from the mere fact that the car started of its own momentum, although after plaintiff was safely upon the platform. We scarcely believe the jury would naturally so interpret the charge, which nowhere expressly suggests a liability for starting the car before plaintiff was seated or had reached the body of the car. True, in reciting the tendency of defendant's testimony, plaintiff was spoken of as having gone "aboard" and as having "arrived on the platform" (in fact such was defendant's theory from the testimony in the case, rather than its testimony). Yet the assertion that defendant would be liable if its testimony was believed both immediately followed and immediately preceded a statement of the legal proposition (apparently as basis of the instruction just referred to) that so stopping its cars that they would start of their own motion, "while passengers are entering," constituted negligence on defendant's part. Defendant asked no instruction, as it might have done, testing defendant's duty by the question whether plaintiff had or had not safely gained the platform before the start was made. Moreover, considering the testimony, including the starting of the car before plaintiff's niece was able even to make the first step, the fact that the testimony which could be thought to most strongly tend to support defendant's theory that plaintiff was safely on board was only that "she had just got on the platform, with a child in one hand and a suit case in the other," a finding that plaintiff had so far reached a place of safety as to justify the starting of the car, so far as she was concerned, could scarcely be reasonably expected, if indeed it could well be justified.

But we are not satisfied that the case, on defendant's submitted theory, is to be judged as if the start had been either directed by the conductor or made by the motorman, pursuant to the judgment of either of them, in the ordinary and usual operation of the car. The general rule that it is not negligence to start a street car without waiting for passengers to reach their seats rests largely upon custom and the necessity of prompt movement in the interest of effective service; and the question of negligence is one of due care on the part of the person whose act is charged to be negligent. But, according to defendant's theory, the car was not started by the conductor in the exercise of his own judgment and in the ordinary course of operation, but occurred without the intelligent volition of any one. If the stopping of the car in such a way that it would automatically start again, unexpectedly and without warning, was negligence in law, as we think

it was under defendant's testimony, the start having indisputably been made before the taking on of passengers was completed, and when plaintiff had at the most "just got on the platform," in the incumbered situation referred to, it is difficult to see what controlling figure the precise location of her feet cut in determining the question of defendant's negligence in previously stopping the car so ineffectively that it would start automatically, and naturally and directly throw and injure the plaintiff. On the whole, we think it fairly apparent that defendant was not prejudiced by the instruction complained of.

We see no merit in the contention that recovery was permitted on a theory not stated in the declaration, viz., the premature starting of the car, without reference to lurch or jerk. No question of variance was raised by exception to the charge or otherwise, and there could have been no surprise, as under defendant's theory there was no jerk.

Complaint is made of the refusal to instruct that if after the car had come to a stand close to, and while the motorman was attempting to open, the switch, "the car started in the usual and ordinary way, and without a jerk sufficiently severe to throw the plaintiff, and if the car was thereafter stopped by the motorman without any sudden or unusual jar or jerk," the plaintiff would not be entitled to recover. We think the refusal of this instruction was not error. It ignored not only the question where plaintiff was when the car started (that is, whether she had safely reached the platform or was in the act of stepping thereon, as she claims), but also the fact that the start was made at a time when passengers were still being taken on.

Complaint is also made of the court's curtailment of cross-examination of a witness; but this was, we think, fairly within the court's discretion.

Being of opinion that no prejudicial error is shown, the judgment of the district court is affirmed, with costs.

In re HOLLINS et al.

(Circuit Court of Appeals, Second Circuit. June 20, 1914.)

No. 256.

1. Assignments (§ 49*)—Equitable Assignments—Agreement to Pay Bill or Draft from Specific Fund.

It is the general rule that a bill of exchange or draft does not operate as an equitable assignment, where it has not been drawn on any particular fund, and this rule is not changed by the fact that funds may have been placed in the drawee's hands as a means of payment; but if in the course of the transaction connected with the delivery of the bill or draft it is agreed, either expressly or by necessary implication, that the bill or draft shall be a charge on and satisfied out of a specific fund, a court of equity will give effect to the agreement as against the drawer, mere volunteers, and persons charged with notice.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 85–98; Dec. Dig. § 49.*]

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

2. BANKRUPTCY (§ 188*)—EQUITABLE LIENS—SECURITIES DEPOSITED TO PROTECT DRAFTS.

Bankrupt firm deposited securities in New York for the account of a London bank to protect drafts, which it was agreed might be drawn on such bank. The drafts were drawn and sold to a New York bank, which was informed that they were drawn pursuant to an agreement with the drawee. The purchaser knew of the custom of the drawer, which was also a general custom, to draw foreign drafts against collateral deposited as security and bought in reliance thereon, and not on the personal credit of the drawer. Bankruptcy having intervened, the London bank refused acceptance of the drafts. *Held*, that the holder of the drafts succeeded to the lien on the securities to which the drawee would have been entitled on their payment as against the receiver in bankruptcy, who took no greater rights than the bankrupt had.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 270, 286–289, 291–295; Dec. Dig. § 188.*]

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of Harry B. Hollins and others, individually and as members of the firm of H. B. Hollins & Co., bankrupts. Petition by A. Leo Everett, receiver, to revise an order establishing a lien on certain securities in favor of John L. Hogeboom. Affirmed. For opinion below, see 210 Fed. 965. See, also, 212 Fed. 317.

Lexow, Mackellar & Wells, of New York City (George M. Mackellar and Martin A. Schenck, both of New York City, of counsel), for receiver.

Alexander & Green, of New York City (Charles C. Deming and W. W. Lancaster, both of New York City, of counsel), for petitioner Hogeboom.

Before COXE and ROGERS, Circuit Judges, and MAYER, District Judge.

ROGERS, Circuit Judge. A petition was filed against a receiver in bankruptcy to establish an equitable lien in certain securities. The issues involved were referred to a special master, who reported in favor of the petitioner. This report was confirmed by the District Judge, who held that the petitioner, John L. Hogeboom, was entitled to a lien on certain securities in the hands of the Equitable Trust Company of New York City, which securities had been deposited with the trust company by H. B. Hollins & Co., now bankrupts, under an agreement with A. Ruffer & Sons, of London, England, that such securities should be deposited with the trust company for the account of A. Ruffer & Sons, that H. B. Hollins & Co. might draw drafts or bills of exchange upon the said A. Ruffer & Sons against the said securities. It appears that H. B. Hollins & Co., having deposited the securities as agreed upon, drew certain drafts on A. Ruffer & Sons, which drafts aggregated $75,000. These drafts H. B. Hollins & Co. offered for sale to the International Banking Corporation, a corporation organized under the laws of Connecticut. At the time the drafts were thus offered, H. B. Hollins & Co. represented to the International Banking Corpo-

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

ration that they had been drawn pursuant to agreement existing between themselves and A. Ruffer & Sons. Thereupon the International Banking Corporation purchased the drafts. At the time of the purchase the buyer knew that it was a custom of H. B. Hollins & Co. in their dealings with foreign bankers to draw drafts against collateral deposited for security, and, in purchasing, relied on this custom. When the drafts were presented acceptance was refused, because of the filing, in the meantime, of a petition in bankruptcy against H. B. Hollins & Co. as a firm, and against the persons who composed it as individuals. Thereafter the International Banking Corporation assigned the drafts to Hogeboom, the petitioner.

The receiver in bankruptcy claims that the securities which the bankrupts deposited with the trust company are a part of the estate of the bankrupts for the benefit of their personal creditors. The assignee claims that as his assignor did not purchase the drafts upon the general credit of the drawers, but in reliance upon the securities deposited in the Equitable Trust Company he has a claim upon those securities superior to any claim of the general creditors. The trust company refuses to surrender the securities except with the consent of the receiver.

The deposit of the securities was made "to the account of A. Ruffer & Sons" and was prior in time to the drawing of the drafts assigned to Hogeboom. The securities were deposited with the trust company in pursuance of the agreement made by H. B. Hollins & Co. with A. Ruffer & Sons. The agreement stated that the securities were to be at the exclusive disposal of A. Ruffer & Sons, and that they were pledged as collateral security for the payment of any sum "now or hereafter due from us to you." The agreement also provided that the securities pledged should be released only on the order of A. Ruffer & Sons or against bankers' drafts approved by them. There is no evidence of any express agreement between the buyer of the drafts and the seller of them that the former should have the benefit of the securities.

[1] The general rule is that a bill of exchange or draft does not operate as an equitable assignment where it has not been drawn on any particular fund. The rule is not changed by the fact that funds may have been placed in the drawee's hands as a means of payment. Pomeroy's Equity Jurisprudence, § 1284; Bowker v. Haight & Freese Company (C. C.) 146 Fed. 257 (1906); Florence Mining Company v. Brown, 124 U. S. 385, 8 Sup. Ct. 531, 31 L. Ed. 424. It is also settled that, if in the course of the transaction connected with the delivery of the bill or draft it is understood and agreed that the bill or draft shall be a charge on and satisfied out of a specific fund, a court of equity will give effect to the agreement as against the drawer, mere volunteers, and parties charged with notice. Fourth Street Bank v. Yardley, 165 U. S. 634, 650, 17 Sup. Ct. 439, 442 (41 L. Ed. 855 [1897]). In the above case there had been a specific representation by the seller of the check which had been relied upon by the buyer. The case shows it is not necessary that there should be an express agreement. An implied agreement is sufficient. The opinion was written by the present Chief Justice of the court, who said:

"In the light of these principles, we proceed to consider the facts certified, in order to ascertain whether in the transaction connected with the giving of the check in question there was either an express agreement to assign the fund or to give a lien or charge thereon, or whether, if not express, such agreement is necessarily to be implied from the conduct of the parties, the nature of their dealings, and the attendant circumstances."

[2] In transactions of the nature of that under consideration the surrounding circumstances may be considered with the view of determining the intention of the parties. If it was the understanding of the parties that the drafts were drawn against certain collateral securities deposited to the account of A. Ruffer & Sons, and if the drafts were purchased on the faith of those securities, and not on the general credit of H. B. Hollins & Co., it is the duty of this court to give effect to the agreement.

We think the facts show that the drafts were not purchased on the general credit of H. B. Hollins & Co. The amount of the drafts, $75,000, is so large that we are not inclined to believe they would have been purchased by the International Banking Corporation had it not been understood that specific means of payment existed outside of and beyond the mere general credit of the seller. There exists a well-known and established custom in dealings between New York and foreign bankers that where bills of exchange are drawn by a New York banker upon a foreign banker, such drawings are against specific security deposited by the drawers. This custom was known to the International Banking Corporation, and was relied upon in the purchase of the drafts. And when the purchase was being negotiated, H. B. Hollins & Co. specifically stated that the drafts were drawn "pursuant to an agreement" with A. Ruffer & Sons, on whom they were drawn. This representation must have been understood as meaning that securities had been deposited according to custom, and that A. Ruffer & Sons had agreed to pay the drafts. That the drafts were drawn against these securities is admitted. If A. Ruffer & Sons had paid them according to agreement, they would have been entitled to reimbursement out of the securities as against the receiver in bankruptcy. See Sexton v. Kessler, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995. The fact that A. Ruffer & Sons declined to pay the drafts, thus breaking the agreement with H. B. Hollins & Co. on the faith of which the drafts were purchased by the International Banking Corporation, should not defeat the right of the latter to be made good out of the securities against which it is admitted the drafts were drawn.

We think the facts in the case are in principle not unlike those in Muller v. Kling, 209 N. Y. 240, 103 N. E. 138 (1913). It was held in that case that the circumstances attendant upon the purchase of a draft by plaintiffs from defendants' assignors disclosed that plaintiffs had parted with their money to such assignors on the supposed security of a fund to be created by the transfer by the drawers of a third party; that the rights of plaintiff to the fund arising from the payment of that debt were therefore superior to those of general creditors of such assignor. The court applied the equitable doctrine that where the just and clear rights of a party to payment of a debt from a par-

ticular fund could be secured in no other way, the fund or its proceeds would be regarded as a trust for his better security.

A trustee in bankruptcy takes the property of a bankrupt subject to equities in favor of third persons, whether arising out of the act of the bankrupt or by operation of law, provided the transactions are not invalid as to creditors. Gage Lumber Co. v. McEldowney, 207 Fed. 255, 124 C. C. A. 641 (1913); In re M. E. Dunn & Co. (D. C.) 193 Fed. 212 (1912); In re McConnell (D. C.) 197 Fed. 438 (1912); Goodnough Mercantile & Stock Co. v. Galloway (D. C.) 171 Fed. 940 (1909). And we discover nothing in the transaction between H. B. Hollins & Co. and A. Ruffer & Sons, or between H. B. Hollins & Co. and the International Banking Corporation, which is invalid as to creditors. The receiver of H. B. Hollins & Co. consequently stands in the shoes of the bankrupt firm, with no greater rights as against the plaintiffs than H. B. Hollins & Co. possessed. As between H. B. Hollins & Co. and the International Banking Corporation it would not be equitable to allow H. B. Hollins & Co. to appropriate the collateral against which the drafts were, as a matter of fact, drawn, and against which the International Banking Corporation understood they were drawn, and upon the faith of which the purchase was made.

If one without more agrees to give security upon specific property, the agreement to give the security in itself creates an equitable lien. If as an inducement to purchase drafts the buyer is given to understand that securities have been deposited to provide for the payment of the drafts offered for sale and on the faith of that understanding the drafts are purchased, as between the buyer and the seller an equitable lien is created which gives the buyer of the drafts a right to have them paid out of the securities so deposited. As this would be the right as against the seller it is the right as against the receiver of the seller. Bispham in his treatise on Equity, § 351, says:

"In modern times the doctrine of equitable liens has been liberally extended for the purpose of facilitating mercantile transactions, and in order that the intention of parties to create specific charges may be justly and effectually carried out. Any agreement sufficiently indicating an intention to make some particular property or fund therein described or identified as security for an obligation creates a lien upon the property as respects that obligation."

Order affirmed.

In re SCOFIELD CO.

Appeal of THOMAS.

(Circuit Court of Appeals, Second Circuit. June 27, 1914.)

No. 244.

BANKRUPTCY (§ 349*)—FUNDS—CONTRACT WITH THE UNITED STATES—RESERVE PERCENTAGES—RIGHTS OF SURETY.

Where a contract with the government for the construction of certain public work provided for the retention of percentages until final completion of the work, and the contractor executed a bond to perform the contract, and promptly make full payments to all persons supplying labor and materials in the prosecution of the work, and after performance the

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

contractor became bankrupt and the surety settled with complainants for labor and materials remaining unpaid, being required to expend an amount larger than the percentages retained by the government, the provision for such reserve fund was for the benefit of the surety, as well as for the protection of the government; and hence the surety was entitled to the amount so retained in preference to the contractor's general creditors without reference to whether the original complainants had an enforceable claim thereon under Act Cong. Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), authorizing such claimants, under certain circumstances, to sue on the contractor's bond.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 533; Dec. Dig. § 349.*]

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

In the matter of bankruptcy proceedings of the Scofield Company. From an order declaring the Fidelity & Deposit Company of Maryland surety for the bankrupt under a bond to the United States, solely entitled to the fund of $46,327.55, held by Seymour P. Thomas as trustee, he appeals. Affirmed.

Burlingham, Montgomery & Beecher, of New York City (Norman B. Beecher, William F. Allen, and Roscoe H. Hupper, all of New York City, of counsel), for appellant.

O'Brien, Boardman & Platt, of New York City (Frank H. Platt and Renwick F. H. Macdonald, both of New York City, of counsel), for appellee.

Before COXE and ROGERS, Circuit Judges, and MAYER, District Judge.

ROGERS, Circuit Judge. A contract was made by the United States and the Scofield Company, a New York corporation, for the erection at Hampton Roads, Va., of certain piers and for the dredging of the basin lying between the arms of the piers and for the deepening of the channel of approach to the basin from deep water. To secure the prompt and satisfactory performance of the contract, and in accordance with the act of Congress passed February 24, 1905, c. 778, 33 U. S. Statutes at Large, p. 811 (U. S. Comp. St. Supp. 1911, p. 1071) a bond was duly executed by the Scofield Company in the penal sum of $100,000 with the Fidelity & Deposit Company of Maryland as surety. In this bond the Scofield Company agreed and covenanted to perform the work called for under its contract and in addition agreed 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 government agreed to pay the contractor $385,000 for the work on the basis of estimates of work done, a percentage of 10 per centum to be reserved from each payment "until the final completion and acceptance of the work." The contract was entered into in November, 1906, and the work was completed on September 20, 1907, and was accepted by the United States. The Scofield Company (the contractor) went into bankruptcy on September 23, 1907, and on March,

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

1908, the United States paid over to the receivers of the bankrupt Scofield Company the sum of $45,453.66 and in September of the same year the additional sum of $985, which sums were the reserved percentages which the government had retained in its hands in accordance with the terms of the contract.

The Scofield Company had left unpaid claims of persons who had supplied it with labor and materials in the prosecution of the work it performed for the government under the contract above mentioned, and the amount of these unpaid claims aggregated $139,781.60. The Fidelity Company, in discharge of its obligation as surety for the Scofield Company, satisfied these claims, and the total amount so expended was $85,625, the claimants having assigned their claims to the Fidelity Company on the payment to them of that amount. The Fidelity Company, therefore, insists that, as it was under legal obligations as surety on the bond to satisfy these unpaid claimants, and as it has satisfied them, it is now entitled to assert an equitable lien on the reserved fund of some $46,000, which the United States retained in its hands in paying the contractor, but which, as we have seen, it later turned over to the receivers of the bankrupt, and which is now in the hands of the trustee in bankruptcy. The question thus presented is whether, under the circumstances stated, the surety of the bankrupt contractor who has paid the claims of the laborers and materialmen has any equity in this so-called reserved fund which it can assert to the exclusion of the general creditors.

In 1894 Congress passed an act for the protection of persons furnishing materials and labor for the construction of public works. That act provided that any persons thereafter entering into a formal contract with the United States for the prosecution of any public work should be required to execute the usual penal bond, with the additional obligation that such contractor would promptly make payments to all persons supplying him with labor and materials in the prosecution of the work, and giving a right of action to such person or persons who had not been paid for their labor or materials and authorizing such person or persons to bring suit in the name of the United States for his or their own benefit against the contractor and his sureties; it being also provided that any such action should not involve the United States in any expense. Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523).

In 1895 an additional act was passed which amended the previous act. This act provides that any person furnishing work or materials may intervene and be made a party to any action instituted by the United States on the bond of the contractor, and have his rights and claims adjudicated in such action, but subject to the priority of the claim of the United States, and if suit is not instituted 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 for which payment has not been made is authorized, subject to certain limitations, to bring suit on the bond in the name of the United States. U. S. Statutes at Large, vol. 33, p. 811.

These acts authorize suits upon the *bond,* the suits to be brought in the name of the United States and without expense to the United States. No suit was brought upon the bond given by the Scofield Company, and none was necessary, for the surety on the bond has satisfied the claimants. And in satisfying the claimants there is no doubt but that the surety, the Fidelity Company, has acted under a legal obligation and not as a volunteer.

There is nothing in this record to indicate that the United States withheld the reserved percentages for the benefit of the subcontractors, unless such intention can be inferred from the language of the bond, which made it the duty of the contractor to pay promptly the subcontractors. The contract itself, in providing for withholding the percentages, does not state or explain the reason, at least so far as this record shows. It simply states that they may be withheld "until the final completion and acceptance of the work." This might seem to indicate that the purpose was simply to secure the government in case the work was not prosecuted promptly and faithfully, for the contract expressly provided that if for any of the reasons stated in the contract the United States found it necessary to terminate the contract, then it might deduct from the reserved percentages which it had withheld whatever sums it expended in completing the contract in excess of the stipulated price, and it allowed certain other deductions to be made. And there was no authority given to pay any subcontractors or deduct from the reserved fund any sums paid to any such persons. Nevertheless when the contract is construed in its entirety and in connection with the obligations imposed by the bond, it will be found that an equity was created in favor of the surety in the reserved fund to which it is the duty of this court to give effect.

In Lawrence v. United States (C. C.) 71 Fed. 228 (1896) decided by Circuit Judge Simonton, the court considered the rights of persons supplying labor and materials to a contractor with the government of the United States, where the government had withheld from the contract price certain sums of money under conditions somewhat similar to those found in the contract made between the United States and the Scofield Company in the case at bar. In that case the court said:

"But these laborers and materialmen have no rights as against the government, rights which can be enforced. There is no privity between them and the government. They are recipients of its bounty, debtors to its good will, objects of its provident care, in whose favor, suo motu, it exercises its right and privilege to withhold the money until their claims are satisfied. Nor have they any specific interest in the money so withheld. It is not necessarily applicable to their claims."

In that case the United States had concluded a contract for building a courthouse and post office for the sum of $76,290. The building had been completed, but the government had withheld the sum of $7,601.06. The reason assigned for withholding this amount was that a number of claims against the contractor for labor and materials supplied in connection with the contract had been filed in the department. The right of the government seemed to be to withhold pay-

ment of the reserved percentages until the contractor made payment of the claims of the laborers and materialmen. And that was what the government in that case did. It insisted that the money withheld should be paid to such persons as came within the favored class, and who had furnished labor and materials. The court was of the opinion that the fund withheld belonged wholly to the contractor, and that no one but the contractor could bring proceedings for the distribution of it. Until he consented that the money should be paid over to the laborers and materialmen the court declared that the laborers and materialmen had not a shadow of interest in the money in the treasury. There was no lien, no quasi lien, no trust. But the same contract came before the Circuit Court of Appeals in Greenville Savings Bank v. Lawrence, 76 Fed. 545, 22 C. C. A. 646 (1896), and was heard before Goff, Circuit Judge, and District Judges Hughes and Morris, the latter writing the opinion. In this case the court held that a person having a contract with the United States could not assign any part of the money coming to him thereunder so as to affect any one but himself, and that the acceptance by the disbursing agent of the United States of an order upon such fund was without validity as against third persons. The court further held that if the contractor failed to pay claims for material and labor, he could not, by an assignment of moneys so withheld, give the assignee any standing to participate in the fund until all labor and material claims had been paid. The contract contained the following stipulation:

"And it is further understood and agreed by and between the parties hereto that it shall be a right and privilege of the said party of the first part to withhold any portion of the sum of money to be paid to said party of the second part under provisions of this contract in the event of the failure of the said party of the second part to promptly make payment to all persons who may supply him with labor and materials in the prosecution and completion of the work herein provided for."

In a suit brought to recover this fund which had been reserved under this stipulation the court said:

"It was a fund withheld under the stipulation of the contract for a particular class of creditors, to which mere assignees of the fund do not belong, and the rights of such assignees, if they have any, must be postponed until the creditors who have a special equity are paid."

In the Greenville Case the right of the government to reserve the fund was, by express language of the contract, as we have seen, to come into existence "in the event of the failure of the said party of the second part to promptly make payment" to the subcontractors. In the case at bar there is nothing to expressly indicate that the reserved fund was to be withheld for subcontractors.

The counsel for the trustee argued before us that the materialmen and laborers had no right, legal or equitable, to the reserved percentages in the hands of the government, and that as the rights of the Fidelity Company could not, in any event, exceed the rights of the materialmen and laborers, it had no claim upon the fund which the government had withheld from the contractors, and which is herein in dispute. He urged upon us that the government was with-

out power to withhold any part of the moneys due to the contractor because of the nonpayment of those to whom the contractor might be indebted. In the brief he submitted he says:

"The learned District Judge apparently thought that the opinion of the Supreme Court in Henningsen v. United States Fidelity & Guaranty Co., 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547, justified the conclusion that the government was under some equitable obligation to see that the laborers and materialmen were paid. He was unable to explain just what was meant by 'equitable obligation,' but thought that the use of this term, in the opinion of the Supreme Court, necessarily presupposes some sort of property right in the laborers and materialmen in the reserved percentages.' * * * For the present it is enough to say that no one has been able to suggest any principle which in the ordinary use of the term confers upon the laborers and materialmen in the present case any right, legal or equitable, which could be enforced against the reserved percentages in the hands of the government."

It appears to us that the reserved percentages were withheld to secure the performance of the contract.

We are unable, however, to see that any real difficulty exists as to the rules which govern the facts of this case. It is not disputed that the claims which the Fidelity Company has satisfied are claims which it was the duty of the Scofield Company to pay. In making the payments it did the Fidelity Company discharged obligations due from the Scofield Company for the performance of which the Fidelity Company was bound under the obligation of its suretyship. When the Fidelity Company assumed the obligation of suretyship its equity at once commenced with its obligation to see that the Scofield Company duly performed all the obligations which the contract with the government imposed upon it, including its obligations to promptly pay the laborers and materialmen. The Supreme Court in Prairie State Bank v. United States, 164 U. S. 227, 233, 17 Sup. Ct. 142, 41 L. Ed. 412 (1896), held that a stipulation in a building contract for the retention until the completion of the work of a certain portion of the consideration is as much for the indemnity of him who may be guarantor of the performance of the work as for him for whom the work is to be performed, and that it raised an equity in the fund to be created. In accordance with this doctrine the equity of the Fidelity Company in this reserved fund cannot be successfully questioned. And the fact is quite immaterial that the contract which the Scofield Company made with the government provided simply for the retention of the fund until the completion of the work. A similar provision existed in the contract in the Prairie State Bank Case, but that fact did not prevent the Supreme Court from regarding the reserved fund as withheld for the benefit of the surety, as well as for the protection of the government. The doctrine of that case was reasserted by the Supreme Court in Henningsen v. United States Fidelity & Guaranty Co., 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547 (1908). These cases show that the equity of the surety who pays the debts arising under the contract will take precedence of any assignment of funds due from the government made by the contractor. A fortiori the equity of the surety must take precedence of the general creditors.

Decree affirmed.

ELDORADO COAL & MINING CO. v. MARIOTTI.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1914. Rehearing Denied May 12, 1914.)

No. 2041.

1. COURTS (§ 321*)—FEDERAL COURTS—JURISDICTION—SUIT BY ALIEN.

Under the express provisions of Const. art. 3, § 2, and Judicial Code (Act March 3, 1911, c. 231, § 24, cl. 1, 36 Stat. 1091 [U. S. Comp. St. Supp. 1911, p. 135]), the District Court has general jurisdiction of a suit by an alien against a citizen of the United States.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 845, 847–849; Dec. Dig. § 321.*]

2. COURTS (§ 276*)—FEDERAL COURTS—JURISDICTION—PLACE OF SUIT—SUIT IN WRONG DISTRICT—WAIVER.

Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1101 [U. S. Comp. St. Supp. 1911, p. 150]) § 51, provides that except as otherwise provided no civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on diversity of citizenship, suit shall be brought only in the district of the residence of either the plaintiff or defendant. *Held*, that where a federal court had jurisdiction of the subject-matter, defendant's right to object on the ground that the suit was brought in the wrong district was one of privilege and might be and was waived by a general appearance to demur to the merits.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276.*

Waiver of right as to district in which suit may be brought, see notes to Memphis Sav. Bank v. Houchens, 52 C. C. A. 192; McPhee & McGinnity Co. v. Union Pac. R. Co., 87 C. C. A. 634.]

3. APPEAL AND ERROR (§ 874*)—REVIEW—RECORD—BILL OF EXCEPTIONS—NECESSITY—MOTION TO DISMISS.

Denial of a motion to dismiss for want of jurisdiction because of matters appearing on the face of the declaration cannot be reviewed on a writ of error, where neither the motion nor the ruling thereon was preserved in the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2874; Dec. Dig. § 874.*]

4. APPEAL AND ERROR (§ 516*)—RECORD—WHAT CONSTITUTES—BILL OF EXCEPTIONS—MOTIONS.

Only the process, pleadings, orders, judgment, and such matters as are properly preserved in the bill of exceptions constitute the record on a writ of error unless made so by agreement of the parties or order of court; motions based on matters dehors the record being not a part of the record unless made so by bill of exceptions or otherwise saved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2332–2340; Dec. Dig. § 516.*]

5. PLEADING (§ 204*)—DECLARATION—COUNTS—DEMURRER.

A demurrer to a declaration and to each and every count thereof is not good if any count states a cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486–490; Dec. Dig. § 204.*]

6. PLEADING (§ 64*)—DECLARATION—DUPLICITY.

Where a declaration for injuries to a miner by the explosion of mine dust alleged that defendant willfully failed to sprinkle a certain entry

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

in compliance with its statutory duty, whereby an explosion was caused and consequent injury to plaintiff, the count was not duplicitous.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 134-137; Dec. Dig. § 64.*]

7. MASTER AND SERVANT (§ 258*) — INJURIES TO SERVANT — CONNECTION BETWEEN NEGLIGENCE AND INJURY.

Where a declaration for injuries to a miner charged that defendant negligently failed to comply with its statutory duty to sprinkle a certain entry, and then charged that, by reason of the heavy dust in the roadway and as a result of defendant's failure to sprinkle, an explosion occurred by which plaintiff was injured, it sufficiently connected the dusty condition of the road with the explosion.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.*]

8. MASTER AND SERVANT (§ 250¾, New, vol. 16 Key-No. Series)—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT—REPEAL—WORKMEN'S COMPENSATION LAW.

Illinois Mining Act (Hurd's Rev. St. 1913, c. 93) § 29, cl. (c), provides that if and whenever there shall be in force in the state a statute providing for compensation to workmen for all injuries received in the course of their employment the provisions thereof shall apply in lieu of the right of action for damages provided by such act. Illinois Workmen's Compensation Law, § 1 (Hurd's Rev. St. 1913, c. 48, § 126), provides that is shall be optional with the employer whether he will accept the provisions of the act, and the same option is accorded to the employé. *Held*, that the application of such act being optional with either or both parties, it did not repeal the mining act so far as to deprive an injured miner of a right of action thereunder for injuries sustained through his employer's omission to perform a duty imposed thereby.

In Error to the District Court of the United States for the Eastern District of Illinois; Francis M. Wright, Judge.

Action by Ugo Mariotti against the Eldorado Coal & Mining Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Defendant in error, who is described in the declaration as a citizen of the kingdom of Italy and a resident of the state of Illinois and of the Eastern district of Illinois, recovered judgment in the District Court for said district against plaintiff in error, described in the declaration as a corporation organized and existing under the laws of Indiana, in the sum of $2,500, to reverse which the present writ of error was sued out.

The declaration contains five counts. Of these we deem it necessary, for the present purposes, to consider only the fifth. By way of inducement this count sets out that plaintiff in error was, at the time of the injuries in said count named, engaged in operating the Seagraves mine, owned by it, situate near the city of Eldorado in the county of Saline, state of Illinois; that defendant in error was, and for a long time had been employed by plaintiff in error in the operation of the mine as a coal miner; that it was the duty of plaintiff in error to comply with the statutes of Illinois in relation to coal mines and pertaining to the protection of its employés therein, particularly the provision of the statute requiring it to have a mine manager at said mine charged with the duty to see that all the dusty haulage roads were thoroughly sprinkled at regular intervals as designated by the mine inspector, and to have the passageways, roadways, and entries of the mine regularly and thoroughly sprayed, sprinkled, or cleaned whenever the same became so dry that the air was charged with dust, and thereupon charges that at the time of the accident defendant in error was down in said mine engaged in the performance of his duties under plaintiff in error's direction; that plaintiff in error then and there failed to comply with said statute by willfully

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

failing on that day and for a long time prior to that day, to see that the roadway known as the third west north entry, in which defendant in error and others were required to pass in the course of their duties, and which was so dry that the air therein was charged with dust, was thoroughly sprinkled, sprayed, or cleaned, and avers that by reason of said willful violation of said statute and such failure to comply therewith on plaintiff in error's part, defendant in error entered into a certain portion of the said mine, which was a dusty haulage road and was in a dangerous condition by reason of the heavy dust in said roadway and plaintiff in error's willful failure to sprinkle the same, which condition was known to plaintiff in error, and as a result of the said dust and the failure to sprinkle said roadway an explosion occurred at that place, in consequence whereof defendant in error was then and there suffocated and his lungs clogged by poisonous gas arising from said explosion, and greatly bruised, etc.

There appears in the record a motion by plaintiff in error specially limiting its appearance for that purpose, asking that the suit be dismissed for want of jurisdiction of said District Court for the Eastern District of Illinois, on the ground that it appeared from the declaration that defendant in error was a citizen of the kingdom of Italy, and that plaintiff in error was a citizen of the state of Indiana, and that therefore the suit had been brought in the wrong district. Neither this motion nor any ruling thereon has been preserved in the bill of exceptions. On the same day on which said motion appears to have been filed, said court entered an order finding that both parties appeared in court by their respective attorneys, and reading as follows, viz.: "And now the defendant, by its said attorneys, filed and presents to the court its motion to dismiss this suit. And the court, now having heard the arguments of counsel for the respective parties hereto upon the said motion of defendant to dismiss and not now being fully advised in the premises, takes said motion under advisement." Afterwards and on the following day the court ordered that said motion be overruled. Thereupon plaintiff in error filed a general and special demurrer to the declaration and each count thereof, alleging the duplicity thereof, their failure to state a cause of action and the repeal of said mining act by reason of the passage of the so-called Workmen's Compensation Act by the Illinois Legislature. This demurrer was overruled. Plaintiff in error having elected to stand by its demurrer, the cause went to a jury and judgment was entered on the verdict for $2,500 as aforesaid.

The errors assigned are: (1) The refusal of the court to dismiss the cause for want of jurisdiction; (2) the overruling of the general and special demurrers; (3) the judgment was contrary to law.

William E. Wheeler, of East St. Louis, Ill., for plaintiff in error.

Charles H. Watson and Charles B. Elder, both of Chicago, Ill., for defendant in error.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1, 2] Under section 2 of article 3 of the Constitution, and as enacted by Congress in clause 1 of section 24 of the Judicial Code of 1911, the District Court had general jurisdiction of a suit brought by an alien against a citizen of the United States. By section 51 of the Judicial Code aforesaid, it is enacted that:

"Except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Where, as here, the court has jurisdiction of the subject-matter, the right of the defendant to object upon the ground that the suit was

brought in the wrong district, unlike the objection of a general lack of jurisdiction of the subject-matter, is one of privilege which may be waived by the defendant, and is waived if not specifically asserted and maintained.

In Interior Construction Co. v. Gibney, 160 U. S. 217, 16 Sup. Ct. 272, 40 L. Ed. 401, the court says:

> "But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties; but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon, or may waive, at his election; and the defendant's right to object that an action within the general jurisdiction of the court is brought in the wrong district is waived by entering a general appearance without taking the objection."

In support of this proposition the court cites In re Keasbey & Mattison Co., 160 U. S. 229, 16 Sup. Ct. 273, 40 L. Ed. 402, and many other cases. The rule has been followed by the several Circuit Courts, in Re Woodbury (D. C.) 98 Fed. 839, Scott v. Hoover, 99 Fed. 251, Platt v. Mass. Real Estate Co. (C. C.) 103 Fed. 706, and in Occidental Consolidated Mining Co. v. Comstock Tunnel Co. (C. C.) 120 Fed. 519.

Whether under section 51 suit may be brought in the district of the residence of the plaintiff, only when the plaintiff is a citizen of one of the United States, and whether, if the foregoing be the correct interpretation of the statute, the treaty with Italy overrides the statute and gives an Italian subject the right to sue in the district of his residence in the United States, are questions we do not consider, because, the right to be sued in one's own district being a personal privilege that may be waived, we find from the record that the objection was waived.

[3] In the printed record, as above set out, there appears what purports to be a motion made by plaintiff in error in the District Court, to dismiss the suit for want of jurisdiction for matters that appear upon the face of the declaration. Neither this motion nor any ruling thereon was preserved in the bill of exceptions and as a motion it is, therefore, not before this court.

[4] Only the process, pleadings, orders, judgment of the court and such matters as are properly preserved in the bill of exceptions, can be deemed as constituting the record, unless made so by agreement of parties or order of court. Sargeant v. State Bank of Indiana, 12 How. 385, 13 L. Ed. 1028; Fisher v. Cockerell, 5 Pet. 248–254, 8 L. Ed. 114; United States v. Taylor, 147 U. S. 699, 13 Sup. Ct. 479, 37 L. Ed. 335; Freeman on Judgments, § 79; Loeb v. Columbia Township Trustees, 179 U. S. 472–482, 21 Sup. Ct. 174, 45 L. Ed. 280. Motions based on matters dehors the record are expressly held to be not a part of the record unless preserved in a bill of exceptions or otherwise saved as above noted. Sargeant v. State Bank of Indiana, and other cases cited supra. It follows, therefore, that this motion, if it were one requiring preservation by bill of exceptions, was not preserved.

It will be seen that the order of May 5, 1913, fails to show that the motion to dismiss therein set out was based upon the claim that plaintiff in error asserted the privilege of being sued in its own district. Nor is there any presumption that such was the case. If, however, it be urged that since the first motion was based on facts appearing in the declaration it should be treated as a special demurrer, the record fails to show that the court ever disposed of it, in which case all right of plaintiff in error now to insist on the further consideration of its objection to the jurisdiction of the District Court for the reason set out was waived by its appearance generally for the purpose of demurring to the merits of the cause. Thus, from whatever point of view the case is considered, the objection must be held to have been waived under the authorities above cited.

[5-7] Plaintiff in error, as above stated, filed its demurrer to the declaration and to each and every count thereof. If any count of the declaration be found to be good, then the judgment will not be disturbed. Section 71, c. 110, Statutes of Illinois (Revision of 1909); North v. Kizer et al., 72 Ill. 173–176; Consolidated Coal Co., etc., v. Scheiber, 167 Ill. 539–541, 47 N. E. 1052. Whether or not the demurrer should have been sustained to counts 1 to 4 inclusive, we do not here determine. While count 5 sets up several duties cast upon the plaintiff in error by the statute, only one breach is alleged, namely, that plaintiff in error willfully failed to see that the roadway known as the third west north entry, which, as plaintiff in error knew, was so dry that the air therein was clogged with dust, was thoroughly sprinkled, sprayed, or cleaned, as by the statute required, whereby the explosion and consequent injury to defendant in error were caused. The count is single, and therefore not open to the charge of duplicity. The contention of counsel for plaintiff in error that the count fails to connect the dusty condition of the road with the explosion is without merit. The declaration alleges that:

"By reason of the heavy dust in said roadway and as a result of the failure to sprinkle the said roadway an explosion occurred."

It would be a difficult matter, without setting forth evidentiary facts, to state the ultimate facts in any other way. The count must therefore be held to be good.

[8] Plaintiff in error also insists, as a ground of demurrer, that the said mining act had, before the time of the accident, been repealed by the passage of the so-called Workmen's Compensation Act by the Illinois Legislature. Clause (c) of section 29 of the mining act provides:

"That if and whenever there shall be in force in this state, a statute or statutes providing for compensation to workmen for all injuries received in course of their employment, the provisions thereof shall apply in lieu of the right of action for damages provided in this act."

Section 1 of the Compensation Act makes it optional with the employer whether he will accept the provisions of that act. The same option is accorded to the employé. A statute whose operation is dependent on the will of the persons to be affected thereby is not such

a statute (a law of universal obligation) as clearly was contemplated by clause (c) of section 29 of the Mining Act. If the Compensation Act was intended to repeal the Mining Act, why make any provisions for the trial of a cause in which the plaintiff refused to accept the terms of the Compensation Act? Where and under what law would the employé seek relief were he to refuse the provisions of the act? Why give each party an election of remedies if there be no other remedy than that of the Compensation Act? The point is devoid of merit and may not, with reason, be deduced from the statute.

The demurrer was rightly overruled by the District Court, and the judgment of that court is affirmed.

UNITED STATES v. ATLANTIC COAST LINE R. CO.

(Circuit Court of Appeals, Fourth Circuit. June 9, 1914.)

No. 1226.

1. POST OFFICE (§ 22*)—TRANSPORTATION OF MAILS—NEGLIGENCE OF SERVANTS—LIABILITY OF CARRIER.
 A railroad in transporting the mails is not relieved from liability for the negligence of its servants because it is performing a public function, but is liable according to its contracts for any loss due to its corporate negligence or the negligence of any of its servants.

 [Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 40, 41; Dec. Dig. § 22.*]

2. POST OFFICE (§ 22*)—MAIL MATTER—PROPERTY RIGHTS.
 The United States has a property right in the mails, and may recover from any person to whom the mails are intrusted direct damages for loss or delay due to the bailee's negligence, which would be the labor and time necessary in the effort to recover the various parcels and the disarrangement of the post office business, and also the value of the mail lost for the benefit of the owners, unless the contract negatives such liability.

 [Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 40, 41; Dec. Dig. § 22.*]

3. POST OFFICE (§ 22*)—TRANSPORTATION OF MAILS—GOVERNMENT CONTRACT—NONMAILABLE MATTER—DIAMONDS.
 Since a government contract with a railroad company for the transportation of mails only obligates the carrier to exercise due care in the transportation of legitimate mail matter, the government may not recover for loss of diamonds, which are nonmailable, due to the carrier's alleged negligence.

 [Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 40, 41; Dec. Dig. § 22.*]

4. POST OFFICE (§ 22*)—TRANSPORTATION OF MAILS—LOSS—GOVERNMENT'S LIABILITY TO OWNER.
 The government is not responsible to the owner of mail lost in transportation.

 [Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 40, 41; Dec. Dig. § 22.*]

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

5. POST OFFICE (§ 22*)—TRANSPORTATION OF MAILS—LIABILITY FOR LOSS—GOVERNMENT'S REMEDY.

Post Office Regulation, § 1489, relating to the duties of railroads with respect to transportation of the mails, provides that fines may be imposed at the discretion of the Postmaster General for each of several delinquencies, including the suffering of mail to become wet, lost, injured, or destroyed, or conveying or keeping it in a place or manner that exposes it to depredation, loss, or injury. *Held*, that in the absence of a provision in the government's contract with a railroad for transporting mails that the railroad company should be liable for damage caused by injury to or loss of mails, the remedy by fine provided by such regulation constituted an exclusive remedy.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 40, 41; Dec. Dig. § 22.*]

In Error to the District Court of the United States for the Eastern District of North Carolina, at Wilmington; Henry G. Connor, Judge.

Action by the United States of America against the Atlantic Coast Line Railroad Company. Judgment (206 Fed. 190) for defendant, and the United States brings error. Affirmed.

Chapman W. Maupin, Special Asst. U. S. Atty., of Washington, D. C. (H. F. Seawell, U. S. Atty., of Carthage, N. C., and Francis D. Winston, U. S. Atty., of Windsor, N. C., on the brief), for the United States.

George B. Elliott and W. A. Townes, both of Wilmington, N. C., for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The United States as plaintiff in its own interest, and in the interest of the senders of certain pieces of mail matter committed to its possession as bailee of said senders, brought this action against the Atlantic Coast Line Railroad Company in the United States District Court for the Eastern District of North Carolina.

It is alleged in the complaint that prior to and on the 18th day of April, 1904, and thereafter, the defendant as a common carrier was under contract with the government, made pursuant to the act of Congress, to carry the United States mails on route No. 118,002 on its railroad between Weldon, in the state of North Carolina, and the line separating North Carolina and South Carolina, at a stipulated price, and that in pursuance of said contract the government had delivered to the defendant, and the defendant had in its possession under said contract, certain mail equipment of the value of $135.85, which was being transported by the defendant in its mail car on April 18, 1904, and that under said contract on said date defendant had in its possession as bailee of the government a certain railway post office car, and certain registered, ordinary, and foreign mail matter described, the mail matter being of the total value of $9,151.54; that on said April 18, 1904, by reason of the negligence of the defendant in leaving a portion of a freight train on its main track at Lucama, N. C, on defendant's railroad, on said mail route, at the time when the defendant's

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

train carrying the mail car was scheduled to pass said point, defendant's train carrying said mail car and mail equipment and mail matter was wrecked, and said car, equipment, and mail matter burned; and that thereafter the defendant negligently failed to guard, care for, and protect the débris of the mail car and mail matter, and rifled, and permitted other persons, including its own agents and employés, to rifle, pillage, search for and carry away, certain indestructible stones, diamonds, part of said mail matter known by defendants to be in said débris, the same having been placed in the mails in Paris, France, addressed and consigned to persons at Havana, Cuba. The defendant filed its answer, admitting the contract to carry the mail as alleged, but denying its negligence in the respects charged and its liability under the law to the government, either for the mail equipment alleged to have been burned or destroyed, or for the mail matter destroyed, lost, or permitted to be carried away out of the débris of said wrecked mail car. The defendant further sets up by way of answer that, as to the first alleged cause of action, the mail equipment alleged to have been destroyed, the defendant had paid the government $500 on October 2, 1906, as a fine imposed by the Postmaster General in full payment, accord, and satisfaction therefor, and the defendant, by way of further answer as to the second and third causes of action, the allegations of the government that certain mail matter had been negligently destroyed, and not properly safeguarded and cared for among the débris of the wrecked car, set up the North Carolina three-year statute of limitations in bar of the government's right to recover.

Certain issues were submitted to the jury, upon which the jury returned a verdict finding that the collision of the defendant's trains was not caused by the negligence of the employés in charge of the train carrying the mail car, but was caused by the negligence of the servants and employés of the defendant in charge of the freight train, and that the government's mail equipment, of the value of $135.85, was destroyed by reason of said collision, and that the mail pouch containing certain mail matter, diamonds, of the value of $6,208.27, was destroyed by reason of the collision of said trains, and that a certain article of registered mail of domestic origin, of the value of $2.50, consigned to Smoaks, S. C., was also destroyed by reason of said collision.

The court, under stipulation of counsel, found the following facts, namely: That the defendant's agents, servants, and employés did not fail to exercise due care in saving said diamonds after they had notice that they were in said mail car at the time of the collision and destruction thereof; that the collision of defendant's train No. 35 with No. 8, on April 18, 1904, was not caused by the negligence of the defendant corporation. The court further found, under stipulation of counsel, that the defendant and its employés did not have notice of the fact that the said diamonds were in the said mail car prior to the collision. And the court further found the following facts, to wit: That the diamonds in said mail car were placed in the post office in violation of the laws and postal regulations of the republic of France and of the laws and postal regulations of the United States, and in violation of the terms and provisions of the postal convention concluded between

the United States and the republic of France, and in force April 8, 1904, and that the owners and senders of said diamonds had theretofore been paid therefor by the insurance company insuring safe transmission and delivery thereof. The court, upon all the facts found by the jury and by the court, and the admissions in the pleadings, adjudged that the government was not entitled to recover of the defendant either for the loss of the mail equipment, or loss of the mail matter, either of foreign or domestic origin, occasioned by reason of the collision of said trains, or by reason of any failure of the defendant to exercise proper care in safeguarding the débris of the burned car and preventing the rifling, searching for, and carrying away of diamonds found therein, and judgment was entered accordingly, to which plaintiff excepted, and the case comes here on writ of error.

Many questions of far-reaching importance were passed upon by the court below in the trial of this case. It is earnestly insisted by counsel for the government that the court below tried this case upon an erroneous theory as respects the relative rights of the parties to this controversy. The learned judge who heard this case filed a very able opinion, dealing at length with the various questions that were presented, as to most of which we are in hearty accord. (D. C.) 206 Fed. 190.

[1] We do not think the position tenable that the railroad was not liable for the acts of negligence of its agents because it was performing a public function. Having the mail in its possession, like other bailees, it was liable according to its contracts for any loss due to its corporate negligence, or the negligence of any of its servants. This was an incident to the relations of bailor and bailee.

[2] It is well settled that the United States has a property right in the mails. Searight v. Stokes, 3 How. 151, 11 L. Ed. 537; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092. This being so, it may recover from any person to whom it intrusted its mails damages for their loss or delay due to the bailee's negligence. The direct damages for loss of mail would be the labor and time necessary in the effort to recover the various parcels and the disarrangement of the post office business. The government could also recover the value of the mail lost for the benefit of the owners of the mail, *provided the contract did not negative the idea of the liability extending that far.*

It does not matter what we call the relation between the government and the railroad, the essential thing is that the railroad company assumed the obligation to use due care to have a safe track for the mail car to run on, and when it was negligent in that respect it became responsible for any damage to the government due either to its own negligence or that of its servants. The distinction urged between the negligence of the company itself and its servants on an issue of this sort is artificial and unsupported by any substantial reason. It may be true that, as between the owner of the mail matter seeking to fix the liability on the railroad for his lost property and the railroad itself, the railroad is a public agency, but as between the government and the railroad contracting to carry its mail, the railroad company is liable as a party to a private contract.

[3] The damages recoverable for negligence at the suit of the government could not extend, however, beyond the contractual obligation of the railroad company, and that obligation was to exercise due care in carrying that which was legitimate mail matter. It did not assume the obligation to carry with due care as mail matter property which was not mailable. Under regulations of the postal convention it appears clearly that diamonds were not mailable, and therefore the obligation could not be forced upon the railroad company to take care of them; and there is not any evidence that the railroad company knew they had been placed in the mail. Therefore the government could not recover the value of the diamonds even if the government itself had been the owner.

[4, 5] The main difficulty is as to the measure of liability, for the railroad's negligent loss of mail, that is, whether it extends to the value of the property lost. The government is not responsible to the owner of mail lost in transportation. The postal regulations of the government under which its mail is carried, and which the railroad assumes as part of its contract, set out numerous duties and obligations imposed on railroads. There is a very strong presumption that if the intention had been to impose upon railroad companies the very onerous obligation of being responsible for the value of all mail lost through its negligence, this obligation of such vast consequence to both parties would have been clearly and directly expressed in the regulations. The absence of such expression creates a strong implication that it was not the intention to impose such liability. The implication against liability in such case is strongly indicated in German, etc., Co. v. Home, etc., Co., 226 U. S. 220, 33 Sup. Ct. 32, 57 L. Ed. 195, 42 L. R. A. (N. S.) 1000; Atchison, T. & S. F. Ry. v. United States, 225 U. S. 640, 32 Sup. Ct. 702, 56 L. Ed. 1236. This view is further supported by the fact that where the government intends to impose such liability it is usually expressed in the written undertaking exacted from the party who undertook to carry the mail. National Surety Co. v. U. S., 129 Fed. 70, 63 C. C. A. 512; United States v. American Surety Co. (C. C.) 155 Fed. 941; United States v. American Surety Co. (C. C.) 161 Fed. 149; Id., 163 Fed. 228, 89 C. C. A. 658. Section 1489 of the regulations relating to the duties of railroads with respect to carrying the mail, to which the company agreed as a part of its contract, provides that fines may be imposed, at the discretion of the Postmaster General—

"for each of the following delinquencies, unless satisfactory excuse be made in due time * * * (b). Suffering the mail, or any part of it, to become wet, lost, injured, or destroyed, or conveying or keeping it in a place or manner that exposes it to depredation, loss or injury."

So that there is not only an absence of any expression imposing the obligation to be responsible for the value of mail, but there is an affirmative expression of a different consequence of allowing the mail to be lost.

There is a legal and natural presumption that the contract is intended only for the benefit of those who make it, and not for that of others not parties to the contract. German, etc., Co. v. Home, etc., Co., su-

pra. The fact that a breach of the contract by the negligence of the company would entail little money loss on the government, because it was not liable to the owners of mail, and the possibility of immense loss to such owner from the loss of a mail car, must have been in the view of the Post Office Department, as well as of the railroad company. And if there had been an intention to impose upon the railroad company an obligation which did not devolve upon the Post Office Department, surely it would have been stated in the regulations. This is convincing that both parties contemplated that the government would rely for redress on the amount to be exacted at the discretion of the Postmaster General, and intended that as an exclusive remedy.

It is also insisted that the court below erred in holding that the suit is barred by the statute of limitations. In our view of this case, we do not deem it essential to pass upon this question, feeling as we do that a determination of the same is not at all necessary in order to reach a correct conclusion as to the questions presented.

For the reasons stated, we are of opinion that the judgment of the lower court should be affirmed.

Affirmed.

In re CANTOR et al.

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

No. 54.

1. BANKRUPTCY (§ 241*)—PROCEEDINGS—EXAMINATION OF BANKRUPT—CONTEMPT PROCEEDINGS—LEAVE TO MOVE.

Where proceedings for the examination of a bankrupt were instituted by petitioning creditors and conducted by their counsel before the appointment of a receiver or trustee, an outside creditor, in the absence of any application to intervene or allegation of apathy, incompetence, or neglect, or interest on the part of petitioning creditors, was not authorized to institute proceedings to punish the bankrupt for contempt without leave.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 398, 402–404, 408, 409; Dec. Dig. § 241.*]

2. BANKRUPTCY (§ 241*)—EXAMINATION OF BANKRUPT—UNSATISFACTORY TESTIMONY—CONTEMPT.

During the examination of a bankrupt at the instance of petitioning creditors prior to the appointment of a receiver or trustee, he was asked to produce the cashbook of the bankrupt firm, of which he was a member, and he testified that he last saw the book in the office of the firm shortly before the appointment of a custodian of its property and left it where he saw it. *Held*, that in the absence of a certificate of the special commissioner taking the testimony, indicating that in his opinion the witness testified falsely or withheld information which he might have given, the testimony did not indicate such falsity or concealment on its face as would justify contempt proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 398, 402–404, 408, 409; Dec. Dig. § 241.*]

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

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

This cause comes here on petition to revise an order of the District Court, Southern District of New York, denying the application of the petitioner to adjudge Samuel A. Cantor, a member of the bankrupt firm of Cantor Bros., guilty of contempt for failure to comply with an order requiring him to produce, on examination before a special commissioner, the cashbook of the firm of which he was a member. The original application to punish for contempt included as one of its grounds a charge that Cantor had testified falsely in the course of his examination. In view of the recent decision of this court in Re Kahn, 204 Fed. 581, 123 C. C. A. 107, the petitioner has not sought to review the order denying the application in respect to the question of false testimony.

The following is the opinion of Hand, District Judge, in the court below:

Samuel A. Cantor and Solomon Cantor, during the first six months of the year 1912, were doing business at 110 Hester street, in the city of New York, as retail merchants in dress goods, silks, and woolens. On the 29th day of July, 1912, creditors of the firm filed a petition in bankruptcy against them, and on the same day the court appointed one Bernard J. MacCorry custodian of their property. A clerk of the attorney for the petitioning creditors at once went to the shop at 110 Hester street and looked for all books. He swears that he found none, except one old checkbook.

This court issued an order on August 7, 1912, directing both bankrupts to appear before the deputy clerk of the court, appointed as special commissioner, under section 21a (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430]), to be examined concerning their acts, conduct, and their property; an adjudication having been entered theretofore. The bankrupt appeared on the 22d, 29th, and 30th of August before the commissioner and was examined at some length. Thereafter an order to show cause was obtained from this court on the 5th day of October, 1912, on petition of one Frederick W. Wakefield, who alleges that he is the credit manager of a corporation which is one of the creditors of the bankrupt, asking that the bankrupt Cantor be punished for contempt of court upon the ground that the bankrupt testified perjuriously and failed to submit to an examination concerning his affairs, and likewise that he concealed and still conceals his cashbook.

There are mixed together in this application two quite distinct proceedings, the incidents of, as well as the theory underlying, each of which is wholly different. There is, first, a petition to punish for contempt for failure to turn over a cashbook; there is, second, an application to punish for perjury on the examination. The first of these is a civil remedy designated to assist the administration of the estate; the second is a criminal contempt in which the court is in theory an actor and is vindicating its authority.

As to the first, I have always held as a practical matter of convenience that the receiver, when there is a receiver, should have in his hands the conduct of such matters in the first instance unless some other person interested should show that the receiver was not doing his duty. Here there was no receiver, but only a custodian, whose duty is only to preserve the assets and await the appointment of a trustee. The order for examination was obtained by the petitioning creditors, with whom the petitioner here had no connection. It is true that at one of the three hearings at which the bankrupt was examined Mr. Rosenberg conducted the examination, but it was as counsel for the petitioning creditors. I do not think that, without some ground shown, third persons may intervene to enforce by civil remedy subpœnas and orders obtained by the petitioning creditors. I do not mean that if suggestion were made of apathy, or incompetence, or neglect from interest, that I should not permit any creditor to intervene, but, where nothing of the sort is suggested, the petitioning creditors who have got the order and conducted the examination are, like a receiver, entitled to control its enforcement.

As to the criminal contempt, quite different considerations control, and any person who will undertake it may suggest to the court the property of some action and become amicus curiæ for so long as he will. However, this is a contempt primarily of the tribunal before which it arises, just as much here as though it were a case of disorder. The real moving party is the commissioner who finds himself impeded in the discharge of his duties. Of course, he has no power to punish for contempt, but he may certify the facts, like a referee. This is the proper course as much as though the witness had by disorderly, insolent, or threatening conduct broken up the hearing. The person aggrieved is the commissioner and through him the court, but the initiation of the proceeding should be his.

There is an especially proper reason for this, because in the case of alleged perjury so much depends upon the witness' bearing. When his words appear in print, it is sometimes possible to see that he is either evasive, or a downright perjurer, but generally it is extremely difficult to tell. This is especially true in the case of men of small education, to whom English is not a native tongue. Again and again such men within two consecutive sentences give the most contradictory answers. It is quite clear that they cannot mean this deliberately, but that they have not understood. In criminal contempts the accused has all the substantive benefits of one indicted (Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 444, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. [N. S.] 874), among them that of the degree of proof and without some certificate of the commissioner I certainly cannot say on this record that beyond a reasonable doubt this man was deliberately blocking the course of the proceeding by swearing to what he knew was false. The power undoubtedly exists, but it ought to be used very circumspectly. By that, I do not mean that it ought to be surrounded with absurd technicality which will destroy its value, but I do mean that all reasonable explanations should be made. A judge ought not to commit a man for contempt for perjury except in so plain a case as makes further attempt to examine the witness a farce, so obviously that no observer, who was present, could doubt that the witness was obviously trifling with the proceeding. He ought not to judge upon the balance of proof introduced to contradict the witness and so turn the examination into a trial of perjury, for this trenches on the criminal law itself. And, while the line cannot be abstractly stated with success, it can be so administered, if the judges will remember the purpose which it answers, and loyally accept the limitations which the defendant's right to a jury trial throws upon them.

There is one thing more: Every judicial proceeding and every charge to which another must respond justly requires that the respondent should know with reasonable definition what he has to answer. It will not do, as in this case, to throw at a man 120 pages of testimony and say generally that it is generally permeated with perjury. Some specification the most elementary rules of fair play demand, so that he may explain what he is charged with, and so that the judge may know on what the moving party relies. Nor is it any answer to say that the absurd precision of an old indictment at common law is not necessary; which, of course, it is not. The requirement is practical and will be treated practically, but for all that it is none the less real and necessary, and it is a condition, so far as I know, of every kind of judicial proceeding in every free country.

Motion denied without prejudice.

W. L. Ball, of New York City, for petitioner.

Leo Oppenheimer, of New York City, for respondents.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. [1] No receiver or trustee had been appointed, but only a custodian whose sole duty was to preserve the assets and await the appointment of a trustee. The order for examination was obtained by the petitioning creditors and it was conducted

by their counsel. The application to punish for contempt was made by an outside creditor, without previous application to the court for leave to intervene. We agree with the District Judge that orderly procedure requires a preliminary application to the court for leave to move, before an individual creditor undertakes to substitute himself for receiver, trustee, or petitioning creditors in a proceeding to enforce process or orders which they have obtained.

[2] Passing this point, however, the record shows that Cantor was examined before the special commissioner as to the keeping of such a book and its whereabouts. He testified that he last saw the book in the office of the firm shortly before the appointment of the custodian, did not take it himself, but left it where he saw it. The testimony of the witness as it reads is, no doubt, rather unsatisfactory; but we did not have the advantage of hearing it as he gave it and of observing his demeanor on the stand. There is no certificate of the special commissioner, who did hear him, indicating that in his opinion the witness testified falsely, or held back information which he might have given. The District Judge held that, in the absence of such a certificate, he was not persuaded to the conclusion that the witness' statements were false or that he was concealing the book. Still less can we, who never saw or heard him decide on mere suspicion that his testimony was perjured, and, unless his statements are false, there is no evidence which will support the conclusion that he has the book or knows where it is.

The order is affirmed.

UNITED STATES v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Ninth Circuit. August 3, 1914.)

No. 2381.

MASTER AND SERVANT (§ 13*)—HOURS OF SERVICE LAW—VIOLATION—"UNAVOIDABLE ACCIDENT"—"CASUALTY."

Defendant operated a single track railroad between two stations, over which the trains of three railroad companies were operated, aggregating 28 passenger trains daily and a large number of freight trains. According to schedule, the crew of train 303, west bound, left T. at 1:40 p. m. daily, arriving at P. at 6:45 p. m., and, returning, left P. at 7:25 the next morning, arriving at T. at 12:35 p. m. The crew left on time May 12, 1913, but were detained by a serious wreck of another train until 6 p. m., when the crew and the passengers of train 303 were transferred around the wreck to train 314, which had come up from P., when they proceeded to P., reaching there at 12:30 a. m. May 13th. The crew, after being off duty about 6½ hours, returned to T. on their regular run, and in doing so was on duty about 17 hours without having had 8 continuous hours off duty. *Held*, that the failure of the train dispatchers to appreciate the fact that the transfer of the crew would prevent their return to T. on their regular train without keeping them on duty more than 16 hours without 8 consecutive hours rest was a casualty or unavoidable accident, within the exception of the Hours of Service Law (Act March 4, 1907, c. 2939, 34 Stat. 1416 [U. S. Comp. St. Supp. 1911, p.

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

1322]) § 3, and that the railroad company was therefore not subject to a penalty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*

For other definitions, see Words and Phrases, vol. 8, pp. 7149-7151, 7822, 7823; vol. 1, pp. 1003, 1004; vol. 8, p. 7597.

Hours of service of employés, see note to United States v. Houston Belt & Terminal Ry. Co., 125 C. C. A. 485.]

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 the United States of America against the Northern Pacific Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Clay Allen, U. S. Atty., of Seattle, Wash., and Monroe C. List, Sp. Asst. to U. S. Atty., of Washington, D. C.

Geo. T. Reid, J. W. Quick, and L. B. Da Ponte, all of Tacoma, Wash., for defendant in error.

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

ROSS, Circuit Judge. This action was brought by the government to recover from the defendant railway company the prescribed penalties for three alleged violations of the act of Congress entitled "An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon," approved March 4, 1907 (34 St. Lg. p. 1415); the complaint containing three counts, the first of which relates to the employment by the company of one of its conductors for certain specified periods of time without allowing him to have "at least eight consecutive hours off duty," as required by section 2 of the act mentioned, and the second and third counts relating, respectively, to the two brakemen employed by the company under like conditions as the conductor.

That portion of section 2 of the act of March 4, 1907, applicable to the case, is as follows:

"That it shall be unlawful for any common carrier, its officers or agents, subject to this act to require or permit any employé subject to this act to be or remain on duty for a longer period than sixteen consecutive hours, and whenever any such employé of such common carrier shall have been continuously on duty for sixteen hours he shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such employé who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty."

Section 3 of the act, which provides for prosecutions of its violations and prescribes the penalties therefor, contains two provisos, the first of which is in these words:

"Provided, that the provisions of this act shall not apply in any case of casualty or unavoidable accident or the act of God; nor where the delay

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

was the result of a cause not known to the carrier or its officer or agent in charge of such employé at the time said employé left a terminal, and which could not have been foreseen."

The defense interposed to the action by the railway company, which was sustained by the action of the court below in directing the jury to return a verdict for the defendant and in denying a like motion on the part of the government for a directed verdict in its favor, was that the undisputed facts of the case brought it within the proviso of the act of Congress above quoted.

The conductor and brakemen in question constituted a crew whose run had been long established between the city of Tacoma, in the state of Washington, and the city of Portland, in the state of Oregon; the regular and usual run being to leave Tacoma on train No. 303 at 1:40 p. m. daily, arriving, if on schedule time, at Portland at 6:45 p. m., making the time of the crew on duty 5 hours and 35 minutes, including the 30 minutes they were required to report before starting. Their regular run required them to leave Portland for the return trip at 7:25 the next morning, arriving in Tacoma, if on schedule time, at 12:35 p. m. of the same day, making the time of the crew on duty on the return trip, including the preparatory time, 5 hours and 40 minutes, so that this regular crew was off duty at Portland 12 hours and at Tacoma 24 hours and 35 minutes, when the trains made their schedule time.

The record shows without dispute that, between the stations of South Tacoma and Lake View on this line, there is a single track over which the trains of three railroad companies were operated, namely, the Northern Pacific, Great Northern, and Oregon-Washington Railroad & Navigation Company, aggregating 28 passenger trains daily, besides a large number of freight trains. The evidence showed without conflict that, on the occasion in question, the crew in question left Tacoma on train 303 at 1:40 p. m. of May 12, 1913, and was due to meet passenger train No. 362 of the Oregon-Washington Railroad & Navigation Company at the station of South Tacoma at 1:56 p. m. of the same day, but that train 362 was derailed between Lake View and South Tacoma at about 1:50 p. m., about six minutes before the regular time of the meeting of the two trains. That derailment tore up the track, overturned the engine and coaches of train 362, resulting in the death and injury of a number of passengers, and prevented train 303, on which was the crew here in question, from proceeding on to Portland until about 6 p. m. of the same day, when that crew, with the passengers of train 303, were transferred to passenger train 314, which had come up from Portland. Train 314, with the crew and passengers of train 303, was then backed to a place near Centralia, where it was turned around and then proceeded to Portland, reaching there at 12:30 a. m. of May 13th. The crew in question, after being off duty about 6 hours and a half at Portland, returned to Tacoma on its regular run on train 308, and in doing so was on duty about 17 hours without having had 8 hours off duty.

The demoralization of the traffic over the road at the time in question, growing out of the derailment, is clearly shown by the uncontra-

dicted testimony in the case; indeed, it is expressly conceded by counsel for the government that the delay of the crew in question on its regular run from Tacoma to Portland was due to the "unavoidable accident at South Tacoma." It is equally plain from the undisputed evidence that the accident was the sole cause why the crew in question was engaged on its run for more than 16 hours without a rest of 8 consecutive hours, so that the question is whether the circumstances of the case bring it within the first proviso to section 3 of the act of Congress, upon which the action is based.

Undoubtedly the train dispatcher both at Tacoma and at Portland would, under ordinary conditions, be held to have known that the delay of train 303 at South Tacoma, and the transfer of its crew and passengers to train 314, could not have enabled them to reach Portland in time for the same crew to return to Tacoma on its regular train 308 without being kept on duty for more than 16 hours without a consecutive rest of 8 hours; but the evidence is uncontradicted to the effect (indeed, it could hardly have been otherwise) that both dispatchers were deeply engrossed in arranging and caring for the movement of the large number of trains, including the necessary wrecking outfits, together with the numerous incidentals, necessarily growing out of such a disaster. Under such circumstances, it would not, we think, be reasonable to hold the company liable for their failure to check up the time of service of the various crews of the very numerous trains passing over this particular piece of road at that particular time. And such we think was the view of Congress in providing, as it did, that the act of May 4, 1907, should "not apply in any case of casualty or unavoidable accident."

We are of opinion that the court below was right in holding that the circumstances of the present case brought it within that proviso.

The judgment is affirmed.

STONEBRAKER v. HUNTER, Treasurer of Osage County, Okl., et al.

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

No. 3933.

1. TAXATION (§ 611*)—ENJOINING COLLECTION—WHEN ACTION MAINTAINABLE.

Independent of statute, a suit in equity will not lie to enjoin illegal taxes, in the absence of some specific ground of equitable jurisdiction, such as the avoidance of a multiplicity of suits, as ordinarily there is a plain, speedy, and adequate remedy at law.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1242, 1245–1257; Dec. Dig. § 611.*]

2. TAXATION (§ 611*)—ENJOINING COLLECTION—WHEN ACTION MAINTAINABLE.

Wilson's Rev. & Ann. St. Okl. 1903, § 4440, providing that an injunction may be granted to enjoin the illegal levy of any tax, charge, or assessment or the collection of any illegal tax, charge, or assessment, does not create any new remedy nor authorize a suit in equity to enjoin the col-

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

lection of a tax unless some independent ground of equitable jurisdiction exists aside from the illegality of the tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1242, 1245-1257; Dec. Dig. § 611.*]

3. STATUTES (§ 226*)—CONSTRUCTION OF STATUTE ADOPTED FROM ANOTHER STATE.

The adoption of a statute from another state is an adoption of the construction placed upon the statute by the court of last resort of the state from which it was taken, prior to such adoption.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 307; Dec. Dig. § 226.*]

4. COURTS (§ 366*)—DECISIONS OF STATE COURTS AS AUTHORITY IN UNITED STATES COURTS.

Where the court of last resort of a state adopting a statute from another state repudiates the construction put upon the statute by the courts of such other state, its action in so doing is binding upon the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. § 366.*]

5. COURTS (§ 366*)—DECISIONS OF STATE COURTS AS AUTHORITY IN UNITED STATES COURTS.

The uniform holding of the Supreme Court of a state, in all cases where the question was raised, that an action to enjoin the collection of an illegal tax would not lie without a showing of independent grounds of equitable jurisdiction was binding on the federal courts, though such actions had been maintained in numerous instances where the question was not raised.

[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.]

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action by Howard M. Stonebraker against John A. Hunter, County Treasurer of Osage County, Okl., and others. From a decree dismissing the bill, plaintiff appeals. Affirmed.

H. B. Martin, of Tulsa, Okl. (Charles E. Bush, of Lindsay, Cal., and A. F. Moss, of Tulsa, Okl., on the brief), for appellant.

Charles West, Atty. Gen., and C. J. Davenport, Asst. Atty. Gen., for appellees.

Before HOOK, ADAMS, and SMITH, Circuit Judges.

SMITH, Circuit Judge. [1] This is an action to enjoin taxes alleged to be illegal. It is and must be conceded that, independently of statute, an action in equity will not lie to enjoin illegal taxes in the absence of some specific grounds for equitable relief. Ordinarily there is a plain, speedy, and adequate remedy at law, and, to maintain an action in equity to enjoin such taxes, there must be some distinct ground of equitable jurisdiction, such as to avoid a multiplicity of suits or the like. Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 33 Sup.

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

Ct. 942, 57 L. Ed. 1288; Same v. Same, 179 Fed. 628, 103 C. C. A. 186; Pittsburgh Railway v. Board of Public Works, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354; Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273; Stanley v. Supervisors of Albany, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000.

[2] It is claimed, however, that a statute of Oklahoma provided for the relief in such cases by injunctions.

"An injunction may be granted to enjoin the illegal levy of any tax, charge, or assessment, or the collection of any illegal tax, charge, or assessment, or any proceedings to enforce the same; and any number of persons whose property is affected by a tax or assessment so levied may unite in the petition filed to obtain such injunction." Section 242, vol. 2, Wilson's Statutes of Oklahoma of 1903.

If this section would authorize a suit in the state court, then the plaintiff, being a citizen of Missouri, could maintain the action in the United States Court. Cummings v. Merchants' National Bank, 101 U. S. 153, 25 L. Ed. 903.

The question, therefore, is whether this action could be maintained in any of the courts of Oklahoma.

In Wilson v. Wiggins et al., 7 Okl. 517, 525, 54 Pac. 716, 718, the court says:

"The rule denying the right to interfere by injunction to restrain the collection of a tax, unless the case is brought within some acknowledged head of equity jurisprudence, is one of public policy. This court has repeatedly held that section 4143 of the Statutes of Oklahoma of 1893 (being the same as section 242 of volume 2 of Wilson's Statutes of Oklahoma of 1903), providing that injunction may be granted to enjoin the illegal levy of any tax, charge, or assessment, or the collection of any illegal tax, charge, or assessment, or of any proceeding to enforce the same, did not substantially enlarge the general powers of a court of equity, and did not create any new remedy; and that such remedy may not be invoked in every case where a tax has been irregularly assessed or levied, nor may it be invoked in any case without the party invoking it bringing himself within the general principles of equitable relief, in addition to establishing the illegality complained of. Wallace v. Bullen, 6 Okl. 17, 52 Pac. 954; Sweet v. Boyd, 6 Okl. 699, 52 Pac. 939."

[3, 4] To the same effect is Carroll v. Gerlach, Tres., 11 Okl. 157, 65 Pac. 844. The case of Fast v. Rogers, 30 Okl. 289, 119 Pac. 241, is squarely in point in this case, and holds an injunction suit will not lie in Oklahoma unless the case involves some matter of equitable cognizance, and of course if it will not lie in Oklahoma it will not lie in the federal court, for the reasons just indicated. But it is claimed that that case does not expressly refer to the section of the Oklahoma statutes on injunctions, but, when it is read in the light of prior decisions, it is manifest that the Supreme Court of Oklahoma regarded the act in question as simply conferring the right to an injunction where the court of equity already has jurisdiction upon some distinct ground. It is claimed that the statute in question was taken from Kansas and was there construed before its adoption by Oklahoma as conferring an independent right to enjoin any illegal tax. It is true that the adoption of a statute from another state is an adoption of the construction already placed upon that statute by the court of last resort in the state from which it was taken at the time of its adoption; but, if the

court of last resort of the state adopting the statute repudiates such construction, its action will be binding upon the federal court in a case of this character.

[5] It is also claimed that numerous injunction suits to restrain illegal taxes have been entertained in Oklahoma before and since its admission as a state and without any showing of independent grounds of equitable jurisdiction. This is denied by appellees, but if it should be conceded that, in cases where the question was not raised, the Supreme Court of Oklahoma had so held, that could not avail the appellant, if, in all cases where the question was raised prior to the institution of this suit, that court had held such an action would not lie.

We find that the Supreme Court of Oklahoma has uniformly held, where the question was considered by it that such an action would not lie, and there being no allegation in the bill of complaint of any distinct grounds of equitable jurisdiction, the action of the district court in dismissing the bill was correct; and it is affirmed.

SCHMULBACH v. CALDWELL et al.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1914.)

No. 1216.

CONTRACTS (§ 322*)—BUILDING CONTRACT—LIABILITY OF CONTRACTOR FOR DELAYS—WAIVER.

Findings of a master, approved by the District Court, that delays in the completion of a building beyond the time fixed by the contract were due to causes for which the contractors were not liable, and that a requirement of the contract that the contractors should procure certificates from the architect to excuse delays had been waived by the conduct of the owner, *held* sustained by the evidence.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1306, 1307, 1339, 1347, 1348, 1465, 1492, 1534–1542, 1754, 1768, 1772, 1801, 1802, 1804–1808, 1815, 1816; Dec. Dig. § 322.*]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Wheeling; Alston G. Dayton, Judge.

Suit in equity by George W. Caldwell and Lester Drake, partners as Caldwell & Drake, against Henry Schmulbach. Decree for complainants, and defendant appeals. Affirmed.

For prior opinion, see 196 Fed. 16, 115 C. C. A. 650.

Nelson C. Hubbard, of Wheeling, W. Va. (Alfred Caldwell and S. M. Noyes, both of Wheeling, W. Va., on the brief), for appellant.

John A. Howard and John J. Coniff, both of Wheeling, W. Va. (James W. Ewing, of Wheeling, W. Va., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is the second time that this case has been here on appeal. At the February term, 1912, this court disposed of the questions involved in the first appeal. 196 Fed. 16, 115 C. C. A. 650. The District Court had held in that instance that,

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

there being delays caused by both parties, the court would not attempt to apportion the causes of delays, denied the owners claim for liquidated damages, and adopted the rule announced by this court in the case of Jefferson Hotel Co. v. Brumbaugh, 168 Fed. 867, 94 C. C. A. 279. The court reversed that part of the decree, and refrained from passing upon the other questions raised on the owner's claim for liquidated damages and the contractors' claim to be relieved from damages for which they were not responsible.

The case was remanded for further proceedings upon the questions raised upon the owner's claim for liquidated damages for delay in completing the building constructed for him by the contractors. Whereupon the District Court referred the cause to a special master to state an account between the plaintiffs and defendant, showing the number of days' delay, the cause of delay, the number of days' delay for which the contractors were responsible, the number of days' delay for which the owner was responsible, the number of days' delay due to bad weather, and the number of days' delay for which for any reason it would be inequitable to charge the contractors, and other pertinent matters.

The master found that the whole number of days' delay was 583; that there was no waiver of the contract for damages for delay until November 20, 1906, at which time the owner took possession of part of the building and installed his first tenant, that from and after that the owner waived the contract requiring damages for delay, that it would be inequitable to charge the contractors with damages for delay after March 15, 1907, at which time the building was fully occupied by the owner's tenants, and that the provision of the contract requiring certificates for delays, claimed by the contractors to be delays for which they were not responsible, was waived by the defendant; and, stating the account in accordance with said findings, the special master, after carefully reviewing the evidence, found that all of the delays were due to the owner himself or his independent contractors, for parts of the building not included in the general contract, except 29 days, which he found to be chargeable to the appellees. The District Court approved the findings of the special master and entered a decree, modifying the former decree accordingly, to the entry of which decree appellant excepted, and the case now comes here on appeal.

The owner claims that there were 583 days' delay. However, 259 of which time it is alleged there was a delay occurred after the owner had installed his first tenant in the building. During these 259 days the contractors had a few men at work from time to time, and it appears that the principal work they did consisted in placing hardware fixtures. That the delay of the contractors in this respect was due to the failure on the part of the owner to promptly provide material is clearly established. Therefore the court below was correct in holding that, inasmuch as the owner had taken possession of the building and commenced to collect rentals from tenants, such conduct on his part constituted a waiver of the contract for damages for delays.

The special master found that the requirements of the contract for certificates for delays for which it is contended by the owner that the

contractors are responsible was waived soon after the work was commenced. This court, in the opinion to which we have referred, in referring to the requirements of the contract for certificates for extras, among other things, said:

"In regard to other changes he [the master] has found that each alteration was necessary—in many of them it would have been impracticable for the architects to have given a written order. It is evident that neither of the parties were adhering strictly to all the terms of the contract in respect to these items of extra work. There is ample ground upon which to base the conclusion that in regard to them there was, by course of conduct, a waiver of the terms of the contract."

Reasoning by analogy, it necessarily follows that the provision of the contract requiring certificates for delays could be waived by the conduct of the owner. The evidence as to this point fully sustains the findings of the master, wherein he gives a fair and impartial review of the evidence, showing very clearly that this requirement was not exacted or insisted upon by the owner. It would be unreasonable to hold that the provision of the contract as respects certificates for extras could be waived, while at the same time the owner could not by his conduct waive the requirements as to delays not chargeable to the contractor.

It is insisted by counsel that the court below, in its order of reference, misinterpreted the opinion of this court; that under the opinion of this court the contractors were to be charged with 583 days, except where it could be shown that certificates had been given the contractors. The master, in pursuance of the order of reference, among other things, found that the contractors were to be charged with 583 days, except where it could be shown that the owner by his conduct waived the requirements as to certificates. When the case was first before this court, the record showed that no certificates had been granted on account of delays; therefore, if the contention of counsel for appellant as to the scope of the opinion of this court be correct, there would have been nothing to refer to the master. The court in referring to this point said:

"If the plaintiffs have taken certificates from the architects and owner showing that the days for which they are entitled to credit are such days as fall within either of the excepted classes, the measure of the plaintiffs' liability is a simple matter of calculation. If they have not done so, other and more difficult questions will be presented. The burden is on the plaintiffs to show the number of excepted days for which they are entitled to credit. As we have said in regard to the completion of the work and the charges for extras, it was competent for the parties to contract that certificates of the conditions entitling the plaintiffs to credit shall be given. It is also true that, notwithstanding this provision, the plaintiffs may show that either by mutual consent, or by conduct showing an intention to waive the certificates, or by conduct on the part of the defendant rendering it inequitable to demand strict compliance with the provisions of the contract, they are not required to produce the certificates. 30 Am. & Eng. Ency. 1259. We forbear discussing the evidence relating to the causes of the delay, or the conduct of the parties in respect to it."

The opinion by Judge Connor is full and comprehensive, and anticipates every point sought to be raised on this appeal. Such being the case, we do not deem it necessary to again enter into a discussion of

the matters disposed of by the court at that time. A careful examination of the order of reference, together with the special master's report, show that the proceedings in the District Court were in accordance with the rule as announced by this court.

For the reasons stated. the decree of the lower court is affirmed.

Affirmed.

FORSTER et al. v. HILL.

(Circuit Court of Appeals, Sixth Circuit. July 7, 1914.)

No. 2464.

GAMING (§ 30*)—STOCK GAMBLING—ILLEGALITY OF EMPLOYMENT OF BROKER—ACCOUNTING.

While a contract for gambling dealings upon a stock exchange cannot be directly or indirectly enforced by action, where plaintiff employed brokers as his agents in gambling stock market transactions, but such business was finished, a specific and agreed sum remained in the agents' hands, and no accounting was necessary, it was their duty, independently of their implied agreement to do so, to pay such sum to plaintiff, whether it was a part of the original investment or a part of the profits, and he could recover such sum by action.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 69; Dec. Dig. § 30.*]

In Error to the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Action by Robert J. Hill against Walter Forster and another, doing business as Forster, Hauser & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

Otto Wolff, of Newport, Ky., for plaintiff in error.

S. O. Bayless and John Galvin, both of Cincinnati, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. Forster & Hauser were brokers in Cincinnati. Being without much capital, they conducted all their "dealings" through the Cincinnati Consolidated Grain & Stock Company, a bucket shop. Hill paid money to Forster & Hauser with which they were to carry on for him a speculation in margins, and they did the business through the Consolidated Company. When this company failed, Hill had received back substantially all his investment, but the books of Forster & Hauser, properly written up from the daily records of the apparent transactions of the Consolidated Company, showed a considerable profit due Hill. For its recovery, he brought this suit. He claimed that the money for these profits had actually come into the possession of Forster & Hauser as his agents; that it was represented by the balance due under an account stated between them; and that this money should be paid over to him. They claimed that they were acting as agents for the Consolidated Company, and that they never re-

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

ceived these supposed profits. This issue was submitted to the jury, which found for Hill. All parties agreed that the business which Forster & Hauser did for Hill consisted of gambling transactions, and that this character of business, and this only, was in contemplation from the beginning. The record is so shaped that the only question presented for our decision is whether plaintiff's theory of fact, if established and applied to the profits from a gambling transaction, entitles him to recover.

The general rule is not to be doubted that no action can be maintained which involves a direct or indirect enforcement of a contract for gambling dealings upon a stock exchange; but this is not such a case. It is true that the original contract contemplating the illegal transactions carried an agreement that Forster & Hauser were to pay over to Hill any profits which they might receive; but plaintiff's right to recover does not depend upon that agreement. The law itself, quite distinct from the contract, raises the same implication. We think it is the fair result of the decided cases that where an agent is employed to conduct such stock market transactions, and where the business is finished and no accounting is necessary, but a specific and agreed sum remains in the agent's hands, whether that sum is a part of the original investment or is profits or is both, it is his duty to pay this fund over to his principal; and he cannot escape that duty by reliance upon the nature of the transaction out of which the fund arose. This rule is, of course, to be confined to the relationship of principal and agent, where the legal duty to pay over ipso facto results, and does not necessarily extend to relations between strangers, where that duty depends upon the invalid contract.

This was an Ohio contract, and, regardless of whether there is an obligation to follow the decision of the Ohio Supreme Court, we should be inclined to do so, unless there was a clearly established contrary general rule. The Ohio Supreme Court seems to have decided the point in Norton v. Blinn, 39 Ohio St. 145, in which the syllabus is:

> "While courts will not enforce an illegal contract between the parties, yet, if an agent of one of the parties has, in the prosecution of the illegal enterprise for his principal, received money or other property * * * he is bound to turn it over to him and cannot shield himself from liability therefor upon the ground of the illegality of the original transaction."

This rule is supported by, or at least is consistent with, the decisions of the Supreme Court of the United States. Brooks v. Martin, 2 Wall. 70, 80, 17 L. Ed. 732[1]; McBlair v. Gibbs, 17 How. 235, 239, 15 L. Ed. 132; Planters' Bank v. Union Bank, 83 U. S. (16 Wall.) 483, 499, 21 L. Ed. 473; Armstrong v. American Bank, 133 U. S. 433, 469, 10 Sup. Ct. 450, 33 L. Ed. 747. And see the decision of this court in Buchanan v. Drovers' Bank, 55 Fed. 223, 227, 5 C. C. A. 83. The decisions of

[1] So far as concerns any rule of law beyond its precise facts, the authority of Brooks v. Martin is much limited by McMullen v. Hoffman, 174 U. S. 639, 666, 19 Sup. Ct. 839, 43 L. Ed. 1117. However, the latter case is not, either in the point it decides or in the principle it invokes, inconsistent with the duty of an agent to pay over the principal's funds in his hands in such a case as the present.

various state courts are to the same effect. Peters v. Grim, 149 Pa. 163, 166, 24 Atl. 192, 34 Am. St. Rep. 599; Gilliam v. Brown, 43 Miss. 641, 659; Heckman v. Swartz, 50 Wis. 267, 270, 6 N. W. 891; Pointer v. Smith, 54 Tenn. (7 Heisk.) 137, 144; Holleman v. Bradley Co., 106 Ga. 156, 163, 32 S. E. 83; O'Bryan v. Fitzpatrick, 48 Ark. 487, 490, 3 S. W. 527; Wilson v. Owen, 30 Mich. 474, 476.

A careful review of the cases presented by the plaintiff in error convinces us that they are all distinguishable upon some one or more of the grounds which we have included in our above formulation of the rule. The contention that Forster & Hauser were so far agents for the Consolidated Company, and so far stood for that company or acted on their own account in their relations with Hill as to neutralize their agency for him, and to give them the same right to defend that strangers would have had, cannot be presented on this record. The pleadings alone do not justify this inference, and, in so far as the pleadings permitted Forster & Hauser to make that contention, they had a trial on that issue, under rulings of which they do not complain.

The judgment is affirmed, with costs.

WHITCOMB v. SHULTZ.

(Circuit Court of Appeals, Second Circuit. June 3, 1914.)

No. 206.

1. TRIAL (§ 260*)—REQUEST TO CHARGE—DENIAL—INSTRUCTIONS GIVEN.
   Refusal of a request to charge is not error, where the court's charge was full, careful, and impartial and properly covered the request.
   [Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

2. SALES (§ 69*)—SALE BY SAMPLE—DUTY TO MANUFACTURE PARTS.
   Where plaintiff's assignor contracted to manufacture certain vending machines according to a specified model, it was not bound to manufacture all the parts itself.
   [Ed. Note.—For other cases, see Sales, Cent. Dig. § 183; Dec. Dig. § 69.*]

3. SALES (§ 166*)—MANUFACTURED ARTICLE—VENDING MACHINES—OPERATION.
   Where plaintiff's assignor contracted to manufacture certain vending machines according to a specified model, it performed its contract if it made the machines substantially like the model, and was not responsible for their operation.
   [Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 391–400, 402; Dec. Dig. § 166.*]

4. SALES (§ 372*)—CONTRACTS—BREACH—SUBSEQUENT CONSIDERATION.
   Where a contract to manufacture certain vending machines for defendant's principal was never completed because the principal repudiated the same after a small portion of the machines had been delivered, the fact that plaintiff's assignor failed to keep in its possession the dies, patterns, etc., so as to be able to perform a provision of the contract that it surrender the same on demand in first-class condition on completion of the contract, was immaterial in an action for breach thereof.
   [Ed. Note.—For other cases, see Sales, Cent. Dig. § 1089; Dec. Dig. § 372.*]

*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 Southern District of New York.

Action by George S. Shultz against James A. Whitcomb. Judgment for plaintiff, and defendant brings error. Affirmed.

J. M. Gazzam, of New York City, for plaintiff in error.
A. J. Rose, of New York City, for defendant in error.

Before LACOMBE, WARD and ROGERS, Circuit Judges.

WARD, Circuit Judge. The Great American Automatic Vending Machine Company, plaintiff's assignor, agreed to manufacture for the Robertson Sales Company 10,000 vending machines like a model submitted. The defendant Whitcomb became surety for the faithful performance of the contract by the Sales Company. By January 1, 1910, the Vending Company had delivered 2,100 machines, after which date the Sales Company refused to receive any more. Thereupon the plaintiff brought this action at law against the defendant as surety, to recover the damages sustained by the Vending Company, being first, the balance due and unpaid upon the 2,100 machines delivered, with interest at 6 per cent; second, the cost of materials purchased for the manufacture of the 10,000 machines, less what was used in the 2,100 delivered; third, the profits on the 7,900 machines remaining to be delivered. The jury returned a verdict for the plaintiff. This is a writ of error to a judgment entered thereon.

[1] Many errors are assigned because of Judge Mack's refusal to charge as requested, but we think that his charge was full, careful and impartial and properly covered the requests.

[2] The defendant relies greatly on the proposition that the plaintiff did not manufacture the machines because it employed other parties to make many of the parts and therefore has no cause of action. The court rightly charged the jury that the plaintiff's assignor was not obliged itself to manufacture all the parts. There was evidence that the model submitted was manufactured in the same way and that the officers of the Sales Company knew before they repudiated the contract that the Vending Company was itself making only some parts of the machine, employing third parties to make other parts.

[3] The material question was whether the Vending Company manufactured machines substantially like the model. If it did, it performed its contract. It was not responsible for the operation of the machines. This question was fully and fairly presented to the jury, who decided it in the plaintiff's favor upon a conflict of testimony and this finding is binding upon us.

[4] The defendant also contends that the plaintiff failed to perform the contract because it did not keep in its possession the dies, patterns, etc., so as to be able to conform to the requirement of the contract that it should deliver the same to the Sales Company upon its demand in first-class condition upon the completion of the contract. This is a quite immaterial consideration, because the contract never was completed, having been repudiated by the Sales Company after 2,100 machines had been delivered.

The trial occupied nearly three weeks and the defendant took a multitude of hypercritical exceptions to the proof of damage offered by the plaintiff. The unpaid balance due upon the machines actually delivered was a mere question of mathematics. In respect to the cost of material ordered by the plaintiff's assignor, there was primary proof, confirmed by the receipted bills of the vendors and the plaintiff's checks in payment thereof. Finally, there was evidence as to the cost of making the machines as compared with the price the plaintiff was to receive, showing the loss of profits. There was sufficient competent evidence to enable the jury to determine the amount of the plaintiff's damages with reasonable certainty, and we are not disposed to be astute to discover and discuss errors in this long trial which in our opinion were harmless.

The judgment is affirmed.

KIRK v. WEST VIRGINIA COLLIERY CO.

(Circuit Court of Appeals, Fourth Circuit. May 8, 1914.)

No. 1234.

NEGLIGENCE (§ 25*)—DANGEROUS PREMISES—REASONABLE CARE.

Plaintiff, while walking down a main railroad track to the place where passenger trains stopped, intending to board such a train as a passenger, reached a point where she would have to walk past a coal tipple discharging coal through a chute into cars below, and met one of defendant's foremen, of whom she inquired if it was safe for her to pass the tipple, to which he replied in the affirmative. She passed on, walking along the ties on the outer edge of the main track, and was injured by a lump of coal that bounded over from the railroad car then being loaded, which struck her on the limb. The distance between the main line railroad track and the side track on which the car was being loaded was 18 feet from center to center. *Held*, that reasonable care did not require defendant to build a guard fence or wall between the tracks, nor to stop loading the car while plaintiff was passing the tipple, and that the proximate cause of the injury was pure accident, and not the result of actionable negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 35-38; Dec. Dig. § 25.*]

In Error to the District Court of the United States for the Southern District of West Virginia, at Huntington; Benjamin F. Keller, Judge.

Action by Sarah Kirk against the West Virginia Colliery Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Finley E. Fogg, of Paintsville, Ky. (Fogg & Kirk, of Paintsville, Ky., and Williams, Scott & Lovett, of Huntington, W. Va., on the brief), for plaintiff in error.

V. L. Black, of Charleston, W. Va. (Brown, Jackson & Knight, of Charleston, W. Va., on the brief), for defendant in error.

Before PRITCHARD and KNAPP, Circuit Judges, and DAYTON, District Judge.

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

DAYTON, District Judge. On August 10, 1911, the defendant company was operating a coal mine on Cabin creek, Kanawha county, W. Va., on one of the branch lines of the Chesapeake & Ohio Railway. The mine was a drift one, and the coal, in mine cars, from the pit mouth was run down an incline to and upon a tipple which was erected over two side or spur tracks from the railroad's main line, for the purpose of loading the coal into railroad cars for transportation. When the mine cars arrived upon the tipple their coal was dumped into the tipple bin from which, through a chute underneath, by opening a metal gate, the coal was allowed to pass down into the railroad car, awaiting its reception upon one or other of the side tracks below. Two men were stationed in the railroad car, being thus loaded, for the purpose of discovering and throwing out any lumps of slate or bone left in the coal and of adjusting the load properly in the car. The side track next to the railway's main line track was distant 18 feet from center to center. On this day in August, the plaintiff, a woman 61 years of age, in company with her daughter, whom she had been visiting, was walking down the main track of the railroad to the place where passenger trains stopped, with a view to board such a train as a passenger. Just before reaching the point where she would have to walk past this tipple she met two men, one a working foreman of defendant, from whom she inquired if it was safe for her to pass by it, who replied, "No, there is no danger, go on." She did go on, walking along the ties on the outer edge of the main track, and was struck and injured by a lump of coal that bounded over from the railroad car then being loaded, and struck her on the leg. This action was thereupon instituted in the court below alleging negligence and claiming damages. A trial was had, in which, after the introduction of plaintiff's evidence the court there held it to be insufficient to warrant a recovery, and directed the jury to find a verdict for the defendant. Upon such verdict, judgment for defendant was rendered and entered, to which this writ of error was taken.

We do not deem it necessary to consider the questions of Mrs. Kirk's right to walk upon the railroad's main track past this tipple instead of taking the obstructed road running alongside such track, nor her alleged contributory negligence in the premises. Regrettable as this injury to this lady, which has undoubtedly caused her much pain and suffering, may have been, it seems clear to us from the evidence that it was the result of a very peculiar, unusual, and unexpected occurrence, which no precaution in ordinary reason and experience could have contemplated or forestalled. Beyond all doubt this lump of coal, instead of going down the chute and bedding itself with the other coal in the body of the railroad car, as ordinarily and usually it would have done, for some reason bounded from the lower end of the chute across the railroad car to its far side, where it struck and again bounded across the railroad's main track some 18 feet, at the particular second of time when it would come in contact with and injure this woman. No such accident would likely occur again in a century if at all. The statement made by the tipple foreman that "there was no danger, go on," was entirely justified from experience, and a reasonable view

of the situation. To say that it was the duty of the coal company, as claimed by counsel, to stop the operation of loading the car until these women could pass the tipple, 18 feet away in anticipation or fear of such a freak occurrence has no support in the principles of the law governing negligence. For the same reason the other claim that the company should have built a guard fence or wall between the tracks is just as untenable. In short, the case resolves itself into one of pure accident for which the coal company could not, upon any principle of law, be held liable.

The judgment of the court below is affirmed.

Affirmed.

CANTON-HUGHES PUMP CO. v. LLERA.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1914.)

No. 2625.

1. BROKERS (§ 85*)—ACTIONS FOR COMPENSATION—EVIDENCE—REASONABLE VALUE OF SERVICES.

In an action for compensation for negotiating a sale of a pump for installation in a building, where the existence of some contract was adjudicated and where there was no evidence tending to show any contract other than that claimed by plaintiff, by which he was to receive the difference between the price quoted to him by defendant and the selling price, evidence as to the reasonable value of his services was not pertinent, and was properly excluded.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 106–115; Dec. Dig. § 85.*]

2. JUDGMENT (§ 622*)—CONCLUSIVENESS—MATTERS CONCLUDED.

A judgment of the New York Municipal Court, allowing so much of a counterclaim as was within the jurisdiction of that court, was conclusive, in a subsequent action for the balance of the counterclaim, that the person making the contract upon which the counterclaim was based had authority to do so, that it was a binding contract, and that the refusal of the plaintiff in the municipal court action to perform the contract was unjustified and amounted to a breach.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1136; Dec. Dig. § 622.*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; William R. Day, Judge.

Action by Manuel Llera against the Canton-Hughes Pump Company. Judgment for plaintiff, and defendant brings error. Affirmed.

A. A. Thayer, of Cleveland, Ohio, and J. A. Jeffers, of Canton, Ohio, for plaintiff in error.

C. S. Yawger, of New York City, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. The facts are fully enough stated in our opinion upon our review of the first trial. 205 Fed. 209, 123 C. C. A. 397. Upon the new trial, the question of the amount due was sub-

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

mitted to the jury, credit was permitted on account of the money received by Llera upon his substituted sale referred to in the former opinion, and he had verdict and judgment for $2,520. The Pump Company again asks review, and assigns errors concerning the admission and weight of evidence.

[1, 2] Upon the theory that the amount of Llera's agreed compensation was in dispute, the Pump Company sought to show the reasonable value of Llera's services, as tending to support its testimony that the smaller amount was the one agreed upon. The right to make such proof is said to be established by Standard Co. v. Brumley (C. C. A. 6) 149 Fed. 184, 186, 79 C. C. A. 132, and the cases there cited. The rule invoked is not here applicable. The agreement between Llera and the Pump Company was made by him with the company's representative, Mr. Hughes, and it was that Llera should receive the difference between the price quoted to him by the Pump Company and the price at which he might be able to make the sale. That this was the agreement is undisputed. The making of a contract between the parties was established by the New York judgment, and there is no evidence tending to show any other contract except the one just stated. It is not claimed that Llera agreed to the subsequent modification demanded by the Pump Company. In this situation, the proof of the reasonable value of Llera's services was not pertinent to any issue. It is suggested that Mr. Hughes did not have authority to bind the Pump Company to this arrangement. It is enough to say that the New York judgment establishes that authority as well as any other element necessary to make a binding contract. As follows from our previous opinion, the New York judgment, when taken in connection with the undisputed testimony upon the trial now under review, left no question open, except the amount for which the Pump Company should have credit because of Llera's receipts on his substituted sale.

The evidence to which all the assignments of error directly or indirectly relate was to the effect that the Pump Company discovered how large Llera's profits were going to be, and protested, that he justified himself by claiming that he had to divide his profits with agents for the purchaser of the pump, and that thereupon the company's officers refused to have anything to do with what they called "graft." This development might or might not have justified the company in repudiating its contract with Llera and have sustained the defense that there was no breach by it; in other words, that Llera, not the company, broke the original contract. However, the New York judgment established both the existence of some binding contract and that the Pump Company broke the contract without justification. The company could not litigate that question over again, in the present case; and it cannot complain of rulings which embarrassed its attempt to do so.

The judgment is affirmed, with costs.

WELLES et al. v. PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO.

(Circuit Court of Appeals, Ninth Circuit. July 6, 1914.)

No. 2273.

MUNICIPAL CORPORATIONS (§ 352*)—PUBLIC IMPROVEMENTS—CONTRACT—BREACH—REMEDY.

Where a contract for the construction of a municipal sewer provided that a failure on the contractor's part to comply with any of the conditions should be deemed a breach of the contract, and authorized the city's board of public works to declare the contract terminated whether any alternative right was provided or not, declaring how the contract might be terminated, and that on such termination the contractor should forfeit the sums due him under the contract and he and his sureties should be liable for all damages caused to the city by reason of his failure to perform such provisions, did not make a termination of the contract the city's exclusive remedy for the contractor's breach, nor did it affect a further provision that the contractor without the consent of the board of public works should not be entitled, either legally or equitably, to assign any of the moneys payable under the contract or his claim thereto.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 883; Dec. Dig. § 352.*]

On petition for rehearing. Denied.
For former opinion, see 211 Fed. 561.

GILBERT, Circuit Judge. In aid of its petition for a rehearing the appellee was permitted to bring before this court certain portions of the record in the court below which were not contained in the transcript on the appeal, the same being certain provisions of the specifications which were referred to and made a part of the contract which was involved. The appellants, answering the petition, object to the consideration of the new matter so brought before us, on the ground that the same was not read to nor brought to the attention of the court below. It is unnecessary to discuss that objection, for in our opinion the new matter so presented is not of such a nature as to affect the decision of the case on the appeal. The provisions of the specification so added to the record are as follows:

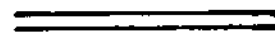
"All conditions of this contract are considered material and failure to comply with any of said conditions on the part of contractor shall be deemed a breach of the contract. Should the contractor neglect or fail to perform any of the conditions of the contract, the board of public works shall have the right, whether any alternative right is provided or not, to declare the contract terminated."

Then follow provisions as to the manner in which the contract may be terminated, and the provision that upon such termination the contractor shall forfeit all sums due him under the contract, and that both he and his surety shall be liable upon his bond for all damages caused to the city by reason of his failure to complete the contract. These provisions, in brief, give to the board of public works the option to terminate the contract upon the failure or neglect of the contractor to perform any of the conditions thereof. It is not declared that the

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

right to terminate the contract is the only remedy against the contractor for breach thereof, or of any of its provisions. On the contrary, it is declared that the board of public works shall have that right, "whether any alternative right is provided or not." The provision that without the consent of the board of public works the contractor "shall not either legally or equitably assign any of the moneys payable under this contract, or his claim thereto," is in no way affected by the provisions of the specifications above quoted. By no principle of reasoning can it be concluded that the provision for the termination of the contract upon breach of condition is tantamount to assent by the board to the transfer of any of the moneys payable under the contract, or the contractor's claim thereto, nor would the act of terminating the contract, if resorted to, be an adequate remedy, or any remedy, for such a breach, and indeed the board of public works might have no means of knowing that an assignment had been made. That breach of the contract is unlike all other possible breaches thereof, in that the latter are open and visible upon an inspection of the work. The maxim, "Expressio unius est exclusio alterius," invoked by the appellee, is not applicable. The question is not one of the construction of a statute, but it is what was the intention of the parties as expressed in a contract. We find neither authority nor reason for applying the maxim to the provisions of a contract relating to the remedies to be pursued for default therein. The reverse has been held in a well-considered opinion in Straus v. Yeager, 48 Ind. App. 448, 93 N. E. 881.

The petition for a rehearing is denied.



ROTH v. SMITH et al.

In re KILLIAN MFG. CO.

(Circuit Court of Appeals, Third Circuit. June 5, 1914.)

No. 1820.

BANKRUPTCY (§ 140*)—PERSONAL PROPERTY—BANKERS' TITLE—ADVANCES TO PAY FOR GOODS—DELIVERY ON TRUST RECEIPT.

Where a banker's agent, in accordance with custom, furnished credit to importers to purchase silk, taking title in the name of the banker, and after importation the silk, through intermediate transfers, on consignment came to a bankrupt, a corporation engaged in manufacturing silk ribbons, the bankrupt never having paid the consignor, and the banker's advances never having been paid, and it never having transferred its title, the paramount title still remained in it, and it was entitled to recover the silk from the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. B. McPherson, Judge.

Proceedings in bankruptcy against the Killian Manufacturing Company. From a judgment affirming a referee's order allowing the claim of Smith & Schipper, agents for William Brandt's Sons & Co., bankers, to recover certain silk purchased and delivered to the bankrupt (209 Fed. 498), Claude L. Roth, trustee, appeals. Affirmed.

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

Henry N. Wessel, of Philadelphia, Pa., for appellant.
Irving L. Ernst, of New York City, for appellees.

Before BUFFINGTON and HUNT, Circuit Judges, and WITMER, District Judge.

BUFFINGTON, Circuit Judge. In the present case the silk in question was imported from the Orient by Smith & Schipper, the claimants, who, at the request of the Raw Silk Trading Company, furnished the funds and took title. Subsequently the silks were delivered to the trading company on the trust receipts common in bankers' importations. Through intermediate transfers the silks came, on consignment, to the bankrupt, the Killian Manufacturing Company, a corporation engaged in the manufacture of silk ribbons. The latter company never paid the consignor. The original bankers' advances were never paid, nor have they ever transferred their title to the silks. The referee granted the petition of the claimants praying a delivery to it of the silk. On certificate the court below sustained the referee, holding:

"Unless the case of Century Throwing Co. v. Muller (C. C. A. 3d Circ.) 197 Fed. 252 [116 C. C. A. 614], was wrongly decided, to say nothing of other cases cited by the claimants' counsel, the referee's order was right. I agree with the findings of fact, as well as with the conclusion that the title of the bankers was not transferred, either directly or indirectly. I need not set out again the somewhat complicated facts of the transaction, which began in Japan and passed through several stages, ending in Pennsylvania, with the delivery of the silk on consignment to the bankrupt corporation. Nowhere in the line can I find anything to show that the bankers' title, which in the beginning was undoubted, was ever divested, either by any positive act of their own or by any act of an agent that binds them under the doctrine of estoppel. The papers that were signed within four months of the bankruptcy neither strengthened nor weakened this title. They were properly disregarded by the referee, and need not be considered now. They might have been relevant if the question concerned an attempted preference; but, if this silk did not belong to the bankrupt, there would be no preference in returning it to the real owner, still less in agreeing to return it. In my opinion, the fundamental facts in the controversy are these: The bankers started with the full ownership of this silk, and this ownership has never been lost. The use of trust receipts has become so common in recent years as to lead the courts (which always follow an established business usage sooner or later) to modify in some particulars the stringency of the old rule concerning the effect of divorcing the title and the possession of personal property."

Notwithstanding the argument which seeks to differentiate, we think the case in hand varies in no essential from Century Throwing Co. v. Muller, supra. If the principles there laid down are to prevail, the order of the referee must stand. We adhere to what was there decided, and apply to this case the language there used:

"* * * We see nothing in the evidence in this case that shows any conduct or act on the part of the plaintiffs by which they would be estopped to assert their title and ownership to the goods in question, so far as the same would serve to protect them in respect to the liability incurred by them for the acceptances made in the purchase of such goods. To hold otherwise would be to strike down a bona fide and honest transaction of great commercial benefit and advantage and founded upon a well-recognized custom by which banking credit is efficiently mobilized for manufacturers and importers of small means."

SMALLS v. WELLS, FARGO & CO.

(Circuit Court of Appeals, Second Circuit. May 14, 1914.)

No. 196.

NEGLIGENCE (§ 134*)—ACTION FOR PERSONAL INJURY—SUFFICIENCY OF EVIDENCE.

Plaintiff, a boy 9 years old, was injured while riding on a freight elevator in defendant's building. There was evidence tending to show that the elevator was constructed in the ordinary manner of such elevators, that defendant had frequently ordered the boys off the premises, that plaintiff knew he was not allowed on the elevator and endeavored to escape observation by hiding in a box thereon, and that his presence there was not known to the operator. *Held*, that such evidence was sufficient to sustain a verdict for defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. § 134.*]

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

On writ of error to the District Court of the United States for the Eastern District of New York to review a judgment for costs in favor of the defendant, entered upon the verdict of a jury which found the defendant free from negligence in causing the injuries received by the plaintiff while riding upon a freight elevator on the premises of the defendant.

Ellis L. Aldrich, of New York City, for plaintiff in error.

William W. Green and Clifton P. Williamson, both of New York City, for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. We are of the opinion that the verdict for the defendant was fully justified by the proof. The plaintiff, at the time of the accident which resulted in the loss of his leg, was between nine and ten years of age. He was injured while riding on a freight elevator, which was constructed in the ordinary manner, being a platform moving up and down in a shaft, having openings at the various floors, for the loading and discharge of freight. The complaint proceeds upon the theory that the plaintiff was permitted and invited to ride upon the elevator by the defendant and that the agents of the latter failed to instruct him as to the dangers to be apprehended and the proper way to avoid them. The proof shows, or at least the jury were warranted in finding, that the defendant had long been annoyed by the boys in the neighborhood playing upon its premises and had frequently ordered them out and driven them away. The jury was also justified in finding that the plaintiff was on the elevator without the knowledge or consent of the defendant and that in order to hide his presence from the elevator operator he had concealed himself in a box three feet long, two feet wide and two feet high. This is made plain by the following excerpt from the plaintiff's testimony:

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

"By the Court: I was wiggling around in that box before I fell out of it. The box was not rolling. And then I happened to get over on one side and lean down on it and it knocked it off. It did not catch on anything, and nobody else hit it. It just fell over because I climbed up on the edge.

"By the Foreman: Q. How did you come to get in the box? A. We were having some fun and we were running and hiding, and then he put off the other boys, and I climbed over in it.

"By the Court: Q. Did you get in the box to keep out of sight of the man on the elevator or were you in the box before he started to put the other boys off? A. Yes.

"Q. You were in the box before he came to the elevator? A. Yes, sir, I ran in the elevator first. The man was then coming on the elevator and I ran and jumped right over and got right in the box. He was coming from the platform; he didn't see me. I didn't see him until after he had put off the boys and then I peeked out. He wasn't on the elevator when I ran and got in the box. When he came and put the other boys off I peeped up when he had his back turned, putting them off. See?"

The proof justified the findings:

First: That the defendant had done all that was required to warn the boys in the vicinity to keep out of its warehouse.

Second: That the plaintiff knew he was on forbidden ground and endeavored to escape observation by hiding in the box.

Third: That the elevator operator did not know of the plaintiff's presence and could not, therefore, remove him from the elevator or warn him of danger.

Fourth: That the elevator was of the ordinary construction found in warehouses of this character and amply sufficient as a freight carrier and no fault can fairly be predicated of alleged defects in this regard.

In short, the proof shows so plain a case of trespass upon the defendant's premises that probably it would not have been error had the court directed a verdict. In leaving the case to the jury every right to which the plaintiff was entitled was accorded him and the verdict should not be disturbed.

The judgment is affirmed.

In re HALSTEAD & CO.

JAMES E. WARE & SON v. GRIFFIN.

(Circuit Court of Appeals, Third Circuit. January 31, 1914. On Petition for Rehearing, April 1, 1914.)

No. 67.

CORPORATIONS (§ 590*)—CONSOLIDATION—CONTRACTS—ASSUMED DEBTS.

A contract for the consolidation of a firm and certain other corporations provided that the assets should aggregate a specified sum, and on that basis the total amount of the firm's debts to be assumed by the consolidated corporation should not exceed $100,000, but if the assets exceeded the amount specified, the indebtedness might also exceed $100,000 to the same extent, and that any claim against the firm for work done or materials furnished should be assumed and paid by the consolidated company. *Held*, that the consolidated company was not liable for an in-

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

debtedness of the firm to certain architects for services not included in the liabilities determined at the time of consolidation, nor computed nor considered at the time the corporation settled its obligations with the members of the firm under the consolidation contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2354, 2361–2367; Dec. Dig. § 590.*]

Appeal from the District Court of the United States for the District of New Jersey; Joseph Cross, Judge.

In the matter of bankruptcy proceedings of Halstead & Co. From an order reversing a referee's order, allowing in part the claim of James E. Ware & Son (204 Fed. 115), they appeal. Affirmed.

John W. Remer, of New York City, for James E. Ware & Son.
McDermott & Enright, of Jersey City, N. J., for Griffin.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

PER CURIAM. In the bankruptcy in the court below of Halstead & Co., a corporation, Ware & Son, the appellants, presented a claim, inter alia, for services as architect, rendered to Halstead & Co., a partnership. This claim they averred had been assumed by the bankrupt in a written contract between the corporation and the partnership. The referee allowed the part of the claim here in controversy, but his action was reversed by the court below. From a decree so holding Ware & Son appealed to this court. The opinion of the lower court is reported at 204 Fed. 115, by reference to which a restatement of the facts is avoided. After argument and due consideration this court agrees with the court below that by the writing in question the bankrupt did not assume the rejected claim.

As no principle or precedent is involved, simply the construction of a writing, we limit ourselves to announcing such conclusion and affirming the order of the lower court.

On Petition for Rehearing.

BUFFINGTON, Circuit Judge. In view of the earnest insistence by brief of counsel for Ware & Son, we have again considered this case and see no reason to change our previously expressed opinions and conclusion. As stated in the opinion of the court below, 204 Fed. 116:

"The claim in question is for architect fees and services alleged to have been performed by Ware & Sons for a partnership known as Halstead & Co., which partnership later became merged in the manner hereinafter described in the bankrupt corporation, also known as Halstead & Co. It is not claimed that Ware & Sons did any work or performed any services for the bankrupt, or that there is any direct privity of contract between them and the bankrupt. If they have any claim against the bankrupt's estate, it arises out of a clause in the agreement of consolidation, pursuant to which the bankrupt subsequently purchased the assets of the firm of Halstead & Co., and of other concerns hereinafter named."

Our holding was that:

"This court agrees with the court below that by the writing in question the bankrupt did not assume the rejected claim."

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

The court below further found and held, and we agree therewith, that:

"As to any alleged recognition of or promise to pay the claim of Ware & Sons by letter of one of the officers of the corporation, written after the consolidation agreement was carried out, it is sufficient to say that it does not appear that such officer had any authority from the corporation to write it. Moreover, if it can be construed to contain any promise to pay, such promise was manifestly without consideration and void. Hasbrouck v. Winkler et al., 48 N. J. Law, 431, 6 Atl. 22."

Such being the case, the corporation Halstead & Co., having neither stipulated by the contract to pay the Ware claim, and not having subsequently legally otherwise assumed its payment, this court, adopting the full and clear opinion of the court below, adheres to its previously announced decision, which was and is to affirm the order of the court below.

THE R. B. LITTLE.

(Circuit Court of Appeals, Second Circuit. June 3, 1914.)

No. 8.

TOWAGE (§ 15*)—LIABILITY OF TUG FOR INJURY TO TOW—BURDEN OF PROOF.

To warrant a recovery against a tug for an injury to a tow, there must be some evidence of negligence or fault on the part of the tug, and she cannot be held liable where the cause of the injury is wholly conjectural.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 30–38; Dec. Dig. § 15.*]

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

On appeal from the District Court of the United States for the Southern District of New York holding the tug Little in fault for damages sustained by the libelant's boat No. 23, while being towed from Elizabethport, N. J., to Ninety-Sixth street, East River. The damages were fixed at $1,011.

James Emerson Carpenter and Henry E. Mattison, both of New York City, for appellants.

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

Before COXE and ROGERS, Circuit Judges.

COXE, Circuit Judge. The negligence alleged in the libel was that the tug "run the said barge No. 23 over what is known as the Tenth Street buoy at about 9 a. m. o'clock of the day aforesaid, resulting in damage to the bottom of said barge, causing her to leak." The District Judge was in grave doubt upon the following questions of fact:

First.—Did the barge run over the Tenth Street buoy?

Second.—If so, was she damaged by so doing?

Admitting that it was a "very puzzling case" and that he could not understand how the injury happened even if the barge had gone over the buoy, he found for the libelant upon the theory that the barge

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

having been injured, the burden was upon the tug to explain the cause of the injury. His ruling was made upon the authority of The Ellen McGovern (D. C.) 27 Fed. 868. In that case the wife of the captain of the injured barge testified to facts which made it probable that the barge struck on Robbins Reef. She testified that some time between 1 and 2 o'clock in the morning she felt a jar which caused her to run up on deck where she saw Robbins Reef light about 100 feet distant. This was clearly sufficient to put the tug upon her proof, but nothing of the kind appears in the case at bar. It must be remembered that the tide was flood, the No. 23 was drawing about thirteen feet and, with the depth of water at the point in question, it would have been impossible for the barge to strike upon the reef or upon a sinker to which a buoy might have been attached. Such sinker could not have extended up from the bottom more than three or four feet and there was still four or five feet of water from the top of the sinker to the bottom of the barge. The buoy could not have caused the damage, even had the barge run over it, because, as before stated, the tide was flood and the buoy was slanting upstream in the same direction the barge was proceeding. The only effect of the barge going over the buoy would be to press it down during the transit, allowing it to spring up as soon as the barge passed. Every theory advanced by the libelant was shown to be untenable and, in the last analysis, the tug was found at fault because the injury was probably received while the barge was being towed. In our opinion something more than this must be required.

It seems to us that the burden is on the libelant to show some negligence on the part of the tug and that until this is done, the burden of proof does not shift. There is nothing in the testimony here to show that the tug was guilty of fault. It is all left to guesswork and speculation. The argument is that the barge was injured at some time, probably while being towed by the tug, ergo the tug is liable. In other words the tug may be held liable for an injury which she did not cause or aid in causing. No one knows or pretends to know how this injury was caused and until some proof is produced that the tug caused it, it seems to us she should not be held liable. The rule laid down by the District Court practically makes the tug an insurer.

Decree reversed with costs.

MIZELL v. ELMORE & HAMILTON CONTRACTING CO.

In re UNITED SURETY CO.

(Circuit Court of Appeals, Second Circuit. May 14, 1914.)

No. 255.

PRINCIPAL AND SURETY (§ 57*)—SURETY COMPANY BOND—LIABILITY OF PRINCIPAL FOR PREMIUMS.

Where a contractor with the state for doing certain work procured a surety company to execute a bond required by the state for the faithful performance of the work, for which it agreed to pay an annual premium until the surety should be discharged from liability, the contractor was

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

not released from liability for the premiums by the fact that during a portion of the time the contract was in litigation, and was finally adjudged invalid; no steps having been taken in the meantime for the discharge of the bond.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 101; Dec. Dig. § 57.*]

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 confirming a report of the special master allowing the claim of the United Surety Company against the receivers of the Elmore & Hamilton Contracting Company for $1,876.32 for premiums which the contracting company agreed to pay the surety company in consideration of its agreement to guarantee the bond which the construction company gave to the state of New York.

Francis L. Kohlman, of New York City, for appellants.

Milton M. Blumenthal, of New York City, for respondent.

Before COXE and ROGERS, Circuit Judges, and MAYER, District Judge.

COXE, Circuit Judge. This seems to us to be a very plain case. The Elmore & Hamilton Contracting Company made a contract with the state of New York to build a section of road in Orange county. The state required a bond for the faithful performance of the work and the contracting company applied to the surety company to furnish it. The bond was given and the contracting company entered upon the work. Soon afterwards an injunction issued in a taxpayer's suit to restrain the completion of the work. After four years of litigation the judgment that the contract was invalid was affirmed by the Court of Appeals of New York. The receivers of the contracting company now seek to avoid the payment of the premiums on the ground that the contract was null and void ab initio.

The answer is manifest. The surety company was not required to examine into the legality of the contract. Good or bad, it was the contract which the Elmore & Hamilton Company wished guaranteed, and for this service that company was willing to pay, and agreed to pay, $469.08 per annum in advance, "and continue the same until said United Surety Company shall, in the manner provided by law, be discharged or released from any and all liability and responsibility upon and from said bond." If at any time the surety company was discharged from liability upon the bond, proper legal evidence was to be served on the surety company, and until this was done the liability to pay annual premiums continued. The surety company fulfilled its obligation to the letter, it guaranteed the bond for four years and the contracting company agreed to pay the premiums for four years.

The fact that the question of the validity of the agreement was in litigation during this period has no relevancy to any question here involved. The contracting company received the consideration for

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

which it agreed to pay. The fact that it might have terminated its agreement to pay premiums, if it had seen fit to do so in the legal way, is of no moment, in view of the fact that it did not terminate the agreement, but insisted upon keeping it in force until the court of last resort had held the contract with the state invalid.

The order is affirmed.

GLICKSTEIN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 1, 1914.)

No. 288.

CRIMINAL LAW (§ 1092*)—REVIEW ON ERROR—BILL OF EXCEPTIONS—TIME FOR ALLOWANCE.

Judicial Code, § 97 (Act March 3, 1911, c. 231, 36 Stat. 1119 [U. S. Comp. St. Supp. 1911, p. 175]), provides that terms of the District Court for the Southern District of New York shall be held on the first Tuesday in each month, and general rule 5 of such court automatically extends each term for the purpose of filing bills of exception for a period of three calendar months beginning on the first Tuesday of the month in which the judgment was entered. *Held*, that where a defendant convicted of a crime did not move to have his bill of exceptions signed until after the expiration of such extended time, the judge was without power to sign the same.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2803, 2829, 2834–2861, 2919; Dec. Dig. § 1092.*]

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

Criminal prosecution by the United States against Abraham Glickstein. Judgment of conviction, and defendant brings error. Writ of error dismissed.

Archibald Palmer, of New York City, for plaintiff in error.

J. N. Boyle, Asst. U. S. Atty., of New York City.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. The trial of Glickstein, plaintiff in error, began July 1, 1913, and continued to July 3d, on which day he was found guilty and sentenced. Section 97 of the New Judicial Code provides that terms of the District Court of the Southern District of New York shall be held on the first Tuesday of each month and general rule 5 of the District Court automatically extends each term for the purpose of making and filing bills of exception so as to comprise a period of three calendar months, beginning on the first Tuesday of the month in which the verdict is rendered or judgment entered. In this case the term expired in the early part of October, 1913, but the plaintiff in error did not move to have his bill of exceptions signed until January 21, 1914, when the trial judge signed it over the objection of the United States Attorney.

He felt that he had the right to do so under our decision in Koewing v. Wilder, 126 Fed. 472, 61 C. C. A. 312, and he was moved to

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

do so by the consideration that a very important question of law was involved, and that it was difficult for the plaintiff in error, being confined at Atlanta, to direct his affairs.

The case of Koewing v. Wilder does not apply because we there held that what the court said at the conclusion of the trial amounted to an extension of the term for the period within which the defeated party was entitled to sue out a writ of error.

The extraordinary circumstances mentioned in the Supreme Court cases which justify the signing of the bill after the term has expired relate to circumstances which caused the delay, and cannot be said to include negligence of the party or the importance or difficulty of the question involved.

As we think the District Judge was without power to sign the bill of exceptions, the writ of error is dismissed.

CINCINNATI, N. O. & T. P. RY. CO. v. McINTYRE.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1914.)

No. 2401.

RAILROADS (§ 376*)—PERSONS ON TRACK—DISCOVERY—DUTY TO STOP TRAIN.

Where decedent was discovered on the track by defendant's brakeman on the approaching train at the full distance ahead for which physical objects permitted a view of the track, and every possible means to stop the train was not immediately taken as required by Shannon's Code, Tenn. §§ 1574–1576, and decedent was struck and killed, the railroad company was liable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1275–1279; Dec. Dig. § 376.*

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 Eastern District of Tennessee; Edward T. Sanford, Judge.

Action by Thomas McIntyre, as administrator of Senia McIntyre, deceased, against the Cincinnati, New Orleans & Texas Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. M. Jones, of Knoxville, Tenn., for plaintiff in error.

G. W. Pickle, of Knoxville, Tenn., for defendant in error.

Before WARRINGTON and DENISON, Circuit Judges, and TUTTLE, District Judge.

PER CURIAM. The jury found that the operators of the train which killed Mrs. McIntyre had not kept a lookout ahead or had not, after she appeared on the track, used every possible means to stop the train, as required by Shannon's Tennessee Code, §§ 1574, 1575, 1576. There seems no doubt that she was seen by the brakeman lookout at the full distance ahead for which physical obstacles permitted a view

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

of the track. Though this distance was short, and though, giving the utmost permissible force to the plaintiff's testimony and theory, the delay was very brief, after she was seen and the statutory precautions could have been taken and before they actually were taken, yet we think there was room for the jury to conclude that the railroad company did not fully meet the duty imposed by this statute and by the familiar very rigorous construction of the law put upon it by the Supreme Court of Tennessee.

The judgment is affirmed, with costs.

THE LOUISA.

McGUIRE v. THAMES TOWBOAT CO.

(Circuit Court of Appeals, Second Circuit. June 23, 1914.)

Nos. 257, 258.

TOWAGE (§ 11*)—STRANDING OF TOW—LIABILITY OF TUG—UNCHARTED ROCK.

A tug *held* not in fault for the stranding of her tow by striking a small submerged rock while following the usual and customary course through the channel of a river, where the rock was uncharted and not generally known to pilots in the vicinity.

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

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

Suits in admiralty by the Thames Towboat Company against the scow Louisa for salvage services, and by James F. McGuire, owner of the Louisa, against the Thames Towboat Company for negligent stranding of the scow. Decree for the Towboat Company, and McGuire appeals. Affirmed.

For opinion below, see 209 Fed. 1001.

F. V. Barnes, of New York City, for appellant.

J. K. Symmers, of New York City, for appellee.

Before COXE and ROGERS, Circuit Judges, and HAND, District Judge.

PER CURIAM. We see no reason to add anything to the opinion of Judge Holt in this case. 209 Fed. 1001. It is perfectly clear that the scow struck a rock, and it is likewise clear that a master was not required to know that the rock was there.

Decree affirmed, with costs.

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

CUDAHY PACKING CO. v. GRAND TRUNK WESTERN RY. CO.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1914. Rehearing Denied May 12, 1914.)

No. 1997.

1. CARRIERS (§ 27*)—INTERSTATE COMMERCE—FREIGHT CHARGES—REGULATION —"TRANSPORTATION."

The Interstate Commerce Act (Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154) having defined transportation to include all services in connection with refrigeration or icing of property transported, an interstate carrier, by holding itself out voluntarily to ice car load shipments, brought itself within the supervisory and regulatory provisions of the act with respect to the reasonableness, certainty, and publicity of rates charged for icing services, and hence was not entitled to recover the value of such services on an express or implied contract, independent of rates made, published, and filed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 73, 74, 94; Dec. Dig. § 27.*

Duties and liabilities of carriers as to furnishing facilities for transportation, see note to Harp v. Choctaw, O. & G. R. Co., 61 C. C. A. 414.

For other definitions, see Words and Phrases, vol. 8, pp. 7075, 7076.]

2. CARRIERS (§ 30*)—RATES—ICING CHARGES.

An interstate carrier published and filed with the Interstate Commerce Commission a tariff sheet, covering icing charges, providing that the carrier, when requested, would furnish refrigeration, charging therefor the "actual cost including labor, but not less than $2.50 per ton of 2000 lbs." *Held*, though the provision for charging the actual cost was void for uncertainty, such invalidity did not invalidate the balance of the rate, and hence the carrier was entitled to charge $2.50 per short ton.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 81; Dec. Dig. § 30.*]

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

Action by the Grand Trunk Western Railway Company against the Cudahy Packing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles B. Morrison, of Chicago, Ill., for plaintiff in error.

Geo. W. Kretzinger, of Chicago, Ill., for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. Defendant in error, plaintiff below, recovered judgment against defendant for $3,637.75 on account of icing charges in transporting dressed meats for defendant.

A jury trial was duly waived, and the cause was submitted on an agreed statement of facts that showed: That plaintiff was a railroad corporation engaged in interstate commerce. That defendant was an interstate shipper of dressed meats. That plaintiff had duly published and filed its schedule of carriage charges for dressed meats, exclusive of icing charges. That defendant paid plaintiff the carriage charges. That plaintiff had duly published and filed a tariff sheet in which the

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

following provision was made for icing charges over and above carriage charges: "Shippers desiring refrigerator service for freight in car loads must furnish at their own cost the necessary quantity of ice and salt, or this company, when requested, will obtain and furnish the same, charging therefor the actual cost including labor, but not less than $2.50 per ton of 2000 lbs., fractions of tons to be charged for pro rata." That defendant requested plaintiff to ice defendant's car load shipments. That plaintiff did so and charged therefor at the rate of $2.50 per ton of 2,000 pounds. That plaintiff procured some of the ice from Swift & Co., a competitor of defendant in the dressed meats trade, at a cost of $2.50 per ton of 2,000 pounds, and that defendant failed and refused to pay plaintiff for any of these icing charges.

[1] In view of the Commerce Act's definition that transportation shall include all services in connection with refrigeration or icing of property transported, and of plaintiff's action under that definition in furnishing ice as a service in transportation, it is needless to consider plaintiff's contention that Congress lacked constitutional power to compel carriers to furnish ice, and that plaintiff could therefore recover the value of its icing services for defendant on an express or an implied contract, without making, publishing, and filing fixed and definite rates therefor. By holding itself out voluntarily as ready to ice car load shipments, plaintiff brought itself within the supervisory and regulatory provisions of the act with respect to reasonableness, certainty, and publicity of rates.

Under the Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) compensation for service in transportation cannot be a matter of bargaining between carrier and shipper, and no payment can lawfully be demanded or received except in accordance with a fixed and definite schedule of charges duly published and filed.

[2] Is plaintiff's tariff provision, that the charge for icing shall be "the actual cost, but not less than $2.50 per short ton," void for uncertainty? If "cost" were published as the charge for a service in transportation, the tariff would in that respect undoubtedly be void, for cost is necessarily variant and is undeterminable with exactness until after the event, while the act contemplates that the shipper shall be informed of a fixed and definite rate in advance of his shipment. If the icing charge were stated to be "$2.50 per short ton," we conceive that no complaint would be made on the ground of uncertainty. If plaintiff had published that "the minimum rate for icing is $2.50 per short ton," without stating any higher rate or giving any fixed and definite basis on which a higher rate could be calculated in advance with certainty, it seems to us that the word "minimum" might well be disregarded as superfluous and $2.50 taken as the fixed rate under all circumstances. Knudsen-Ferguson Co. v. Mich. Cent. R. Co., 148 Fed. 968, 79 C. C. A. 46. Quite evidently plaintiff has woven the idea of cost into its icing tariff. But does that element inhere throughout the structure? If the cost is less than $2.50 per short ton, the tariff explicitly provides that nevertheless $2.50 per short ton shall be the rate. In that part of the structure, therefore, the idea of cost as a condition to be taken into account has clearly been excluded. It is only in the

part of the tariff which contemplates a charge above $2.50 per short ton that cost is made an element in the accounting. There is, consequently, we believe, a clean line of demarcation at $2.50 per short ton. Cost, if below or at that line, plays no part; if above, it is the sole basis given. And inasmuch as cost, for reasons heretofore stated, cannot be accepted as a published rate under the act, part of plaintiff's icing tariff is void for uncertainty. But, while the Commerce Act and all tariffs and doings of carriers should be strictly construed and enforced to accomplish the large purposes of fairness and uniformity, we are of opinion that the general principle in relation to statutes, wills, contracts, etc., that the illegal parts will be excised and the legal preserved unless the bad is so interwoven with the good that extrication is impossible, should be applied to the facts of this case. Plaintiff had duly declared that icing service was not included in the carriage rate, and had published an icing tariff, part of which was good and part bad. Where to cut seems clear, and what is left is without taint. And what is left is the only part that has been acted on by plaintiff.

Whether the carriage and icing charges separately or combined were reasonable, whether plaintiff could lawfully arrange to procure ice from defendant's competitor, and whether that arrangement brought about an undue preference, are matters beyond this case.

The judgment is affirmed.

WONG KEOW v. UNITED STATES.

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

No. 2045.

1. ALIENS (§ 32*)—DEPORTATION OF CHINESE—APPEAL—DISMISSAL—DEFECTS IN RECORD.

Where an appeal by a Chinese person from an order of deportation was allowed and perfected, and the record filed contained the orders and decree of the district court, an appeal would not be dismissed, though there was no bill of exceptions or certificate of the evidence, and the only ground of reversal urged was that the district judge erred in affirming the commissioner's order of deportation.

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

2. ALIENS (§ 32*)—DEPORTATION OF CHINESE—APPEAL—RECORD—CERTIFICATE OF EVIDENCE.

On an appeal in a proceeding to deport a Chinese person, the evidence should be brought up by a certificate of evidence under equity rule 75 (198 Fed. xl, 115 C. C. A. xl) rather than by a common-law bill of exceptions.

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

3. ALIENS (§ 32*)—DEPORTATION OF CHINESE—APPEAL—RECORD—QUESTIONS—DENIAL.

On appeal in a deportation proceeding, a motion for leave to bring up a duly authenticated certificate of the evidence long after the term at which the trial was had has ended will be denied, where there is no showing that a certificate of evidence authenticated by the judge will afford

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

any stronger basis for attacking the order of deportation than is contained in the commissioner's certificate which indicates that the order was properly made.

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

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

Deportation proceeding against Wong Keow. From an order of deportation, defendant appeals. Affirmed.

Charles F. Hille, of Chicago, Ill., for appellant.

James H. Wilkerson, of Chicago, Ill., and Albert L. Hopkins, for the United States.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

BAKER, Circuit Judge. Appellant is a person of Chinese descent. At a hearing before the commissioner, where appellant was represented by counsel who produced and examined witnesses, appellant was adjudged to be unlawfully in this country. On appeal, the district judge heard appellant's witnesses and counsel, and affirmed the ruling of the commissioner.

In the record before us there is physically embodied what purports to be the commissioner's certificate of the evidence before him. But there is no bill of exceptions or certificate of evidence showing what testimony was before the district judge. And the only ground of reversal urged in appellant's original brief is that the district judge, in view of what purports to be the evidence in the record presented to us, erred in affirming the order of deportation.

[1] The government thereupon moved that the appeal be dismissed on the ground that nothing is presented for consideration. But the appeal was allowed and perfected; and the record filed in this court contains the orders and decree of the district court. What the government probably wants is an affirmance on the ground that the record fails to support the assignment for reversal.

[2] As this is an appeal (in a statutory proceeding, however), a certificate of evidence under equity rule 75 (198 Fed. xl, 115 C. C. A. xl), rather than a common-law bill of exceptions, is what would be required. But form is not of the essence, since each has to be authenticated by the trial judge.

[3] Appellant has made a counter motion for leave to apply for and bring up a duly authenticated certificate of evidence. Inasmuch as the term at which the trial was had ended long before the cause was removed here by appeal, compliance with equity rule 75 or with the requirements for a bill of exceptions is impossible unless a nunc pro tunc order could properly be made by the trial court. But we do not enter upon that, and have the less hesitancy in denying the counter motion, because appellant presents no showing that a certificate of evidence authenticated by the judge would afford any stronger

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

basis for attacking the order of deportation than is contained in the commissioner's certificate, and because an examination of what appellant presents as the testimony in his favor discloses the usual case where the commissioner and the district judge were rightly dissatisfied with the hazy, contradictory, and improbable testimony of the Chinese person and his Chinese witnesses. Quock Ting v. U. S., 140 U. S. 417, 11 Sup. Ct. 733, 851, 35 L. Ed. 501; Chin Bak Kan v. U. S., 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121; Ark Foo v. U. S., 128 Fed. 697, 63 C. C. A. 249; Hong Yon v. U. S., 164 Fed. 330, 90 C. C. A. 542.

The order is affirmed.

BROOMFIELD v. LEHMAN.

(Circuit Court of Appeals, First Circuit. June 24, 1914.)

No. 1064.

BANKRUPTCY (§ 414*)—DISCHARGE—GROUNDS FOR REFUSAL—GIVING FALSE TESTIMONY.

An order denying discharge to a bankrupt on the ground that he intentionally refused to answer material questions on his examination *held* sustained by the evidence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 720-722; Dec. Dig. § 414.*]

Appeal from the District Court of the United States for the District of Massachusetts; Jas. M. Morton, Jr., Judge.

In the matter of Philip Broomfield, bankrupt. Appeal by the bankrupt from an order refusing a discharge on objections of Isaac Lehman, creditor. Affirmed.

Charles S. Hill, of Boston, Mass., for appellant.

Martin Witte, of Boston, Mass, for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

DODGE, Circuit Judge. Broomfield, a voluntary bankrupt in the District Court under a petition filed August 23, 1912, appeals from a judgment refusing him a discharge, entered April 14, 1913. The specifications of objection by Lehman, the objecting creditor and appellee, having been referred for ascertainment and report of the facts, the referee reported that the evidence did not sustain the specifications. The District Court, however, did not accept this conclusion, and found on the evidence submitted to the referee that the bankrupt had made intentionally false answers while under examination

Broomfield and one Hershman, as partners, had previously been adjudged bankrupt in the same court in January, 1909, and the proceedings had resulted in a composition; the creditors accepting composition notes for part of their claims. This was confirmed in July, 1910. In his present bankruptcy most of the claims scheduled by Broomfield were scheduled as "notes in composition," and as contracted in 1910,

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

at Boston. In addition to these, he scheduled 15 other claims. As to 14 of them, the nature and consideration of the debt was given as "Acct." or "Account." The remaining claim was stated to be "Claim for services"; and all these claims were scheduled as contracted in 1910, at Boston. The total amount of these claims was $4721.61.

The bankrupt undertook to say, while under examination, as to 6 of the 15 claims referred to, amounting in all to $4,150, that they antedated his former petition; but they did not appear in his former schedules, and he gave no satisfactory reason for their omission. The largest in amount was for $1,500, scheduled as due the Westinghouse Machine Company. This, he said, was "for a bill from 1905 or 1906 that was not put in the first schedule." Being asked why it was not put into that schedule, the only answer he gave was, "I don't know." His answer was the same to a question why he did not state in his present schedule that Hershman was jointly liable with him for the bill. As to this claim also, and as to others of the six claims referred to, when he was asked why he swore in his present schedule that they were contracted in 1910, his only answers were that this was "as good as he could remember" at the time he made the schedule.

Broomfield was interrogated as to his dealings subsequent to his former adjudication and before he filed his present petition. He testified that between 1908 and 1910 he used to peddle in metals and used to go to various factories to see if they would have anything to sell. To repeated inquiries as to the names of these concerns, and what his transactions with them were, no better answer than "I don't remember" could be obtained from him. It appeared that in 1911 his wife had settled claims against him by the General Electric Company for $27,500; but in answer to questions seeking to ascertain what these claims were, or what the transactions on which they were founded, he would say nothing more than "I don't remember."

There is nothing in the record enabling us to say that the six claims referred to did in fact antedate his former bankruptcy. As he has twice failed so to schedule them, the presumption is that they did not. The inquiries regarding his dealings since his composition and regarding the settlement made by his wife were therefore material and important. We are unable to hold, from the record before us, that the District Court was wrong in finding that he could not have been honestly incapable of remembering the facts regarding those dealings, or regarding his transactions with the General Electric Company. We must therefore affirm the judgment appealed from.

The judgment of the District Court is affirmed, and the appellee recovers his costs of appeal.

NORTHROP v. TIBBLES.

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

No. 2035.

1. LIBEL AND SLANDER (§ 82*)—REFERENCE TO PLAINTIFF—PLEADING.

Where an alleged libelous letter did not name plaintiff as the person intended to be libeled, a declaration, failing to charge that the recipient of the letter, or any other third person, understood the libelous matter to refer to plaintiff, was demurrable; it being insufficient to charge merely that defendant wrote and published the letter of and concerning plaintiff.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 187–197; Dec. Dig. § 82.*]

2. LIBEL AND SLANDER (§ 21*)—ELEMENTS OF INJURY—INJURY TO REPUTATION.

Since the gist of an action for libel is not injury to plaintiff's feelings, but damage to his reputation, it is insufficient to constitute a libel that plaintiff knew that he was the subject of the article, or that defendants knew of whom they were writing, but it must appear on the face of the declaration that persons other than these must have reasonably understood that the article was written of and concerning plaintiff, and that the so-called libelous expressions referred to him.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 103; Dec. Dig. § 21.*]

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

Action by Florence C. Northrop against Charles E. Tibbles. Judgment for defendant, and plaintiff brings error. Affirmed.

William M. Marshall, for plaintiff in error.

A. F. Reichmann, of Chicago, Ill., for defendant in error.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

BAKER, Circuit Judge. To plaintiff in error's declaration for libel a demurrer for want of facts was sustained, plaintiff declined to amend, and judgment for defendant was entered.

Many objections are urged by defendant; but, if the declaration is deficient in any material respect, the judgment must be affirmed.

[1] So we may assume that the letter written and mailed by defendant to a third person contains matter libelous per se (though this is strenuously controverted), that defendant intended to defame plaintiff, and that plaintiff, when she somehow obtained a copy, applied the libel to herself. But the letter does not name plaintiff as the person intended to be libeled; and the declaration fails to charge (either as a conclusion of fact, if such pleading is permissible, or by an exhibition of extraneous facts that have the necessary effect of showing) that the recipient of the letter, or any other third party, understood the libelous matter to refer to plaintiff.

[2] To allege that defendant wrote and published (by mailing) the letter "of and concerning plaintiff" is not enough. As this court said in Duvivier v. French, 104 Fed. 278, 43 C. C. A. 529:

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

"The gravamen of an action for libel is not injury to the plaintiff's feelings, but damage to his reputation in the eyes of others. * * * It is not enough, to constitute libel, that the plaintiff knew that he was the subject of the article, or that the defendants knew of whom they were writing; it must appear upon the face of the declaration that persons other than these must have reasonably understood that the article was written of and concerning the plaintiff, and that the so-called libelous expressions related to him."

See, also, Robinson v. Drummond, 24 Ala. 174; De Witt v. Wright, 57 Cal. 576; Patterson v. Edwards, 7 Ill. (2 Gilman) 720; McLaughlin v. Fisher, 136 Ill. 111, 24 N. E. 60; McCallum v. Lambie, 145 Mass. 234, 13 N. E. 899; Carlson v. Minnesota Tribune Co., 47 Minn. 337, 50 N. W. 229; Miller v. Maxwell, 16 Wend. (N. Y.) 9; Sasser v. Rouse, 35 N. C. 145; Dunlap v. Sundberg, 55 Wash. 609, 104 Pac. 830, 133 Am. St. Rep. 1050.

As plaintiff refused to plead the necessary additional facts, we must believe that (but for the filing of her present declaration) her reputation with the world at large remained as good as if the letter had been written in a code unknown to any one except defendant and herself.

The judgment is affirmed.

DETROIT COPPER MINING CO. OF ARIZONA v. MINE & SMELTER SUPPLY CO.†

ARIZONA COPPER CO. v. SAME.

(Circuit Court of Appeals, Ninth Circuit. July 6, 1914.)

No. 2291.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—ORE CONCENTRATING TABLE.

   The Wilfley patent, No. 590,675, for an ore concentrating table, is valid, and entitled to a reasonably liberal construction; also *held* infringed.

2. PATENTS (§ 236*)—INFRINGEMENT—CHANGE OF FORM.

   Form in a patented device is immaterial, unless it is essential to the result, or indispensable by reason of the state of the art to the novelty of the claim, and infringement is not avoided by a change of form which does not change the principle or mode of operation.

   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 372, 373; Dec. Dig. § 236.*]

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

Suits in equity by the Mine & Smelter Supply Company against the Detroit Copper Mining Company of Arizona and the Arizona Copper Company. Decrees for complainant, and defendants appeal. Affirmed.

The appeal in this case is taken from a decree of the court below sustaining letters patent No. 590,675, issued September 28, 1897, to Arthur R. Wilfley and assigned to the appellee, and adjudging the appellants to have infringed the same. Suits against each of the appellants were consolidated for the purpose of trial in the court below, and they are heard as one case on the appeal. The patent in question is for a certain new and useful improvement in ore concentrators. The appellants are copper mining companies, and they

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

† Rehearing denied October 13, 1914.

used in their business a form of ore concentrator manufactured by the Deister Concentrating Company at Ft. Wayne, Ind. The controversy herein relates to the concentrating table, a table upon which finely comminuted particles of metal are separated from the waste material or gangue with which it is commingled by floating the same in the form of a wet pulp upon the table and separating the mineral from the gangue by a lateral agitation of the table, together with the action of water flowing across the same. The appellants in their answer admitted the validity of the appellee's patent, but denied that they had used ore concentrating tables which embodied the improvements and invention so patented to Wilfley, or that they infringed the claims thereof, and they alleged that prior to that invention the art of making and using ore concentrators was old, and that such concentrating tables had been made and patented and used in many forms before Wilfley made his improvement, and they referred to numerous patents showing the state of the prior art. They alleged that the Wilfley patent was for a narrow and specific improvement in an old art, and that it must be taken to apply only to the apparatus covered clearly and closely by its specifications and claims.

On referring to the patents introduced to show the prior art, it will be seen that they all contain two elements, a concentrating surface or table, usually consisting of a combination of riffles, and a clear or smooth space, and a reciprocating movement in the form of oscillation, the effect of which is to drive forward the pulp which rests on the surface of the table, and to separate and stratify the mineral matter in the valleys between the riffles, while the gangue or base matter passes over to the lower side of the table, from which it is thence removed. In the specifications of the Wilfley patent, the process is described as follows:

"All the mineral, together with a portion of the gangue, is first caught by the riffles, and under the influence of the table's motion is carried longitudinally toward the foot of the table until it reaches the smooth, unriffled portion *A* of the table, where it is acted on by the water, which effects a perfect or approximately perfect separation of the gangue from the mineral. As the material caught by the uppermost and shortest riffle passes to the portion *A* of the table the action of the water, which is fed to the upper edge of the tables, carries the gangue downward to the next riffle, while the mineral remains on the smooth portion *A*, and is carried toward the tail of the table, where it is finally discharged. It is expected that some of the mineral caught by the uppermost and shortest riffle will be carried downward with the gangue to the next riffle, which is longer. After leaving this last-named riffle and passing to the smooth or unriffled portion of the table, the water again acts on the material, and carries the gangue downward to the next riffle, leaving the clean mineral on the smooth portion *A* of the table. If any of the mineral escapes with the gangue the second time, it will be caught by the riffle next below and again subjected to the separating action of the water as soon as it reaches the smooth portion *A* of the table. In this manner the material is carried transversely downward and longitudinally forward, the gangue being discharged at the lower edge of the table completely impoverished of its mineral values, while the latter are discharged at the foot or tail of the table. A portion of the gangue—that is to say, the lighter part thereof—passes over each riffle in succession from the shortest or uppermost to the longest or lowermost riffle. The mineral and the heavier gangue are caught by the riffles, and finally separated on the smooth portion *A* of the table. This combination, in a concentrating-table, of riffles of varying length for catching the mineral and a smooth, plain, or unriffled portion at the extremities of the riffles, where the final separation is effected through the action of the water, is believed to be entirely new in an apparatus of this class."

The claims which were held to be infringed are the following:

"1. A transversely-inclined concentrating-table, having a movement whose tendency is to carry the material longitudinally forward toward the tail or foot of the table, said table being provided with a number of riffles extending longitudinally a portion of the distance from its head toward its foot, said riffles varying in length for the purpose specified, the table having a smooth, plain, or unriffled portion extending from the extremities of the riffles toward

the tail of the table, whereby the material as it leaves the riffles is subjected to the action of the water on the smooth portion of the table and the final separation of the mineral from the gangue effected.

"2. A transversely-inclined concentrating-table having a number of longitudinal riffles extending a portion of the table's length from the head toward the foot, said riffles being of unequal length, the uppermost being the shortest, while the other riffles increase in length from the upper edge to the lower edge of the table, the table having a plain or unriffled portion lying at the extremities of the riffles and adapted to receive the material caught by the riffles."

"7. The combination of a transversely-inclined concentrating-table having a series of riffles extending longitudinally from the head toward the tail of the table, said riffles being of unequal length, the uppermost being the shortest, and the riffles increasing in length from the upper to the lower edge of the table, the table being provided with a plain or unriffled portion of suitable area located at the extremities of the riffles, means for feeding the material to the upper portion of the table's head, means for discharging water on the upper edge of the table, and suitable means for imparting to the table a longitudinally-reciprocating movement of a character adapted to move the material from the head toward the tail of the table."

Robert S. Taylor and Elwin M. Hulse, both of Ft. Wayne, Ind. (Edward Rector, of Chicago, Ill., of counsel), for appellants.

George L. Hodges and D. Edgar Wilson, both of Denver, Colo., for appellee.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellants admit the validity of the Wilfley patent, but they contend that it covers an invention which is an extremely narrow improvement of an art which was old, and that since the invention described is for a specific improvement in that art, the claims are to be so limited as to apply closely to the apparatus described in the specifications and claims, since Wilfley patented as that feature of his invention only a specific form and arrangement of riffles, and a specific smooth surface upon the concentrating-table, and went no farther, and that when so construed the claims are not infringed by the appellants' apparatus. The contention of the appellee is that the Wilfley invention marks a distinct advance, and discloses the application of principles and the performance of functions theretofore unknown to the art, and that the claims thereof are entitled to a construction commensurate with the step in advance, and that with such construction, and without expanding the Wilfley invention, the device used by the appellants will be found to infringe the same.

It is true that the use of concentrating-tables with riffles and with smooth surfaces was old, and that patents prior to Wilfley's showed the wet concentration of ore on automatically vibrating tables having transverse riffles or corrugations for the purpose of arresting the metal and separating it from the gangue. It does not appear, however, that any of the prior patents was successful, or that any of the concentrating-tables described therein went into general use. Wilfley invented a table divided into two areas, a smooth surface and a surface covered with riffles of unequal length, the shortest being at the top of

the table, and the others increasing in length until the last riffle extended the whole length of the table, leaving a triangular smooth surface of about one-fourth the area of the table. In operation the pulp as it flows upon the upper side of the Wilfley table is subjected to two forces, one the endwise oscillation of the table, the other the transverse flow of water across the same. As the ore pulp is discharged upon the uppermost riffle, the side wash and the motion of the table cause the same to flow transversely over the riffles, and cause the heavier minerals to settle between the riffles in the order of their specific gravity, the gangue flowing over the top of the riffles until it is discharged from the tables. In the meantime the mineral is caused to travel forward, toward the discharge end, while at the same time it is subjected to a repeated side wash of water in a continuous operation, which removes the lighter gangue and leaves the mineral clean. The riffle cleats terminate in a diagonal line, and they restrain the material and guide it in the line of motion, causing an automatic and visible line of separation between the mineral and the gangue.

[2] The improvement made by Wilfley, as measured by the prior art and as proven by the testimony, is evidently of such merit that the claims of his patent are entitled to a reasonably liberal construction. The mere form of his table does not measure the scope of his invention. He did more than to invent a table of a precise form and configuration. He discovered a method of application of principles and an effectual mode of operation, and the appellee should be protected in that feature of the combination which is new in principle and function. In view of the evidence, we are not convinced that the court below erred in reaching the conclusion that the appellants' apparatus infringed claims 1, 2, and 7 of the Wilfley patent. In so deciding we are not unmindful of the rule that the protection afforded by a patent is to that only which is specified in the claims, that the language of the claims is intended to convey public notice of the limits of the invention, and that, as was said by Mr. Justice Brown, in McClain v. Ortmayer, 141 U. S. 419–424, 12 Sup. Ct. 76, 77 (35 L. Ed. 800):

"The object of the patent law in requiring the patentee to 'particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery' is not only to secure to him all to which he is entitled, but to apprise the public of what is still open to them."

But form is immaterial unless it is essential to the result, or indispensable by reason of the state of the art to the novelty of the claim.

"When the whole substance of the invention may be copied in a different form, it is the duty of courts and juries to look through the form for the substance of the invention." Winans v. Denmead, 15 How. 330, 14 L. Ed. 717; Metallic Extraction Co. v. Brown, 104 Fed. 345, 43 C. C. A. 568; Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co. (C. C.) 132 Fed. 614.

The riffles in the Deister table, used by the appellants, differ from those of the Wilfley table in that each alternate riffle terminates with minute and slightly deflected ends, which have an elevation of but one thirty-second of an inch, so that at the conclusion of the separa-

tion the material is discharged into the open spaces between them. If the deflected ends were removed, there would remain a table having riffles with advancing terminals, as in the Wilfley table. We are of the opinion that the use of these deflected terminals so greatly reduced in elevation does not serve to differentiate the Deister table from that of the patent in suit, whether the space covered by them be regarded as substantially a smooth surface, as was held in Wilfley v. Denver Engineering Works Co. et al. (C. C.) 111 Fed. 760, and in Mine & Smelter Supply Co. v. Braeckel Concentrator Co. (D. C.) 107 Fed. 897, or whether they be regarded as a continuation of the riffles. There is presented in either view a table with riffles terminating in a diagonal course with reference to their general direction, a course which is essential to the successful operation of either table, and thereby the appellants have availed themselves of the distinctive feature of the Wilfley table, and therewith they have performed the same function by the same means, and in substantially the same manner, as in the Wilfley combination.

The decrees are affirmed.

KINTNER et al. v. MARCONI WIRELESS TELEGRAPH CO. OF AMERICA.

(Circuit Court of Appeals, Third Circuit. May 26, 1914.)

No. 1810.

PATENTS (§ 308*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTIONS.

Orders granting a preliminary injunction against infringement of the Fessenden patent, No. 918,306, for a method of wireless signaling, and subsequently modifying the same by suspending the injunction so far as related to transactions with the United States and private stations installed by defendant, on the giving of bonds by defendant, *held* within the discretion of the court.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 504–506; Dec. Dig. § 308.*]

Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Suit in equity by Samuel M. Kintner and Halsey M. Barrett, receivers of the National Electric Signaling Company, against the Marconi Wireless Telegraph Company of America. Appeal from orders relating to preliminary injunction. Dismissed, and order granting injunction affirmed.

F. W. H. Clay, of Pittsburgh, Pa., and Melville Church, of Washington, D. C., for appellants.

L. F. H. Betts and Livingston Gifford, both of New York City, for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

PER CURIAM. The decision of this court on the appeal of National Electric Signaling Company and Samuel M. Kintner and

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

Halsey M. Barrett, receivers, plaintiffs and appellants, against Telefunken Wireless Telegraph Company of the United States, defendants and appellees, reversing the judgment of the District Court for the Eastern District of Pennsylvania and remanding the case, with instructions to enter a decree for complainants, sustaining the validity of the claims involved in patents No. 918,306 and No. 918,307, was filed October 23, 1913.

Thereafter, on November 3, 1913, a bill in the suit set forth in the caption was filed in the District Court of New Jersey, against the defendant Marconi Wireless Telegraph Company, for alleged infringement of the same claims of the same patents that were involved in the decision by this court on the appeal above referred to. This bill prayed for a preliminary injunction and an accounting. An order granting such injunction as to the method patent No. 918,306 was granted November 17, 1913, except as to transactions with the United States. As to such, said order provided that defendant should file a bond in the sum of $25,000, to secure the complainant against any damages that thereafter might be adjudged to them on account of sales to the United States. This injunction order was afterwards modified November 21, 1913, by suspending, until further order of the court, so much of the preliminary injunction of November 17th as related to private stations installed or operated by defendant at the time of the said prior order, upon defendant filing a bond in the sum of $100,000, conditioned to pay damages and profits, if any, that might afterwards be adjudged in the final disposition of the suit. From these orders, an appeal, No. 1810 on the docket of this court, was asked for by complainant and granted December 1, 1913, and is now pending.

Afterwards, on December 29, 1913, the complainants moved the court: (1) To increase the indemnity bond against sales to the United States government; (2) for a preliminary injunction under claims 1 and 3 of method patent No. 918,306; and (3) for a preliminary injunction under claims 1, 2, 3, and 4 of apparatus patent No. 918,307.

On the objection of defendant's counsel to these motions, the court below refused to entertain them, or any of them, on the ground that "the complainants have appealed from the orders of this court respecting the matters involved in said motions, and that the appeal is still pending," and, also, on the ground that, as to the second and third motions above mentioned, notice of the making of the same, as prescribed by the practice and rules of court, had not been given to defendant.

January 28, 1914, an appeal was allowed complainants from the order refusing to entertain said motions, which appeal is No. 1841 on the docket of this court. This appeal, having been argued in connection with the former appeal No. 1810, was dismissed by this court March 16, 1914, and consideration of the original appeal, No. 1810, was reserved until the Supreme Court had passed upon the petition of defendants for a certiorari to this court in the "Telefunken" case, above referred to.

The prayer of the defendants for a certiorari having been refused, it is now ordered and adjudged by this court that the original appeal,

No. 1810, from the orders of the District Court of New Jersey, granting a preliminary injunction and thereafter modifying the same, be dismissed; this court being of opinion that the said orders were a proper exercise of its judicial discretion by the court below.

CONSOLIDATED RUBBER TIRE CO. et al. v. DIAMOND RUBBER CO.

(Circuit Court of Appeals, Seventh Circuit. May 29, 1913.)

No. 1916.

PATENTS (§ 312*)—SUIT FOR INFRINGEMENT—SUFFICIENCY OF EVIDENCE.

Evidence, taken in connection with admissions made in the answer, *held* sufficient to sustain the allegations of the bill that defendant corporation charged with infringement was still in business, and that it maintained or controlled an office and selling agency within the district of suit where infringing articles were sold.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544–549; Dec. Dig. § 312.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Christian C. Kohlsaat, Judge.

Suit in equity by the Consolidated Rubber Tire Company and the Rubber Tire Wheel Company against the Diamond Rubber Company. Decree for defendant, and complainants appeal. Reversed.

Complainants-appellants on August 21, 1908, filed their bill of complaint in the usual form, charging defendant-appellee with infringement of patent No. 554675, issued to Arthur W. Grant, February 18, 1896, for improvements in rubber tire wheels. At the close of the prima facie case, and on the motion of the defendant-appellee, the trial judge entered an order dismissing the bill for want of equity. The propriety of that action is questioned by this appeal.

John W. Hill, of Chicago, Ill., for appellants.

Charles K. Offield, of Chicago, Ill., for appellee.

Before BAKER, Circuit Judge, and ANDERSON and CARPENTER, District Judges

CARPENTER, District Judge. This case involves the Grant tire patent, over which there has been much litigation, resulting in conflicting decisions. The validity of the patent was upheld finally by the Supreme Court of the United States on April 10, 1911. See Consolidated Rubber Tire Co. v. Diamond Rubber Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527.

The record does not disclose the grounds upon which the bill was dismissed. The defendant-appellee, however, asserts, in support of the decree:

1. The defendant-appellee, Diamond Rubber Company, of West Virginia, had gone out of business, and sold its plant and assets to another corporation, three years prior to the filing of the bill.

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

2. No showing was made that the Diamond Rubber Company of West Virginia ever had a place of business in the Northern district of Illinois, nor any agent conducting business in that district; and that no proof was made that the defendant-appellee ever committed any act of infringement of the patent in suit in the Northern district of Illinois.

3. No proof of infringement at any time or place that would confer jurisdiction on the trial court.

4. No proof of title in the complainants-appellants.

The bill alleges that the defendant-appellee, the Diamond Rubber Company, is a corporation duly organized and existing under the laws of the state of West Virginia, having a regular and established place of business at No. 1523 Michigan avenue, in the city of Chicago. The answer admits that the defendant-appellee "is a corporation organized and existing under the laws of the state of West Virginia," and that its principal office and place of business is at Akron, Ohio. This, in our opinion, disposes of the contention that the Diamond Rubber Company of West Virginia had gone out of business prior to the filing of the bill.

The situation as to the defendant-appellee maintaining a place of business in the city of Chicago is somewhat complex. A careful analysis of the record, however, discloses that there were at least five Diamond Rubber Companies: The Diamond Rubber Company, a West Virginia corporation; the Diamond Rubber Company of Illinois; the Diamond Rubber Company, an Ohio corporation; the Diamond Rubber Company of New York, a New York corporation; and the Diamond Rubber Company, a Canadian corporation.

The defendant-appellee may be called the senior Diamond Rubber Company. The Ohio corporation was organized November 7, 1905. Some time in 1908 or 1909 we find the Diamond Rubber Company of New York. When the Diamond Rubber Company, the Canadian corporation, and the Diamond Rubber Company, the Illinois corporation, came into existence, we are not informed, but may infer some time subsequent to the organization of the Diamond Rubber Company of West Virginia. Whether the Ohio corporation succeeded the West Virginia corporation, and whether the other Diamond Rubber Companies were merely selling agents of the parent company, none of the officers of the Ohio corporation or the West Virginia corporation or the New York corporation seem to know with any definiteness, save that the New York company was the selling agent of the Diamond Rubber Company. The same officers operated the defendant-appellee and the Ohio company, but none of them seem to know whether the West Virginia company went out of business, or whether the Ohio company, upon its organization on November 7, 1905, took over all of its assets and business.

In any event, the West Virginia company had and maintained a place of business in Chicago, at least until the Ohio company was formed; and the Ohio company until the New York company entered the field. The West Virginia company always had its plant at Akron, Ohio, and at the time of the filing of the bill the same plant was being

operated by some Diamond Rubber Company. What particular Diamond Rubber Company, the officers were not sure; they "supposed" by the Diamond Rubber Company of Ohio. The answer states:

"Defendant admits that it is a corporation organized and existing under the laws of the state of West Virginia, and states that its principal office, factory, and place of business is at Akron, in the state of Ohio."

We have therefore an office in Chicago originally operated by the West Virginia corporation, the defendant-appellee, which sometime or other, nobody knows quite when, was taken over by the Ohio corporation and subsequently turned over to the New York corporation. The lack of knowledge on the part of the officers of the corporation taken into consideration, with the admission in the answer, we think establishes the fact that the defendant-appellee did maintain an office in Chicago at the time the bill was filed.

Defendant-appellee was represented by astute counsel, learned and acute. We may presume, if not assume, conferences were had between counsel and the officers of his client. If the West Virginia corporation had actually ceased doing business prior to the filing of the bill in this case, and if it had no interest whatever in the Chicago office, it would have been a matter easy to prove by the witnesses called by complainants-appellants. The evidence as to the status of these various companies was drawn from the officers of the defendant-appellee, and they must have known or been advised that proof of the taking over by the Ohio corporation on November 7, 1905, of all the assets and business of the West Virginia corporation would have constituted a complete defense. None of these officers were willing to make such proof, nor were they willing to state what the real facts were. From the present record we believe and find that the various Diamond Rubber Companies were organized and operated under the same direction, and, considering the history of the Grant patent, it is not necessary to speculate as to the general purpose they were to serve. We are of the opinion that the several corporations were created and maintained in order to render more difficult litigation arising under that patent, and are not seriously impressed by what might be designated in this case as a "swivel-chair" defense.

Some Diamond Rubber Company operated a manufacturing company in Akron, Ohio, and some Diamond Rubber Company operated a selling agency in the city of Chicago, where acts of infringement of the Grant patent were committed. The Diamond Rubber Company of West Virginia seems to be the parent company, and nobody intimately connected with the business appears to know or is willing to state that it is not now in business and operating and controlling the enterprise.

The record shows clearly that the product sold by the Diamond Rubber Company in Chicago was an infringement on the Grant patent. We are also satisfied that the complainant-appellant has made out its title to the patent in question.

The trial court erred in dismissing the bill, and the cause must be reversed and remanded for further proceedings, not inconsistent with this opinion, and it is so ordered.

HALL-MAMMOTH INCUBATOR CO. v. TEABOUT.

(Circuit Court of Appeals, Second Circuit. June 3, 1914.)

No. 252.

1. PATENTS (§ 246*)—INFRINGEMENT—COMBINATION.

A claim of a patent for a specific combination of elements is not infringed by a device from which some of such elements are omitted, and no equivalents substituted, even though they are unnecessary to the operativeness of the patented device.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 387; Dec. Dig. § 246.*]

2. PATENTS (§ 328*)—INFRINGEMENT—INCUBATOR.

The Hall patent, No. 692,277, for an incubator, *held* not infringed.

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

On appeal from a decree of the District Court for the Northern District of New York (205 Fed. 906) dismissing the bill of complaint with costs, in an action for infringement based upon letters patent No. 692,277 granted to Wilber P. Hall, February 4, 1902, for an incubator.

The patent contains a single claim which sufficiently describes the invention for the purposes of this appeal. It is as follows:

"In combination with an incubator, a heater, having a water-jacket, pipes within the incubator having communication with said water-jacket, the upper end of the heater having an air-chamber, a throttle mounted over an aperture leading into said chamber, a stem to said throttle passing through an aperture in the upper wall of said chamber, an expansion-cylinder, a float mounted therein, said expansion-cylinder having communication with the water-jacket, an adjustable bracket-arm on the support for the expansion-cylinder, a lever pivoted to the end of said bracket-arm, a damper pivoted to the top of the chamber of the heater, a rod connecting said damper, with the pivoted lever, a second lever fulcrumed on a bracket or arm of said expansion-cylinder, and having connection with the float at one end, and the stem of said throttle at a location adjacent to its other end, which rests upon the pivoted lever carried by the bracket-arm, substantially as shown and described."

Edmund Wetmore, of New York City, and Cookinham & Cookinham, of Utica, N. Y., for appellant.

Henry N. Paul, Jr., and Joseph C. Fraley, both of Philadelphia, Pa., for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. [1, 2] Hall invented a successful incubator. He was not a pioneer in this art, as incubators had been known before, operating upon substantially the same principle. Whether he could have obtained a broad claim for his contribution to the art it is unnecessary to decide, as he received a patent with a single claim, limited to the apparatus described and containing 13 separate and distinct elements. Unquestionably the defendant has omitted three of these elements. Even if the complainant were entitled to a broad application of the doctrine of equivalents, that rule is not applicable here because some of the elements have been omitted altogether and nothing

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

substituted therefor. It may be that the claim was unnecessarily specific, that elements which are unnecessary are found there and that the apparatus will operate without these elements. Concede all this and it does not aid the complainant. Hall saw fit to include in his combination all the elements found in the claim. One who does not use that combination does not infringe. The court has no more right to eliminate "an adjustable bracket-arm on the support" than it has to eliminate "a heater having a water-jacket;" one is as much an element of the combination as the other. We are dealing with the claim as we find it, not as it might have been, and agree with the District Judge in holding that the claim is not infringed. This proposition has been frequently sustained. Among the cases in this circuit may be noted Dey Register Co. v. Syracuse Recorder Co. (C. C.) 152 Fed. 440; affirmed 161 Fed. 111, 88 C. C. A. 275; Consolidated Engine Co. v. Landers, 160 Fed. 79, 87 C. C. A. 235.

The decree is affirmed with costs.

GRUPE DRIER & BOILER CO. v. GEIGER, FISKE & KOOP.

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

No. 3959.

1. PATENTS (§ 234*)—INFRINGEMENT—JOINING TWO PARTS OF MACHINE INTO ONE.

Infringement is not avoided by the joinder of two parts of a patented machine into one if the new one performs the same functions in substantially the same way; but it is otherwise if the patentee has intentionally made their separability an essential feature of his invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 370, 381; Dec. Dig. § 234.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DRIER.

The Chamberlain patent, No. 822,185, for a drier, used chiefly for drying spent grains in breweries and distilleries for feed, is void for prior use by others of a conveyor in the bottom of the draft flue for carrying the deposit of wet chaff therein back into the drying cylinder, which is the essential feature of the patented machine.

3. PATENTS (§ 81*)—PRIOR USE—EVIDENCE TO ESTABLISH.

The rule is that to defeat a patent by oral testimony of prior use the proof must be clear, satisfactory, and beyond reasonable doubt, but the standard is not an impossible one, and each case must be determined upon its own facts.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 104; Dec. Dig. § 81.*]

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

Suit in equity by Geiger, Fiske & Koop, copartners doing business under the trade-name of the Louisville Drying Machinery Company, against the Grupe Drier & Boiler Company. From an order granting a preliminary injunction, defendant appeals. Reversed.

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

Charles C. Bulkley, of Chicago, Ill., for appellant.

Frank T. Brown and Charles M. Nissen, both of Chicago, Ill. (Brown & Hopkins, of Chicago, Ill., on the brief), for appellee.

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

HOOK, Circuit Judge. This is an appeal from an interlocutory injunction in a suit brought by Geiger, Fiske & Koop to enjoin the Grupe Drier & Boiler Co. from infringing the patent to George E. Chamberlain, No. 822,185, May 29, 1906, of which the plaintiffs are assignees. Of the seven claims of the patent all but the sixth are involved. The invention claimed is of an improvement in driers designed to prevent the choking up of the draft flue. The means specified is a removable conveyor in the bottom of the flue which cleans it without interfering with the operation of the drier. In its entirety the machine is for drying wet material. It is especially adapted to the drying of the spent grains of breweries and distilleries for preservation as feed. The drier proper is a large revolving cylinder the interior of which is heated by steam pipes or other means not interfering with its motion. It is mounted at an incline in order that the wet material fed into the upper end will flow downward and out at the lower. Fitted to the upper end of the drier cylinder, so as not to prevent its revolution, is a stationary cylindrical flue, with a large opening between them. The heating of the wet material in the revolving drier cylinder produces a vapor which interferes with the drying, so a current of air is forced or drawn through it and into, up, and out of the flue. This is generally done by a suction fan at the top of the flue. The course of the air is the reverse of that of the material being dried. Particularly in the case of wet grain the current of air is intended also to draw off and out of the top of the flue the worthless chaff, but in practice considerable of it not fully dried falls to the bottom of the flue and tends to choke the draft. At first it was the custom to clean the flue by hand, access being through a manhole, but the method was tedious and expensive, and interfered with the operation of the machine. The only element of the patented combination for which a claim of novelty can reasonably be made relates to the means of cleaning the flue. The patentee provided a conveyor in the bottom of the flue to carry the deposit back through the opening into the drier cylinder, where it was again subjected to the heated air. The first claim of the patent only need be set forth. It is:

"A drier comprising a drying-chamber, a flue communicating with said chamber, a feeding-conveyor and a flue-cleaning conveyor arranged in the lower portion of said flue."

[1] The defendant contends that if the patent is valid it is in very narrow compass which it does not infringe; also that the method described was old. It says that in the combination of the patent the conveyor which carries and feeds the grain into the upper end of the drier cylinder is separate and distinct from that which carries back into the same cylinder the deposit from the bottom of the flue, whereas defendant uses but one conveyor for both purposes. Infringement is

not avoided by the joinder of two parts of a machine into one if the new one performs the same functions in substantially the same way; but it is otherwise if the patentee has intentionally made their separability an essential feature of his invention. In each of the claims in suit the two conveyors, one for feeding in the grain and the other for cleaning out the chaff, are referred to as distinct, independent elements of the combination. The drawings and the specifications of the patent show them physically separated, though their operating power comes from the same shaft. In the specifications it is said that the feed conveyor "delivers the material to be dried to the drier-cylinder at one side of and below the major portion of the draft flue opening, so as to avoid the draft as much as possible." Chamberlain's application for the patent was filed in the Patent Office September 15, 1905. Eight days later, September 23d, while his application was pending, and before the assignment to the plaintiffs, he wrote as follows to a firm who were experimenting with a single conveyor for both feeding and cleaning, and who afterwards became interested in the defendant corporation:

"Answering your letter of Sept. 16th, while our improvements look very much alike on paper, as I wrote you the operating difference is radical, the one works the other fails. The reasons are briefly as follows: The amount of wet feed delivered to the dryer cannot be controlled by ordinary gates and slides. It is for this reason that the universal method of feeding dryers is by the use of helicoidal conveyers. * * * As stated in my earlier letter I installed your device six years ago at Marshalltown and gave it a thorough trial. I have no doubt the same arrangement was tried long before my time by others and abandoned. All dryers are fed by a screw conveyer entirely independent of the vapor duct. It may be a little difficult to understand why one arrangement will work and the other will not. It is plain to me because I have seen the complete demonstration. I trust that my explanation as given above will convey the fundamental facts clearly. To conclude, your arrangement contemplates additional services from a conveyer that is already fully loaded. It don't make much difference whether you feed in at the top of the vapor duct or at its bottom. The conveyer cannot do more work than it is already doing. The better thing to do is to feed in as far from the vapor flue as possible. My device consists of a separate and independent screw conveyer properly housed at the bottom of the vapor flue. This conveyer is operated at a very slow speed dependent on the amount of material to be returned to the dryer. * * * I trust that this explanation will give you a clear idea as to where we differ and what my device consists of. Will be glad to make further explanation if you desire."

The reason given by Chamberlain why the feed or grain conveyor could not also be used for carrying back the deposited chaff was that its capacity for the former purpose was always taxed, and it had to be boxed or inclosed to prevent spilling its contents. This objection was avoided by defendant by mounting two screw conveyors of different diameters tandem on one shaft, the smaller to convey the grain into the bottom of the flue where the larger took it and had a surplus capacity for the chaff. By this means, which was simple and effective, both the feed and the chaff deposit in the bottom of the flue were carried into the drier-cylinder.

[2] But we need not determine whether the separation of the conveyors is an essential feature of the patent or whether defendant's device of a single conveyor conflicts, because we think it clear beyond

reasonable question that the use of a conveyor in the bottom of the draft flue for carrying the deposit there back into the drier-cylinder was not new with the patentee. The statement of the patentee that six years before his letter was written he had given the double duty conveyor a thorough trial, and that he had no doubt others had tried the same arrangement long before his time, may be true, but it is not true that there had been no successful and continued application of the mechanical principle involved here. In the winter of 1897–98 three driers were installed in a distillery in Peoria, Ill. Endless chain conveyors had been used to clean out the flue by carrying the deposit back into the drier-cylinder, but as the iron corroded, they were not satisfactory. The draughtsman of an independent firm of millwrights employed by the distillery company prepared about January 1, 1898, a plan of the drying machinery. This plan was produced from the records of the company, and identified by the man who prepared it and by others. It shows a screw conveyor running along the bottom of the flue to the opening into the drier-cylinder and a wiper on each side to wipe the chaff to the conveyor. The arrangement of the plan was not adopted, but it shows quite clearly the parties had in mind a mechanical method of cleaning the flue by conveying the chaff back to be dried. The device they did adopt was evidently designed to perform both functions, wiping and conveying. Defendant's witnesses call it a spiral sweep, a reel, or a reel conveyor, while plaintiffs say it was merely a revolving series of paddles. A spiral effect was secured by bending strips of hard wood out of line and fastening the ends to the metallic arms of spiders mounted at each end of a revolvable shaft placed near the bottom of the flue. The spiral was several feet in length and 30 or more inches in diameter. In the first two driers the grain was delivered directly into the drier-cylinder, in the third it was delivered to the bottom of the flue where the chaff fell. Plaintiff's witnesses say this device would not convey, but would only stir up the deposit so it would be blown out by the draft. The evidence showed, however, that it actually worked as a conveyor and also by its large diameter wiped the sides of the flue. Those who designed and installed it were seeking something to replace the chain conveyor, and they had before them the draughtsman's plan. Moreover, had it not acted as a conveyor, the machine in which the feed was delivered to the bottom of the flue could not have been successfully operated. The device may not have been as effective as a screw conveyor, but the spirally disposed strips were similar in principle to the threads of a screw, and would naturally give a forward movement to the material they engaged. These driers so equipped were operated for about five years when they were destroyed by fire. In 1903 plans for a new installation were prepared and in 1903–04 new driers were constructed, with screw conveyors in the bottom of the flue. The application of the patentee was filed September 15, 1905. We do not stop to consider whether the actual use of screw conveyors at the distillery preceded the patentee's discovery but refer to it to show the natural development of the work of others acting independently and in ignorance of his efforts. If evidence is needed that the screw as a conveyor was

old it may be found in the patent to Ruggles No. 603,208, April 26, 1898. It would not be invention to substitute it in the place of an endless chain with paddles or other mechanical arrangement intended for and adapted to the same purpose. The spiral device was not an abandoned experiment as is contended. See Brush v. Condit, 132 U. S. 39, 48, 10 Sup. Ct. 1, 33 L. Ed. 251. It was used and served its purpose for five years, and when destroyed it was supplanted by the more efficient screw shown in the early plans.

[3] The rule is that to defeat a patent by oral testimony of prior use the proof must be clear, satisfactory, and beyond a reasonable doubt. The Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154; Deering v. Winona Harvester Works, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153. But the standard is not an impossible one, and each case must be determined upon its own facts. The particular kinds of flue cleaning devices installed in 1897–98 and 1903–04 would naturally have impressed themselves upon the memory of those who planned and put them in and of those who afterwards used them. The corroboration of the plan of the draughtsman is persuasive. It is not a case of casual observation of a mechanical detail by persons not particularly interested. These and other considerations, including the character of the witnesses and the fact that some of them appear wholly disinterested, have convinced us that a conveyor in the bottom of the draft flue to carry the deposit there into the drier-cylinder was not the discovery of the patentee. Even the statement of the patentee himself of the abandonment years before of attempts to make the conveyor do double duty contains an implication of knowledge of the value of each separately.

The decree is reversed.

VAN VALKENBURGH, District Judge, concurs in the result.

HASSAM PAVING CO. et al. v. CONSOLIDATED CONTRACT CO. et al.

(District Court, D. Oregon. May 4, 1914.)

No. 3818.

1. PATENTS (§ 45*)—NOVELTY—BURDEN OF PROOF.
   The burden of proof rests upon one who assails a patent for want of novelty, and every reasonable doubt should be resolved against him.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 51–53; Dec. Dig. § 45.*]

2. PATENTS (§ 26*)—INVENTION—COMBINATION OF OLD ELEMENTS.
   A combination of old elements may be the result of invention and patentable.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. § 26.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PAVEMENT.
   The Hassam patents, Nos. 819,652, 851,625, 861,650, for a pavement and process of making the same, was not anticipated, nor is it invalid

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

for prior use, but discloses novelty and patentable invention, also held infringed.

4. PATENTS (§ 283*)—INFRINGEMENT—DEFENSES.

That a city, in advertising for bids for paving a street, specified a patented pavement, at the request of the owner of the patent, is not a defense to a suit for infringement in the use of the patented pavement by another, who was the successful bidder.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448–450, 452; Dec. Dig. § 283.*]

In Equity. Suit by the Hassam Paving Company and the Oregon Hassam Paving Company against the Consolidated Contract Company and the Pacific Coast Casualty Company. On final hearing. Decree for complainants.

Carey & Kerr, of Portland, Or., and Louis W. Southgate, of Worcester, Mass., for complainants.

Jesse Stearns and John H. Hall, both of Portland, Or., for defendants.

BEAN, District Judge. The time at my disposal will not permit the formation of an elaborate and exhaustive opinion, and I can do nothing more than state my conclusions briefly.

The suit is brought to restrain infringement of letters patent granted to the complainants' assignor for what is known as Hassam pavement. The defense rests on the ground that the patents in question are invalid (1) for want of invention or discovery, and (2) that the defendants have a license to use complainants' patent without royalty because the city of Portland, at the request of its agent, specified that the pavement covered by complainants' patent should be used on a certain street in the city, and since the ordinances of the city require that contracts for street improvement shall be awarded to the lowest bidder, and defendant contract company obtained such contract by underbidding its competitors, it is entitled to use the complainants' patent without being liable for infringement thereof.

[1] The granting of letters patent is prima facie evidence that the patentee is the first inventor of the device or discoverer of the art or process described in the patent and of its novelty. The burden of proof is therefore upon one who assails a patent for want of novelty, and it is said every reasonable doubt should be resolved against him. San Francisco Cornice Co. v. Beyrle, 195 Fed. 517, 115 C. C. A. 426.

The patents in question are for an art or process and the methods of carrying it into effect and making it useful, and for claims laid directly on the pavement itself. The manner of constructing the pavement, as described in the patents in brief, is: First, covering the subgrade of the street or road with a layer of uncoated broken stone and compressing the same by a heavy steam roller, thus reducing the voids to a minimum. Second, after the stone has been thus compressed, it is grouted by pouring over it in place a mixture of cement, sand, and water and agitating the same by a steam roller during the process of grouting until the grout flushes to the surface, thus expelling the water and filling up the voids or spaces between the stones with grout. And,

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

third, applying and compressing a wearing surface of uncoated fine or pea stones while the grout is still fresh and before the cement has had a chance to set or harden, so that the surface material is united to the foundation by the cement grout. The pavement, as thus constructed, is then allowed to stand without use until the cement hardens. The result is the building in the street or road itself of a solid monolith or stone structure, differing in this respect from any other known pavement.

[2] It may be and probably is true that every one of the elements going to make up the complainants' pavement had been employed before in road or street improvements, or in other mechanical ways, but not in the same combination and put together in the same manner as Hassam has combined and arranged them. I am of the opinion, therefore, that the defense of want of novelty is not satisfactorily made out. A combination of old elements may be the result of invention and is patentable. National Tube Co. v. Aiken, 163 Fed. 254, 91 C. C. A. 114; Beryle v. S. F. Cornice Co. (C. C.) 181 Fed. 692; S. F. Cornice Co. v. Beyrle, supra; Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed. 1000.

I am unable to distinguish this case in principle from Elizabeth v. Pavement Co., supra, sustaining the Nicholson patent for pavement, or Warren Bros. Co. v. City of Owosso, 166 Fed. 309, 92 C. C. A. 227, holding valid the Warren patent.

[3] The prior patents relied upon as showing an anticipation of the Hassam patent differ materially from those in suit and do not constitute an anticipation thereof. In the Murphy patent there is no provision for rolling the stone foundation before the grouting is applied, no grouting consisting simply of cement, sand, and water, no agitation or disturbance of a previously rolled stone foundation to cause the grouting to fill out the voids and expel the air, and no continuous grouting occupying the voids between the foundation stone and serving to bind the surface layer of small stones to the foundation. Moreover, although the Murphy patent was issued in 1881, there is no evidence that any pavement was ever laid under it. It never came into general or extensive use. It is a mere paper patent and should not be held to invalidate the complainants' patent, which the evidence shows to be in common and extensive use. Robins Conveying Belt Co. v. American Rd. Mach. Co., 145 Fed. 923, 76 C. C. A. 461; Hall Signal Co. v. Gen. Ry. Sig. Co., 169 Fed. 290, 94 C. C. A. 580; Amer. Graphophone Co. v. Leeds & Catlin, 170 Fed. 327, 95 C. C. A. 511. The Bayard, Haggerty, and Warren patents relate to roads or pavement made in part of asphalt, tar, or some bituminous composition, and, so far as I can see, have no substantial bearing upon the patents in question.

The prior publication consists of extracts from encyclopedias, dictionaries, scientific works, and the like, describing various kinds of roads and their construction, and defining some of the elements going to make up the complainants' patent, but they do not describe the complete plant in such a full and intelligible manner as to enable persons skilled in the art to which it relates to make or construct the pave-

ment without assistance from the patent, and are therefore insufficient to invalidate the patents. Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33; Cohn v. U. S. Corset Co., 93 U. S. 366, 23 L. Ed. 907.

The evidence as to the alleged prior use consists of the oral testimony of the witness Gordon describing, or attempting to describe, some cement pavements or walks which he assisted in laying in England some 40 years ago, and the McClintock experiment. The construction of the pavement described by Gordon differs materially from the process described in complainants' patent, and, moreover, there is no evidence that it has ever been patented or described in any printed publication, and therefore cannot affect the validity of complainants' patents. R. S. § 4923 (U. S. Comp. St. 1901, p. 3396); Westinghouse Mchy. Co. v. Gen. El. Co., 207 Fed. 75, 126 C. C. A. 575. McClintock was the city surveyor of Rochester, N. Y., in 1893. Owing to the unsatisfactory condition of the streets, he asked and obtained permission from the city authorities to try an experiment on one of the streets. The experiment was not satisfactory, but, as McClintock says, "demonstrated that I might have something of practical value, but that I had not carried it far enough or experimented enough at length to demonstrate its practical value." The pavement laid by McClintock was never used elsewhere or tried again. It comes clearly within the category of an abandoned experiment, which is not sufficient in law to anticipate a successful patent. The Cornplanter Patent, 23 Wall. 181, 23 L. Ed. 161; Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. Ed. 952; Deering v. Winona Harvester Works, 155 U. S. 285, 15 Sup. Ct. 118, 39 L. Ed. 153; King Co. Raisin & Fruit Co. v. U. S. Consol. S. R. Co., 182 Fed. 59, 104 C. C. A. 499.

[4] The fact that the city of Portland saw fit to specify Hassam pavement for one of its streets at the request of the holder of the patent does not excuse one who underbid the owner of the patent, for an infringement thereof any more than if the owner of a rock quarry should induce the city to specify rock for use in a street of a quality to be obtained only from his quarry would justify the successful bidder in appropriating the rock without paying for it.

Injunction will issue as prayed for, and the cause be continued for an accounting. The same order will be entered in the suit against the Reliance Construction Company.

NEVA-SLIP SHIRT WAIST GRIP CO., Inc., v. MARCON MFG. CO., Inc.

(District Court, E. D. New York. June 22, 1914.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—WAIST GRIP.
   The Crawford patent, No. 1,065,297, for a waist grip, was not anticipated, but is limited to the particular arrangement of parts shown, and as so limited *held* not infringed.

2. PATENTS (§ 167*)—CONSTRUCTION—LIMITATION BY SPECIFIC CLAIMS.
   To give a broad meaning to the specification of a patent, it must be evident that the inventor had in mind the invention which would be described by the broad interpretation. If the contrary is apparent, and it

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

appears that he did not appreciate what might be covered by a different claim or by a forced construction of the claims, he is not entitled to a patent therefor.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

In Equity. Suit by the Neva-Slip Shirt Waist Grip Company, Incorporated, against the Marcon Manufacturing Company, Incorporated. On final hearing. Decree for defendant.

William B. Whitney, of New York City, and Leopold Blumberg, of Brooklyn, N. Y., for plaintiff.

Stephen J. Cox, of New York City, for defendant.

CHATFIELD, District Judge. Letters patent No. 1,065,297 were issued upon June 17, 1913, on an application filed July 9, 1912, by Guy H. Crawford, duly assigned to the Neva-Slip Shirt Waist Grip Co., Incorporated, for what is called a waist grip.

Suit was brought for infringement of this patent, and at the close of the trial the following findings were made:

"Brooklyn, March 10, 1914.

"The Court: I think I will make a preliminary decision so as to narrow the ground for argument. As I indicated at the outset, the Marcon Manufacturing Company, Inc., was never organized sufficiently to do business in such a way that Mr. Connell could successfully separate his own actions from those that were done by him in the name of the corporation. We need not consider at all the financial responsibility of any one, either as stockholder or as subscriber for what was done, but, assuming that the use of the corporate name was something for which Mr. Connell and Mr. Geary were personally responsible, rather than as officers of the corporation, and also assuming that they had filed a certificate under which they could do business as individuals in the name of the Marcon Manufacturing Company, throughout this entire period, nevertheless, the responsibility was such that if Mr. Geary or Mr. Connell, or either of them, dealt with any one in the name of the corporation, and if the corporation was held out as a party qualified to do business, there is ground for charging the corporation (in so far as it existed) with infringement, if there be any infringement.

"There is jurisdiction therefore for considering the validity of the patent and the defenses urged against the patent with respect to the defendant, Marcon Manufacturing Company, as a corporation. It is unnecessary to consider whether the plaintiff could join Mr. Geary and Mr. Connell as individual defendants upon the record here presented; and it is also unnecessary to determine whether—if Mr. Geary and Mr. Connell could show successfully that any act in the name of the Marcon Manufactruing Company, Inc., was accidental or incidental—the present action should be dismissed without costs, and an action against the individuals substituted in its place. All those questions have been removed by the way in which the case has been presented by both parties, and through the fact that the corporation is nominally associated with the acts, charged to be infringing, to a sufficient extent to enable us to take up the questions of patentability and infringement.

"As to those questions the principal issue is raised through the use of the Rival fastener, and with respect to the construction of the claims of the patent in suit.

"The defendant's form of device and the form used by Mr. Geary at present would both be infringements if the patent to Crawford is valid, and covers the use of a single tape passing through an eyelet attached to one end of the tape, and carried back for fastening around a cleat of such form as to bring the pressure of one part of the tape, or of the cleat, over the loose end.

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

"The prior art patents relating to skirt supporters, or belts, or methods of fastening, have little to do with the question, except in so far as they show ability to hold a loose strap or end of tape by friction applied through some other portion of the tape; and the idea of fastening a loose end by means of a cleat, either by pressure of the other strands or by binding through the angle of the return, is old.

"The only element of patentability would seem to be in the employment of a cleat upon the single strand, or in using a cleat in connection with a single piece of tubular tape, so arranged as to hold the cleat, to furnish the reinforcement and to give an end for the fastening, in a way which, tested by either the prior art or the Rival style of belt, would seem to show patentable improvement.

"The Rival fastener shows a reinforced or duplicated section with an eyelet at each end, and with these eyelets fastened by riveting a strap or gusset through the eyelet and into the main portion of the belt.

"It would not seem to be an invention to substitute an extended or integral portion of the tape through the eyelet so as to do away with the extra piece in making the gusset; and therefore the question of novelty or patentability in the plaintiff's device depends upon the arrangement with reference to the method of applying and fastening the belt, rather than to the method of attaching the eyelets, or affixing the rivets.

"The defendant's device, as well as that now in use, makes no use of the folded or turned back part of the tubular tape, so as to hold the so-called cleat in one position; but does use the same method of fastening the loose end of the belt, by means of the cleat, and uses, as has been said, an equivalent (or method in which no novelty is involved) in attaching the eyelet.

"The claims of the patent, however, seem to relate to a method, or a device constructed according to a method of arranging a single piece of tape, so as to hold the cleat in a fixed position, and to make the different parts of the device with one piece of tape.

"If that be the proper interpretation and construction of the claims, and if the patentee has either assumed that the use of the cleat itself is old or has given to the world the idea of using the cleat in this way, for this purpose, then the patent in suit, like the Rival belt, would not cover what would seem to be a patentable idea, but has merely protected a particular combination, which is not that of the defendant.

"I think that is the question in the case: Whether the patent means anything more than a particular arrangement of what was patentable but not patented. If the patent claims cover only one combination of parts so arranged that the tape shall be doubled on itself, that the same tape shall come back through the eyelet and shall be fastened around the cleat which is to be held in one spot by a loop of the tape itself, then the defendant is not infringing.

"I will take briefs on the question of meaning and construction of the claims."

[1] The court, having considered the prior art, reached the conclusion that none of the patents cited showed a device like that of the plaintiff or the defendant in this case, and it was apparent that a patentable novelty was described in the Crawford patent, unless the so-called Rival belt, which had been developed from the Koch and other older devices, was an anticipation of the idea, except as limited to the exact combination shown in the claims.

The testimony shows that the Rival belt has been upon the market for some time and is not patented. It, in general, consists of a belt or tape, with a ring at each end, and with two strings or tapes fastened to one of these rings, by means of which the two rings are drawn together and a knot tied, in the general method of the Koch patent, No. 644,557 of February 27, 1900.

In the Koch patent, however, one of the two ends is attached to each of the rings at the ends of the belt. In the Crawford patent, and in the design used by the defendant, the fact that an end of the string or tape is passed through the ring in the opposite end of the belt, and that the belt is tightened by pulling upon this end, is similar to the idea in the Rival and the Koch belts; but the method of fastening, and the arrangement of the parts so as to allow of this method of fastening, is entirely different and is unlike anything in the patents cited.

Of these, the patent to Dwyer, No. 886,780, May 5, 1908, is merely an application of the old idea of the so-called Mexican or cinch fastening for a saddle girth, and only resembles the patent in suit from the fact that the belt, as in the Koch and Rival patents, is drawn tight by pulling of the strap through the ring.

Hellenberg, patent No. 429,910, June 10, 1890, uses the same idea of drawing a strap through a ring to tighten upon a hook or buckle, and this idea is shown in the patent to Reznicek, No. 1,021,728, March 26, 1912, and Scheuer, No. 656,666, August 28, 1900, while in Kimsey, No. 636,149, October 31, 1899, Mullee, No. 7,879, September 11, 1877, and Edwards, No. 730,751, June 9, 1903, a method of forming some support for the skirt is the basis of the patent and takes the device entirely out of the category of the one in suit.

In none of these patents is there anything shown that resembles in an anticipatory way the Crawford belt and the Marcon belt as nearly as does the Rival, and, as has been said, the Rival belt resembles a simplified cinch strap fastening, but is in this respect alone like the Crawford and Marcon device.

As was said in the preliminary finding, the question of infringement has raised the meaning of the claims and the scope of the patented idea. The testimony shows that the defendant had knowledge of the plaintiff's device and, before this suit was started, had knowledge of the plaintiff's patent. Certain changes in the defendant's device were made so as to avoid the actual appearance of copying the plaintiff's patented article, and by this change two lengths of tubular braid were put together by drawing one inside of the other, instead of folding back a continuous piece of braid upon itself in order to make the reinforced portion.

There could be no invention in doubling back a single piece of tape, if precisely the same function were performed by the doubled part as would be performed by a tape of twice the thickness, or by two pieces of tape fastened together.

As was indicated in the preliminary opinion, a combination of parts to form the two-fold belt, gussets, rings, and ends for fastening, is intended to accomplish exactly the same result as would be performed by a combination of similar parts, either of more expensive material, or so arranged as to involve greater expense in the handling and manufacture. But so far as the idea patented was concerned, the novelty seems to have been in so combining the different parts that might be employed (or the equivalent in use and function of the parts described in the patent) as to present a new way of making a belt or a new way of performing the functions of the old style of belt, with some addition-

al functions added by one or more of the elements of the patented combination.

In the Rival belt, each of the rings was definitely fixed at one of the ends of the belt proper. The Crawford patent substituted a fastener (that is, a cleat or buckle or a ring, but preferably a cleat, which would require a mere twisting of the end to complete the fastening) in such a position that it would be available in the place of that ring of the Rival fastener which was attached at the same end from which the two single tapes projected.

If Crawford had attempted to patent a device in which the use or position of this cleat was the novel feature, through locating the fastener at any desired point, and then holding it in place as well as clamping the end of the tape by the friction presented when the fastener was in use, and had also set forth in another claim a particular combination of those parts, in which that frictional fastener should be restrained and located at a definite fixed place, by the use of additional elements in the combination, it would seem that the claims of his patent, if allowed, would include the defendant's style of device. But the file wrapper and the patent itself indicate that Crawford, in his original application, attempted to claim merely the general idea of a combination consisting of a folded or duplicated tape, attached at one end to a ring and at the other to a fastener, with a single piece of tape extending therefrom, and to make the preferred form of device with one piece of tape, by manipulation, without cutting, instead of by putting the several pieces together as in the Rival belt, or by constructing it in the form of the Koch patent, supra.

There was plainly no invention in this idea, and Crawford thereupon proceeded to develop his claims in the direction of attaching his fastener by a different method and at a different point, but in such a way that the method of attachment (i. e., the arrangement of parts so as to hold the fastener in the desired place) and the place of attachment (i. e., at some other point than at the precise end of the doubled portion of the belt) were the novel features of his device as stated in his claims.

The other claims of the patent are not relied upon and definitely describe the fixing of the cleat fastener in a permanent position by attached parts of the belt, while claim 4, although at first relied upon, is now admitted to describe only a different form of the same arrangement.

The plaintiff relies upon claim 1, which is as follows:

"1. A waist grip made of a tubular piece of tape folded on itself for a portion of its length, whereby a reinforced portion is provided, the end of the tape beyond the reinforced portion having a fastener secured thereto, the folded end of the reinforced portion being provided with a ring, the said piece of tape beyond the reinforced portion being adapted to be entered into the ring and brought into engagement with the said fastener, whereby it is held in position for use."

If the words "secured thereto" could be construed to mean simply "movable thereon," claim 1 would be general enough to secure to the plaintiff the rights which, looking at the matter at the present time, it would seem might have been claimed by him as invention. But, as a matter of fact, he apparently did not appreciate nor understand nor conceive the whole invention. He had the idea of substituting a cleat

for a ring or other fastener, but the mere use of a cleat was not patentable, and he failed to see the possibility of novelty in so applying the cleat as to get the full use and benefit of its qualities as a fastener.

The drawings and specifications plainly show that he was limiting his invention to the precise form in which the cleat was to be held in position by an additional fold of the tape and to be thus prevented from being movable upon the end of the belt.

[2] Under the decision of the Circuit Court of Appeals in the case of Crown Cork & Seal Co. v. American Cork Specialty Co., 211 Fed. 650, 652, 128 C. C. A. 154, an express statement in a claim, which is in accord with the specifications and drawings, cannot be construed to mean something different, nor can it be reconstructed so as to eliminate the limitations indicated in the specifications and drawings and shown by the literal meaning of the claim. In other words, to give a broad meaning to a specification, it must be evident that the inventor had in mind the invention which would be described by the broad or liberal interpretation. If the contrary is apparent, and it appears that the inventor did not appreciate what might be covered by a different claim or by a forced construction of the claims, then he is not entitled to a patent therefor.

The device of the defendant consists of such parts of the old Rival belt as are shown to be necessary from the teachings of the Crawford patent, but with a movable cleat in the place of a ring. This device is not shown nor described by the Crawford patent, and the defendant has not attempted to obtain a patent therefor.

The defendant may have a decree.

INDEPENDENT DIE CO. v. SAVELS et al.

(District Court, D. Massachusetts. July 7, 1914.)

No. 375.

PATENTS (§ 328*)—INVENTION—DIE FOR CUTTING LEATHER.

The Gimson patent, No. 709,008, for a die for cutting out leather, *held* void for lack of patentable invention, in view of the prior art.

In Equity. Suit by the Independent Die Company against Orvis M. Savels and others. On final hearing. Decree for defendants.

Nathan Heard and Frederick A. Tennant, both of Boston, Mass., for complainant.

Albert E. Fay and Southgate & Southgate, all of Worcester, Mass., for defendants.

MORTON, District Judge. This is a suit for infringement of letters patent to Gimson, No. 709,008, on knife, cutter, or dieing-out instruments, dated September 16, 1902. It was heard in open court under the new equity rules.

The patent in question relates to dies which are used in cutting leather and other materials into various shapes. They are, in prin-

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

ciple, much like the old fashioned cookie cutter. The cutting edge is on the bottom of the die; the leather is laid on the table of the machine; the die is placed on the leather, and is pressed through it by a descending beam which strikes the die on the top. Both the beam and the table are of considerable width; and the die is placed here and there on the leather, wherever the cut can be made to the best advantage. The operations are carried on with considerable rapidity, from 3,000 to 4,000 pieces being died out by one workman in a day. It is desirable that the die shall be light so that it may be shifted from one place to another quickly and easily by the workmen's hands, that it shall be stiff so as to retain its shape under the pressure of the press, and that it shall safeguard the workmen's fingers as much as possible against the danger of being caught between the top of the die and the descending beam of the press.

At the time of the patentees' invention, the die in common use was the Walker die, which consisted of a smooth strip of steel and iron, about one-quarter of an inch thick, formed into the desired shape, sharpened around the bottom, and having parallel top and cutting edge. One of the objections to the Walker die was the danger of injury to which it exposed the operative. Its smooth sides became more or less slippery with use, and they furnished no indication to the operative when his fingers were dangerously near the upper edge of it and likely to be crushed by the descending beam. When Walker dies became chipped on the cutting edge, it was customary to send them back to the die makers to be repaired. The first step in repairing was to grind out the defect in the cutting edge. This left the die of less than the proper height, which is determined by the distance between the table and the beam of the press and has to be substantially the same for all dies used in the same press. In order to restore the proper height to the die after grinding off, two methods were customarily used. The first consisted of welding a piece around the top of it; the second, of drawing the die out, by heating it about an inch below the upper edge and pounding a groove around it—an adaptation of the familiar method of lengthening an iron bar by heating and pounding. The height of the die having been thus restored, the repairs were completed by paralleling the top and the bottom, and resharpening the edge. The result was that the repaired die had a shallow groove around it at an uncertain distance from the top, made by the round point of the hammer or tool used, and was in other respects substantially the same as when new. If a die which had been so repaired was again injured, it could be again repaired in the same way, in which event it would have two hammered grooves around it, one below the other. This method of repairing Walker dies had been in constant and general use by die makers in this country for many years before the plaintiff's invention, and has continued to the present time.

The grooves in the repaired die did in fact make the die less likely to slip in the operative's hand and, by one who noticed their distance from the top of the die, might have been used as safety guides or devices to prevent his fingers from straying over the top and being

crushed by the beam. But comparatively few of the dies in each set were likely to have been so repaired, and on these the groove or grooves were not at any regular and uniform distance from the top edge. And it never seems to have occurred, either to the makers of the dies or to the users of them, to put grooves in old dies or in new ones for the purpose of giving a better holding surface on the die, or of indicating to the workman where his fingers were with reference to the top edge of the die; nor does it seem ever to have occurred to anybody before the patentees to take advantage of the truss principle, by constructing a die with grooves and projecting ridges or ribs extending around it. By such a construction a die can be made of less weight than the ordinary Walker die, and equally stiff.

In this state of the art the Gimson improvement was made, which consisted essentially of manufacturing dies from strips having ridges and grooves on their outer surfaces. The corrugations were regularly placed and were alike on all dies in a set. By this method a die could be constructed which was as stiff as the Walker die and of less weight, and was safer to use, because the corrugations on the outside of it gave a better hold, and, being uniform on all dies in a set, came to indicate to the operative where his fingers were with reference to the top of the die, and thereby diminished the danger of the fingers or hand being allowed to stray over the upper edge of the die and be caught by the descending beam. In each of the plaintiff's dies, which were put in as exhibits, there are three grooves. The ridges or ribs on the repaired dies do not seem to be so sharply worked out as those on the new dies, and the grooves are shallower; but there is no testimony that these differences are significant.

The plaintiff's patent says:

"Our invention refers to improvements in or relating to knives, cutters, or dieing-out instruments or tools." Line 14.

* * * * * * * * * *

"The objects of our improvements are to reduce the weight * * * of material, and increase the strength of such instruments or tools * * * and to greatly facilitate the holding or gripping of such * * * dies." Line 22.

* * * * * * * * * *

"In carrying out this invention the steel for forming such knives, cutters, or dies *A* is prepared by such means as rolling or pressing the corrugations or indentations *D* either in the direction of its length, as shown, or otherwise, or any combination of bars and ribs as may be best suited to the material. Said ribs may be on the outer or both walls of the material, if desired. It is well known that a die or cutting instrument in the form of a sole, with a beveled cutting edge, has been long employed, but in such knives as now made from wide strips of steel and known in the trade as 'deep knives' when placed under the press cannot be manipulated by the operator. So by making one or more ribs or corrugations in the material this end is attained." Line 43.

The single claim of the patent is:

"A die, cutter, or dieing or cutting out instrument *A* having ribs, corrugations or indentations *B* on its outer walls, and its cutting edge in line with the interior walls thereof, substantially as described."

As the cutting edge of the Walker die was "in line with the interior wall thereof," it is apparent that this single claim of the patent in suit can be exactly and precisely read upon a Walker die which had been repaired by being drawn out and grooved in the way described. "Corrugations or indentations" (line 64) on the outer walls of a die were old in repaired dies and were capable of being used in such dies for the same purpose as the corrugations or grooves in new dies. The patentees were not the first to construct the die described in the claim.

The defendants are repairing dies in the manner above described, and are also manufacturing and intend to continue to manufacture new dies which have three grooves substantially similar in position and in character to those on the plaintiff's die. Infringement is conceded. The defense is that the patent is invalid for lack of novelty.

It is not contended for the plaintiff that the patent is entitled to a construction which includes repaired Walker dies (which are admittedly old), whether the corrugations are made by hammering around the die, or are rolled into the heated die by a rounded roll. The plaintiff has not pointed out wherein such repaired dies differ essentially from the plaintiff's new ones, nor how the claim can be construed so as to cover new dies made by the defendants and not to cover the repaired ones, unless perhaps by limiting it to dies made from corrugated stock and having a plurality of grooves or ridges. I doubt the soundness of such limitations. As to the plurality of grooves or ridges, the specifications of the patent plainly state that the object of the invention may be attained "by making one or more ribs or corrugations" (line 43); moreover, when occasion required, Walker dies were customarily repaired by inserting a second groove. As to the other saving limitation suggested: The patent is plainly not for a process or method of constructing corrugated dies, but for the corrugated die itself; to adopt this limitation is not to construe this patent, but to issue a new one.

What the patentees really did was to point out that grooves and ridges on the outer surfaces of dies might, if similarly placed on all dies in a set, so that the workmen's fingers became accustomed to them, be used as a safety device, and might also be used for lightening the weight of the die without impairing its stiffness. This was pointing out a use or function of such grooves and ridges which had theretofore escaped notice. In carrying out this idea, they naturally made their dies of corrugated instead of plain stock. It was a valuable suggestion, but I do not think it constituted a patentable invention as claimed in this patent. Marshall v. Packard (C. C.) 51 Fed. 755; National F. B. & P. Co. v. Stecher Lith. Co. (C. C.) 77 Fed. 828.

These considerations are sufficient to dispose of the case, without going into the prior art as to new dies as disclosed in the prior patents which were put in evidence.

Decree for defendants.

TREIBACHER CHEMISCHE WERKE GESELLSCHAFT MIT BESCHRANKTER HAFTUNG v. WOLF SAFETY LAMP CO. OF AMERICA, Inc.

(District Court, S. D. New York. May 29, 1914.)

No. 110.

PATENTS (§ 324*)—SUIT FOR INFRINGEMENT—DECREE—EFFECT OF APPEAL.
The effect of a decree sustaining a patent, as an adjudication, is not suspended by the taking of an appeal therefrom.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 600-606; Dec. Dig. § 324.*]

In Equity. Suit by the Treibacher Chemische Werke Gesellschaft mit Beschrankter Haftung against the Wolf Safety Lamp Company of America, Incorporated. On motion for preliminary injunction. Motion granted.

See, also, 214 Fed. 414.

James Hamilton, of New York City, for plaintiff.
Briesen & Knauth, of New York City, for defendant.

WARD, Circuit Judge. As between the complainant and defendant, I think the complainant entitled to an injunction. The defendant is not a manufacturer of these metal pins, and its plant will not be shut down in the meantime. The public welfare was the sole consideration which moved me to partially suspend the injunction, and I was largely influenced by the statements contained in the defendant's 1914 catalogue as to the extent to which the suspension should go. The defendant was given an opportunity to explain these statements, but I am not satisfied with the explanation made. The defendant was not comparing its parafine igniter with the complainant's metal igniter. On the contrary, it advised the public in unmistakable terms that its parafine igniter was "the best of all existing igniters, being the safest in construction and the safest for lighting a lamp in the presence of gas." Furthermore, it invited its customers in ordering lamps to state whether they should be equipped "with our paraffine friction igniter, Mod. 1914, or with our metal spark igniter, Mod. 1914."

In view of the defendant's insistence that it is the practice in this district not to treat a decree sustaining a patent as an adjudication pending appeal, I have inquired of every judge at present in the district and find them to be unanimously of a contrary opinion. The effect of an appeal in a somewhat analogous case was considered in Straus v. American Publishers' Association, 201 Fed. 306, 119 C. C. A. 544.

For these reasons, I have signed the order submitted by the complainant.

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

THE I. F. CHAPMAN.

(District Court, D. Rhode Island. June 25, 1914.)

No. 1292.

SHIPPING (§ 84*)—LIABILITY FOR INJURY TO STEVEDORE—DEFECTIVE EQUIPMENT.

Libelant, when going down into the hold of a coal barge in the performance of his duty as timekeeper of stevedores engaged in discharging, fell and was injured by reason of the breaking of a rung of the stanchion ladder, which was a part of the permanent equipment of the vessel. While portable ladders were furnished by the barge, there was evidence that stevedores customarily used the stanchion ladders with the knowledge of the master. The rungs of such ladder had not been recently inspected, and some of them were broken off, and there was evidence tending to show that the one which was seized by libelant was bent and broke at an old fracture. *Held*, that under the circumstances it was the duty of the barge to keep the ladder in reasonable repair, and that it was liable for the injury.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 342, 349–351; Dec. Dig. § 84.*]

In Admiralty. Suit by Jacob Kazarian against the barge I. F. Chapman. Decree for libelant.

Frank Healy, of Providence, R. I., for libelant.
J. J. Macklin, of New York City, for claimant.

BROWN, District Judge. This is a libel in rem by Kazarian for personal injuries sustained on the night of December 26, 1912, by falling down the after-hatch of the coal barge "I. F. Chapman," which was being discharged by the consignee, the New York, New Haven & Hartford Railroad, at the Wilkesbarre Pier in the Providence river. The stevedores were employed by the railroad.

Kazarian had worked as a coal shoveler at the Wilkesbarre Pier for about 11 years, but on the night of the accident, and for about three months previous, had been employed by the railroad as timekeeper.

The night gang went to work at 7 o'clock p. m., and were working in the lower hold. Kazarian testified that he was going below to take the time of the men; that he was attempting to descend by a stanchion ladder, consisting of a stanchion with wrought-iron rungs driven through it at intervals; that one of these rungs which he had grasped with his hand broke or pulled out of place, precipitating him into the lower hold, a distance of some 15 feet.

This stanchion ladder was a part of the permanent equipment of the vessel. From the testimony of the claimant it appears that these iron rungs were put into the ship when she was converted from a full-rigged sailing ship into a coal barge. They appear to have been originally of proper construction for the purpose.

The claimant contends that the stanchion ladders, which were provided not only in the after-hatch but in the other hatches, were for the use only of the crew, who were expert in using them, and that for the use of the stevedores proper and sufficient portable ladders were

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

provided, which were not used by the men discharging the barge merely because they would not take the necessary trouble to put them in the hold and use them. The testimony shows that the barge was provided by the owners with portable ladders suitable for use. There was a conflict of testimony as to whether the use of these ladders had been expressly refused to the men, and whether they were available for use; witnesses for the libelant testifying to a request and refusal of the use of ladders, and witnesses for the claimant denying such request and refusal. Upon the whole testimony, I am not satisfied that upon this particular night the master or other officer in charge of the Chapman had refused an express request for the use of a portable ladder. The testimony, however, shows a very general practice of the longshoremen to use the stanchion ladders in getting in and out of the hold of this and other barges unloaded at this pier. The Chapman had been discharging at this pier from January, 1908, and had been discharged 44 times.

I am of the opinion that the evidence shows the master of this barge to have had full knowledge of the practice of the longshoremen. I find that stanchion ladders of this description are a usual part of the permanent equipment of coal barges, customarily used by the longshoremen in entering and leaving the hold. It follows that the duty rested upon the owners to take reasonable care that they should be in proper condition for such use as might be made of them, not only by members of the crew, but by the coal shovelers. The barge was equipped some five or six years before the accident with a suitable stanchion ladder. From an inspection made after the accident, it appears that the ladder had been subject to rough usage; that some of the rungs had been broken off or removed; and that one of them, opposite the place from which it is claimed by the libelant that the rung which was produced in court fell when grasped by Kazarian, was knocked upwards at an angle of about 45 degrees with the face of the stanchion. It also appears that some railroad spikes had been inserted as handholds in place of portions of rungs which had been broken off.

The condition of the ladder as testified to indicates a series of injuries received at different times rather than recent injuries received upon her last trip. The witness Savage testified to a general overhauling of the barge about six months before the accident, and said that the rungs were then in place. There was no evidence that any repairs were made to the stanchion ladder at this time, or that since that time there had been any inspection or repair. It is true that Capt. Beers testified that he used to go down to the hold about every trip, and sounded them with his foot before going down; but his testimony is insufficient to show any proper inspection.

At the trial was produced a piece of iron similar to that used for the rungs, which witnesses testified was found in the hold near where Kazarian fell, immediately after the accident. This appeared to have been bent and broken by a blow or blows of great violence. The exhibit was bent and showed what appeared to be an old fracture.

While there is room for some doubt as to whether the iron produced is in fact a portion of a handhold which broke near the face of the

stanchion, yet from the testimony of witnesses to finding immediately after the accident, and at the place where Kazarian fell, of this piece of iron, which corresponds in general appearance to other rungs on the barge, and from the evidence that a handhold was missing opposite the portion of the rung which had been knocked up at an angle of 45 degrees, I find that the evidence preponderates in favor of the complainant's claim that this is in fact a portion of a rung in which there was an old break, which caused the rung to give way, resulting in the accident. If this exhibit is not in fact a part of the rung whose opposite end remained in the stanchion, it would rather seem that it was within the power of the claimant to have demonstrated that fact.

The claimant calls attention to the fact that when the barge is loaded the stanchion ladder is covered with coal, and that there is no opportunity for inspection until after the coal is removed, and this only after the vessel is in the hands of the stevedores who discharge her. The injury to the rung, however, is such as could hardly have been received on the voyage. There is no evidence that it is such as would likely have been received in loading, and if received upon the occasion of a former discharge it should have been discoverable.

According to the weight of the evidence, the break in the iron which caused the handhold to give way was an old and rusty break. That it occurred on the last trip, or so recently that there was no opportunity to discover it, is much less probable than that it occurred at some time or times during the periods occupied by her 43 previous trips, since her conversion into a coal barge.

That in addition to the stanchion ladder there were furnished portable ladders, which might have been used had the foreman of the stevedores seen fit to use them, does not seem a sufficient defense in this case. Reasonable care depends upon a reasonable apprehension of danger. There was ground for a reasonable apprehension of danger, not only to the crew, but to longshoremen, in view of the evidence from credible witnesses of the general practice of using these stanchion ladders by longshoremen as well as by crew. The General Knox (D. C.) 180 Fed. 489.

The question of liability is determined in favor of the libelant, and the case may stand for further hearing upon the amount of damages.

In re O'BRIEN.

(District Court, D. New Jersey. June 3, 1914.)

1. BANKRUPTCY (§ 184*)—PROPERTY HELD UNDER CONDITIONAL SALE CONTRACT —RIGHT TO RECLAIM.

Under the statute of New Jersey which provided that a conditional sale contract or bill of sale shall be absolutely void unless recorded as against judgment creditors of the purchaser, and Bankr. Act July 1, 1898, c. 541, § 47a (2) 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), which vests a trustee as to all property coming into the custody of the court with all the rights, remedies, and powers of a judgment cred-

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

itor, property in possession of a bankrupt under such an unrecorded conditional sale contract passes to his trustee and cannot be reclaimed by the seller.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275–277; Dec. Dig. § 184.*]

2. BANKRUPTCY (§ 196*)—JUDGMENT LIENS OBTAINED WITHIN FOUR MONTHS' PERIOD.

2 Comp. St. N. J. 1910, p. 2245, § 10, relating to exemptions, which contains a proviso that no property shall be exempt from sale on an execution for its purchase price, does not confer any rights on an unpaid vendor as against other judgment creditors, but only as against the debtor, and a judgment and levy obtained by him within four months prior to the bankruptcy of the purchaser are avoided by the adjudication the same as those of any other creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 306–316; Dec. Dig. § 196.*]

In Bankruptcy. In the matter of John O'Brien, Jr., bankrupt. On petition of the Æolian Company for the reclamation of certain property. Petition denied.

William Newcorn, of Plainfield, N. J., for petitioner.

Walter L. Hetfield, Jr., of Plainfield, N. J., for trustee.

HAIGHT, District Judge. [1] The petitioner claims title to a certain piano and a piano stool, which were taken possession of by the trustee as the property of the bankrupt. The referee has decided adversely to the petitioner's claim. The property in question was delivered by the petitioner to the bankrupt under a conditional bill of sale, which provided that the title should remain in the petitioner until the property had been paid for. At the time of the adjudication only a small amount of the purchase price had been paid. The petitioner had, a few days before the petition in bankruptcy was filed, recovered a judgment against the bankrupt and levied on the property in question. The conditional bill of sale was never recorded. The laws of New Jersey provide that every such instrument, under circumstances such as exist in this case, unless recorded, shall be absolutely void as against judgment creditors of the person contracting to buy (P. L. 1889, p. 421, as amended by P. L. 1895, p. 302). By section 47a (2) of the Bankruptcy Act of 1898, as amended by the Act of June 25, 1910 (36 Stat. at L. 840), trustees, as to the property in the custody of the bankruptcy court, are vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon. As the property in question was in the possession of the bankrupt at the time of the adjudication and was taken by the trustee, it was in the custody of the bankruptcy court. Whitney v. Wenman, 198 U. S. 539, 25 Sup. Ct. 778, 49 L. Ed. 1157. The effect of the amendment of 1910 is to place the trustee, so far as his right to attack the validity of the instrument in question is concerned, in the same position as a judgment creditor and to invest him with the same rights. As the conditional bill of sale would, under the state law, be void as against a judgment creditor, it is likewise void as against the trustee. It seems unnecessary to cite any authorities in support of this proposition.

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

Counsel for the petitioner in his brief, and the referee in his certificate, seem to have assumed that the validity of the instrument is governed entirely by section 71 of the New Jersey Act respecting conveyances (Revision of 1898, P. L. 1898, p. 699; 2 Comp. Stats. p. 1561). Under the act of 1889, as amended by the act of 1895, an unrecorded conditional bill of sale is void as against any judgment creditor, whereas under the act of 1898 it is void only as against judgment creditors "not having notice thereof." The difference, however, is immaterial, because the Supreme Court of New Jersey has held that the act of 1889 was not repealed or affected by the act of 1898, and that the former act is still in force. Lauter & Co. v. O'Toole, 77 N. J. Law, 29, 71 Atl. 288; Lauter & Co. v. Isenreath, 77 N. J. Law, 323, 72 Atl. 56. It is further argued that as the petitioner is a judgment creditor, having a lien upon the property in question by virtue of an execution and levy, and as the trustee's rights, so far as avoiding the conditional bill of sale is concerned, are only those of a judgment creditor having a lien, and as the petitioner's lien is prior in point of time to that of the trustee, that its rights are superior to those of the trustee. One of the fallacies of this contention is that, as petitioner's judgment was obtained and levy made within four months prior to the filing of the petition in bankruptcy and while the bankrupt was insolvent, the judgment and levy were null and void and the property attached was released from the same. Bankruptcy Act of 1898, § 67f.

[2] It is also contended that the petitioner's lien is not such as is affected by section 67f of the Bankruptcy Act, as the judgment, execution, and levy merely perfected a valid lien which the petitioner already had, such as was held by the Supreme Court in Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, not to be affected. This contention is based on section 10 of the New Jersey Act concerning executions (2 Comp. Stats. p. 2245). That section provides for an exemption from sale, under execution, of property to the value of $200 of any judgment creditor having a family residing in the state of New Jersey. It contains the following proviso:

> "That nothing herein contained shall be deemed or held to protect from sale, under execution or other process, any goods, chattels or property, for the purchase whereof the debt or demand for which the judgment, on which such execution or process was issued, shall have been contracted."

This proviso, the petitioner contends, gave it an inchoate lien upon the property in question which became perfected by the recovery of the judgment and the issuing of the execution. I cannot so construe it. It was not intended to confer any rights on the unpaid vendor, as against other judgment creditors of the vendee. Its application is confined solely to the unpaid vendor and the vendee. Its manifest purpose is to prevent one who has purchased goods and not paid for them from perpetrating a fraud upon the seller. Were it not for this proviso, an unscrupulous person could purchase goods, fail to pay for them, and when sued for the purchase price prevent satisfaction of the judgment by claiming an exemption of the very goods, for the purchase price of which the judgment had been recovered. It was, I think,

to avoid such a possibility that the proviso was inserted in the act in question.

The case cited by counsel for petitioner in support of this latter contention (Neary v. Hinckley, 4 N. J. Law J. 121) not only fails to sustain it, but, as far as I can see, in no way touches it.

The order of the referee will be affirmed.

CROPSEY v. SUN PRINTING & PUBLISHING ASS'N.

(District Court, D. New Jersey. July 9, 1914.)

1. REMOVAL OF CAUSES (§ 84*)—NOTICE—SUFFICIENCY.

A notice of intent to file a removal petition served March 28, 1914, and stating that such petition and bond would be filed "on or before" April 2, 1914, was not fatally defective on the ground that the date of filing was uncertain.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 164; Dec. Dig. § 84.*]

2. REMOVAL OF CAUSES (§ 89*)—REMOVAL PROCEEDINGS—PETITION AND BOND—SUFFICIENCY—DETERMINATION BY STATE COURT.

Since defendant is entitled to file a petition and bond for removal of a cause regardless of any objection that plaintiff might interpose in the state court and the failure of that court to order removal will not prevent the federal court from acquiring jurisdiction, whether the petition and bond comply with the removal act is not for the final determination of the state court.

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

3. REMOVAL OF CAUSES (§ 84*)—REMOVAL PROCEEDINGS—NOTICE.

While the requirement of Jud. Code, § 29 (Act March 3, 1911, c. 231, 36 Stat. 1095 [U. S. Comp. St. Supp. 1911, p. 142]), for the service of notice of intent to file a removal petition and bond is mandatory and jurisdictional in a limited sense, such requirement does not change the respective powers of the state and federal courts with reference to jurisdiction to ultimately determine the validity of removal proceedings.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 164; Dec. Dig. § 84.*]

4. REMOVAL OF CAUSES (§ 102*)—PROCEEDINGS—ATTACK.

The sufficiency of removal proceedings may be attacked in the federal court on any ground available in the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 218–220, 223, 224; Dec. Dig. § 102.*]

5. REMOVAL OF CAUSES (§ 103*) — REMOVAL PROCEEDINGS — IRREGULARITIES — REMAND.

Where a cause has been removed and is removable under the removal act, it will not be remanded for irregularities which can be remedied and which have worked no injury to the adverse party.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 221; Dec. Dig. § 103.*]

At Law. Action by Eva P. Cropsey against the Sun Printing & Publishing Association. On motion to remand the case to the state court. Denied.

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

Herbert Clark Gilson, of Jersey City, N. J., for plaintiff.
Lindabury, Depue & Faulks, of Newark, N. J., for defendant.

RELLSTAB, District Judge. The only ground of the motion is that the notice of intended removal given is insufficient.

Section 29 of the Judicial Code requires that written notice of the petition and bond for removal be given the adverse party prior to filing the same. The petition and bond for removal were filed on March 30, 1914. The notice was served on March 28, 1914, and stated that such petition and bond would be filed "on or before the 2d day of April, 1914." The insufficiency asserted is that no definite day or time was named when such paper would be filed.

The notice was within the letter of the law. Was it within its purpose?

[1] The plaintiff does not disclose, and it is not apparent, what better purpose would have been served, or what greater advantage she would have gained, had the notice stated the exact time when such petition and bond were to be filed. If, as suggested, the legislative purpose was to "give the adverse party an opportunity to be heard as to whether the petition and bond were 'requisite,'" that opportunity was as available to the plaintiff by the notice given as if the exact time when such petition and bond were to be filed had been stated.

[2, 3] Whether the petition and bond comply with the federal statute is not for final determination by the state court. The defendant has the right to file the petition and bond, regardless of any objection the plaintiff might interpose, and the failure of the state court to order a removal would in no way prevent the cause from getting into the federal court. Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870. Under the old procedure, all questions as to defects or irregularities appearing on the face of the proceedings to remove were ultimately for the determination of the federal court; and the present requirement that a notice of such intended removal be given, while mandatory (United States v. Sessions, 205 Fed. [C. C. A. 6] 502, 123 C. C. A. 570, and Wanner v. Bissinger & Co. [D. C.] 210 Fed. 96), and perhaps jurisdictional in a limited sense (Goins v. Southern Pac. Co. [D. C.] 198 Fed. 432), in no wise changed the respective powers of the state and federal courts in that regard (Goins v. Southern Pac. Co., supra, and cases cited).

[4] Any objection that the plaintiff could have made to the papers while in the state court she can make here. She has therefore lost no opportunity "to be heard as to whether the petition and bond were 'requisite.'" She can make such objections here, and here only they may be finally determined, regardless of any disposition the state court might make in the premises.

[5] Where a cause has been removed and falls within the act of Congress, it will not be remanded for irregularities which can be remedied and have worked no injury to the adverse party. Woolridge v. McKenna (C. C.) 8 Fed. 650, 667.

The main, if not the only, purpose of the statutory requirement as to notice, is that the plaintiff be seasonably advised of the defendant's

intention to remove the cause. This the notice under consideration did. In Chase v. Erhardt (D. C.) 198 Fed. 305, the furnishing of plaintiff's counsel with a copy of the petition for removal was deemed sufficient notice under this statute. In Hansford v. Stone-Ordean-Wells Co. (D. C.) 201 Fed. 185, the notice, accompanied by copies of the removal papers to be filed, was served on the day that such papers were filed. This was also held sufficient.

No substantial right of the plaintiff as a suitor in the state court was or could have been invaded by the filing of the removal papers on a day between the date of serving such notice and that specifically named therein. In the present case, the notice given is not disserving of the statutory requirement, and the motion to remand is denied.

In re BALSIER.

(District Court, W. D. Pennsylvania. June 25, 1914.)

BANKRUPTCY (§ 345*)—JUDGMENT LIEN—PROCEEDS OF FIRE INSURANCE POLICY.

A judgment creditor of a bankrupt, having a lien on his real estate, has no better claim than any other creditor to the proceeds of a fire insurance policy taken by the bankrupt for his own benefit, since the money does not arise from the real estate but from the personal contract of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. § 345.*]

In Bankruptcy. In the matter of Frank Balsier, bankrupt. On review of order of referee disallowing claim of the Pittsburgh Provision & Packing Company for preference. Order confirmed.

The money payable as the proceeds of a policy of insurance taken out by the bankrupt prior to bankruptcy for his own benefit does not arise from real estate, but from a personal contract, and, upon distribution, will be awarded to the trustee in bankruptcy, and not to the judgment creditor of the bankrupt. The judgment creditor of the bankrupt, claiming a preference by reason of its lien on the real estate of the bankrupt, has no more title to the proceeds of the insurance policy than any other creditor.

J. Wallace Paul and George A. Foster, both of Johnstown, Pa., for petitioner.

The lien creditor is entitled to the proceeds of the insurance. Nichol's Appeal, 128 Pa. 428, 18 Atl. 333, 5 L. R. A. 597; O'Brien's Estate, 19 Pa. Co. Ct. R. 467.

Thomas H. Hasson, of Pittsburgh, Pa., and F. C. Sharbaugh, of Edensburgh, Pa., for trustee.

A claim on the insurance money can arise only out of a contract, and one who has a lien only on the insured property has no claim to the insurance money. 19 Cyc. 887; 28 Cent. Dig. tit. "Insurance," § 1439; Mosser v. Donaldson, 7 Sadler (Pa.) 277, 10 Atl. 766; Columbia Insurance Co. v. Lawrence, 35 U. S. (10 Pet.) 507, 9 L. Ed. 512; Ridley v. Ennis, 70 Ala. 463; Vandegraaff v. Medlock, 3 Port. (Ala.) 389, 29 Am. Dec. 256; Carter v. Rockett, 8 Paige (N. Y.) 437; Beach on the Law of Insurance, vol. 2, p. 581, § 1117; Farmers' Loan & Trust Co. v. Penn Plate Glass Co., 186 U. S. 434, 22 Sup. Ct. 842, 46 L. Ed. 1234.

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

ORR, District Judge. This matter comes before the court upon a petition to review the action of the referee in disallowing the claim of the Pittsburgh Provision & Packing Company, creditor, as a preferred claim, and upon exceptions to the action of the referee.

The question is very simple. The petitioner had been a judgment creditor of the bankrupt for some years, when a fire occurred, destroying a building owned by the bankrupt and situate on land subject to the lien of petitioner's judgment. The petitioning creditor, after the fire, issued a writ of attachment execution upon its judgment and summoned the insurance company as garnishee, thereby trying to establish an equitable assignment of the proceeds of the insurance policy for its benefit as a lien creditor. Within four months after the issuance of such attachment execution, proceedings in bankruptcy were entered against the owner of the insured premises and the defendant in the judgment. The proceedings upon the execution attachment were stayed as giving an unlawful preference to the judgment creditor. The proceeds of the insurance policy were paid to the trustee in bankruptcy. The petitioner now seeks to have its claim allowed in full out of the proceeds of insurance, invoking what petitioner believes some equitable principle whereby moneys arising from real estate shall be applied in reduction of the liens thereon. Unfortunately for the petitioner, the money in this case did not arise from the real estate, but from a personal contract entered into between the bankrupt and the insurance company. It cannot be pretended that a judgment creditor stands in any better position than a mortgagee of real estate. We find this language used by Mr. Justice Story in delivering the opinion of the Supreme Court in Columbia Insurance Co. v. Lawrence, 10 Pet. 507, 512, (9 L. Ed. 512):

"We know of no principle of law or of equity by which a mortgagee has a right to claim the benefit of a policy underwritten for the mortgagor on the mortgaged property, in case of a loss by fire. It is not attached, or an incident to his mortgage. It is strictly a personal contract for the benefit of the mortgagor; to which the mortgagee has no more title than any other creditor."

That such is still the law, there can be no doubt. See Farmers' Loan & Trust Company v. Penn Plate Glass Co., 186 U. S. 434, 22 Sup. Ct. 842, 46 L. Ed. 1234.

The referee was clearly right in his conclusions.

UNITED STATES v. WUPPERMAN et al.

(District Court, N. D. New York. June 5, 1914.)

1. CONSPIRACY (§ 43*)—CONSPIRACY TO COMMIT OFFENSE AGAINST UNITED STATES—INDICTMENT.

The crime of conspiracy to commit an offense against the United States within Cr. Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [U. S. Comp. St. Supp. 1911, p. 1600]) § 37, is sufficiently charged if it be stated that two or more persons named agreed together to commit some act declared to be a crime by some statute of the United States, and it is also charged that

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

one or more of such persons did an act to carry out the object of such conspiracy. It is not necessary that the overt act or acts charged must appear on their face to have been acts which necessarily would aid in the commission of the crime, nor is it necessary to point out how it would or was intended to aid.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84-99; Dec. Dig. § 43.*]

2. POST OFFICE (§ 48*)—USING MAILS TO PROMOTE FRAUDS—INDICTMENT.

In charging the use of the mails to execute a scheme to defraud in violation of Cr. Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [U. S. Comp. St. Supp. 1911, p. 1653]) § 215, it must be alleged that a letter, card, or package was deposited in the mail for the purpose of executing such scheme or attempting to do so, and the letter should be set out if possible, or sufficiently identified and described, but it is not necessary to allege just how the letter would or was intended to aid in executing the scheme. The indictment should set forth a scheme which if executed would defraud some one or obtain money or property by means of the pretenses alleged which must be alleged to have been false and fraudulent.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. § 48.*]

Criminal prosecution by the United States against Adolph E. Wupperman, Max M. Hart, Andrew S. Work, and Frank W. Fowler. On demurrer to indictment. Overruled.

The defendants are jointly indicted for conspiring to commit an offense against the United States, in that, having devised or intending to devise a scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises to be made effectual or carried out by the use of the mails or post office department of the United States, they committed certain overt acts, charged in the indictment to effect the object of the said conspiracy. The indictment also charges in several counts the commission of the offense of actually using the mails of the United States on different dates and occasions, by depositing letters, etc., in the mail, to carry out or execute a scheme or artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, etc. See sections 215 and 37 of the Criminal Code of the United States. The scheme or artifice is fully set out in detail. Defendant Wupperman demurs.

John H. Gleason, U. S. Atty., of Albany, N. Y., and T. H. Dowd, Asst. U. S. Atty., of Cortland, N. Y., for the United States.

Arthur Furber and Chas. E. Le Barbier, both of New York City, for defendant Wupperman.

RAY, District Judge (after stating the facts as above). [1] The crime of "conspiracy" is sufficiently charged if it be stated that two or more persons, naming them, conspired (that is, agreed together) to commit some offense against the United States (that is, commit some act declared to be a crime by some statute of the United States); and it is also charged that one or more of such parties did an act to effect (that is, carry out) the object of such conspiracy. The offense to be committed must be described with sufficient particularity, but I do not understand that the overt act or acts charged must appear on their face to have been acts which necessarily would aid in the commission of the crime charged. Some act must have been done by one or more to

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

effect the object of the conspiracy, but in and of itself it may have been an innocent act and one entirely disconnected from the crime itself.

And it was not necessary to point out in this indictment why or how the doing of the overt act would or did, or was intended to, aid in effecting, or carrying out, the object of the conspiracy. It is sufficient that the act done was done to aid in effecting the object of the conspiracy; was so intended, even if the doing of such act, instead of actually aiding to effect the object of the conspiracy, defeated the conspirators and actually operated to prevent the commission of the crime.

And in charging a conspiracy to commit a crime against the United States and overt acts done to effect the object of such conspiracy it is not necessary to allege that the crime which the parties conspired to commit was actually committed, or that any act in and of itself evil was done in aid of effecting the object of such conspiracy.

[2] And when we come to the counts alleging the use of the mails to execute a scheme or an artifice to defraud or obtain money or property by false or fraudulent pretenses, representations, statements, or promises, it must be alleged that a letter or postal card, etc., was deposited in the mail for the purpose of executing such scheme or artifice, or attempting so to do, and the letter, etc., so deposited in the mail should be set out if possible, or sufficiently identified and described; but it is not necessary to go to the extent of alleging just how the letter or package deposited in the mail would or was intended to aid in executing the scheme or artifice. In alleging the scheme or artifice the indictment should set forth a scheme, artifice, plot, or plan, which, if executed, would defraud some one, or obtain money or property by means of the pretenses, etc., alleged, which must be alleged to have been false or fraudulent.

The gist of the offense, under section 215 of the Criminal Code, is the placing or causing to be placed in the mails of the United States any letter, postal card, package, writing, circular, pamphlet, or advertisement for the purpose of executing or attempting to execute the "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises," either already devised or intended to be devised.

If the defendant A. has devised his scheme to defraud and has B. in mind as the victim and writes B. to come to his home to dinner and deposits the letter in the mail, the purpose being to say or learn something at such dinner, what being entirely uncertain, which will aid A. to execute his scheme, the government is not bound to guess or speculate as to what would or was to be said at such dinner. It is all-sufficient to say, having charged the scheme, that A. "for the purpose of executing such scheme or artifice, or attempting so to do, placed the letter describing it, in the mails." The fact that it was mailed in aid of the execution of the scheme would be proved on the trial by showing a variety of facts, acts, and declarations perhaps, but it would be unnecessary to allege these in the indictment.

The demurrer is overruled.

MUTUAL FILM CO. v. INDUSTRIAL COMMISSION OF OHIO et al.

MUTUAL FILM CORPORATION v. SAME.

(District Court, N. D. Ohio, E. D. April 2, 1914.)

Nos. 205, 206.

1. COURTS (§ 281*)—JURISDICTION OF FEDERAL COURT—FEDERAL QUESTIONS.
The fact that federal questions are raised by a bill is sufficient to give a federal court jurisdiction, although such questions are decided adversely to complainant or the court finding it unnecessary to pass upon them decides the case on state questions alone.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820–825; Dec. Dig. § 281.*]

2. THEATERS AND SHOWS (§ 2*)—REGULATION OF MOVING PICTURE EXHIBITIONS—POWER OF STATE.
It is within the police powers of a state to establish a censorship of moving picture films exhibited in the state, and, if the measure enacted has reasonable relation to the regulation of such exhibitions, neither the federal nor state courts have power to adjudge it invalid.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 2; Dec. Dig. § 2.*]

3. STATUTES (§ 58*)—CONSTITUTIONALITY—REVIEW BY COURTS.
The courts are without power to adjudge a state statute unconstitutional where the question of its constitutionality is at all doubtful.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 51, 53, 54, 196; Dec. Dig. § 58.*]

4. THEATERS AND SHOWS (§ 2*)—STATE REGULATION—CENSORSHIP OF MOVING PICTURE FILMS.
Act Ohio May 3, 1913 (103 Ohio Laws, pp. 399–401), which provides for a board of censors of moving picture films to which all films must be submitted before being publicly exhibited in the state, and prohibiting the exhibition of any film not bearing the stamp of approval of such board, is not in violation of the provisions of either the federal or state Constitution safeguarding the freedom of the press, but is in effect a license regulation and within the police power of the state.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 2; Dec. Dig. § 2.*]

5. THEATERS AND SHOWS (§ 2*)—STATE REGULATION—CENSORSHIP OF MOVING PICTURE FILMS.
Such act relates only to films after they have been removed from the cases in which they are shipped and placed on reels to be publicly exhibited and displayed in the state, and as applied to films shipped from outside of the state is not in violation of the commerce clause of the Constitution, nor is it invalid as an inspection law under article 1, § 10, of the federal Constitution, because a fee of $1 for each reel of film examined, not exceeding a certain length, is required, to be paid into the treasury of the state, nor as a delegation of legislative power because discretion is vested in the board to approve generally such films as are in their judgment of a "moral, educational or amusing and harmless character."

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 2; Dec. Dig. § 2.*]

In Equity. Suits by the Mutual Film Company and by the Mutual Film Corporation against the Industrial Commission of Ohio and Wallace D. Yaple, Matthew B. Hammond, and Thomas J. Duffy, as mem-

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

bers of such commission, and the Board of Censors of Moving Picture Films of the State of Ohio, and J. W. Maddox, H. E. Vestal, and Maude Murray Miller, as members of such board. On motion for preliminary injunction. Denied.

Squire, Sanders & Dempsey, of Cleveland, Ohio, Wm. B. Sanders and Harold T. Clark, both of Cleveland, Ohio, and Walter N. Seligsberg, of New York City, for complainants.

Timothy S. Hogan, Atty. Gen., and James S. Bolger, Asst. Atty. Gen., both of Columbus, Ohio, and Robert M. Morgan, of Cleveland, Ohio, for defendants.

Before WARRINGTON, Circuit Judge, and KILLITS and DAY, District Judges.

PER CURIAM. The ultimate question in these cases is whether a state has power to regulate the public exhibition of motion pictures. The statement of the question would seem to present a simple problem, and yet it is earnestly contended that the General Assembly of Ohio has through its enactment violated grave constitutional guaranties. The contention is not that persons displaying improper pictures may not be punished after the fact; but it is that the display itself cannot be prevented. This is not a denial of the existence of evil practices growing out of this class of public exhibitions; it is a challenge of the power of the state to avoid such practices through the exercise of any measures of prevention. The issue then is one of remedy, and its nature is seen in the difference between the avoidance and the practical endurance of such evils as may exist.

The complainant in each case is a corporation, one having been organized under the laws of Ohio and the other under the laws of Virginia, and each is engaged in business as a distributor of moving picture films. The defendants in each case are the same; the Industrial Commission of Ohio, and the board of censors of motion picture films, with their respective members. The former board was created under an act approved March 18, 1913 (103 Ohio Laws, 95–110), and the latter under an act entitled "An act providing a board to censor motion picture films and prescribing the duties and powers of the same," approved May 3, 1913 (103 Ohio Laws, 399–401). The first act is not directly involved, except a single section to which we shall later have occasion to allude; and the body of the second act is hereinafter set out. The complainants seek to enjoin the enforcement of the second act, and this accounts for the presence of three judges (Judicial Code, § 266; Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]). The bills are in the usual form and substantially alike. They will be sufficiently understood by setting out the substance of their pertinent averments, in connection with our consideration of the objections urged against the validity of the second act.

[1] No question of jurisdiction is presented. Diversity of citizenship in the first case, and the presence of federal questions in both cases, are admitted; and the latter are sufficient to vest the court with jurisdiction, even though it should decide the federal questions adversely to the complainants, or, finding it unnecessary to pass upon such

questions, should decide the cases on state questions alone. Siler v. Louisville & Nashville R. Co., 213 U. S. 175, 191, 29 Sup. Ct. 451, 53 L. Ed. 753; Mich. Cent. R. R. v. Vreeland, 227 U. S. 59, 63, 64, 33 Sup. Ct. 192, 57 L. Ed. 417; Louisville & Nashville R. R. v. Siler (C. C.) 186 Fed. 176, 179; Ohio River & W. Ry. Co. v. Dittey (D. C.) 203 Fed. 537, 589.

[2] The second act, called by counsel the censorship law, has not been passed upon by the Supreme Court of Ohio, nor, so far as we know, by any court of the state. The main strength of the argument in support of the suits is aimed against the constitutional validity of the act; it appears in the margin.[1]

[1] "Section 1. There is created under the authority and supervision of the industrial commission of Ohio a board of censors of motion picture films. * * *

"Sec. 2. * * * Each member of the board of censors shall receive an annual salary of one thousand five hundred dollars per year. Such salary and expenses shall in no case exceed the fees paid to the Ohio board of censors for examination and approval of motion picture films. The members of the board shall be considered as employés of the industrial commission and shall be paid as other employés of such commission are paid. The industrial commission shall appoint such other assistants as may be necessary to carry on the work of the board.

"Sec. 3. It shall be the duty of the board of censors to examine and censor as herein provided, all motion picture films to be publicly exhibited and displayed in the state of Ohio. Such films shall be submitted to the board before they shall be delivered to the exhibitor for exhibition. The board shall charge a fee of one ($1.00) dollar for each reel of film to be censored which does not exceed one thousand (1,000) lineal feet; for any reel of film exceeding one thousand (1,000) lineal feet, the sum of two ($2.00) dollars shall be charged. All moneys so received shall be paid each week into the state treasury to the credit of the general revenue fund.

"Sec. 4. Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board. They shall be stamped or designated in an appropriate manner and consecutively numbered. Before any motion picture film shall be publicly exhibited, there shall be projected upon the screen the words 'Approved by the Ohio Board of Censors,' and the number of the film.

"Sec. 5. The board of censors may work in conjunction with any censor board or boards of legal status of other states as a censor congress and the action of such congress in approving or rejecting films shall be considered as the action of the board and all films passed, approved, stamped and numbered by such congress, when the fees therefor have been paid to the Ohio board, shall be considered approved by such board.

"Sec. 6. Ninety days after this act shall take effect no films may be publicly shown or exhibited within the state of Ohio unless they have been passed and approved by the board or the censor congress and stamped and numbered by such board, or congress, as provided for herein.

"Sec. 7. Any person, firm or corporation who shall publicly exhibit or show any motion picture within the state of Ohio unless it shall have been passed, approved and stamped by the Ohio board of censors or the congress of censors shall upon conviction thereof, be fined not less than twenty-five ($25.00) dollars nor more than three hundred ($300.00) dollars, or imprisoned not less than thirty days nor more than one year, or both, for each offense.

"Sec. 8. Any person in interest being dissatisfied with any order of such board shall have the same rights and remedies as to filing a petition for hearing on the reasonableness and lawfulness of any order of such board or to set aside, vacate or amend any order of such board, as is provided in the case of persons dissatisfied with the orders of the industrial commission."

Examination of the act plainly discloses an exercise of the state's police power; and no one doubts that this power 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. Presumably the General Assembly was convinced that the business of exhibiting motion picture films was attended with such public evils as both to warrant and demand regulation; and, if the measures adopted have reasonable relation to that end, it is not open to the judiciary to interfere. It does not matter that the subject in the main is harmless; it does matter, however, if something is associated with it that is harmful; and it is only when it clearly appears that the enactment has no real or substantial relation to a proper subject, or is unquestionably an invasion of rights secured by the fundamental law, that the courts either of the United States or of the state of Ohio will interfere. Purity Extract Co. v. Lynch, 226 U. S. 192, 201, 202, 33 Sup. Ct. 44, 57 L. Ed. 184; Schmidinger v. City of Chicago, 226 U. S. 578, 587, 588, 33 Sup. Ct. 182, 57 L. Ed. 364; Jacobson v. Massachusetts, 197 U. S. 11, 31, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765; Otis v. Parker, 187 U. S. 606, 609, 23 Sup. Ct. 168, 47 L. Ed. 323; Noble State Bank v. Haskell, 219 U. S. 104, 111, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062; Booth v. Illinois, 184 U. S. 425, 429, 22 Sup. Ct. 425, 46 L. Ed. 623; Board of Health v. Greenville, 86 Ohio St. 1, 20, 23, 98 N. E. 1019, Ann. Cas. 1913D, 52.

[3] This is but recognizing the "principle, long established and vital in our constitutional system, that the courts may not strike down an act of legislation as unconstitutional, unless it be plainly and palpably so." Booth v. Illinois, supra, 184 U. S. at page 431, 22 Sup. Ct. at page 428 (46 L. Ed. 623). And, as Judge Donahue expressed the rule prevailing in Ohio:

"A court is not authorized to adjudge a statute unconstitutional where the question of its constitutionality is at all doubtful." Board of Health v. Greenville, supra, 86 Ohio St. at page 20, 98 N. E. at page 1021 (Ann. Cas. 1913D, 52).

Having these principles in mind, we shall consider as briefly as we may the objections urged against the constitutional validity of the statute.

[4] 1. In the argument at the bar it was insisted for complainants, and in the briefs it still is, that the statute violates the freedom of the press under the guaranty of the first amendment to the Constitution of the United States. Ordinarily it would be enough to say of this, as Mr. Justice Miller said in Eilenbecker v. Plymouth County, 134 U. S. 31, 34, 10 Sup. Ct. 424, 425 (33 L. Ed. 801):

"That the first eight articles of the amendments to the Constitution have reference to powers exercised by the government of the United States and not to those of the states."

And see Lloyd v. Dollison, 194 U. S. 445, 447, 24 Sup. Ct. 703, 48 L. Ed. 1062. Recognizing the controlling force of this rule, complainants associate the first amendment with the clause of the fourteenth amendment, providing:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Then they seem to regard this as unimportant, and at last rely on section 11 of article 1 of the state Constitution, which provides:

"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. * * *"

It is claimed, as before pointed out, that this provision contemplates legislation providing for punishment after an act forbidden is committed, but that such an act cannot be prevented. Thus decisions which establish the right simply to punish—such, for instance, as People v. Most, 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509, or Tyomies Pub. Co. v. U. S. of America, 211 Fed. 385, decided March 3, 1914 (C. C. A. 6th Cir.)—are not questioned. It is urged on behalf of the state that the question so presented is met by the rule that the corporate complainants are not citizens within the true meaning of the guaranties contained either in the clause of the fourteenth amendment or of the Ohio Constitution, before quoted. Blake v. McClung, 172 U. S. 239, 259, 19 Sup. Ct. 165, 43 L. Ed. 432; Western Turf Ass'n v. Greenberg, 204 U. S. 359, 363, 27 Sup. Ct. 384, 51 L. Ed. 520; Selover, Bates & Co. v. Walsh, 226 U. S. 112, 126, 33 Sup. Ct. 69, 57 L. Ed. 146; Orient Insurance Co. v. Daggs, 172 U. S. 557, 566, 19 Sup. Ct. 281, 43 L. Ed. 552. But since these decisions did not involve the Ohio guaranty, we prefer to consider the statute upon its merits.

It is averred in the bills:

"That the motion pictures, the films for which are purchased, sold and leased by complainant, depict dramatizations of standard novels and short stories and the performance of standard dramas. * * * That they also exhibit many subjects of scientific interest, such as showing the various uses that may be made of electricity, showing the manner of development and growth of various forms of animal and plant life, giving pictures of trips of exploration * * * and pictures of other subjects covering a range as wide as life itself, which are educational, instructive, and amusing. That one of the most important classes of subjects exhibited in complainant's motion picture films is the depicting of events * * * described in words and by photographs in newspapers, weekly periodicals, magazines, and other publications; * * * this regular furnishing and publishing of news through the medium of motion pictures being done under the name of the 'Mutual Weekly.'"

It is contended that the Mutual Weekly, so described, is as much a press enterprise as are any of the standard magazines, periodicals, and newspapers; and that, unless it can be safely affirmed that the state may provide for the censoring of newspapers and magazines, the present statute cannot be sustained. We cannot believe that this question is in reality involved. Counsel overlook a broad distinction between the things they describe in their bills and the objects with which they make comparison. Analysis of the bills and affidavits, not to speak of familiar knowledge, serves to show that an exhibition of these motion picture films, with its inclosure, surroundings, and attendance, has all the material attributes of an ordinary theater. The state of Ohio had prior to the enactment in question made detailed statutory provisions respecting the construction and maintenance of buildings in which mov-

ing picture films might be publicly exhibited, and had imposed penalties for violation of such provisions. 6 Page & Adams Ann. Gen. Code, pp. 121, 234. The business in which complainants are confessedly engaged would have no reason to exist if the picture films they supply were not employed as the means of furnishing entertainment and amusement at these exhibitions. These films are, so to speak, the actors, the stage players, to produce the drama (Kalem Co. v. Harper Bros., 222 U. S. 55, 61, 32 Sup. Ct. 20, 56 L. Ed. 92), or other entertainment. The object and the ordinary and natural tendencies of such enterprises are to attract people; and, of course, as the picture films increase in range and variety, so does the attendance. It is true the statute does not make direct provision as to either exhibitors or places; but indirectly it does this and more; it provides in effect for licensing the use of films, the only films the exhibitors can publicly display. Sections 4 and 7 of Act, supra. Why then is this not the practical equivalent of a plan to regulate these public exhibitions, the picture film theaters, through the old system of granting and, if necessary, revoking, or withholding, licenses? Since the state has in effect declared the existence of public evils growing out of these picture film exhibitions, which require regulation, what court can rightfully say, in cases like these, either that such evils do not exist, or that the measures adopted are not reasonably designed to correct the evils?

If this interpretation of the statute is at all admissible, it is a mistake to ascribe to the Legislature a purpose to do anything inimical to the principle of freedom of the press. It was seeking to accomplish a totally different object. It was apparently providing that the most salutary principles of a public license system should be applied to the use of this new instrumentality in places of amusement. It can make no difference what its use achieves or constitutes, whether it be a drama, a publication, or even more. It is the manner and the place of such use that must concern the lawmaker. It is to be remembered, too, that the guaranty here invoked, like other guaranteed rights and privileges, is to be reasonably restricted and so reconciled with the exercise of the fundamental powers and duties of the state in relation to the public at large. Counsel's argument assumes a degree of repugnancy between such privileges and powers which in logical effect would unnecessarily sacrifice the latter; for it denies to the state the right simply to protect the public against immoral and harmful acts. As Mr. Justice Field said, in Crowley v. Christensen, 137 U. S. 86, 89, 11 Sup. Ct. 13, 15 (34 L. Ed. 620):

"Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will."

And see Board of Health v. Greenville, supra, 86 Ohio St. at page 22, 98 N. E. at page 1022 (Ann. Cas. 1913D, 52). It was never supposed there was any repugnancy between the legislative power to regulate theaters and the guaranty of freedom of the press. Complainants' counsel place special reliance upon a decision, which, when read in connection with a later decision of the same court, presents a good illustration of this. We allude to Dailey v. Superior Court, 112 Cal. 94, 44 Pac. 458, 32 L. R. A. 273, 53 Am. St. Rep. 160, where it was

held by a divided court that a judicial order forbidding the representation, upon a theatrical stage, of the facts of a particular criminal case, then on trial, was an infringement of the state constitutional provision which protects the right of a citizen freely to speak, write, and publish his sentiments. But later the same court, in Greenberg v. Western Turf Ass'n, 148 Cal. 126, 82 Pac. 684, 113 Am. St. Rep. 216, when speaking of the right to license and regulate vocations and employments, and to prohibit exhibitions, shows, places of amusement, and the like (without as much as alluding to Dailey v. Superior Court), held (148 Cal. 128, 82 Pac. 685 [113 Am. St. Rep. 216]):

"The state, in the exercise of its police power, has the unquestioned right to regulate these places of public amusement, and it is in the exercise of this power, and not at all as having to do with civil rights, that the act in question was upheld in 140 Cal. (and 73 Pac.), and its constitutionality is here again affirmed."

And in Laurelle v. Bush, 17 Cal. App. 409, 119 Pac. 953, an ordinance regulating moving pictures, and making it unlawful for any person to conduct or carry on a moving picture exhibition, without first applying for and receiving a permit, was sustained; and the appellate court, like the Supreme Court in the Greenberg Case, did not find it necessary even to cite the decision in Dailey v. Superior Court. The reason for this, no doubt, was that the judiciary does not, while the Legislature does, possess authority to regulate theaters; it is not meant by this either to signify approval or disapproval of the decision in Dailey v. Superior Court. Commonwealth v. McGann, 213 Mass. 213, 215, 100 N. E. 355; Patterson v. Colorado, 205 U. S. 454, 462, 27 Sup. Ct. 556, 51 L. Ed. 879, 10 Ann. Cas. 689. We need not dwell upon the familiar power of a state to provide for the granting or withholding of licenses as a means of regulating theatrical performances; it is sufficient to say that any reasonable exaction or denial of such licenses is universally regarded as a proper exercise of the police power. Marmet v. State, 45 Ohio St. 63, 72, 73, 12 N. E. 463; Baker v. Cincinnati, 11 Ohio St. 534; Commonwealth v. McGann, supra, 213 Mass. 213, 216, 100 N. E. 355; People v. Steele, 231 Ill. 340, 344, 345;[1] Brackett, Theatrical Law, p. 37, § 32 et seq.; Cooley's Const. Lim. (7th Ed.) p. 884 et seq.; 2 Story, Const. Lim. (5th Ed.) § 1954; 2 Blackstone (Cooley's 3d Ed.) p. 167. This power to give or withhold licenses may be extended to public speaking in the highways or public grounds within municipalities. Davis v. Massachusetts, 167 U. S. 43, 47, 17 Sup. Ct. 731, 42 L. Ed. 71; Love v. Judge of Recorder's Court, 128 Mich. 545, 549, 87 N. W. 785, 55 L. R. A. 618; Fitte v. City of Atlanta, 121 Ga. 567, 568, 49 S. E. 793, 67 L. R. A. 803, 104 Am. St. Rep. 167. Besides, the rule of Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, and the class of decisions following it, prevails in Ohio as to purely local matters (Zanesville v. Gas Co., 47 Ohio St. 1, 30, 31, 23 N. E. 55); and, since complainants devote their films to a use in which the public is interested, they must for that reason submit to the control of the public so long as they continue such use (Atlantic Coast Line R. R. Co. v. City of Goldsboro, 232 U. S. 548, 34 Sup. Ct. 364, 58 L. Ed. 721, decided by the Supreme Court February 24, 1914).

[1] 83 N. E. 236, 14 L. R. A. (N. S.) 361, 121 Am. St. Rep. 321.

Furthermore, the right of a state to regulate the use of moving picture films has been repeatedly upheld in other jurisdictions, though we do not discover that the question of interference with the freedom of the press was presented in any of the cases. In State v. Loden, 117 Md. 373, 380, 381, 83 Atl. 564, 567 (40 L. R. A. [N. S.] 193, Ann. Cas. 1913E, 1300), an act providing for the regulation of moving picture machines in the city of Baltimore, and for the appointment by the Governor of a board to be known as the "Board of Examining Moving Picture Machine Operators," and vesting the board with power to issue, suspend, or withhold licenses, to exact fees for the issuance of licenses, and after paying the members of the board for their services and expenses requiring them to pay any surplus to the state treasurer, was passed upon, the court, besides denying certain objections presented against the validity of the law, held:

"The act was to protect the people of Baltimore City against the consequences resulting from the work of incompetent moving picture machine operators and was passed in the exercise of the police power of the state, and does not, in our opinion, violate either the federal or state Constitution."

In Block v. City of Chicago, 239 Ill. 251, 87 N. E. 1011, 130 Am. St. Rep. 219, an ordinance was upheld, which required those engaged in exhibiting moving pictures to secure a permit for the exhibition of such pictures, and forbade the chief of police to issue such a permit for the exhibition of any obscene or immoral pictures, though it required him to issue a permit without fee or charge respecting pictures not of that character. To the same effect are the decisions in Laurelle v. Bush, supra; Higgins v. Lacroix, 119 Minn. 145, 150, 151, 137 N. W. 417, 41 L. R. A. (N. S.) 737; Dreyfus v. City of Montgomery, 4 Ala. App. 270, 58 South. 730, 732. See, also, State v. Morris, 1 Boyce (Del.) 330, 76 Atl. 479; People v. Gaynor, 77 Misc. Rep. 576, 137 N. Y. Supp. 196, 199; McKenzie v. McClellan, 62 Misc. Rep. 342, 116 N. Y. Supp. 645, 646. It results that so far as the foregoing constitutional provisions, either federal or state, are concerned, the statute is sustainable as a license measure, and so, as to the claims thus far considered, is not an undue interference with any right of complainants.

[5] 2. It is claimed that the statute violates the commerce clause. Substantially all the films supplied by complainants are manufactured outside the state of Ohio. The films are brought into the state in shipping packages containing one or more tin boxes in each of which is a film wrapped on a core. When the packages reach their destination in the state, they are opened and the films taken off the shipping cores and put on reels, and then placed in the stock of an exchange. The reels are then distributed among the exhibitors and passed from one to another for purposes of public exhibition. Some of these films circulate wholly within Ohio until worn out, while some remain there only for brief periods. It is to the films so placed on reels that the statute applies. The statute in terms limits the duty of the board of censors to examination of "all motion picture films to be publicly exhibited and displayed in the state of Ohio." They must be submitted to the board before they are delivered to exhibitors for exhibition, and the fees charged are fixed by uniform rates according to the length of "each reel

of film." Section 3 of Act, supra. We are therefore not concerned with shipping packages which pass into and out of the state in their original form. It cannot be said that the act imposes any sort of burden upon the original shipping packages; for, when the packages are broken and their contents placed upon reels, the films have lost their distinctive character as articles of interstate commerce. May v. New Orleans, 178 U. S. 496, 508, 20 Sup. Ct. 976, 44 L. Ed. 1165. It is said that the use made of the films is similar to that made of books belonging to circulating libraries; but we do not see how this feature can affect the question now under consideration. While the films are in use for public exhibition within a given state, they are like any other property owned and used in the state. It can make no difference that all are not consumed through use in a particular state, and that such as survive are shipped into one or more other states and there similarly used; for in each instance commerce ceases where local use commences. Above all, the films that are open to action of the board are subject to uniform treatment and charge, no matter in what state they originated or who may own or supply or use them in Ohio and whether such persons be resident therein or not. It is in vain then to urge that the statute violates the commerce clause. Hinson v. Lott, 8 Wall. 148, 153, 19 L. Ed. 387; Machine Co. v. Gage, 100 U. S. 676, 679, 25 L. Ed. 754; Emert v. Missouri, 156 U. S. 296, 314, 322, 15 Sup. Ct. 367, 39 L. Ed. 430; Patapsco Guano Co. v. North Carolina, 171 U. S. 345, 354, 359, 18 Sup. Ct. 862, 43 L. Ed. 191; Brown Forman Co. v. Kentucky, 217 U. S. 563, 575, 30 Sup. Ct. 578, 54 L. Ed. 883; Savage v. Jones, 225 U. S. 501, 525, 32 Sup. Ct. 715, 56 L. Ed. 1182.

3. It is said the statute is not sustainable as an inspection law under section 10, art. 1, of the federal Constitution. It is to be observed that this provision forbids a state, without the consent of Congress, to lay imposts or duties on imports or exports except as may be absolutely necessary for executing its inspection laws, and the net produce of such duties and imposts shall be for the use of the federal treasury. The objection is aimed against the fees authorized by the present statute and the requirement that they shall be paid into the state treasury. This does not seem to be important. In the first place, the word "imports," as used in the Constitution, does not apply to property brought from one state into another, but only to imports from foreign countries. Brown v. Houston, 114 U. S. 622, 628, 5 Sup. Ct. 1091, 29 L. Ed. 257; Woodruff v Parham, 8 Wall. 123, 136, 19 L. Ed. 382. In the next place, if films should be imported from foreign countries into Ohio, it could not now be presumed that the authorized fees would be more than are absolutely necessary for executing the law. And, as Mr. Chief Justice Fuller said in Patapsco Guano Co. v. North Carolina, supra, 171 U. S. at page 354, 18 Sup. Ct. at page 865 (43 L. Ed. 191):

> "If the receipts are found to average largely more than enough to pay the expenses, the presumption would be that the Legislature would moderate the charge."

See, also, Red "C" Oil Co. v. North Carolina, 222 U. S. 380, 393, 32 Sup. Ct. 152, 56 L. Ed. 240.

It is only when such fees are proved to be in excess of the necessary expenses and their exaction is persisted in, that judicial interference will be warranted. Foote & Co., Inc., et al. v. Stanley, 232 U. S. 494, 34 Sup. Ct. 377, 58 L. Ed. 698, decided by the Supreme Court February 24, 1914. Moreover, this objection is based upon the assumption that the statute is an inspection law. Even if this were accepted as the true characterization of the statute, its enactment would remain an exercise of the police power and so would not change the result.

4. It is argued that the statute delegates legislative power to the board of censors in violation of section 1, art. 2, of the Ohio Constitution. The theory is that the statute fixes no definite standard for determining what films shall be approved or disapproved by the board; but that this is left to its judgment and discretion and so in its essence is legislative. The language of section 4, supra, is:

"Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board."

It may be conceded that this language might have been extended by descriptive and illustrative words, and yet it is not at all certain that the act would have been any more intelligible than it is now. It would probably have been more restrictive, and its purposes more easily thwarted. In view of the range of subjects which complainants claim to have already compassed, not to speak of the natural development that will ensue, it would be next to impossible to devise language that would be at once comprehensive and automatic. Is it correct, then, to say that the enacted standard is insufficient? It seems to us to find analogy in many subjects of approved legislation. Thus, boards of health have been accustomed to prosecute inquiries into and to determine the facts of the existence or not of nuisances and other local conditions injurious to health. Boards and officers are frequently employed to inspect and pass upon private buildings with a view of having changes made as respects sanitary objects, fire prevention, and the like. These are but some of the illustrations that are adducible to show not only the necessity but the practice of lodging discretion in subordinate agencies in the interest and for the protection of the public. Government administration and regulation could not be adequately carried on, or even rationally exist, if everything of a subordinate and yet injurious character had to be passed upon by the legislative bodies themselves. Inevitably, then, some discretion must be lodged somewhere; and where could it be more appropriately placed than in the administrative boards created and selected for the execution of such laws? It was said by Chief Justice Cartwright, in Block v. City of Chicago, supra, 239 Ill. at page 258, 263, 87 N. E. at page 1013, 1015 (130 Am. St. Rep. 219), when considering an ordinance which prohibited the exhibition of "immoral or obscene" moving pictures:

"The purpose of the ordinance is to secure decency and morality in the moving picture business, and that purpose falls within the police power. It is designed as a precautionary measure to prevent exhibitions criminal in their nature and forbidden by the laws. * * * The audiences include those classes whose age, education, and situation in life specially entitle them to protection against the evil influence of obscene and immoral representations."

Again, when passing upon an objection that the ordinance fixed no standard, it was said:

"Manifestly it would be impossible to specify in an ordinance every picture or particular variety of picture which would be considered immoral or obscene, and no definition could be formulated which would afford a better standard than the words of the ordinance."

We think the present question is in principle resolved unfavorably to complainants by the decision in Board of Health v. Greenville, supra. There the State Board of Health was authorized to determine whether the contamination of any stream amounted to a "public nuisance detrimental to public health or comfort"; and upon the board's affirmative finding, after approval by the Governor and Attorney General, a municipality or person could be required to install works "satisfactory to the State Board of Health for purifying" any such stream. See, also, Fairview v. Giffee, 73 Ohio St. 183, 189, 190, 76 N. E. 865; Rose v. Baxter, 7 Ohio N. P. (N. S.) 132, affirmed without report, 81 Ohio St. 522, 91 N. E. 1138; Theobald v. State, 30 Ohio Cir. Ct. R. 336, 338, 339. In this latter case the court upheld the law as amended, which, in its original form, had been condemned by the Supreme Court in Harmon v. State, 66 Ohio St. 249, 64 N. E. 117, 58 L. R. A. 618. We think the standard fixed by the statute now under consideration will bear favorable comparison with that prescribed by the amended act passed upon in the Theobald Case, and that the instant cases are distinguishable from Harmon v. State for that reason. We are thus constrained to believe that, under the present rule of decision of Ohio alone, the primary standard here prescribed is sufficient to avoid the charge that legislative power is delegated. C. W. & Z. Railroad Co. v. Commissioners of Clinton County, 1 Ohio St. 77, 88, 89, per Ranney, J. And our views as to the sufficiency of the primary standard are strengthened by decisions of the Supreme Court of the United States. Red "C" Oil Co. v. North Carolina, supra, 222 U. S. 394, 32 Sup. Ct. 152, 56 L. Ed. 240; Monongahela Bridge v. United States, 216 U. S. 177, 192, 193, 30 Sup. Ct. 356, 54 L. Ed. 435; Int. Com. Comm. v. Goodrich Transit Co., 224 U. S. 194, 214, 32 Sup. Ct. 436, 56 L. Ed. 729; Jacobson v. Massachusetts, 197 U. S. 11, 27, 25 Sup. Ct. 358, 49 L. Ed. 643, 3 Ann. Cas. 765; Union Bridge Co. v. United States, 204 U. S. 364, 382, 27 Sup. Ct. 367, 51 L. Ed. 523.

As to the suggestion that the board of censors is invested with arbitrary power, it is sufficient to say that under section 8 of the act, supra, provision is made for reviewing any order of the board in the Supreme Court of the state. This remedy was given by creating in any dissatisfied person in interest the same right of review that is given in respect of orders of the Industrial Commission. Section 38 of the act creating that body authorizes an action to be commenced in the Supreme Court of the state to set aside, vacate, or amend an order that is either unreasonable or unlawful; and the Supreme Court is invested with "such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law." Article 4, § 2, Ohio Const.

While we have considered all the objections made to the statute, it is not necessary to prolong the discussion. We are unable to find anything in the act that is opposed to either the state or federal Constitution. It follows that the application for an interlocutory injunction in each case must be denied. However, in order to enable complainants to take an appeal in each of the suits directly to the Supreme Court of the United States, pursuant to section 266 of the Judicial Code, and to apply to that court for orders of suspension or supersedeas, if they so desire, we have concluded to suspend the operation of the orders of denial herein for a period of 15 days from the date of their entry.

THE SENATOR RICE.

THE LUZERNE.

(District Court, E. D. New York. April 9, 1914.)

1. Collision (§ 37*)—Crossing Rules—Starboard Hand Rule.
With the starboard hand rule for crossing vessels must be considered the rule forbidding the giving of a cross or contradictory whistle, unless the vessel crossing whistles had the right to insist, at that moment, upon its own indication of course, and that vessel could, under the circumstances of the case, safely seek to initiate navigation by forcing the application of the rule upon the other vessel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 34-36; Dec. Dig. § 37.*]

2. Collision (§ 93*)—Tugs with Tows—Crossing Signals.
A collision on the Hudson river between a barge in tow of a tug proceeding up the river and a car float in tow alongside a tug intending to cross from the New York side, but at the time the vessels were approaching each other on a variable course, *held* due solely to the fault of the latter tug in crossing the two-whistle signal of the up-bound tug, given when the two were on overtaking courses, and in attempting to change to a crossing course and to enforce the right to pass ahead of the other tow, under the starboard hand rule.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 194, 195; Dec. Dig. § 93.*]

In Admiralty. Suit by the C. F. Harms Company against the steam tugs Senator Rice and Luzerne, and cross-suit by the Lehigh Valley Transportation Company, owner of the Luzerne, against the Senator Rice. Decree for libelant against the Luzerne.

Foley & Martin, of New York City (W. J. Martin, of New York City, of counsel), for C. F. Harms Co.

Amos Van Etten, of Kingston, N. Y., for steam tug Senator Rice.

Harrington, Bigham & Englar, of New York City (D. Roger Englar, of New York City, of counsel), for Lehigh Valley Transp. Co.

CHATFIELD, District Judge. The libelant, the C. F. Harms Company, has brought action against the Senator Rice and the Luzerne for damage to a boat towed by the Senator Rice and injured by contact with a car float alongside the Luzerne, which belongs to the

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

Lehigh Valley Transportation Company. The collision occurred on May 29, 1913, in the Hudson river, and no fault on the part of the barge has been shown. The Lehigh Valley Transportation Company filed a cross-libel against the Senator Rice, and the cases have been tried on one record.

It is apparent that the libelant should recover against one or both of the tugs, and that the cross-libel should be disposed of in accordance with the finding of fault upon the testimony presented. The facts have been previously found and stated as follows, at the close of the case:

This collision happened in broad daylight near the center of the Hudson river and on a line, as indicated, substantially without question, by the witnesses, drawn from New Pier 1 to the float bridges just south of the Morris and Essex Canal entrance. There is substantially no conflict as to the position in which the boats came together. The Luzerne had the car float on her starboard side; the car float projecting ahead of the tug. The port forward corner of the car float came in contact with the starboard side of the barge Southern Cross, which was on a hawser 150 feet in length immediately behind the Senator Rice. The barge Schultz, which was close behind the Southern Cross, also came in contact with the port forward corner of the float, and the hawser between the barges parted. It makes no difference, so far as the finding is concerned, whether the float went between the barges and broke the hawser by its impact or whether the hawser was parted by the pull from the Senator Rice, except so far as it may help determine whether the Luzerne did, or did not, have headway.

The damage to the Southern Cross, which is the basis of this action, was without any fault on the part of the Southern Cross, and there is no dispute as to the general direction of the course of the Senator Rice at the time. She had come around the Battery, taken her course up the Hudson river, and her boats, influenced by the ebb tide and the northwest wind, were following in a steady course, but, according to one of the witnesses from the Luzerne, each was slightly off from the straight line and further towards New York. The Luzerne reversed her engines. According to her engineer's testimony, she was under reverse motion about sufficient time to lose headway, and he testifies that he saw the wash coming up along the tug just before the collision.

The testimony of the Southern Cross's captain is that the car float was still moving ahead while in contact with his vessel, so that she had not entirely lost her way.

The testimony of all the witnesses is that the effect of the reversing would be to swing the float to port and to stop its headway; but whether or not the float was actually moving backward is of little consequence, for the question of responsibility controls, rather than that of whether the Luzerne had succeeded in entirely stopping the way of the car float, it being evident that the difference between actually moving backward or having substantially stopped would not affect the issue in the case. That is, if the error were one of judgment as to the distance in which the car float could be stopped so as to let the Senator Rice go by, the responsibility would be exactly the same,

and that apparently is not the fault alleged on the part of the libelants or by the Senator Rice.

The only disputed facts which bear on the situation are with relation to the whistles and to the position and course of the boats at the time the whistles were blown. Another tow in charge of the Decker was coming around the Battery, but far enough astern so that it did not complicate the movements of the vessels. A sand scow in charge of the Automatic had passed up the river far enough ahead of the Senator Rice so that it could safely cross the bow of the Luzerne and did not obscure either the view of the Luzerne or the Senator Rice. A tramp steamer in tow of tugs passing up inside of the Senator Rice (that is, towards New York), having gone under the stern of the Senator Rice's tow, compelled the Senator Rice to proceed to keep her tow out of the way of the steamer. This steamer went under the stern of the Luzerne, and there was sufficient room so that the Luzerne could safely cross her bow.

The actual course of the Luzerne after she crossed the bow of the steamer and was headed for the floats at Port Morris would be a little north of directly across the river, and the Luzerne would have been turning from a course down river (which was the first course she could take after coming out of the slip) entirely around upon a port wheel until she was upon the course towards the car floats. According to the testimony, she had made this turn and was proceeding towards New Jersey for some distance before she crossed the bow of the tramp steamer and before any danger arose because of her proximity to the Senator Rice.

Another question which is in conflict, other than that of the whistles, is the exact position of the Senator Rice with reference to the course of the Luzerne at the time when the Luzerne began to reverse. The captain of the Senator Rice testifies that he had then crossed the Luzerne's course, having already given a two-whistle signal, which had been answered by a one-whistle signal. The one-whistle signal, if the Rice had already passed, would indicate that the Luzerne was going up the river and around his bow.

The testimony of the deck hand on the Luzerne was given very definitely and was exact in all details. He says that the Senator Rice was some 200 feet down river from the point where the vessels could cross at the time that the Luzerne was some 200 feet back of the point of crossing and when the Luzerne signaled to reverse her engine.

It would seem from the testimony that the Senator Rice did blow a two-whistle signal, and that the Luzerne had blown a one-whistle signal, at a time when the Senator Rice and the Luzerne could each observe the other. It also appears that the Luzerne paid no attention to the Senator Rice nor to the two-whistle signal which she had blown further down the river, upon the assumption that the Senator Rice was the burdened vessel and that the Luzerne need not take her position into account until at the time of the alarm whistle.

It is apparent from the testimony that the blowing of an alarm whistle by the Luzerne, followed by a signal to reverse and the reversal of her engines, coupled with the testimony of the witness upon

the float that at that time the Senator Rice had not actually crossed the path of the Luzerne, and the improbability of the Luzerne blowing a one-whistle signal after the Senator Rice had crossed her course and was further up river, proved that the Luzerne gave the alarm and blew the whistle to reverse because she could not cross the course of the Senator Rice, and that up to that time she had persisted in attempting to do so. At that time the course of the Luzerne was slightly up river (that is, in the direction of the movement of the Senator Rice), but the courses would be crossing courses, and it would appear that the Senator Rice would arrive first at the point where the courses would cross.

The question, therefore, is one of responsibility. If the Luzerne had the right, after taking a course across the river which would intersect the course of the Senator Rice up river, to hold her course and speed because the Senator Rice had the Luzerne upon her starboard hand, then, as the Luzerne did not accept the signal of the Senator Rice but did for a time hold her course and speed, the Senator Rice would be to blame for insisting by giving another two-whistle signal and creating danger.

If the Senator Rice was upon a course which, from the apparent situation, would bring her to the point of crossing sufficiently ahead of the Luzerne to remove her from the starboard hand rule, or if the course of the Luzerne was not such that she could evoke the starboard hand rule, then the plain position of the Senator Rice across the path of the Luzerne (whether or not whistles were given, and especially in view of the fact that a two-whistle signal was given before the courses were definitely shown to be crossing) show a situation where the starboard hand rule would not avail, and the Luzerne would be responsible for the situation. If, by error of judgment or by force of circumstances, she could not get sufficient sternway under reversing to clear the drift of the barges, the Luzerne would be liable.

The questions of law thus presented have been argued upon briefs, and the case finally submitted.

According to the testimony, the Luzerne had been swinging at least 180 degrees before undertaking to go straight ahead across the river. She passed astern of the Automatic but ahead of the tramp, and in so doing took a course which would intersect that of the Senator Rice. She then received the two-whistle signal of the Senator Rice, which she answered with one whistle, and shortly reversed her engines to avoid collision. Having continued thus reversed for substantially a sufficient time to bring her to rest, she nevertheless was so headed as to strike the port forward corner of her float against the side of the barge injured. In other words, she must still have been headed somewhat upstream of straight across the river, and the testimony is all to the effect that, proceeding under a reversed engine, she could swing the bow substantially to port in less time than it would take to stop the headway of the vessel.

The presence of the car float upon the starboard hand of the Luzerne would increase the tendency to turn her bow to port, and if the only object of the Luzerne, in extremis, was to avoid collision by reversing,

it is impossible to see how she could have struck the barge as she did, if she had previously been heading straight across the river. On the other hand, before the boats had permanently started upon what were crossing courses, but at a time when the Luzerne was proceeding in such a direction that the Senator Rice saw the need of signaling, the latter blew a two-whistle signal to keep the Luzerne from trying to force the Senator Rice to give way if the Luzerne was going across the river. The one-whistle signal by the Luzerne indicated that the Luzerne was intending to insist upon the course which she appeared to be taking.

[1] With the starboard hand rule must be considered the rule forbidding the giving of a cross or contradictory whistle, unless the vessel crossing whistles had the right to insist at that moment upon its own indication of course, and if that vessel could, under the circumstances of the case, safely seek to initiate navigation by forcing the application of the rule upon the other vessel.

[2] It appeared from the testimony that the Senator Rice was unable to hold back and allow the Luzerne to cross her bow. She apparently knew where the Luzerne was proceeding, and that the Luzerne might require an indication as to the course of the Senator Rice. This indication was given by the two-whistle signal. Up to that time the Luzerne had not reached a position nor assumed a course which would prevent the Senator Rice from indicating that the starboard hand rule could not be safely relied upon. The Luzerne saw fit to differ and to indicate that she not only was proceeding in a direction which would make the starboard hand rule applicable, but that she was going to insist upon that rule and to proceed, holding her course and speed. As a matter of fact, she did not come in collision with the Senator Rice, but struck the barge some distance further back and also to the east of the course of the Senator Rice. The Luzerne was headed further up the river than if she had been holding her indicated course and speed until she was under reversal. It is possible that the Luzerne tried to turn upstream while reversing, so as to save time, or she may have been influenced by trying to go astern of the Automatic and yet get upstream ahead of the Senator Rice.

The indications are that the Luzerne was operating upon a general changing course, which would make her an overtaking instead of a crossing vessel, if she did not proceed, or was not allowed to proceed, in a straight line, so as to reach the intersection of the courses first. She came into collision through inability to entirely lose momentum before reaching the tow of the Senator Rice. The Luzerne was apparently, therefore, at fault for giving a cross signal and attempting to compel the application of the starboard hand rule at a moment too late to avoid collision, if her cross signal was not accepted, and at a time when she had not previously assumed a definite course which made the Senator Rice a wrongdoer in giving a two-whistle signal. The Luzerne is further at fault in apparently attempting to treat the situation as one of crossing courses, when her own observation and her previous movements rendered it likely to result in the situation of her being an overtaking vessel; and the mere fact that for a short

period, at about the time of the whistle, the Luzerne was proceeding in a direction which, if pursued, independent of other circumstances, would have been a crossing course to that of the Senator Rice at the moment of the whistle, does not free the Luzerne from fault. The two-whistle signal initiated navigation before the Luzerne was pursuing a course which the Senator Rice was bound to respect, and the Luzerne undertook to then compel the Senator Rice to give way. This the Luzerne could not do.

The cases of The Chicago, 125 Fed. 712, 60 C. C. A. 480, The Cygnus, 142 Fed. 85, 73 C. C. A. 309, The New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126, and subsequent cases based upon the starboard hand rule, depend upon the words printed in large type in the rule (rule 7, effective May 1, 1912), "approaching each other at right angles or obliquely so as to involve risk of collision." The former rule allowing a vessel to give a signal that it would cross the bow of the other, if this could be done without risk of collision, is no longer promulgated, but, under the special circumstance rule, the language of this old rule states what is still the law.

As in The Chicago Case, supra, crossing vessels may be proceeding at such a rate and in such positions that the burdened vessel will reach the point of intersection first. This alone does not determine the question. If the boats are within the 90-degree angle, which makes the courses "crossing," and if they would reach the point of intersection so as to get in collision, if both boats held their course and speed, then the burdened vessel must keep out of the way. This is the language of the statute of June 7, 1897 (30 Stat. 96, c. 4 [U. S. Comp. St. 1901, p. 2876]), as amended (article 19).

If the boats will clear one another, then there will be no collision, and it makes no difference which boat reaches the point of intersection of courses first, and both may hold their course and speed. If the boats be approaching the point of intersection of their courses, with an angle less than 45 degrees between their courses, one or the other of the boats will be an overtaking vessel, and the crossing rule does not apply.

The chart put in evidence and the oral testimony shows that the Luzerne was, after turning around so as to head out or up the river, either overtaking or being overtaken by the Rice, until the Luzerne reached a position where she thought she could assume a crossing course. The evidence makes it apparent that the Luzerne was never on a crossing course before the two-whistle signal by the Senator Rice. Hence she could not, by merely heading in a crossing direction or by increase of speed so as to outrun the Senator Rice, change her position from that of an overtaking or overtaken vessel to a crossing vessel, operating under a change of whistle, unless the Luzerne had first proceeded up the river far enough to have room to properly undertake a crossing course and to make the previous overtaking signal by the Senator Rice a mere incident which no longer controlled the situation. The Luzerne did not evidently reach such a position, and the two-whistle signal of the Senator Rice should have been respected. Whether the accident happened from failure so to do, or from failure to

appreciate the drift of the barges out of the line of the tug, the Lu zerne must be held responsible.

The C. F. Harms Company may have a decree against the Luzerne, with costs, and the libel of the Luzerne against the Senator Rice will be dismissed, with costs. The libel of the C. F. Harms Company against the Senator Rice will be dismissed, without costs.

In re HALSEY W. KELLEY & CO., Inc.

(District Court, D. Connecticut. May 29, 1914.)

No. 3180.

BANKRUPTCY (§ 314*)—CLAIMS—LIABILITY.

Where an accommodation indorser of a note for the accommodation of a corporation, which had filed a certificate of incorporation, signed by the indorser on the understanding that he was not to be a stockholder, believed in good faith that the corporation was legally organized and authorized to transact business, though as a fact the directors had failed to file a certificate of organization, as required by state statute, and the officers accepted and used the proceeds of the note in the corporation's business, the accommodation indorser, paying the note, was entitled to an allowance against the corporation, becoming a bankrupt, for the full amount thereof.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469–473, 478, 483–487, 489, 490; Dec. Dig. § 314.*]

In Bankruptcy. In the matter of the bankruptcy of Halsey W. Kelley & Co., Incorporated. On review of the evidence, finding, and order of the referee on the claim of John B. Kennedy, certified to the judge on exceptions and petition of the trustee. Exceptions overruled, and allowance by the referee of the claim of John B. Kennedy confirmed.

Frederick H. Wiggin, of New Haven, Conn., for trustee.

Howard C. Webb, of New Haven, Conn., for John B. Kennedy.

THOMAS, District Judge. The evidence certified, in so far as is pertinent, would justify the following conclusions of fact:

1. On December 14, 1911, John B. Kennedy, David R. Alling, and Halsey W. Kelley subscribed a certificate of incorporation of the Halsey W. Kelley & Co., Inc., which certificate was approved by the Secretary of State of Connecticut, on December 16, 1911, and thereby the corporation's existence was begun.

2. In said certificate it was stated that the corporation was to be located in New Haven; that its capital was to be $20,000, divided into 200 shares of the par value of $100 each; and that the amount of cash with which the corporation was to commence business was $20,000.

3. John B. Kennedy signed said certificate at the personal request of Halsey W. Kelley, and with the understanding and agreement that he was not to be a stockholder or have any part in the business of the corporation.

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

4. The subscribers to the capital stock of the corporation, and the number of shares and value subscribed by each, were as follows, viz.: D. W. Murdock, 10 shares, $1,000. Mr. Mayo, 10 shares, $1,000. Mrs. Kelley, wife of Halsey W. Kelley, 10 shares, $1,000. Halsey Johnson Kelley, son of Halsey W. Kelley, 5 shares, $500. Halsey W. Kelley, 50 shares, $5,000. Halsey W. Kelley, 10 shares, $1,000. There were no other signed subscribers for the stock.

5. The following statement shows the only stock subscribed and paid for and the method of payment: 10 shares by Mayo, who paid therefor $1,000 in cash; 10 shares by Murdock, the amount of which, $1,000, was deducted from a bill owed to him on open account, and for fixtures furnished for the store of the concern; 10 shares by Halsey W. Kelley, who paid for the same with $1,000 borrowed by him; 10 shares by Mrs. Kelley, for which she paid $1,000, of which $700 was realized on a policy of insurance and $300 which Kelley himself put in at the start of the business, but the dates of these payments or credits do not appear, and no certificates of stock were ever issued to subscribers therefor.

6. An organization was attempted by said subscribers by the election of Halsey W. Kelley, his wife and son as directors, and they appointed Halsey W. Kelley as president and treasurer. Said Kelley thereafter acted as president and treasurer of the corporation, no attempt being made to elect directors or appoint officers.

7. Notwithstanding the attempted organization of the corporation as above stated, the corporation never executed or filed, as required by law, a certificate of its organization.

8. On December 20, 1911, said Halsey W. Kelley executed a note as follows:

"$5,000. New Haven, Conn., December 20, 1911.

"Four months after date I promise to pay to the order of John B. Kennedy, five thousand dollars ($5,000) at the People's Bank and Trust Company. Value received.

"No. ——. Due (in pencil) April 20, $84.72. Halsey W. Kelley."

Kennedy indorsed said note, and it was further indorsed "Halsey W. Kelley & Co., Incorporated, Halsey W. Kelley, President," and was on said December 20, 1911, discounted by the People's Bank & Trust Company, and the Halsey W. Kelley & Co., Inc., was credited with the amount of said note, less discount, viz., $4,915.28, which sum constituted the capital with which said company commenced business.

9. There was no vote of the directors of said Halsey W. Kelley & Co., Inc., authorizing the indorsement of the corporation on said note, and said indorsement was placed thereon by said Halsey W. Kelley.

10. On April 22, 1912, said note was renewed by the substitution of a new note, similar in tenor, and said note was stamped, "Paid, April 22, 1912, People's Bank and Trust Co., New Haven, Connecticut" as appears on the back of said note (Exhibit 2).

11. Said renewal note was similarly renewed, and the loan was thus kept outstanding by several similar renewals until August, 1913, when the full amount thereof, together with protest fees, was paid by said

John B. Kennedy to the People's Bank & Trust Company; the maker, said Halsey W. Kelley or the said corporation, or any other person for him or it, never having paid the same.

12. Immediately before and at the time of the incorporation of said company, and until its adjudication as a bankrupt in this court on July 16, 1913, upon a voluntary petition in bankruptcy filed by the corporation, said Halsey W. Kelley had been its leading spirit, active officer, and director, and had charge of the store wherein the company carried on a general hardware and paint business in the city of New Haven, under the name and style of Halsey W. Kelley & Co., Inc.

13. When said Kennedy indorsed said note, he supposed that Halsey W. Kelley & Co., Inc., had been legally organized as a corporation, and could lawfully transact business as such, and he indorsed it for the purpose of loaning his credit to the concern, so that it would, by the discounting of said note, be enabled to secure money whereby to purchase material and stock for the business, and with the direct understanding and agreement that the note which he indorsed was to be used for no other purpose, and that the corporation would indorse said note and be responsible for its payment, and that the note would be ultimately paid by the corporation from the profits of its business.

14. Said Kennedy would not have indorsed said note were it not for his friendship for said Kelley, and his desire to assist him in getting the business of the corporation started.

15. The officers and agents of said corporation accepted and used the proceeds of said note in its business, with the full understanding that it was not to be used for the payment of any part of the capital stock of the corporation, and that it was an obligation which it was the duty of the corporation to eventually take care of.

16. Kennedy acted in good faith, and because he placed reliance upon the representations and the agreement and understanding that he had with Kelley to the effect that the company would take care of said note, and that he would not be obliged to make payment of any part thereof.

17. Had the corporation been successful, the amount represented by the note would have eventually been paid out of the funds of the corporation, and Kennedy would have had no claim upon any part of its capital stock.

18. Kelley, in the organization of his corporation, employed no lawyer, because he thought thereby to save an expense of $100, and was himself ignorant of the strict requirements of the corporation law of Connecticut concerning the necessity of filing a certificate of organization before a corporation can legally commence business. He seems to have conceived the notion that the filing of said certificate would not be required until he had obtained the full sum of $20,000, which he had expected to be able to raise by the sale of shares of stock and otherwise, and it was for this reason that the corporation essayed to commence business without such certificate being executed by its directors, sworn to and filed with the Secretary of State.

19. Although Kelley never considered the indorsement by Kennedy

on said note as a loan to him personally, he nevertheless subscribed for 50 shares of the capital stock of the bankrupt corporation amounting to $5,000 and credited himself as having paid therefor.

20. Though Kelley had so subscribed for 50 shares of the capital stock of the bankrupt corporation and had credited himself with payment thereof on the strength of said Kennedy's indorsement of said note, yet Kennedy had no knowledge of this fact at any time until after bankruptcy proceedings had been commenced.

21. Said Halsey W. Kelley is insolvent, and it is impossible for said Kennedy to collect any portion of the note from him.

The evidence which has been certified, in so far as is pertinent to the matter, would lead to the conclusions of fact above set forth, and the law is such as to charge the corporation with the money obtained on said note, through the efforts of said Kelley, even though there was a failure on the part of the directors to execute, swear to and file with the Secretary of State a certificate of organization in behalf of that corporation. Scholfield, Gear & Pulley Co. v. Scholfield, 71 Conn. 1, 14, 40 Atl. 1046; Canfield v. Gregory, 66 Conn. 9, 22, 33 Atl. 536; Barrows v. Natchaug Silk Co., 72 Conn. 658, 45 Atl. 951; Lamkin v. Baldwin & Lamkin Mfg. Co., 72 Conn. 57, 43 Atl. 593, 1042, 44 L. R. A. 786.

It would appear that the trustee's exceptions to the finding and report of the referee should be overruled, and that the allowance by the referee of the claim of said John B. Kennedy for the full amount mentioned in the certificate should be confirmed.

The exceptions to the certificate, finding and order of the referee are overruled, and the allowance by the referee of the claim of said John B. Kennedy is hereby approved and confirmed.

THE CITY OF CHESTER.

THE J. S. W. HOLTON.

(District Court, E. D. Pennsylvania. June 20, 1914.)

Nos. 51–53 of 1908, and 13 of 1909.

1. COLLISION (§ 102*)—STEAM VESSELS MEETING—BOTH VESSELS IN FAULT.

The steamboat City of Chester, passing down the Delaware river in the evening on the east side of the channel, came into collision with and sunk the tug Holton, coming up. The night was clear and still, and when about a half a mile apart the vessels, which were nearly head on, but slightly to the starboard of each other, exchanged signals for passing port to port. The steamer was moving at a speed of about 16 miles and the tug 8 or 9 miles an hour, and the steamer struck the tug about amidships on the port side with great force. *Held*, on conflicting evidence, that the collision resulted from the fact that both vessels miscalculated the distance between them and the combined speed, and failed to promptly and sufficiently change their courses to starboard, for which both were in fault; that the steamboat was also in fault for not continuing such starboard course longer, for which there was ample room, and the tug for being unnecessarily so near the western side of the channel.

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

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

2. COLLISION (§ 115*)—SUITS FOR DAMAGES—BOTH VESSELS IN FAULT—LIABILITY FOR DEATH OF MEMBERS OF CREW.

Representatives of members of the crew of a vessel, killed in a collision for which both vessels were in fault, are entitled to a decree in solido against either vessel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 244-247; Dec. Dig. § 115.*]

In Admiralty. Suit for collision by the owners of the steam tug. J. S. W. Holton against the steamboat City of Chester, the Wilmington Steamboat Company, claimant, with cross-libel, and libels by Clara F. Adkins and A. Virginia Lynch, respectively, against the Wilmington Steamboat Company, for death of members of crew of the Holton. Decree in favor of each vessel against the other for half damages, and for each libelant against the steamboat company in the suits in personam.

Howard M. Long, of Philadelphia, Pa., for the J. S. W. Holton and others.

H. Alan Dawson, of Philadelphia, Pa., for the City of Chester and others.

JOHN B. McPHERSON, Circuit Judge. By agreement of counsel these four cases were heard together upon the same evidence. The cross-libels seek to fix the liability for a collision between the river steamboat City of Chester and the ocean-going tug J. S. W. Holton, and the other libels are for the resulting deaths of two members of the tug's crew. The home port of the steamboat is Wilmington on the Delaware river, and her business is the regular and frequent carriage of freight and passengers between the cities of Philadelphia, Chester, and Wilmington. She is an iron vessel, 185½ feet long, 28 feet beam, and 9 feet depth of hold, and belongs to the Wilmington Steamboat Company, sometimes called the Wilson Line. The tug was also of iron, but of course much smaller, about 70 feet long, 16 feet beam, and 7½ feet depth of hold, and 62 gross tons in measurement. Certain facts are undisputed, and may be premised.

[1] On the evening of Friday, September 11, 1908, the steamboat, after a stop at Chester, was going down the river on a regular trip to Wilmington, carrying passengers and freight, and the tug without a tow was coming up the river from Wilmington to a stone wharf at Bellevue, Del. Owing to a break in her steering gear (which occurred as she was leaving Philadelphia) the steamboat was almost an hour behind her schedule time. Both vessels were seaworthy and properly equipped. The hour was 9:30 or thereabouts, the flood tide was in the first quarter, and the wind was light and not disturbing. The night was fair, both the stars and the moon being visible, and there was no obscuring haze on the water. All the proper lights of both vessels were set and burning, and the electric lights of the steamboat were also in service. The tug was in charge of a skillful and experienced master, who was in the pilot house steering, and also keeping the lookout, while the chief engineer and a fireman were on duty in the engine room.

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

The mate, the assistant engineer, and the other fireman, had already turned in. The master of the steamboat was also skillful and experienced, and, although he was not in the pilot house forward on the hurricane deck, he was close at hand. Her wheel was in charge of the first officer, a licensed and competent man, and the second officer was also in the pilot house, while a lookout was stationed forward on the main deck. The collision took place on the western side of the river, near the government buoy wharf at Edgemoor in the waters of the state of Delaware, and above buoy No. 28, which lies at the turn from the Cherry Island Range to the Bellevue Range or Reach. The blow was delivered by the stem of the steamboat nearly amidships on the port side of the tug, one result being that the tug filled and sank almost immediately. The mate and the assistant engineer may have been drowned, but more probably they were killed in their berths, either by the blow or by escaping steam. Their bodies were recovered a few days later. The tug was afterwards raised, and photographs were taken, showing the injury to her side. The place of the collision was in the western half of the channel, and this fact, together with the character of the blow, is fixed with substantial accuracy. The deep-water channel along the two ranges is 500 to 600 feet wide, but for vessels drawing no more than the steamboat and the tug there was plenty of additional room between the edge of that channel and the western shore.

On the other facts the case presents a square conflict of testimony after the usual fashion. In outline the theory of the tug is as follows: She had put into Wilmington for a short stop, and had then come down Christiana creek to the river, turning north toward Bellevue, which is also on the western bank about 3½ miles distant from the mouth of the creek. The channel runs along the Delaware, or western, shore for several miles above Wilmington. When she had gone about a quarter of a mile above the mouth of the creek and had reached a point in the river about three-quarters of a mile below Edgemoor Light, her master in the pilot house saw the electric lights of the steamboat coming down the river. The tug was then heading northeast, but was still on the westward, or Delaware, side of the channel, and the steamboat was about a point or a point and a half on the starboard bow of the tug. At first only the electric lights of the steamboat were seen, but almost at once both her side lights also came into view. When the vessels were about a half mile apart the steamboat blew one whistle, signifying her intention to pass to the westward, and the tug accepted and answered the signal immediately, putting her wheel to port at once and directing her course to the eastward. When this signal was given and accepted the vessels were nearly end on, each showing both her side lights to the other. The tug was going at full speed with the tide, making eight or nine miles an hour, and she immediately responded to her wheel, changing her course more to the eastward, or New Jersey, side of the river. After the exchange of signals, the steamboat appeared to change her course to the westward, shutting out her green light and showing only her red light to the tug. Both vessels continued on these courses for a short time, each showing her red light to the

other. The steamboat—which was 50 minutes behind her schedule time and was running about 16 or 17 miles an hour—suddenly changed her course to the eastward without slackening speed, and showed both her lights, thus indicating that she was coming directly at the tug, which was still showing her red light to the steamboat. The vessels had now approached within 200 or 300 yards, and the master of the tug, realizing the imminent danger of collision, blew four blasts of his whistle (which were not answered) and rang four bells to the engineer to stop and reverse. But the vessels were so near, and the speed of the steamboat was so great, that the engineer could only stop the engine and had no time to reverse, being compelled to leave the engine room without a moment's delay in order to save his life. Immediately thereafter the collision occurred, the stem of the steamboat striking the tug with great force about amidships on the port side, cutting several feet into the tug, breaking the steam pipe and cylinder, and doing so much damage that the tug sank within a few minutes. She hung on the steamboat's bow long enough to allow the master of the tug, the chief engineer, the two firemen, and a deck hand to escape, but the mate and the assistant engineer lost their lives. The steamboat lowered a boat and played her searchlight on the water in an effort to find the missing men, but the effort was in vain.

The cross-libel gives the following account of the occurrence: The steamboat was properly manned, equipped, officered, and supplied; her proper lights were set and burning brightly; a duly licensed and competent man was at the wheel in the pilot house at the forward end of the hurricane deck; the master was in the pilot house or about the decks; the second officer was also in the pilot house, keeping a lookout and assisting the man at the wheel; a competent hand was on lookout forward on the main deck; and the other officers and crew were properly stationed. She left Philadelphia about 7 o'clock for Wilmington, calling at Chester on the way. Soon after leaving Chester the tide became flood, and was about quarter flood when the collision took place. As the steamboat approached Edgemoor, running on the westward, or Delaware, side of the channel in the proper and regular channel course at a speed of about 16 miles an hour through the water, she saw the green light of the tug somewhat on her port bow, indicating that the tug was heading westward. Almost immediately, however, and before signals could be exchanged, the red light of the tug also came into view, so that both lights were seen somewhat on the steamboat's port bow, thus indicating that the tug was swinging to the starboard or eastward. As soon as both lights of the tug appeared, the steamboat blew one blast, and the tug answered promptly by a similar signal. Both vessels, therefore, had agreed that they would direct their respective courses to starboard, and would pass at a safe distance, port to port. When the signals were exchanged, the tug was less than half a point on the steamboat's port bow, showing both lights, so that the vessels were practically end on. They were then less than a half mile apart, and the steamboat was moving at full speed, her rate being about 16 miles an hour through the water. As soon as the signal was given, the steamboat put her wheel to port and held it there, the course being

changed at once to starboard and to the westward, so that the green light of the tug was shut out and only her red light was visible. This position was safe, but soon afterwards the tug changed her course to port and to the westward, again showing both her lights to the steamboat, and held this course to port so long that she shut out her red light and showed only the green. This would indicate that she was going to the westward, in the apparent effort to cross the steamboat's bow and to pass starboard to starboard, in violation of her duty under the signals that had been exchanged, and in violation of the rules of the road and of the requirements of safe and prudent navigation. As soon as the appearance of the tug's green light indicated that she had improperly changed her course to the westward, the steamboat put her engines full speed astern, and set her wheel hard aport, so that her speed through the water was quickly reduced, and her own course was changed rapidly still farther to the westward. When this improper change of course was made by the tug, and the engines of the steamboat were put full speed astern, the tug was almost dead ahead, and the vessels were about 1,000 feet apart. The tug continued to hold her improper course to the westward until she came close to the steamboat, when she made another change of course, this time to the eastward, apparently changing her mind a second time and deciding now to carry out the original maneuver according to the signal and to pass port to port. She succeeded in swinging far enough to the eastward to head in that direction, shutting out her green light again and showing only the red, but she was now directly under the steamboat's bow. Being in this position, she suddenly put her engines astern, stopping or greatly delaying her movement to the eastward, so that she was held practically without motion across the steamboat's bow, and was carried by her own momentum and by the set of the flood tide into the steamboat, her port side about amidships striking upon the sharp bow of the steamboat. When the collision took place, the steamboat had lost her headway and had nearly stopped moving, both over the ground and through the water.

These conflicting theories are maintained in the voluminous testimony of both vessels, and in the elaborate and excellent briefs of counsel. I have read and considered the whole record and both the arguments, but I see no advantage in an extended discussion. Two prominent facts exist that cannot be explained away and must be accounted for, namely, the facts that the tug was struck amidships on her *port* side, and that she was struck so heavy a blow as to send her to the bottom within a few moments of the collision, and to inflict much damage upon the steamboat also. It is certain that the vessels must have come together at an angle not far from 90 degrees, and that the steamboat must have been in rapid motion. The tug's side was penetrated several feet—indeed an oil cup from her engine was found on the steamboat's bow after the latter arrived at Wilmington—and the steamboat's bow was so badly injured on both sides for several feet back from the stem that she also would probably have sunk if her collision bulkhead had not kept her afloat. It is idle to argue that the tug was practically drifting with the tide, and that the way of both vessels

had nearly stopped; and it is clear, I think, that, although the steamboat reversed, this expedient was adopted too late to have much, if any, effect on her speed. Neither is it credible that the tug went through the extraordinary maneuvers set forth in the cross-libel unless it be supposed that her master had taken leave of his senses. Moreover, both the steamboat's theory and her supporting testimony allow much too short a time for these remarkable evolutions, and accordingly I regard the theory as improbable. But I cannot accept in all its details the account given by the tug without supposing that the first officer of the steamboat was doing a similar violence to prudent navigation. It is not to be believed that he deliberately or recklessly followed the tug and ran her down. As it seems to me, the collision can be explained in a way that lays little, if any, strain upon probability, and is also in general accord with the testimony, especially of the disinterested witnesses. I refer to those members of the "Shawmut's" crew that watched the occurrence from the deck of their own vessel, which happened to be in the neighborhood on the eastern side of the channel, and the testimony of two persons who were on a launch somewhat below the point of collision, and were coming up the river not far from the center of the channel. Some of this testimony was given within a reasonable time after the occurrence, and some of it much later, so that the different accounts are of varying value. Taking everything together, in my opinion the ultimate facts are these:

The tug and the steamboat were both in the western half of the channel. They saw each other in ample time to avoid the collision, but they were closer together than either of them believed. They both failed to judge the situation accurately, miscalculating the distance, and the combined speed. They were then nearly head on, the only point of disagreement here being that the tug places herself a point, or a little further, on the steamboat's starboard bow, while the steamboat places her on the port bow. I think the tug's account is more probable, and accept it as true. She had left Wilmington not long before, and was more likely to be to starboard of the steamboat than to port, especially as she was bound to a point not far away on the western side of the river, and was likely to be saving time by taking this course. I think she was at fault in being where she was; she ought to have been farther to the eastward, and she had had ample time to get over to a safe and proper position in the channel. It was a risk to be on the wrong side, although she was moving in the right direction. But, in spite of the tug's being to starboard, the steamboat offered to pass port to port, and I do not criticise her for so doing, as the tug was nearly head on. But, as the vessels were somewhat to starboard of each other, the execution of this maneuver would evidently require each to go somewhat farther to gain a position of safety than if they had undertaken to pass starboard to starboard, and therefore each was bound to take this increased distance into account. Here, also, I think the steamboat was at fault. She did go to starboard, or to the westward, in accordance with her signal, but she did not go far enough, and straightened up too soon. As her witnesses say, her change of course from first to last was not more than two points. Evidently the

vessels were closer than they supposed—this is also the opinion of the master of the steamboat—and it must be continually kept in mind that they were covering the intervening space at the combined rate of 24 or 25 miles an hour, or nearly a mile in two minutes. Or, if they began their maneuvers when they were a half mile apart, a little more than a minute is the whole time available for everything that was done. I do not think either is to be blamed for excessive speed, but speed was a most important factor that neither could safely leave out of account or misjudge. As usual, the estimates of time in the testimony are for the most part not to be accepted literally; if they were accurate, it is hard to see how the collision could have occurred. If the steamboat had gone even 50 yards further to starboard—and she had plenty of room, and plenty of time also if her testimony on this point were reliable—nothing would have happened; but she was behind her schedule time and evidently in a hurry, so that she cut down the margin of safety too far. And, if the tug had been on the proper side of the channel, where she could easily have been, there would not even have been a crisis. I do not pass upon the other faults charged against either vessel, since those I have noticed are sufficient to account for the disaster.

A decree finding both vessels at fault may be entered, and referring the question of damages to a commissioner.

[2] But there is no reason for further delay in the matter of the damages sustained by the widows of the mate and of the assistant engineer. They are each entitled to a decree in solido against the owner of the steamboat (The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264), who may be left to such ultimate remedy as may exist against the tug. The evidence on the subject of the widows' damage has already been taken, and is now before the court. Both men were, and always had been, in excellent health, and both were industrious and sober. They had been steadily employed with only occasional short periods of idleness, and at the time of his death each was earning $65 per month and his board, devoting much the larger part of his wages to the support of his family. Lynch was 25 years old and had no children. Adkins was 39 years old and had five children, whose ages ranged from 1 to 12 years in 1908. It is not easy to estimate what would be a fair and legal allowance for the damage sustained by each family, taking into account the chances of death, sickness, and unemployment during the life expectancy of the head of the family; but in my best judgment the respective sums are $4,500 and $5,500.

The clerk is therefore directed to enter a final decree against the owner of the steamboat in favor of A. Virginia Lynch in the sum of $4,500, and a final decree in favor of Clara V. Adkins in the sum of $5,500, with costs to each of these libelants.

BAYLEY et al. v. DAVIS et al.

(District Court, D. Oregon. June 29, 1914.)

No. 6249.

EXECUTION (§ 70*)—JURISDICTION TO ISSUE—DEATH OF DEBTOR—OREGON STATUTE.

Under B. & C. Comp. Or. § 220 (L. O. L. § 220), which authorizes the issuance of an execution against the property of a judgment debtor notwithstanding his death, but provides that it shall not issue until six months after the appointment of an executor or administrator without leave of the county court, it is not necessary that a judgment be revived against the heirs of a deceased judgment debtor, nor is a notice to the heirs required of an application to the county court for leave to issue execution thereon.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 159; Dec. Dig. § 70.*]

In Equity. Suit by James Bayley, Marcus L. Bayley, Emery S. Bayley, Lizzie Lynn, Ida Bayley, and Hazel Bayley, by H. B. Beckett, her guardian ad litem, against M. M. Davis and Mary B. Davis, his wife, C. M. McKellips and Alice H. McKellips, his wife, Mary Case, A. D. Shollenberg and Lizzie Shollenberg, his wife, H. D. Blakely and Effie A. Blakely, his wife, E. M. Hurd and Ruby A. Hurd, his wife, William N. Borden and Eleanor Borden, his wife, Thomas Leese and Emma Leese, his wife, Theresa Roper, S. E. Paddock and Jane Doe Paddock, his wife, Floyd Bilyeu and Hazel Bilyeu, his wife, W. I. Watson and Charlotte E. Watson, his wife, J. L. Rickman, L. C. Smith, Don V. Walker and Mabel D. Walker, his wife, E. E. Wilson, Alwilda Shonkwiler, Ray C. Oliver, T. H. Halleck and Daisy E. Halleck, his wife, A. H. Hampton and Agnes S. Hampton, his wife, Carl Tamm, Isabel Yaeger, F. H. McDonald and Carrie McDonald, his wife, Frank Priest and Hattie L. Priest, his wife, and the City of Newport. On motion to dismiss bill. Motion sustained.

Hibschman & Dill, of Spokane, Wash., and Wilbur & Spencer, of Portland, Or., for plaintiffs.

Woodcock, Smith & Bryson, of Eugene, Or., for defendants.

BEAN, District Judge. This suit is brought to vacate and set aside a sale of real property under an execution issued on a judgment recovered against plaintiffs' ancestor in his lifetime, and for a decree adjudging that plaintiffs are the owners of an undivided one-sixth interest in such property.

The facts are that on November 27, 1893, one Margaret A. Stevens recovered a judgment against James R. Bayley for the sum of approximately $450, which judgment was regularly docketed in the judgment lien docket of the county. On May 24, 1901, Bayley died intestate, seised and possessed of the real property in question. On May 28, 1903, the Stevens judgment was assigned and transferred to the defendant Davis, who on November 24th following, three days less than ten years after the entry of the judgment, petitioned the

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

county court of Lincoln county for the appointment of an administrator of Bayley's estate, alleging that the decedent left property in the county, that certain persons, of whom the petitioner was one, had judgments against him, and that he (petitioner) desired to apply to the court for leave to issue execution on his judgment. Based on this petition an administrator was regularly appointed, and on the same day, and immediately thereafter, Davis applied to and obtained from the county court an ex parte order permitting him to issue execution under his judgment. An execution was thereupon issued, the property advertised and sold thereunder in January, 1904. The plaintiffs, who are the heirs of Bayley, now bring this suit to set aside such sale on the ground that it is void because the judgment was not revived against them and the order of the county court granting leave to issue execution was made without notice.

The state statutes in force at the time of the proceedings in question, and by which this case must be determined, are as follows:

"The party in whose favor a judgment is given which requires payment of money * * * may at any time after the entry thereof have a writ of execution issued for its enforcement, as provided in this title." Section 213, B. & C. Code.

"Notwithstanding the death of a party after judgment, execution thereon against his property * * * may be issued and executed in the same manner and with the same effect as if he were still living; but such execution shall not issue within six months from the granting of letters testamentary or of administration upon the estate of such party, without leave of the county court or judge thereof." Section 220, B. & C. Code; section 220, Lord's Oregon Laws.

"If, at any time after the entry of a judgment, the period of ten consecutive years shall have elapsed without an execution being issued on such judgment during such period, no execution shall thereafter issue on such judgment and such judgment shall thereafter be conclusively presumed to be paid and satisfied unless an execution be issued thereon within one year from the passage of this act." Section 241, B. & C. Code.

It is, I take it, settled law in this state that an execution may issue on a judgment notwithstanding the death of the judgment debtor, without the judgment being revived against his heirs by a proceeding in the nature of scire facies against them. Knott v. Shaw, 5 Or. 482; Barrett v. Furnish, 21 Or. 17-19, 26 Pac. 861; Bower v. Holladay, 18 Or. 490, 22 Pac. 553; Watson v. Moore, 40 Or. 206, 66 Pac. 814. The only limitation is that the judgment shall be a valid subsisting lien, and that the execution shall not issue until after the appointment of the administrator, and not within six months thereafter, without the consent of the county court or judge thereof.

The position of the plaintiffs is that, since the order of the county court consenting to the issuance of the execution was made without notice to the heirs, it operated to deprive them of their property without due process of law, and is void. The statute does not in terms require notice of such an application, and section 536, Lord's Oregon Laws, provides that: "Notice of a motion is not necessary except when this Code requires it, or when directed by the court or judge in pursuance thereof," which would seem to be a complete answer to the plaintiffs' contention.

But it is argued that the section of the Oregon statute in reference to the issuance of an execution after the death of a judgment debtor was adopted from the New York Code of 1850; that the New York decisions construing such statute prior to its adoption here held that notice to the heirs is necessary, and that such interpretation was impliedly carried into the Oregon jurisdiction. I cannot concur in this view. The section of the Oregon statutes differs in some respects from that of New York (Bower v. Holladay, supra), and, moreover but a part of the New York system was adopted here. In New York the law required a judgment to be revived by a proceeding in the nature of a scire facies in the court where rendered after the death of the judgment debtor before execution could issue thereon, and the cases referred to by plaintiffs (Alden v. Clark, 11 How. Prac. [N. Y.] 209; Frink v. Morrison, 13 Abb. Prac. [N. Y.] 80) discuss the question whether the act of 1850, conforming in substance to section 220 Oregon Statutes, repealed by implication this requirement, and it was held, and in subsequent decisions, that it did not. Wood v. Moorehouse, 45 N. Y. 368; Wallace v. Swinton, 74 N. Y. 188.

In this state, as we have seen, the law does not require a judgment to be revived against the heirs before execution can issue thereon, but execution may issue after the death of the judgment debtor in the same manner and with the same effect as if he were still alive, except that it cannot issue within six months after the appointment of an administrator without leave of the county court, so I take it the New York decisions are not in point. The Wisconsin case (Eaton v. Youngs, 41 Wis. 507) cited was an application for leave to issue execution, and the court ruled that it would not be allowed until the heirs and creditors had an opportunity to pay the judgment without execution, a matter resting within the discretion of the court.

The Legislature has the undoubted power to determine when and under what circumstances execution may issue on a judgment. It may authorize its issuance notwithstanding the death of the judgment debtor. It may give such right unconditional, or leave it optional with the probate court whether it shall issue within a certain time after the appointment of the administrator. The latter is the course adopted by the Oregon Legislature, but there is nothing in the terms of the statute which requires notice of an application to the county court for leave to issue an execution. Process of any kind may ordinarily be issued without notice to the opposite party, and, as said by the Supreme Court of California, in Harrier v. Bassford, 145 Cal. 529, 78 Pac. 1038:

> "The general rule is that notice of application therefore need be given only where there is some statute expressly prescribing it. Such notice is not necessary to constitute that due process of law which is guaranteed by the Constitution of the United States."

See, also, Doehla v. Phillips, 151 Cal. 488, 91 Pac. 330; Water Supply Co. v. Sarnow, 6 Cal. App. 586, 92 Pac. 667.

I am of the opinion, therefore, that notice to the heirs of a motion in the county court for leave to issue execution on a judgment against their ancestor is not required by the Oregon statute. It would probab-

ly be better practice to give such notice, and the failure to do so might be sufficient ground for quashing the execution on an application timely made, but it would not vitiate a sale made thereunder. Eddy v. Coldwell, 23 Or. 163, 31 Pac. 475, 37 Am. St. Rep. 672.

The claim is made that the proceedings in the county court were colorable "and a fraud upon the law," but this position is untenable. It was the only course open to the judgment creditor by which he could preserve and enforce his lien. No execution could issue upon his judgment without the appointment of an administrator. Watson v. Moore, supra. The heirs and other creditors had failed to apply for such appointment, and clearly it is no cause of complaint that an earlier application was not made by the judgment creditor. He waited until his judgment was about to expire, and as no one else had applied for the appointment of an administrator, he availed himself of the right given him by the law, and took the necessary and proper steps to enforce his judgment.

Motion will be allowed, and the complaint dismissed, with leave to the plaintiffs to amend within 20 days, if they so elect.

WEEGHAM et al. v. KILLEFER et al.

(District Court, W. D. Michigan, S. D. April 10, 1914.)

1. CONTRACTS (§ 10*)—MUTUALITY OF OBLIGATION.

Where a contract, employing a baseball player of unique, exceptional, and extraordinary skill for the year 1913 at a specified salary, obligated the player to contract with and continue in the service of the employer for the succeeding season of 1914 at a salary to be determined by the parties to the contract, such provision, though founded on a sufficient consideration, was unenforceable for want of mutuality; the employer being expressly authorized to terminate the contract at any time on 10 days' notice.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21–40; Dec. Dig. § 10.*]

2. EQUITY (§ 65*)—MAXIMS—CLEAN HANDS.

The maxim, "He who comes into equity must come with clean hands," is a cardinal one, lying at the foundation of equity jurisprudence, and any willful act or misconduct in regard to the matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men, though not punishable as a crime or sufficient to constitute the basis of legal action, will be sufficient to bar relief in equity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185–187; Dec. Dig. § 65.*]

3. EQUITY (§ 65*)—MAXIMS—CLEAN HANDS.

Where complainants, knowing that a ball player of unique, exceptional, and extraordinary skill had entered into an unenforceable agreement to render services to defendant club for the season of 1914 induced him, by an offer of large salary, to contract with complainants for that season, and after the player had entered into a legal contract with complainants he entered into another contract to render services during the 1914 season for defendant in accordance with the original reservation,

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

complainants were guilty of unfairness, and were therefore not entitled to injunctive relief in equity to restrain the player from playing for defendant.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185-187; Dec. Dig. § 65.*]

In Equity. Suit by Charles Weegham and another, copartners doing business under the name of the Chicago Federal League Baseball Club, against William Killefer, Jr., and the Philadelphia National League Club. On motion for a preliminary injunction. Denied.

Order affirmed, 215 Fed. 289, 131 C. C. A. 558.

Matson, Gates & Ross, of Indianapolis, Ind., and Winston, Payne, Strawn & Shaw, of Chicago, Ill. (Kleinhans, Knappen & Uhl, of Grand Rapids, Mich., of counsel), for complainants.

Stevenson, Carpenter, Butzel & Backus, of Detroit, Mich., and Samuel M. Clement, Jr., of Philadelphia, Pa. (George Wharton Pepper, of Philadelphia, Pa., of counsel), for defendants.

SESSIONS, District Judge. This record shows that the defendant, Killefer, is a baseball player of unique, exceptional, and extraordinary skill and expertness. Unfortunately, the record also shows that he is a person upon whose pledged word little or no reliance can be placed, and who, for gain to himself, neither scruples nor hesitates to disregard and violate his express engagements and agreements. His repudiation of one contract, for the making of which he had been paid several hundred dollars, and his breach of another contract, entered into after at least a week's consideration and deliberation, give rise to the present controversy. Viewed from the standpoint of common honesty and integrity, his position in this litigation is not an enviable one.

In April, 1913, defendant Killefer entered into a written contract with the Philadelphia Ball Company (now Philadelphia National League Club) by the terms of which he bound himself to perform for the Ball Company the services of a professional baseball player during the season of 1913. Three clauses of that contract are of a special importance here:

"1. The compensation of the party of the second part stipulated in this contract shall be apportioned as follows: 75% thereof for services rendered and 25% thereof for and in consideration of the player's covenant to sanction and abide by his reservation by the party of the first part for the season of 1914, unless released before its termination in accordance with the provisions of this contract. The party of the second part shall be entitled to and shall be paid the full consideration named herein in regular semimonthly installments, unless released prior to the termination of this contract in accordance with section 8 hereof, regardless of whether or not the contracting club exercises the privilege of reserving the party of the second part for the season of 1914."

"8. It is further understood and agreed that the party of the first part may, at any time after the beginning and prior to the completion of the period of this contract, give the party of the second part ten days' written notice to end and determine all its liabilities and obligations under this contract, in which event all liabilities and obligations undertaken by said party of the first part, in this contract, shall at once cease and determine at the expiration of said ten days; the said party of the second part shall thereupon be also freed and discharged from obligation to render service to said party of the first part. If such notice be given to the party of the second part while

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

'abroad' with the club, he shall be entitled to his necessary traveling expenses to the city of Philadelphia."

"10. In consideration of the compensation paid to the party of the second part by the party of the first part as recited in clause 1 hereof, the party of the second part agrees and obligates himself to contract with and continue in the service of said party of the first part for the succeeding season at a salary to be determined by the parties to such contract."

After the close of the season of 1913, and before the first of the next year, the Philadelphia Club notified Killefer that it desired his services for another year, and would pay him an increased salary, and thereupon he again promised and agreed to play with that club during the season of 1914. Notwithstanding these agreements with the Philadelphia Club, he, upon the solicitation and at the request of the plaintiffs, entered into negotiations with the latter which, on the 8th day of January, 1914, resulted in the execution of a written contract, by the terms of which he agreed to play baseball for and with the Chicago Federal League Club, during the three seasons of 1914, 1915, and 1916, at a salary of $5,833.33 per season. At the time of the execution of this contract, plaintiffs and their manager had knowledge of Killefer's previous contract with the Philadelphia Club, and were acquainted with its provisions. Twelve days later and on January 20, 1914, Killefer executed another contract with the defendant Philadelphia National League Club, by the terms of which he agreed to play baseball for and with that club during the three seasons of 1914, 1915, and 1916, at a salary of $6,500 per annum. Since the execution of the last-mentioned contract, Killefer has entered upon its performance and intends to continue to play with the Philadelphia Club unless he is restrained from so doing. In this proceeding, plaintiffs seek an injunction restraining him from playing with any baseball team or club other than their own.

The parties concede and the authorities sustain the jurisdiction of a court of equity in a suit of this character. That the contracts of January 8th and January 20th are, in form, valid and binding upon the parties thereto must also be conceded. Therefore the questions here presented and requiring consideration are these:

First, are the provisions of the 1913 contract between the defendants, relative to the reservation of the player for the succeeding season, valid and enforceable? and, second, are the plaintiffs by their own conduct barred from seeking relief in a court of equity?

[1] The leading authorities, with possibly one exception, are agreed that executory contracts of this nature can neither be enforced in equity nor form the basis of an action at law to recover damages for their breach. The reasons for the decisions are that such contracts are lacking in the necessary qualities of definiteness, certainty, and mutuality. The 1913 contract between these defendants, relative to the reservation of the defendant Killefer for the season of 1914, is lacking in all of these essential elements. It is wholly uncertain and indefinite with respect to salary and also with respect to terms and conditions of the proposed employment. It is nothing more than a contract to enter into a contract, in the future, if the parties can then agree to contract. Although it is founded upon sufficient consideration, it lacks mutuality,

because the Philadelphia Club may terminate it at any time upon 10 days' notice while the other party has no such option and is bound during the entire contract period. A contract exists, but, if broken by either party, the other is remediless, because the courts are helpless either to enforce its performance or to award damages for its breach. Metropolitan Exhibition Co. v. Ewing, 42 Fed. 198, 7 L. R. A. 381; Brooklyn Baseball Club v. McGuire (C. C.) 116 Fed. 782; Metropolitan Exhibition Co. v. Ward, 9 N. Y. Supp. 779; Arena Athletic Club v. McPartland, 41 App. Div. 352, 58 N. Y. Supp. 477; Rutland Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 955.

[2] The principle embodied in the maxim, "He who comes into equity must come with clean hands," is a cardinal one, lying at the foundation of equity jurisprudence. Equity imperatively demands of suitors in its courts fair dealing and righteous conduct with reference to the matters concerning which they seek relief. He who has acted in bad faith, resorted to trickery and deception, or been guilty of fraud, injustice, or unfairness will appeal in vain to a court of conscience, even though in his wrongdoing he may have kept himself strictly "within the law." Misconduct which will bar relief in a court of equity need not necessarily be of such nature as to be punishable as a crime or to constitute the basis of legal action. Under this maxim, any willful act in regard to the matter in litigation, which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean. Both courts and text-writers have repeatedly spoken upon this subject in no uncertain language.

In Michigan Pipe Co. v. Fremont Ditch, Pipe Line & Reservoir Co., 111 Fed. 284–287, 49 C. C. A. 324, 327, the Circuit Court of Appeals of the Eighth Circuit, speaking by Judge Sanborn, said:

> "A suit in equity is an appeal for relief to the moral sense of the chancellor. A court of equity is the forum of conscience. Nothing but good faith, the obligations of duty, and reasonable diligence will move it to action. Its decree is the exercise of discretion, not of an arbitrary and fickle will, but of a wise judicial discretion, controlled and guided by the established rules and principles of equity jurisprudence. One of the most salutary of these principles is expressed by the maxims, 'He who comes into a court of equity must come with clean hands,' and 'He who has done iniquity cannot have equity.' A court of equity will leave to his remedy at law—will refuse to interfere to grant relief to—one who, in the matter or transaction concerning which he seeks its aid, has been wanting in good faith, honesty, or righteous dealing. While in a proper case it acts upon the conscience of a defendant, to compel him to do that which is just and right, it repels from its precincts remediless the complainant who has been guilty of bad faith, fraud, or any unconscionable act in the transaction which forms the basis of his suit."

In Deweese v. Reinhard, 165 U. S. 386, 17 Sup. Ct. 340, 41 L. Ed. 757, Mr. Justice Brewer, speaking for the court, said:

> "A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity."

In Larcheid v. Hashek Mfg. Co., 142 Wis. 172, 175, 125 N. W. 442, 443 (20 Ann. Cas. 576) the Supreme Court of Wisconsin said:

"The exclusion of a plaintiff from the peculiar favors of courts of equity results equally where his conduct has been unconscionable by reason of a bad motive, or where the result in any degree induced by his conduct will be unconscionable either in the benefit to himself or the injury to others."

Mr. Pomeroy in his work on Equity Jurisprudence, §§ 398, 400, and 404, says:

"Whatever may be the strictly accurate theory concerning the nature of equitable interference, the principle was established from the earliest days, that while a Court of Chancery could interpose and compel a defendant to comply with the dictates of conscience and good faith with regard to matters outside of the strict rules of law, or even in contradiction to those rules, while it could act upon the conscience of the defendant and force him to do right and justice, it would never thus interfere on behalf of a plaintiff whose own conduct in connection with the same matter or transaction had been unconscientious or unjust, or marked by a want of good faith, or had violated any of the principles of equity and righteous dealing which it is the purpose of the jurisdiction to sustain. While a court of equity endeavors to promote and enforce justice, good faith, unrightness, fairness, and conscientiousness on the part of the parties who occupy a defensive position in judicial controversies, it no less stringently demands the same from the litigant parties who come before it as plaintiffs or actors in such controversies.

"A contract may be perfectly valid and binding at law; it may be of a class which brings it within the equitable jurisdiction, because the legal remedy is inadequate; but, if the plaintiff's conduct in obtaining it, or in acting under it, has been unconscientious, inequitable, or characterized by bad faith, a court of equity will refuse him the remedy of a specific performance, and will leave him to his legal remedy by action for damages."

"It is not alone fraud or illegality which will prevent a suitor from entering a court of equity; any really unconscientious conduct, connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience."

Mr. Eaton in his work on Equity, at page 74, says:

"The maxim applies not only to fraudulent and illegal transactions, but to any unrighteous, unconscientious, or oppressive conduct by one seeking equitable interference in his own behalf. A court of equity will not decree the specific performance of a contract unless it is strictly equitable, and free from trickery and deception on the part of the party seeking such performance. Even if the inequity of the plaintiff is insufficient to warrant the court in canceling the contract, yet the plaintiff may be refused its enforcement. And equity will refuse its aid in the enforcement of a contract where the plaintiff has practiced fraud on the defendant, and also where the plaintiff has been guilty of unconscionable conduct which does not amount to legal fraud."

[3] Authorities to the same effect might be multiplied indefinitely. The foregoing will suffice to state and to define the universally accepted and adopted rule upon this subject. The principle thus broadly enunciated is not confined in its application to controversies of any particular nature or class, but extends generally to all cases cognizable by courts of equity. It is, however, peculiarly appropriate and applicable to cases like the present one, where relief will not be granted as a matter of strict right, but must result from the exercise of a sound judicial discretion. Measuring and testing their conduct by this rule, are the plaintiffs in court with clean hands? Knowing that the defendant, Killefer, was under a moral, if not a legal, obligation to fur-

nish his services to the Philadelphia Club for the season of 1914, they sent for him, and by offering him a longer term of employment and a much larger compensation induced him to repudiate his obligation to his employer. In so doing a willful wrong was done to the Philadelphia Club, which was none the less grievous and harmful because the injured party could not obtain legal redress in and through the courts of the land. Can it be doubted that, if the plaintiffs had not interfered, Mr. Killefer would have carried out his agreements with the Philadelphia Club in honesty and good faith? The plaintiffs and Killefer both expected to derive a benefit and a profit from their contract, and both knew that such contract, if performed, would work a serious injury to the Philadelphia Club. The conduct of both is not only open to criticism and censure, but is tainted with unfairness and injustice, if not with actionable fraud. To drive a shrewd bargain is one thing and to resort to unfair and unjust practices and methods in order to obtain an advantage over a business rival or competitor is another. Courts of equity may protect and enforce the former, but will not sanction nor lend their aid to the latter. While it is true that the plaintiffs and Mr. Killefer have entered into a legal and binding contract, for the breach of which the one may be compelled to respond in damages to the other, it is also true that, because both have acted wrongfully and in bad faith, a court of equity will neither adjust their differences nor balance their equities. The motion for an injunction must be denied, not because the executory part of the 1913 contract between the defendants was of superior or any legal force and effect, not because the contract between plaintiffs and defendant, Killefer, is not in itself such a one as the courts will enforce, not because there are any equities in Killefer's favor which excuse or exempt him from the performance of his engagements, and not because the merits of the controversy are with the Philadelphia Club, but solely because the actions and conduct of the plaintiffs in procuring the contract, upon which their right to relief is and must be founded, do not square with one of the vital and fundamental principles of equity which touches to the quick the dignity of a court of conscience and controls its decision regardless of all other considerations.

Ex parte KEISUKI SATA et al.

(District Court, N. D. California, First Division. June 20, 1914.)

No. 15592.

1. ALIENS (§ 54*)—IMMIGRATION—EXCLUSION—DEPORTATION PROCEEDINGS—HEARING—EVIDENCE.

Evidence on which a warrant of arrest in deportation proceedings is issued may not be considered as evidence on subsequent hearings, unless it is called to the alien's attention and he has been given an opportunity to meet it.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

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

2. ALIENS (§ 54*)—DEPORTATION—FAIR HEARING.

While the courts are not authorized to interfere with an order of deportation made after a fair hearing, though the evidence on which the order is based is slight, if there is any evidence whatever to support it, yet, where the alien has not been accorded a fair hearing within the meaning of the law, it is the court's duty to intervene.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

3. ALIENS (§ 54*)—DEPORTATION—FAIR HEARING.

Where the most important evidence against an alien in proceedings to deport him because he was afflicted with a contagious disease consisted of a letter written by a hospital surgeon, a hearing at which the alien was not confronted with such letter and had no opportunity to controvert the statements made therein was an unfair one, and insufficient to sustain an order of deportation.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

4. ALIENS (§ 54*)—DEPORTATION PROCEEDINGS—WARRANT OF ARREST—EVIDENCE.

Where a warrant in deportation proceedings provided that it should operate to cancel a previous warrant issued in the case June 5, 1913, the alien was under no obligation to search the record on which such prior warrant was issued in order to find evidence to be used against him in support of the present proceeding.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

5. ALIENS (§ 54*)—DEPORTATION—GROUNDS.

Though an alien arrested on one charge may be deported for any reason which may develop in the course of the proceedings, this can only be done when he has been advised of the new charge or charges, and been given an opportunity to meet them.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

Habeas corpus by Keisuki Sata and others to obtain discharge from custody under a deportation warrant. Writ granted, and petitioners discharged.

Marshall B. Woodworth, of San Francisco, Cal., for petitioner.

John W. Preston, U. S. Atty., and Walter E. Hettman, Asst. U. S. Atty., both of San Francisco, Cal., for respondent.

DOOLING, District Judge. In view of certain references made in the briefs herein, it may not be amiss to state that in the determination of cases on habeas corpus, as in all other cases, the court can only act upon the record and the facts presented to it. The only record presented to the court upon the hearing of the present case was the petition, the return, the traverse to the return, and the copy of an unsigned letter, which is as follows:

"Department of Commerce and Labor.
"Immigration Service.

"1048/604

"Medical Division, Angel Island Station, via Ferry Post Office, San Francisco, Cal.,

"August 19, 1913.

"The Commissioner of Immigration, Angel Island, California—Sir: Replying to your request for my opinion as to whether or not Keisuki Sata was

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

afflicted with Syphilis at the time of his entry into the United States, I beg to state that this man was admitted to the hospital on May 30th with syphilistic symptoms which he said had been manifest for the last 3 weeks. There was nothing in connection with the symptoms which would lead me to suppose that the man was not telling the truth and allowing that he was truthful that would make the first manifestation of his disease apparent on May 9th. The usual incubation stage of syphilis, by incubation stage I mean the time elapsing between the time of contracting the disease and the time of symptoms manifesting themselves, is from 3 to 6 weeks. As this alien landed from his ship on April 24th it will be seen that at the time of landing he might have had no obvious symptoms and still have the disease. This is what I believe to have been the case. As to whether or not the disease was contracted on board the vessel while en route or whether just before leaving Japan it would be impossible for me to say because I do not know the definite period of incubation in this particular man.

"Respectfully,

"WCB/CLA. Surgeon, P. H. S."

It appears from the petition and proofs presented that petitioner Keisuki Sata was arrested by virtue of a warrant dated August 28, 1913, charging him with being illegally in the country for the reason that:

"He is an alien and a member of the excluded classes in that he was afflicted with syphilis, a dangerous contagious disease, at the time of his entry into the United States."

The warrant contains this further statement:

"This will serve to cancel warrant of arrest issued in the case on June 5, 1913."

Upon this charge he was arraigned and examined on September 5, 1913, the only testimony taken concerning the matter set forth in the warrant being the testimony of the petitioner himself, unless indeed the letter above quoted may be regarded as evidence supporting the order of deportation finally entered. Of this letter mention will later be made. From the testimony of petitioner taken September 5, 1913, it appears that he left Kobe, Japan, on April 5, 1913, and landed at Seattle April 24th, where he was examined before landing, and found to be free from disease; that some time after his arrival in this country, not definitely fixed, symptoms of syphilis were developed, but that at the time of his testifying he was wholly cured; that he did not have the disease at all until he was in this country, and that he thought it had developed in him too long after the only occasion when he might have contracted it abroad, which occasion was on March 27th, to be the result thereof. It also appears from his affidavit, made on September 22d, that after his arrival here there were three occasions upon which he might have contracted the disease in question. This is all the evidence, exclusive of the letter already quoted, which bears upon the charge contained in the warrant of arrest. If the letter be regarded as evidence in support of the order of deportation, it is claimed by petitioner that the hearing accorded him by the immigration department was unfair for the reason that he had no knowledge of the existence of such letter until it was offered in evidence in this court, and therefore had no opportunity to controvert the statements therein contained. Who the author of this letter is

does not appear in the evidence, but it will be observed that it antedates the warrant by nine days, and is important in view of the testimony of petitioner above set forth.

[1] Passing the question as to whether the evidence upon which a warrant of arrest is issued in cases of deportation may be considered as evidence also upon the subsequent hearings, it is clear that it cannot be so considered, unless it is called to the attention of the alien and he is given an opportunity to meet it. Letters passing between the various officers of the immigration service are generally held by themselves to be confidential, and we are frequently confronted in court by such communications, which the alien has never theretofore seen. The proceedings upon which an alien is denied a landing, as well as those upon which he is deported, are very summary in character, and the courts have gone far in upholding them. The following principles seem to be well established:

[2-4] The courts are not authorized to interfere with an order of deportation made after a fair hearing, even though the evidence be slight upon which the order is based, if there be any evidence whatever to support it. But it has been uniformly held that where the petitioner has not been accorded a fair hearing within the meaning of the law, it is the duty of the courts to intervene. In the present case if the letter be regarded as evidence used upon the hearing of the charge specified in the warrant of August 28th, then such hearing was in law an unfair one, because petitioner was never confronted with it, and had no opportunity to controvert the statements which are made therein. As the letter was offered in evidence by the respondent upon the hearing of this petition in support of the order of deportation, and of his return, the court must assume that it was so offered because it had been considered by the secretary as part of the evidence upon which he based his finding that petitioner was afflicted with a dangerous contagious disease at the time of his entry into the United States. Something has been said in the briefs concerning a prior hearing, of which no evidence has been presented. If this letter constituted a part of the record of such prior hearing, then manifestly petitioner would not be under any obligation to search such record to find the evidence to be used against him on the present charge, as the warrant itself declared:

"This will serve to cancel warrant of arrest issued in the case on June 5, 1913."

With this declaration of the secretary before him, and upon which he was entitled to rely, it cannot now be urged that, when he was informed that he was entitled "to see all the evidence on which the secretary has acted in issuing his warrant of arrest," he should have searched the proceedings had upon the canceled warrant in order to ascertain the basis for the new one. The letter in question, so far as appears, was the most important evidence against petitioner upon the charge specified in the warrant, and, taken in connection with his own testimony, might well be held sufficient upon which to base the finding of the secretary. For this reason it was very essential to petitioner's defense that he be apprised of its existence and intended

use, so that he might have an opportunity to controvert its statements. Such opportunity was not given him, unless it be held to have been given him, as contended by respondent, by the statement that he was entitled to see all the evidence on which the secretary had acted in issuing his warrant of arrest. But it does not even appear that this letter was at that time a part of the files of the local office and accessible to petitioner even in the record of the prior hearing spoken of in the briefs, and, if it were, I am satisfied, for the reasons given above, that he was under no obligation to search such prior record, the warrant for which had been already canceled. The order of deportation, as is set forth therein, is issued upon the following grounds:

"That the said alien is a member of the excluded classes in that he was afflicted with syphilis, a dangerous contagious disease, and was a person likely to become a public charge at the time of his entry into the United States, and that he is unlawfully within the United States in that he secured admission by means of false and misleading statements, thereby entering without inspection."

[5] It is quite true that an alien arrested on one charge may be deported for any reason which may develop in the course of the proceedings, but before this can be done he must be advised of the new charge or charges, and be given an opportunity to meet them. Nothing of that kind appears here. Just what preceded the issuance of the warrant of August 28, 1913, is not apparent to the court, but it *is* apparent that a previous warrant had been canceled. It is doubtless true that the secretary may, upon reconsideration, adopt a different view from that which he has already expressed, but if he do so, I think the alien should have some suggestion of such change, so that he may not be lulled into a fancied security that he is being examined on one charge, when it is really intended to order his deportation upon another. It is only proper to state that whatever is said herein is based solely upon the record as presented in court. This statement is made because the briefs have taken a somewhat wider range, and deal with matters concerning which the court has no information aside from the references therein contained.

As to the wife and child of petitioner, also ordered deported, it is sufficient to say that no evidence whatever appears against them.

For the reasons herein stated, the petitioners are ordered discharged.

In re CORETTO.

(District Court, E. D. New York. June 16, 1914.)

ALIENS (§ 68*)—NATURALIZATION—WITNESSES—NONPOSTED WITNESS.

Naturalization Act (Act June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1911, p. 529]) § 4, par. 2, provides that the petition shall be verified by two credible witnesses and paragraph 4 declares that it shall be made to appear to the satisfaction of the court that the alien has resided, etc., and, in addition to the applicant's oath, the testimony of at least two witnesses, citizens of the United States, shall be given as to the facts, and the name, place of residence, and occupation of each witness entered

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

on the record. Section 5 provides for the filing and posting of notice containing the names of the witnesses whom the applicant expects to summon in his behalf, and that the clerk, if the applicant requests it, shall issue a subpœna for the witnesses so named to appear on the day set for the final hearing; but, in case the witnesses cannot be produced on the final hearing, other witnesses may be summoned. Section 6 declares that final action on the petition shall be had only on stated days and not until at least 90 days have elapsed for filing and posting the notice, and section 9, that on the final hearing the applicant and witnesses shall be examined under oath. By section 11 the United States is authorized to appear and cross-examine the petitioner and the witnesses produced in support of his petition and to produce evidence and be heard in opposition to the granting of the petition. *Held*, that where one of the witnesses whose name was posted in support of the petition had returned to Italy at the time of the hearing, and therefore could not be produced and sworn and could not be obtained after a reasonable adjournment, the petitioner was entitled to support his petition by the testimony of other witnesses.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138-145; Dec. Dig. § 68.*]

Application by Angelo Coretto for naturalization. On objections to the issuance of a final certificate. Certificate granted.

William J. Youngs, U. S. Atty., and Reuben Wilson, Asst. U. S. Atty., both of Brooklyn.

Angelo Coretto, in pro. per.

CHATFIELD, District Judge. The petition was filed on March 5, 1914, by Angelo Coretto, with the statement that the names of the witnesses to be called were Giuseppi Cogliana and Cosimo Cavalluzzo. These two men at the time verified the usual affidavit to accompany the petition, and their names were posted for the 11th day of June, 1914, upon which date the case was called for hearing. Cogliana appeared and was examined, but Cavalluzzo is in Italy, and the petitioner was therefore unable to produce him or to subpœna him under section 5 of the statute. He therefore summoned or asked that the court summon Pietro Iannace, of No. 411 Liberty avenue, Brooklyn, N. Y., who was sworn and testified and proved to have known the applicant in a satisfactory way for the necessary period.

The United States had previously examined Cogliano and found that he was a competent witness and possessed the necessary qualifications of knowledge with respect to the petitioner.

The Naturalization Examiner made no request for further time to investigate the truth of the statements by Iannace, and no defect in any way with respect to the petition has been urged except that arising from the failure to produce the original witness and the production of a new witness upon the final hearing.

The United States Attorney appeared upon the hearing and, without asking for further adjournment for investigation or examination, objected to favorable action on the petition of Coretto until that petition, supported by the affidavits of two witnesses, who were named upon the petition, and who should appear for final examination at the time of final hearing, could be taken up after posting for 90 days.

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

The provisions of the naturalization statute which we must consider are section 4, par. 2:

"The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits," etc. (the facts as to five years' residence, moral character, etc.)

And paragraph 4:

"It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that" he has resided, etc., and "in addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts," etc., "and the name, place of residence, and occupation of each witness shall be set forth in the record."

Section 5 provides that the clerk shall give notice of the petition and its filing, by posting the name, etc., of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf. The section then goes on to say:

"And the clerk shall, if the applicant requests it, issue a subpœna for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses cannot be produced upon the final hearing other witnesses may be summoned."

It is evident that subpœnas would not be issued when the petition is filed, for a hearing as to which the date is fixed "as nearly as may be," and the provision for additional witnesses is that they may be "summoned," not that they may be "subpœnaed."

By section 6 final action upon a petition is to be had only on stated days and not until at least 90 days have elapsed for filing and posting the notice of such petition.

Section 9 provides that upon final hearing "the applicant and witnesses shall be examined under oath," and by section 11 the United States is given the right to appear, to cross-examine the petitioner and the witnesses produced in support of his petition, and is also given the right to call witnesses and produce evidence and be heard in opposition to the granting of the petition.

By section 13, the clerk is required to collect a fee of $2 for filing and docketing a petition, and $2 more for entering the final order and issuing a certificate of citizenship thereunder. If the original witnesses die or are ill and cannot be produced in court, it is easy to see that a mere adjournment of the hearing will not meet the situation. When a case comes up for final action, it is impossible for the applicant to produce a new witness and to then comply with the provision that the witness' name be stated in the petition and posted for 90 days, nor can a subpœna for the originally named witnesses be used in procuring the attendance of anybody else. If a mere temporary adjournment will allow the production of the original witnesses, there would seem to be no reason why adjournment should not be had, and this should be compelled. If the witnesses fail to appear without proper evidence that they cannot so do, adjournment will meet the situation, and the objection of the United States to a hearing of the petition without the presence of the original witnesses would seem proper and is the

usual course. But if an original witness cannot be produced, or if an attempt to compel his appearance would make adjournment of the hearing unreasonable, it would seem that there is nothing in the quoted portions of the statute which prevents the taking of testimony, if proper regard is had for examination by the government as to anything as to which the government is not satisfied at the hearing.

If new witnesses are summoned either by the court or produced and heard by direction of the court, their testimony in the presence of the court is compulsory, but the statute (section 9) says, "the *applicant and witnesses*" shall be examined, not "the applicant and *original* witnesses." In re Schatz (C. C.) 161 Fed. 237.

The requirement as to admission to naturalization is that the requisite facts shall be made to appear to the satisfaction of the court. There is no requirement that the exact facts of the original petition shall in all respects be sworn to orally in mere repetition of what has been previously sworn to upon the petition. Section 2, par. 4, again makes it the testimony of *at least two witnesses,* rather than the testimony of *the* two witnesses who verified the petition. United States v. Doyle, 179 Fed. 687, 103 C. C. A. 233.

It is manifestly the oral, sworn statement of satisfactory witnesses that is to be heard by the court upon final hearing. The provisions for posting and for the naming of at least two witnesses who shall comply with the requirement that the petition shall be verified by two competent and credible witnesses are provisions to prevent fraud by allowing opportunity for examination of the jurisdictional facts and of the claim set forth in the petition, that at least two witnesses have known the applicant in a satisfactory way a sufficient length of time. There is no authority in the statute for a reposting of an original petition, nor the posting of names of additional witnesses after the date of the first time for final hearing has arrived. United States v. Erickson (D. C.) 188 Fed. 747; In re Neugebauer (D. C.) 172 Fed. 943.

Section 5 provides that such posting shall be immediately after filing, and if the court should conclude that the original petition was insufficient, because not properly verified by two competent witnesses, or if there is default in appearing upon the petition, it would seem that the only remedy would be to deny the petition or compel the payment of a new fee upon filing another. Such action or the requirement of compelling an original witness to return from time to time, until he can happen to be present with another original witness, would frequently work unnecessary hardship, and the rights of the government can be entirely protected by the provision that the United States shall be afforded opportunity for any necessary examination. United States v. Ojala, 182 Fed. 51, 104 C. C. A. 491.

In the present case, the government has examined the new witness as well as the old ones, asks for no further adjournment, but does ask that the applicant and the original witness who appeared be compelled to return, and that the clerk post upon the board used for filing purposes the name of the witness who will then be called. Any such entry by the clerk of this name upon the original record would certainly confuse the statement of what happened more than 90 days be-

fore, and there would seem to be no authority for allowing the clerk to exact another fee unless the original petition is denied.

The cases of O'Dea (C. C.) 158 Fed. 703, and U. S. v. Daly, 32 App. D. C. 525, are to the contrary, but are not controlling.

The objection of the United States to the granting of this petition will be overruled, and the certificate may issue.

OSBORN v. PEACE et al.

SAME v. EDAY REALTY CO. et al.

(District Court, E. D. New York. July 15, 1914.)

1. FRAUDULENT CONVEYANCES (§ 105*)—HUSBAND AND WIFE—PURCHASE BY HUSBAND—TITLE IN WIFE'S NAME.

A husband may not lawfully purchase property and place the title in the name of his wife, and then prevent lienors or judgment creditors of the wife from treating the property as hers in case she reconveys to him without consideration, she having used the property as her own in creating incumbrances, as provided by Real Property Law, N. Y. (Consol. Laws, c. 50) § 262, nor can the wife successfully transfer the property in equity belonging to her husband in order to prevent her creditors from collecting their debts, incurred through their reliance on her ownership, as provided by section 263.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 345; Dec. Dig. § 105.*]

2. TRUSTS (§ 81*)—PROPERTY PURCHASED BY HUSBAND—CONVEYANCE TO WIFE—ACCOUNTING.

Where a husband purchases property with his own funds and has the title conveyed to his wife, equity as between the parties may compel her to account to him for the proceeds.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 115–118; Dec. Dig. § 81.*]

3. FRAUDULENT CONVEYANCES (§ 44*)—CONVEYANCE BY WIFE TO HUSBAND—RIGHTS OF CREDITORS.

Where a husband, having purchased certain real property with his own funds, caused the title to be conveyed to his wife, and she reconveyed to him through a third person at a time when there was no creditor having a lien of any sort on the property, the conveyance was not voidable at the instance of her creditors, unless she had held herself out as the owner of the property, and made representations of ownership which would have made a transfer by her fraudulent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 102–104; Dec. Dig. § 44.*]

4. PRINCIPAL AND AGENT (§ 156*)—REPRESENTATIONS OF AGENT—AUTHORITY.

Where a husband purchased certain real property, taking the title in the name of his wife, she was not bound by representations made by her brother, who was her agent to discount certain notes at a bank on which she was an indorser, that she was the owner of the property, in the absence of proof that the brother was authorized to make any representations, or that the bank had any right to rely thereon.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 583–587; Dec. Dig. § 156.*]

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

5. BANKRUPTCY (§ 175*)—TRANSFER BY BANKRUPT TO CORPORATION—RIGHTS OF CREDITORS.

Where persons who subsequently became stockholders of a corporation placed certain real property in the hands of a bankrupt and made it possible for her to deal with it as her own, and after money had been loaned to her on the faith of her ownership such stockholders, through the use of the bankrupt as a dummy holder of title, procured a transfer of the property to the corporation for their own benefit, such transfer was fraudulent and subject to vacation at the instance of the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. § 175.*]

In Equity. Actions by Everett H. Osborn, as trustee in bankruptcy of the estate of Elizabeth Peace, bankrupt, against Peter M. Peace and others and against the Eday Realty Company and another. Judgment for complainant against the Realty Company, and dismissed as against the individual defendants.

Charles P. Hallock, of New York City, for plaintiff.

L. & J. Weinberger, of New York City, for defendants Peter M. Peace, Margaret Rendall, and Eday Realty Co.

Herman M. Schaap, of New York City, for defendant Elizabeth Peace.

CHATFIELD, District Judge. These actions grew out of the same general situation which preceded a petition in bankruptcy, filed by one Elizabeth Peace, on the 30th day of December, 1912, in this court. The plaintiff, Everett H. Osborn, was appointed trustee in bankruptcy of her estate on the 24th day of January, 1913, and one of the debts proved in the case was a judgment obtained by the Cosmopolitan Bank, for $5,301.15. This was the amount due upon a promissory note for $5,000, becoming due March 1, 1912. The action against the individual defendants is concerned with a piece of real estate known as No. 33 Stevens street, Astoria, Queens county, upon which was erected a dwelling house, and in which the bankrupt, Elizabeth Peace, and her husband, had been and are residing at the present time. The action against the Eday Realty Company is based on the sale of two four-story apartment houses on the north side of Kelly street, about 173 feet west of Intervale avenue, in the borough of the Bronx, a piece of land in New Jersey, consisting of about 13 acres, and a plot of land at Canarsie, Queens county. In the case of the Stevens street house above referred to, it appears that title was conveyed to Elizabeth Peace and Margaret Rendall by deed under date of June 16, 1897, recorded in Liber 1159 of Deeds, page 145, in the office of the clerk of Queens county.

It appears from the testimony that Mrs. Peace is the sister of the defendant Margaret Rendall, and wife of the defendant Peter Peace. Some time previous to the dates above named, John Rendall, who was in business in the city of New York as a plumber, undertook certain building operations in the city of New York, and acquired a plot of property for the purpose of erecting an apartment, which will be later referred to as the "Kenilworth." This John Rendall was the brother

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

of the two women above named, and enlisted their interest and that of John Peace in the building operation. Margaret Rendall has lived in this country for a number of years, and had saved considerable money from the proceeds of her own work. Peter Peace was a mason, and his wife, Elizabeth Peace, had no property of her own, but lived at home with her husband and one son. The moneys entering into the various transactions and into the purchase of the property taken in the name of Elizabeth Peace was earned by and came from the proceeds of the business of the husband, John Peace, or from the sister, Margaret Rendall. It seems that Peace had a partner in his business; and in order to avoid difficulties through partnership obligations, Peace turned all of his earnings over to his wife, or took whatever property he obtained in her name. So long as Peace was solvent there was, of course, no fraud in so doing. The house at 33 Stevens street was built under the direction of Peace, who furnished money to his wife to partially make the purchase. The bills were generally rendered to Peace, and everything was done in his name. He has continued to live in the house, treating the house as his own, but furnishing therein a home to Miss Rendall whenever she wished a place to stay. A mortgage placed thereon was used to furnish funds for the building. This mortgage is for $3,500, and the value of the property is considerably more than that, probably in the neighborhood of $8,500. Upon the 10th of May, 1912, Mr. and Mrs. Peace and Miss Rendall went to an attorney, and had executed and delivered to Miss Rendall a deed from Elizabeth Peace of her own one-half interest in the property. The deed was acknowledged on the day of its execution and recorded upon the following day, but was dated back to the 6th day of May, 1912; and Miss Rendall then executed a deed, also dated May 6, 1912, but acknowledged upon the 10th and recorded the following day, of a one-half interest in the property to Peter Peace.

It will be noticed that the note to the Cosmopolitan Bank became due upon March 1, 1912, and in the month of April of that year Peter Peace organized, with the approval and help of his wife, her sister and nephew, a corporation known as the Eday Realty Company. Upon the 17th of April, 1912, Elizabeth Peace transferred to the Eday Realty Company the property on Kelly street in the borough of the Bronx, New York, and also the New Jersey property and Canarsie lots which have been mentioned. These conveyances were all for a nominal consideration, and left Elizabeth Peace with no real estate in her own name.

It appears that the building operations of John Rendall in constructing the Kenilworth had exhausted the money which had been loaned to him by his sisters and his brother-in-law; and he had made numerous loans with the Cosmopolitan Bank, and also had other transactions with the Bronx Borough Bank, which will be referred to subsequently. The title to the Kenilworth was placed in the names of Elizabeth Peace and Margaret Rendall, and subsequently sold, the Kelly street property, the Jersey land, and the Canarsie lots being received as a part of the price and held in the name of Elizabeth Peace until the conveyance to the Eday Realty Company.

It will be seen from the list of stockholders and directors of the Eday Realty Company that it was formed for the benefit of the parties who had loaned money to John Rendall, and also for whose benefit, according to the testimony, title to the Kenilworth and to the other property had been taken in the name of Elizabeth Peace. John Rendall owed money to his sister and his brother-in-law throughout the entire period, and their only return therefor was the real estate which was put in Mrs. Peace's name. John Rendall conducted all of the transactions with the Cosmopolitan Bank, including that relating to the $5,000 note on which the judgment was taken against Mrs. Peace.

A long series of notes were put in evidence, bearing the name of the wife of John Rendall as maker, and the indorsement of John Rendall and Elizabeth Peace. The testimony shows that Rendall made the statement that his sister, Elizabeth Peace, owned $30,000 or $40,000 worth of real property, and was a woman of independent means. She indorsed the notes, knowing that he was intending to use them in his real estate transactions, and that she was doing so as an accommodation. There is no evidence, and it appears not to be the fact, that she had knowledge of the statements made by him to the bank. The notes were renewed or payments made on account, so that the last amount was the $5,000, on which judgment was entered.

Upon the sale of the property known as the Kenilworth, certain sums of money were realized which were handled and disposed of by John Rendall, who acted as attorney for his sisters; and under agreement with Rendall this money was taken by Dr. Becker, the president of the Cosmopolitan Bank, and used in part to pay obligations of Rendall in the Bronx Bank. This amount was more than sufficient to have paid the claim against Margaret Peace in the Cosmopolitan Bank. John Rendall then went into bankruptcy, and nothing having been received from his estate, suit was brought against the indorser, Mrs. Peace, by the Cosmopolitan Bank, and resulted in the judgment which has been referred to.

With reference to the Stevens street property, the trustee in bankruptcy, having the same standing as a judgment creditor, charges that the trust created by taking the property in the name of Mrs. Peace was void; that John Peace, while really the party purchasing the property, did not preserve any valid claim thereto as against creditors of Mrs. Peace; that even in equity, Peace could claim no trust except to have his wife account for the proceeds of the property; that the transfer of the one-half interest to Miss Rendall and back to Peace was but another step to cover up the real situation; and that the whole transaction was fraudulent so far as bona fide creditors of Mrs. Peace were concerned, or so far as innocent parties relying upon the bona fides of the transaction subsequent to the taking of title to the property in the name of Mrs. Peace.

[1] It is evident that Peace could not purchase property and place the same in his wife's name, and then prevent lienors or judgment creditors of his wife from treating the property as hers, in case she deeded it back without consideration, if she had used the property as her own in creating the incumbrance. Real Property Law, section 262

of chapter 52, Laws of 1909. Nor could Mrs. Peace transfer the property, which was in reality that of her husband, in order merely to prevent her creditors from collecting their debts if she had incurred those debts through reliance upon her ownership, if this was known or ought to have been known by her. Real Property Law, section 263 of chapter 52, Laws of 1909.

[2] As between Peace and his wife, equity might compel her to account to him for the proceeds; but the real questions at issue in this case are whether Mrs. Peace's creditors can charge fraud because of what she allowed to happen or should have known, even if the transaction was otherwise an innocent one throughout, and whether the whole transaction was impregnated with fraud.

The testimony seems to entirely bear out the various propositions urged by the defendants with respect to the method of acquiring the actual interest of the parties in the Stevens street house.

[3] While the deeds from Mrs. Peace to Miss Rendall and back to John Peace were evidently given for the purpose of transferring through an apparently innocent and independent party, a one-half share which really belonged to John Peace, and while it is evident that this was done so that it would be fraudulent if he was not entitled to receive the property, nevertheless it must be held that there was no creditor having a lien of any sort upon the property at the time the transfer was made. The beneficial interest in the property was his, and if his wife saw fit to deed it to him, she not only had a right to do so, but was fulfilling her legal duty; and unless she had held herself out as owner of the property and made representations which would have made a transfer by her fraudulent, she had a right to make the deed in question.

[4] The charge that the bank was misled by her, and that she held herself out as owner, is based upon the statements of her brother who was her agent in delivering the notes to the bank, to the effect that she was the owner of the real estate which was standing in her name. Inasmuch as there is no definite statement shown which would indicate that the brother was authorized to make any representations whatever, or that the bank had a right to rely upon his statements as the agent of his sister, it must be held that any charge of fraud could be made against John Rendall alone. The precaution of an affidavit or a written statement from Mrs. Peace was not required. The bank had the right to levy on the proceeds of the Kenilworth property to pay its note, and could apply it to the debts of John Rendall if paid over by him as agent. As to the properties transferred to the Eday Realty Company, the same question is raised as to the representations and statements by John Rendall to Dr. Becker, to show that Mrs. Peace was the actual owner of the property, or that she held herself out as the owner, so that it was fraud upon her creditors to transfer it for the benefit of the people who were beneficially interested.

[5] The Eday Realty Company has been conducted in such a way and with such entire disregard of the necessary legal forms of regular procedure that the parties have evidently acted in ignorance of the requirements of the law in all respects. It is apparent that the stockholders who considered themselves the owners of the corporation have

dealt with it as if it were their individual property. They also placed it in the hands of Mrs. Peace and made it possible for her to deal with it as her own. If in so doing she has prevented them from objecting to the collection of claims by Mrs. Peace's creditors, or if any liens had attached thereto, it would not be at all surprising; on the contrary, their carelessness was so great as to merit that result.

But with reference to the property transferred to the corporation, a different situation is presented than with respect to the Stevens street house. In the case of the Stevens street house, the money invested had not been lost, nor had creditors dealt with Mrs. Peace from any knowledge of the transaction itself. In the case of the Kenilworth and the purchase of the other property, the money was lost in the transaction of the very operations from which the stockholders of the corporation have attempted, through the use of Mrs. Peace as a dummy holder of title, to transfer to the corporation for their own benefit some part of the property it represented or investment made by them at the solicitations of their brother.

It would seem that, considering the statements of Mrs. Peace's agent, in borrowing money from the bank, it should be held that the transaction with the Eday Realty Company involved fraud, and that there is sufficient value to the properties transferred to indicate that the parties who were thus using Mrs. Peace to hold their title to the real estate, intended to secrete that property from creditors who had extended credit, knowing that she was the ostensible owner of the property as to which the debt was incurred. In this case transfer of this property to the Eday Realty Company would be void as against creditors, and the proceeds should be accounted for to the trustee in bankruptcy. The action against the individuals should be dismissed.

STETSON v. INSURANCE CO. OF NORTH AMERICA.

(District Court, E. D. Pennsylvania. June 1, 1914.)

No. 10.

1. INSURANCE (§ 273*)—MARINE INSURANCE—IMPLIED WARRANTY OF SEAWORTHINESS.

   In every insurance upon a vessel there is an implied warranty on the part of the assured that at the time of sailing the vessel shall be seaworthy for the voyage insured, which extends not only to the hull, but if a sailing vessel to the sails and rigging.

   [Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 583-588; Dec. Dig. § 273.*]

2. INSURANCE (§ 481*)—MARINE INSURANCE—FREIGHT—ABILITY OF VESSEL TO COMPLETE VOYAGE.

   To warrant a recovery on a policy insuring freight, it must appear that because of perils insured against the vessel could not with reasonable repairs and within a reasonable time complete the voyage and earn the freight.

   [Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1259-1261; Dec. Dig. § 481.*]

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

3. INSURANCE (§ 481*)—MARINE INSURANCE—FREIGHT—DEFENSES AGAINST LIABILITY.

A schooner having insurance on her freight left Philadelphia in winter for a voyage to Charleston and other points and return. She encountered storms, and 46 days later put in at Bermuda in a serious condition. The evidence showed that when she sailed her hull was leaky, her sails in poor condition, and a gasoline engine used for the pumps was inoperative for want of simple repairs, and she was altogether unseaworthy for the voyage at that season. Such facts were reported by the captain, who, however, expressed the opinion that by making some repairs and mending the sails he could reach Charleston. He was ordered by the owners to obtain a survey and if possible have the vessel condemned and sold, which was finally done on the captain's statement that the owners refused to pay for any repairs. The report of survey showed that the damaged condition of the vessel was due largely to wear and tear, rot, and other defects, and not to sea perils during the voyage. *Held*, that the insurer was not liable for her failure to earn freight.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1259–1261; Dec. Dig. § 481.*]

In Admiralty. Suit by David S. Stetson against the Insurance Company of North America. Decree for respondent.

Edward F. Pugh, of Philadelphia, Pa., for libelant.
Henry R. Edmunds, of Philadelphia, Pa., for respondent.

THOMPSON, District Judge. The libelant sues to recover the sum of $1,700 as insurance upon freight on board or not on board the schooner John R. Penrose on a voyage from Philadelphia to Charleston, S. C., and Belfast, Ga., and return to Philadelphia for account of whom it may concern, loss if any payable to D. S. Stetson & Co., the libelant.

The Penrose sailed from Philadelphia for Charleston January 21, 1909, having loaded a cargo of 694 tons of gas coal, the freight upon which amounted to $763.40. She was under charter for her expected return voyage from Belfast, Ga., to Philadelphia to carry lumber under which the freight would have amounted to $2,100 or $2,200. The vessel never reached Charleston, but encountered violent storms, and at the end of 46 days put into Bermuda on March 7, 1909. The Penrose was leaking badly, and during the time she was battling with the storms her hand pumps were being constantly used; her gasoline engine and mechanical pump having become useless shortly after the stress of weather began. The first day the gale was encountered, the mainsail split and the forestaysail gave way, and subsequently other sails were rent and torn. The captain telegraphed to the libelant notifying him of his arrival at Bermuda and wrote him of the serious condition of the vessel. In his letter he said:

"She commenced to leak from the time we come to sea. * * * The engin stoped work from the first of the gale and has never worked any since. * * * The vessel nor her canvass was not fit for no such weather as we got for five week. * * * We will mend our sails and try to git along with them to Charleston. Mainsail foresail jib and staysail all verry poor sails, and we about used them all up but if we can have any decent weather can git to Charleston with them."

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

Upon receipt of this letter, the libelant, who was one of the owners, sent the captain an answer in which he stated:

"The writer to-day has been in consultation with the owners. Thomas Winsmore and Taulane are both uninsured, and instruct us not to advance one dollar on their account, for they will not pay, and their decision is for you to call a survey that will recommend the vessel to be condemned and sold. If you cannot get a survey to condemn the vessel and order her sold, then all you can do is to repair the engine, pumps and sails and proceed under sail for Charleston as you suggest. As before stated there is no insurance on the vessel, but the little we have on our interest, and notwithstanding that fact, Thos. Winsmore and Taulane say that vessel should be condemned and sold, for they will not pay or reimburse us for any amount we may advance towards the repairs of vessel at Bermuda or for towing her to Charleston, for she could not be towed over there for less then six or eight hundred dollars. If she is condemned and sold we can collect the $1,700 freight insurance we have for the trip, and then pay the bills, and Taulane can collect his insurance on the bills. We rely on you to do your best for the interest of all concerned and get the owners out of this trouble the best you can."

Upon the request of the captain, a survey was made at Bermuda, under a warrant from the United States consul, by two surveyors, who reported about two feet of water in the hold and that the vessel was in a serious condition. They estimated the probable cost of repairs at £570, and, as a result of a second survey, after 200 tons of the cargo had been discharged, concluded:

"Master reported to us that being without funds and the owners having refused to give any money to pay the expenses of the vessel, he could not discharge any more cargo, neither could he effect any repairs to the vessel."

They estimated her value as she lay at £80 and condemned her as unseaworthy and recommended her to be sold at public auction. The vessel, her sails and rigging, and the cargo, were sold by the captain at public auction. The total received from the sale of the vessel, her sails and rigging, was £206, and from the cargo £295, which, after deducting the expenses, left a balance paid to the libelant of £115.

[1] The respondent defends upon the ground that the contract of insurance is void by reason of the unseaworthiness of the vessel at the commencement of the voyage and also upon the ground that the breaking up of the voyage at Bermuda was not necessary, as the captain could have proceeded to Charleston with his cargo.

"There is no principle of marine insurance better settled than the one which declares that in every insurance upon a vessel there is an implied warranty upon the part of the assured that at the time of sailing the vessel shall be seaworthy for the voyage insured. This implied warranty is not confined to the sufficiency of the hull, but in a sailing vessel extends to the soundness of sails and rigging. * * * There is another principle applicable to the case under consideration, and it is this: If a ship, in a short time after leaving port, becomes leaky, * * * the presumption is that she was not 'seaworthy' when she sailed, and the onus probandi in such a case is thrown upon the assured to show that the inability arose from causes subsequent to the commencement of the voyage and attaching of the risk. * * * 'A ship is always presumed to have been defective when she sailed, unless her disability be proved to have been occasioned by the perils of the voyage.'" Myers v. The Girard Insurance Co., 26 Pa. 192.

If it sufficiently appears by the evidence that the vessel sailed in a leaky state and in want of repairs and that she was not equipped and

fitted out as she ought to have been, there is a violation on the part of the insured of the implied warranty that the vessel is seaworthy. Prescott v. Insurance Co., 1 Whart. (Pa.) 399, 30 Am. Dec. 207.

[2] "The contract of insurance upon freight is that the goods shall arrive at the port of delivery notwithstanding the perils insured against; and that, if they fail thus to arrive, and the owner is thereby unable to earn his freight, the underwriter will make it good. It does not undertake that the goods shall be delivered in a sound or merchantable state, or that the vessel in which they are shipped shall be safe against the dangers of the sea, but that it shall be in the power of the insured to earn his freight; that is, that the perils insured against shall not prevent the ship from earning full freight for the assured in that voyage. If the ship and cargo remain, notwithstanding the disasters, in a condition to continue the voyage, it is in his power to earn freight, and he is bound to proceed; but if damage happens to either, and the voyage is broken up, so that no freight can be earned, the owner is entitled to recover, as for a total or partial loss, according as he may or may not have earned freight pro rata itineris. If the damage happens to the vessel, and that can be repaired at the port of distress in a reasonable time, and at a reasonable expense, it is the duty of the owner to make the repairs, and to continue the voyage and earn his freight. * * * In every case, before he can recover of the underwriter, he must show that he was prevented by one of the perils insured against from completing the voyage, and, for that reason, had failed to entitle himself to freight from the shippers." Hugg v. Augusta Insurance and Banking Co., 48 U. S. 604, 12 L. Ed. 834.

[3] It is satisfactorily established by the evidence that the Penrose was not, when she sailed, in a seaworthy condition for a voyage in January around the Capes to Charleston. More credence is to be given to the statement in the captain's letter to the libelant before he was informed that the libelant desired the vessel condemned and sold than to his testimony after that information and the instructions from the libelant "to do your best for the interest of all concerned and get the owners out of this trouble the best you can." He states that "she commenced to leak from the time we come to sea" and that "the vessel nor her canvass was not fit for no such weather." The fact that the leaking of the vessel was due to her bad condition, and not to the storms which she experienced, appears from the report of the surveyors who examined her at Bermuda and from the testimony of Ernest Evald, who examined her after she was brought to the Raritan Dry Dock in New York in June. That the canvas was not fit for the voyage appears not only from the statement of the captain that it was not fit for such weather, but by his further statement in the letter to the libelant that the mainsail, foresail, jib, and staysails were all very poor sails. That very poor sails would split and tear in such gales was but natural. The gasoline engine, which should have been efficient to work the pump, stopped work in the first gale encountered in the voyage. It appears by the testimony of Evald and Dodge that all the gasoline engine required to put it in working condition was packing. That the condition of the vessel, her sails and engine, was bad when she arrived at Bermuda is undoubtedly true; but that this condition was sustained from sea perils is negatived by that portion of the report of the surveyors upon the third survey made at the request of the National Board of Marine Underwriters at Bermuda by Nathaniel Vesey, who was one of the original surveyors appointed

at the request of the captain, and W. B. Smith, which classified the damaged conditions as follows:

"First. The damage sustained from sea perils: Axle of steering wheel bent. Boat davit bent down. Several chain bolts slack.

"Second. The damage from wear and tear, rot, or other natural defects: Rail of both quarters open at angle. Scarf of mail rail starboard side adrift. Buts of decks, waterway seam port side, buts of topsides slack, many buts of topsides very open and seams slack in places. Plank in poor condition. Seams on quarter of quick work open."

The report upon the third survey is not contradictory to that upon the first and second surveys. At the two earlier surveys, it was not reported that the conditions, which in the third survey were found to be the result of damage from wear and tear, rot, and other natural defects, were the result of sea perils. In fact, the two original surveys did not contain any finding as to the cause of the damaged condition of the vessel, and upon the third survey the estimated cost of repairs necessary to be effected to make good damages sustained from sea perils, so as to render the schooner seaworthy, is estimated at £35. The fact that the condition of the vessel causing leakage was not the result of the strain of the voyage is shown also by the testimony of Mr. Evald when he examined the vessel at the dock in New York. While the testimony of Capt. Dodge, who took the vessel from Bermuda to New York, shows that she was in very bad condition, there is nothing in his evidence to show that that condition arose from the sea perils which had been sustained while the vessel was being driven about at sea before arriving at Bermuda.

The evidence, in my opinion, amply sustains the contention of the respondent that the vessel was unseaworthy from the bad condition of her hull, in that her planking was so bad that it would not retain the caulking, and that not only was the hull unseaworthy, but the poor condition of the sails and the gasoline engine rendered them also unseaworthy. The failure of the owners of the Penrose to make the hull tight, strong, and seaworthy, to equip her with proper sails, and sending her to sea with the gasoline engine defective as to packing constituted a breach upon their part of the implied warranty of seaworthiness which forfeits the right of the insured to recover under the policy. While, under these circumstances, a discussion of the necessity for the condemnation of the vessel at Bermuda may be unnecessary, the evidence sustains the respondent's contention in that regard. It is apparent from the letter of the captain to the libelant upon arrival at Bermuda that he did not then consider it impracticable to continue the voyage to Charleston. He said:

"We will mend our sails and try to git along with them to Charleston. Mainsail foresail jib and staysail all verry poor sails and we about used them all up but if we can have any decent weather can git to Charleston with them."

After the receipt of the letter from the libelant stating, "If you cannot get a survey to condemn the vessel and order her sold, then all you can do is to repair the engine, pumps and sails and proceed under sail for Charleston as you suggest. You of course will have to give a

draft at 3 days sight for the bills and expenses at Bermuda," and further informing him that the co-owners would not pay or reimburse the libelant for any amount advanced, the attitude of the captain appears to have changed. While he was able to keep the vessel afloat for over 40 days in violent storms, after receipt of the letter he allowed her to fill while lying in the harbor, and part of her cargo had to be discharged to enable the surveyors to examine her hull. The condemnation was based upon the fact that the master reported to the surveyors that he was without funds, and that the owners refused to give any money to pay any expenses, and that he could not discharge any more cargo, neither could he effect any repairs to the vessel. A condemnation and sale brought about under the circumstances developed in this case would not warrant a finding that the voyage was broken up by reason of perils against which the respondent insured. The sale and condemnation are not entitled to any weight as evidence to hold the insurer under the policy.

A decree will be entered dismissing the libel at the cost of the libelant.

In re PURTELL.

(District Court, N. D. New York. July 22, 1914.)

BANKRUPTCY (§ 184*)—MORTGAGE ON MERCHANDISE—FRAUD—RIGHTS OF CREDITORS.

Where a bankrupt executed a chattel mortgage on a stock of merchandise to secure payment of a part of the purchase price to the seller, and there was no delivery of possession to the mortgagee, and the mortgage expressly gave permission to the mortgagor to sell the mortgaged property, but the mortgage contained nothing requiring the bankrupt to apply the proceeds of sales from the stock to the payment of the mortgage debt or to the purchase of new stock to replenish or increase the mortgaged goods, the mortgage was fraudulent as to the mortgagor's creditors and unenforceable in favor of the mortgagee against the mortgagor's trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275–277; Dec. Dig. § 184.*]

In Bankruptcy. In the matter of bankruptcy proceedings of William P. Purtell. Application for a confirmation of the report of a special master holding a certain chattel mortgage given by the bankrupt to one Lillian Meeker invalid as against the bankrupt's trustee. Affirmed.

Hinman, Howard & Kattell, of Binghamton, N. Y., for Lillian Meeker, mortgagee.

T. B. & L. M. Merchant, of Binghamton, N. Y., for trustee.

RAY, District Judge. Prior to January 23, 1913, Lillian Meeker, the mortgagee, was the owner of a stock of groceries, provisions, furnishings, fixtures, etc., in a store situated in the village of Union, Broome county, N. Y. On or about December 15, 1912, she made an agreement in writing with William P. Purtell, now bankrupt, whereby

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

she agreed to sell the said property to said Purtell for the sum of $1,-000 cash. Fifty dollars was paid down by Purtell, and the agreement was that the balance should be paid on or about January 1, 1913. Lillian Meeker continued in charge of the store making sales and turning over the proceeds to Purtell and buying stock and supplies to replenish the stock in the store. This condition continued until on or about the 1st day of January, 1913, when Purtell paid $300 to Lillian Meeker to apply on the purchase price of the stock. At that time Purtell was given a receipt for the $300 and one of the two keys of the store. From that time on he had the complete possession of the store and the goods therein, except that Lillian Meeker held the other key down to the time the chattel mortgage was given. At the time the $300 was paid and the possession turned over as above stated to Purtell, he stated that he would pay the balance of the purchase price in cash in a few days. On or about January 8th, Purtell stated to Lillian Meeker that he had been unable to get the money, but that he would pay the balance from time to time in sums of $50 or more as he could get it.

On or about the 23d day of January, 1913, and at the time the chattel mortgage was executed, Mrs. Meeker requested Purtell to fix up a paper for her protection, and they went to an attorney at law where the mortgage in question signed by both parties was drawn up and executed. The mortgage is for the sum of $650 and interest. It was duly filed January 25, 1913. At the time of the payment of the $50 to apply on the purchase price of the stock and fixtures Purtell paid to one C. W. Meeker $15 as one month's rent of the store being for the month of January, 1913. After the giving of the said chattel mortgage, Purtell continued the business until on or about May 7, 1913, and during that time he made regular sales of merchandise in carrying on the business and also purchased stock for the business. The old stock remaining unsold can be and has been separated from the new stock purchased by Purtell.

There is no evidence of any agreement by Purtell to turn over the proceeds of the sales made by him to Mrs. Meeker, and there is no claim that he did turn over any of such proceeds.

The chattel mortgage executed as aforesaid recites the sale of the stock of goods and fixtures by Mrs. Meeker to Purtell and that $650 of the purchase price remains unpaid. It also recites that Purtell is desirous of giving the second party a lien upon said stock of goods and fixtures as security for the payment of said sum of $650 in the manner hereinafter stated. This refers to the entire stock of goods as it then existed. The chattel mortgage then proceeds as follows:

"Whereas, the said party of the first part has and hereby does agree to pay to party of the second part the said sum of $650.00 with interest thereon, as follows: The whole amount thereof to be paid within one year from the date hereof. With the privilege to first party to pay $25.00 or more thereon at any time during that period, and upon the payment of which, and the performance of the conditions herein contained to be performed on the part of the party of the first part, this obligation shall become null, inoperative, void and of no effect, otherwise to remain in full force and effect: Now this agreement witnesseth, that as security for the payment of the said sum, and of the performance of the conditions herein mentioned, and for the purpose of creating

a lien upon the property hereinafter mentioned and party of the first part has and hereby does sell and transfer to the party of the second part all of the stock of goods and merchandise and all the fixtures owned by first part in the store conducted by first party on the south side of Main street in the village of Union, N. Y., purchased of second party; the intention being that said lien shall be a continuing security and lien; that the first party shall have the right to sell the goods and merchandise above mentioned in the ordinary course of mercantile business the same as though this lien had not been given; but that he shall at all times keep said stock good, that is, that he shall, as nearly as possible, keep the stock of goods up to its present standard, as to quantity and quality, and that this obligation shall remain and be a lien upon any and all goods and merchandise that first party may put in said store in the place of goods sold or otherwise, and all fixtures installed by him in connection with said business, until such time as this obligation is paid as aforesaid. And the party of the first part covenants that he is the owner of said property and has the right to mortgage the same and that the same is free from all liens and incumbrances and are situate at the said store in the village of Union, N. Y."

The chattel mortgage then contained the usual clause for taking possession in case of default and power of sale, etc.

The trustee in bankruptcy contends, and the special master so found, that the provision contained in the chattel mortgage that Purtell shall have the right to sell the goods and merchandise in the ordinary course of mercantile business the same as though the mortgage had not been given, but that he should at all times keep the said stock good, up to its present standard as to quality and quantity, and that the instrument should remain and be a lien upon any and all goods and merchandise that the first party may put in said store in the place of goods sold or otherwise and all fixtures put in the store in connection with the business makes the mortgage as to creditors and the trustee in bankruptcy null and void as being in fraud of creditors in view of the chattel mortgage law of the state of New York.

It will be noted that there is no provision whatever for turning over the proceeds of the sales made by Purtell to Mrs. Meeker, or for using the proceeds of such sales to replenish and keep up the stock, or for a renewal of the lien by giving renewal mortgages or new mortgages on the new stock purchased. Purtell was under no obligation to turn over the proceeds of the sales made by him to Mrs. Meeker or to invest same in other stock to take the place of the goods sold. He could under this agreement apply the proceeds of sales to his own use at will. He could fulfill his agreement as to keeping up the stock by using other money or by borrowing money from others or by purchasing such goods on credit. There is no agreement in this chattel mortgage and there was no agreement outside that the proceeds of sales of mortgaged property made by Purtell should apply in reduction of the debt or be turned over to Mrs. Meeker to apply in reduction of the debt.

It has been held that a chattel mortgage on a stock of goods to be sold in regular course of business by the mortgagor is not invalid as to creditors which contains a provision for the sale thereof by the mortgagor, provided the instrument also contains a provision obligating the mortgagor to turn over the proceeds of such sales to the mortgagee in reduction of the mortgaged debt. Here there is no fraud. The mortgagor sells and turns the proceeds over in reduction of the debt,

and creditors are in no wise injured. It has also been held many times that a chattel mortgage on a stock of goods containing a provision that the mortgagor may sell the same in regular course of business or otherwise for his own benefit or in a mode and manner where the sale is for his own benefit, he being at liberty to retain and use the proceeds of such sales as he sees fit, is fraudulent and void as to creditors, and, it being fraudulent and void as to creditors, it follows that such a mortgage is fraudulent and void as to the trustee in bankruptcy.

It is only necessary to cite on this subject the case of Skilton v. Codington, as Trustee in Bankruptcy, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885, reversing 105 App. Div. 617, 93 N. Y. Supp. 460. It is there held that:

> "While permission given the mortgagor to sell mortgaged chattels, the proceeds thereof to be applied in payment of the mortgage, does not render a chattel mortgage void because in such case the proceeds of the sales must be treated as reducing the amount due on the mortgage, even though the mortgagor should misapply them or refuse to pay them to the mortgagee, yet a chattel mortgage which expressly provides that the mortgagor may sell and dispose of the mortgaged property and apply the proceeds to the payment of the debt, 'excepting such portion thereof as is necessary for the expenses of the business or as he * * * may need to replenish or increase the said stock of goods,' is fraudulent as a matter of law and void as against creditors; since the mortgage does not require all the proceeds of the mortgaged chattels to be applied either on the mortgaged debt or to the acquisition of new property, but only the surplus after deducting the expenses of carrying on the business; in effect it is an agreement that the mortgagor might conduct the business as if the mortgaged property was his own, selling and buying goods at his pleasure, and, if at any time he should be unsuccessful and be pressed by creditors, then the whole stock should be subject to the lien of the mortgage even against creditors from whom new goods might have been purchased."

The same in effect is held in Newman v. Peyser, 80 Misc. Rep. 404, 141 N. Y. Supp. 422.

There is nothing in Brackett v. Harvey, 91 N. Y. 214, to the contrary.

In the case now under consideration for decision, there is nothing in the mortgage which requires the application of the proceeds of the sales made by Purtell to the purchase of new stock for the purpose of replenishing or increasing the stock of goods. No such requirement can be written into the mortgage by implication. It is not found there.

Under these authorities and for these reasons, this court is compelled to affirm the decision of the special master and hold that Mrs. Meeker can prove her debt, but that it is not a secured debt, and that the mortgage as to creditors and the trustee is void.

Ordered accordingly.

In re GEORGIA & F. RY.

(District Court, S. D. Georgia, N. D. July 30, 1914.)

ARBITRATION AND AWARD (§ 68*)—RAILROAD EMPLOYÉS—AWARD—EXCEPTIONS.

Where a controversy between a railroad company and certain of its employés was submitted to arbitration, without limitation as to the scope of the inquiry or any method prescribed as to how the arbitrators should ascertain a reasonable wage to be paid to the employés, which was one of the issues in controversy, as provided by Arbitration Act (Act July 15, 1913, c. 6, 38 Stat. 103), the award of the arbitrators was only subject to such exceptions as attacked the jurisdiction, right, or authority of the arbitrators to determine.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 343-351; Dec. Dig. § 68.*]

In the matter of proceedings for the arbitration of controversies between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen and the Georgia & Florida Railway, under Arbitration Act July 15, 1913, superseding the Erdman Act. On exceptions to the Board of Arbitrators. Dismissed.

Wm. H. Barrett, of Augusta, Ga., General Counsel for Georgia & F. Ry.

Henry C. Roney, of Augusta, Ga., for Brotherhood of Locomotive Engineers and Brotherhood of Locomotive Firemen and Enginemen.

SHEPPARD, District Judge. This case presents for consideration certain exceptions, four in number, to the award of the arbitrators, in the matter of the controversy between the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen and the Georgia & Florida Railway.

The contention between the parties arose over the application of the employés for an increase of wages. The provisions of the Newlands Act for the mediation and conciliation of controversies between railroad companies and their employés, approved July 15, 1913, were invoked, and a board of three arbitrators was organized in accord with the liberal terms of the act. Several matters of difference as to modification of rules, hours of service, compensation while in attendance upon court as witnesses, and for an increase of pay were accordingly submitted for arbitration. The arbitrators qualified as provided, a written submission of the matters in controversy was entered into, and the hearing proceeded regularly to an award on all the questions submitted, and one of the findings allowed an increase of wages to the employés.

Section 11 of the act, under which the arbitration was agreed upon, provides that the award and the papers and proceedings, including the testimony relating thereto, certified under the hands of the arbitrators, and which shall have the force and effect of a bill of exceptions, shall be filed in the clerk's office of the district court where the controversy arose, and shall be final and conclusive upon the parties to the agreement unless set aside for error of law apparent upon the record. The award was filed in compliance with the requirements of the statute.

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

Increased pay allowed to the employés was from 10 to 12 per cent. over the wages previously paid, and the method pursued by the board in determining that the employés were entitled to an increase of wages constitutes the subject-matter of four exceptions interposed by the railway to the legality of the award.

Section 8 of the act provides that, when the award is filed in the clerk's office, it shall go into practical operation, and judgment shall be entered thereon at the expiration of 10 days, unless within such 10 days either party shall file exceptions thereto for matter of law apparent upon the record.

The first two exceptions noted in the brief include an interpretation of the word "arbitration" made by the chairman of the board at the conclusion of the argument, to wit, "All matters of arbitration are matters of compromise," and it is argued that if this principle, declared as the view of the chairman, influenced the award, it was error, but it is not disclosed by the record how this mere ipse dixit of one member of the board affected the award, and, as will be seen later from the disposition made of the exceptions, is not, in the opinion of the court, such error of law in contemplation of the statute as would justify a judicial review of the award.

The second exception challenges the correctness of the issue before the board as expressed by Mr. Burgess, representative of the employés at the hearing, viz.:

"The petitioners or plaintiffs desire to state that, to our mind, this question is devoid of any complex or intricate features. It is a simple problem as to whether the engineers and firemen on the Georgia & Florida Railway receive the same compensation for similar services rendered as obtains on other roads in this southern territory."

Under this exception it is also urged, in the nature of assignment of error, that other railroads in the same territory are paying better wages for similar services is not sufficient of itself to authorize an increase in the wages of the employés in question; that there was no evidence that such increase was otherwise proper. Furthermore, that there was no evidence showing what wages were being paid to the same class of employés by all the other roads in the same territory, nor the average of such wages. It is admitted that there was some evidence as to what wages were paid by some of the other roads in this territory; but the evidence showed, it is insisted, that there was a marked difference on the different roads, especially between the smaller and the larger roads.

The third exception challenges the principle adopted by the board, as substantially quoted from the award, namely, that there is no difference in principle between the inability of a road to meet its operating expenses and its inability to pay dividends on its stock and interest on its indebtedness. In either event, as above stated, the employés for the service rendered have the first claim on the earnings of the road for a reasonable and just compensation. Therefore, in reaching the conclusion we have in determining the reasonable rate to be paid the employés, we have not considered the inability of the road to meet its operating expenses as an element therein.

The fourth exception is stated in the language of pleader, as follows:

"The award fixing the wages is in contradiction to the principles found to be governing and unsupported by the testimony. While declaring that the wages should be fixed solely according to what is paid by other roads in this territory for like service under similar conditions, the award fails to show that there is an existing prevailing wage on said roads, which was adopted by the arbitrators, and shows affirmatively that they considered the average of only a limited number of roads; and fails to show that they considered in this average the wages on shorter roads."

As has been already observed, this was a proceeding in arbitration of the controversy between the railway and its employés of a certain class, had in pursuance of the provisions of an act of Congress, July 15, 1913, known as the Arbitration Act, adopted in lieu of the Erdman Act (Act June 1, 1898, c. 370, 30 Stat. 424 [U. S. Comp. St. p. 3205]), but containing substantially many of the provisions of the latter act, among them section 3, which reads:

"That whenever a controversy shall arise between an employer or employers and employés subject to this act, which cannot be settled through mediation and conciliation in the manner provided in the preceding section, such controversy may be submitted to the arbitration of a board of six, or, if the parties to the controversy prefer so to stipulate, to a board of three persons, which board shall be chosen in the following manner: In the case of a board of three, the employer or employers and the employés, parties respectively to the agreement to arbitrate, shall each name one arbitrator; and the two arbitrators thus chosen shall select the third arbitrator; but in the event of their failure to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the board of mediation and conciliation. In the case of the board of six, the employer or employers and the employés, parties respectively to the agreement to arbitrate, shall each name two arbitrators, and the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators; but in the event of their failure to name the two arbitrators within fifteen days after their first meeting the said two arbitrators, or as many of them as have not been named, shall be named by the board of mediation and conciliation."

Section 4 provides:

"Sec. 4. That the agreement to arbitrate: First. Shall be in writing. Second. Shall stipulate that the arbitration is had under the provisions of this act. Third. Shall state whether the board of arbitration is to consist of three or six members. Fourth. Shall be signed by duly accredited representatives of the employer or employers and of the employés. Fifth. Shall state specifically the questions to be submitted to the said board for decision. Sixth. Shall stipulate that a majority of said board shall be competent to make a valid and binding award. Seventh. Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board, as provided for in the agreement, within which the said board shall commence its hearings. Eighth. Shall fix a period from the beginning of the hearings within which the said board shall make and file its award; provided, that this period shall be thirty days unless a different period be agreed to. Ninth. Shall provide for the date from which the award shall become effective and shall fix the period during which the said award shall continue in force. Tenth. Shall provide that the respective parties to the award will each faithfully execute the same. Eleventh. Shall provide that the award and the papers and proceedings, including the testimony relating thereto, certified under the hands of the arbitrators, and which shall have the force and effect of a bill of exceptions, shall be filed in the clerk's office of the District Court of the

United States for the district wherein the controversy arises or the arbitration is entered into, and shall be final and conclusive upon the parties to the agreement unless set aside for error of law apparent on the record. * * *"

The several matters in controversy, including the rate of wages to be paid employés for 100-miles run, was submitted in writing as provided in the statute to the board, duly selected by the parties for inquiry and adjudication. Upon these issues a hearing was had, and a volume of testimony was taken, and large number of exhibits were filed, resulting in the award by a majority of the board, which found that the employés were entitled to an increase of wages.

It is observed by the express terms of the statute that the award shall be final and conclusive upon the parties unless set aside for error apparent upon the record. Thus, we are met at the threshold of the investigation with the query: Do the exceptions stated above present within the purview of the statute such errors of law as can be reviewed by the court? The only precedent that has rewarded the industry of the court for construction of the act in question is the case which construed the Erdman Act. In re Southern Pacific (C. C.) 155 Fed. 1001, where the provisions of the statute for review by the court for errors apparent upon the record were presented. There it was held that an arbitration under the former (Erdman) Act, containing essentially the same provisions as section 4 of the present act, was substantially a common-law arbitration, and the power and authority of the board rest solely on the written submission entered into by the parties, which limits and determines not only the rights of the parties, but also the extent of the powers of the arbitrators, and that the submission is to be construed according to the rules governing contracts and not those governing pleadings. By reference to paragraph 5 of section 4, it is required that the agreement shall state specifically the matters to be submitted to the board for its decision. The agreement entered into between the parties stipulates, with other things, that the controversy concerned conditions of service, and rate of wages to be paid, and we have already seen that the arbitration was pursuant to the provisions of the act, and one of the questions submitted to the board for decision was whether the employés of a class named should receive certain compensation. Neither party to the agreement proposed any rule or theory limiting the scope, or defining the basis on which a reasonable wage should be ascertained. Obviously, it was the right of either party under the statute to have prescribed the scope of the inquiry, and to have defined the principles of law or conditions of fact upon which the inquisition was to proceed and the award to be established. Doubtless, any departure from accepted rules, or failure on the part of the board to follow the adopted criteria, or the nonobservance of the restrictions imposed by agreement upon the latitude of the board's investigation, would have been cause for error apparent upon the record to which exception would lie as provided in the statute.

There were, however, no limitations by the agreement to arbitrate put upon the scope of inquiry, or any method prescribed as to how the board was to ascertain a reasonable wage to be paid the employés. It appears that the alleged errors presented by the exceptions raise

questions of mixed law and fact put in issue by the submission without limitation, and having been heard and determined by the court constituted by consent of the parties called to arbitrate, that is to say, to hear, compare, adjust, and adjudicate the controversies, is as conclusive of the matters submitted, as well as the process by which they were reached, as the verdict of a jury. It would seem on the facts that their judgments are reviewable for only such errors as would warrant setting aside a common-law arbitration—such error as goes to jurisdiction, right or authority of the court to determine. The award has not been assailed, it will be observed, on any ground that would avoid it for lack of jurisdiction; or any ground that would be cause for setting aside the award of a common-law arbitration; it is not pretended that it was not a legally constituted board, or that the statute under which it was organized was invalid, or that the board traveled beyond the scope of the matters properly submitted by agreement of the parties. By the agreement, the parties accepted the modus operandi of the statute for a speedy and expeditious adjustment of their differences, and thereby voluntarily waived any rights to have the questions involved determined by the strict and cumbersome rules of the courts of law. Arbitration, it is agreed, generally is a substitution by consent of the parties of a simple expeditious tribunal in lieu of courts whose procedure is circumscribed by definite rules of law.

Reviewing an arbitration proceeding authorized under a statute of Michigan for conciliation and arbitration of controversies arising between employés and employers where the award was attacked because the board exceeded its jurisdiction, the Supreme Court of Michigan in the course of its opinion said:

"To hold that the intervention of this court may be invoked to supervise, control, and direct the court of mediation and arbitration, to review its proceedings, and reverse its awards because it has not followed the technical methods and rules applied in ordinary judicial proceedings, to deprive it of its summary influence or power—if 'power' is an appropriate term to use—by dragging through the courts proceedings which the law attempts to have disposed of in ten days," would, in our opinion, "thwart the purpose of the act, and turn the court of conciliation and arbitration into the ordinary tribunal, with its attendant evils of technicality, delay, and expense to litigants." Pingree et al. v. State Court of Mediation & Arb., 130 Mich. 237. 89 N. W. Text 946.

Such courts are not confined in their scope of inquiry, nor in their determinations of questions before them, by technical rules of law that would possibly determine issues in a court of justice, but are subject to the broad terms of the statute under which they are organized. New Orleans City & L. R. Co. v. State Board of Arbitration, 47 La. Ann. 874, 17 South. 418; Standard Ency. vol. 2, 663; 3 Cyc. 728.

It is plain from the text of the act that Congress, appreciating the necessity of a forum for the arbitration of distracting controversies which often arise between employés and employers, established a tribunal to which the parties at their option might resort for a speedy determination of such controversies on their merits, without the delays incident to trials in courts of law. If the awards of such courts are to be set aside on technical grounds, or because their proceedings were not according to the rules of law, it would tend to set at nought

the good offices of Congress as expressed by the act and leave to the courts at last, in spite of legislation to the contrary, the settlement of such controversies. It was undoubtedly the intent of the Legislature that such awards should be final except for such error that would avoid the proceedings ab initio.

The exceptions should be dismissed, and the award affirmed, and it will be so ordered.

PENOZA et ux. v. NORTHERN PAC. RY. CO. (No. 2762.)

(District Court, W. D. Washington, N. D. June 24, 1914.)

1. COURTS (§ 363*)—FEDERAL COURTS—RULES OF DECISION—STATE STATUTES.
In a suit in a federal court for the wrongful death of a child, the measure of damages is controlled by the statutes of the state.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939-949; Dec. Dig. § 363.*]

2. DEATH (§ 89*)—DEATH OF MINOR—ACTION BY PARENTS—DAMAGES—MENTAL SUFFERING.
Rem. & Bal. Code, § 183, authorizes parents to recover for the wrongful killing of a minor child such damages as to the jury shall seem just under all the circumstances. Section 194 provides that no action for personal injury to any person, occasioning his death, shall abate, if he have a wife or child living, or, leaving no wife or issue, if he have dependent on him for support and resident within the United States at the time of his death, parents, etc., who are authorized to sue. Section 184 declares that a father, or, in case of his death or desertion of his family, the mother, may maintain an action as plaintiff for the death of the child. *Held*, that under such statute no recovery can be had by a parent for mental suffering, pain, and anguish sustained and suffered as the result of the wrongful killing of a minor child, but the damages are limited to the pecuniary loss resulting from such death.
[Ed. Note.—For other cases, see Death, Cent. Dig. § 118; Dec, Dig. § 89.*]

At Law. Action by Joseph Penoza and another against the Northern Pacific Railway Company. On motion to strike an allegation of mental suffering, pain, and anguish from plaintiff's amended complaint. Granted.

Martin Korstad and E. G. Mills, both of Seattle, Wash., for plaintiffs.

C. H. Winders, of Seattle, Wash., for defendant.

NETERER, District Judge. The plaintiffs have instituted action against the defendant for damages on account of the death of plaintiffs' minor son, alleged to have been caused by the negligence of the defendant, and allege as a basis for recovery, as follows:

"Thereby causing plaintiff great mental suffering, pain, and anguish, and damages through the loss of his services."

The defendant has filed a motion to strike from the complaint "great mental suffering, pain, and anguish," on the ground that it is incompetent, irrelevant, and immaterial.

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

[1, 2] The question for decision is the right of recovery for grief or anguish occasioned by reason of the death of a child. The measure of damages in this case will be controlled by the statutes of the state of Washington. The sections of the statute which are pertinent to the issue here are sections 183 and 194 of Remington & Ballinger's Code, which provide:

"* * * When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. If the deceased leave no widow or issue, then his parents * * * who may be dependent upon him for support and who are resident within the United States at the time of his death, may maintain" an action for damages.

"In every such action, the jury may give such damages, as under all circumstances of the case may to them seem just."

"No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine, by reason of such death, if he have a wife or child living, or leaving no wife or issue, if he have dependent upon him for support and resident within the United States at the time of his death, parents. * * * But such action may be prosecuted * * * in favor of his parents * * * who may be dependent upon him for support, and resident within the United States at the time of his death."

And section 184 of Remington & Ballinger's Code, which provides:

"A father or in case of the death or desertion of his family the mother, may maintain an action as plaintiff for the injury or death of a child."

The authorities cited by counsel for the plaintiff to sustain his contention that a recovery can be had for mental suffering on the part of the parents are, almost without exception, cases where the plaintiff had suffered from outraged feelings, shame, humiliation, disgrace, mental pain and anguish, occasioned by the conduct of the defendant towards the plaintiff, or the property of the plaintiff, which directly affected the physical possession and occasioned the pain and anguish by reason thereof. The statutes of Washington do not authorize damages to be given for suffering of the deceased, nor for grief and sense of bereavement on the part of surviving relatives. Only the direct pecuniary loss to the parents of the deceased are considered in estimating the damages to be recovered. This statute was construed by the Supreme Court of Washington in Hedrick v. Ilwaco Ry. & Nav. Co., 4 Wash. 400, 30 Pac. 714, in which the court held that while the parent could maintain an action for damages for loss of services of his minor child, at common law, the object of the statute was to create a new and independent right of action for the loss of services subsequent to the death, and held:

"The measure of damages in such cases is the value of the child's services from the time of the injury until he would have attained the age of majority, taken in connection with his prospects in life, less the cost of his support and maintenance. To this may be added, in proper cases, the expense of nursing and medical treatment, and in some jurisdictions even funeral expenses."

The measure of recovery was not enlarged by the amendment of the act of 1909, Laws of Washington 1909, pp. 425 and 566. Nor does

the language, "who may be dependent for support," restrict recovery to actual need. The Supreme Court of Washington, in Kanton v. Kelly, 65 Wash. 617, 118 Pac. 890, 121 Pac. 833, quoted from Bortle v. N. P. Ry. Co., 60 Wash. 552, 111 Pac. 788, Ann. Cas. 1912B, 731, as follows:

"While we would not give it such a strict construction as to say" they must be "wholly dependent, or that the parent must have no means of support or livelihood other than the deceased, such a construction being too harsh and not in accordance with the humane purpose of the act; nevertheless there must be some degree of dependency, some substantial dependency, a necessitous want on the part of the parent, and a recognition of that necessity on the part of the child."

No case has been called to our attention, nor have we been able to find any, where a recovery is permitted for grief and mental anguish except in states where exemplary damages may be recovered, and a rule has been established differing from the statutes of Washington.

The closing provision of section 183, supra, "the jury may give such damages as under all of the circumstances of the case may to them seem just," cannot aid the plaintiffs or enlarge their right of recovery. This undoubtedly has reference to the mode and character of proof with relation to the pecuniary damages authorized by the statute, and the difficulty in establishing such damages. In Atrops v. Costello, 8 Wash. 149, 35 Pac. 620, the Supreme Court of Washington uses this language:

"We are satisfied that the great weight of authority sustains the doctrine that judgment can be obtained in the absence of proof of special * * * damage. It is true that a great many of the cases which sustain this position are in states where exemplary damages are allowed in cases of this kind; but the general doctrine is stated on the broad ground that proof of special damages is impracticable, and that no specific loss occasioned by the death of a child is necessary, for the reason that calculations of this kind are within the special province of the jury, and that the jury is as well calculated, knowing the age of the child, her health, her habits, her character, and the station in life of her parents, to judge of the pecuniary loss to the parents, as witnesses who might be called to testify."

"This, in effect, means that the damages shall rest in the sound discretion of the court or jury, a discretion to be exercised in view of the fact 'that such damages are to be measured by what shall fairly seem the pecuniary injury or loss to the plaintiff.'" In re California Navigation & Improvement Co. (D. C.) 110 Fed. 670, at page 676, citing Morgan v. Southern Pacific Co., 95 Cal. 501, 30 Pac. 601.

In Atkeson v. Jackson Estate, 72 Wash. 239, 130 Pac. 102, the Washington Supreme Court held that substantial damages for the death of a baby girl could be recovered without proof of special pecuniary loss, and no recovery was included for wounded feelings of grief or mental suffering on the part of the parents. To the same effect is Mesher v. Osborne, 75 Wash. 439, 134 Pac. 1092, 48 L. R. A. (N. S.) 917.

3 Sutherland on Damages (Ed. 1883) p. 282, uses the following language:

"It is only for pecuniary injuries that this statutory right of action is given, and neither pain and suffering of the deceased, nor the grief and wounded feelings of his surviving relatives can be taken into account in the estimate of damages."

The same author ([1903 Ed.] p. 3704) says:

"There is almost entire harmony in denying a recovery for mental suffering of the beneficiaries of the deceased, or as a solatium."

"The jury is not authorized to take into consideration the mental suffering of the beneficiaries designated by the statute and award in solatium for the bereavement and grief occasioned by the death, but must give compensation for pecuniary loss only. Such injuries to the sentiments or affections, which are frequently designated sentimental damages, are not capable of measurement." 13 Cyc. 1373, par. 6.

A consideration of the statutes of Oregon, California, and Iowa, which are similar to the Washington statute, and the construction placed upon these statutes by the United States District Court, will shed much light upon the issue here.

In Re California Navigation & Improvement Co. (D. C.) 110 Fed. 670, at page 676, Judge De Haven says:

"This statute does not authorize damages to be given for the suffering of the deceased, nor for grief and sense of bereavement on the part of surviving relatives."

Section 377 of the California Code of Civil Procedure, then under consideration, provides:

"When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or, if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all of the circumstances of the case may be just."

In Holmes, Adm'r, v. Oregon & California Railroad Company, 5 Fed. 523, Judge Deady cites with approval 2 Thompson on Negligence, 1289, § 90, in which the following language is used:

"Under similar statutes of other states, it has been generally held that the rule upon which damages should be assessed in this class of cases is as for a pecuniary injury, and not solatium or solace for feelings of mental suffering."

See, also, Ladd v. Foster et al. (D. C.) 31 Fed. 827; Kelley v. Central Railroad Co. of Iowa (C. C.) 48 Fed. 663.

In the latter case, Judge McCrary, in charging the jury in a damage case, stated:

"In a case of this character you are not to take into account the pain or suffering of the deceased, nor the wounded feelings nor grief of his surviving relatives in fixing the damages. What you are to ascertain and by your verdict decide, if you come to the question, is what, according to the evidence, would have been the probable pecuniary benefit to the estate of the deceased from the continuance of his life."

It is manifest that the measure of damages must be based upon pecuniary injury or loss, and that the motion to strike should be granted.

MARGARETE STEIFF, Inc., v. BING.

(District Court, S. D. New York. July 20, 1914.)

1. TRADE-MARKS AND TRADE-NAMES (§ 68*)—"UNFAIR COMPETITION."
"Unfair competition" consists in selling goods by means which shock judicial sensibilities.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*
For other definitions, see Words and Phrases, vol. 8, pp. 7174, 7824.]

2. TRADE-MARKS AND TRADE-NAMES (§ 67*)—UNLAWFUL COMPETITION—JUSTIFICATION—DECISIONS OF FOREIGN COURTS.
It was no defense to a suit in the federal courts for unlawful competition in the sale of stuffed animal toys manufactured in Germany that defendant's acts were not violative of the German law, which gives no protection to simulation of articles unprotected by patent or some form of copyright.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 64-68; Dec. Dig. § 67.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 68*)—UNLAWFUL COMPETITION—EXCELLENCE OF PRODUCT—NOVELTY.
Excellence of a new product or novelty affords no ground for preventing competition unless it is unfair and tends to palm off the goods of defendant for those of complainant.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNLAWFUL COMPETITION.
The borrowing by a newcomer in trade from the first maker of something not necessary to the excellence of the product nor required for functional perfection, but which is almost invariably cleverly calculated to attract and fix the attention or please the eye of the careless, is what constitutes unlawful competition; but the deviser and maker of an unpatented and uncopyrighted novelty may not object to the making of a competing novelty and the sale thereof in fiercest competition, so long as what competes is the essential thing stripped of all those attributes which do not make the article any better, but enable or assist a careless public to remember what the thing is.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 72, 73; Dec. Dig. § 70.*]

5. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNLAWFUL COMPETITION—ANIMAL TOYS.
Where complainant had built up a large business in the manufacture and sale of stuffed animal toys, manufactured with artistic cleverness to represent the natural animals through the use of photographs, etc., defendant was not entitled to manufacture and sell competing toys made from toys manufactured by complainant as models, but was entitled to manufacture and sell such competing toys so long as they were manufactured from defendant's own photographs and models, though of the same materials, coloring, etc.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 72, 73; Dec. Dig. § 70.*]

In Equity. Suit by Margarete Steiff, Incorporated, against John Bing. Decree for complainant.

Hans von Briesen, of New York City, for complainant.
Archibald Cox, of New York City, for defendant.

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

HOUGH, District Judge. This case has been heard on complainant's motion for injunction pendente lite, the motion granted, and order affirmed on appeal. 206 Fed. 900, 124 C. C. A. 560.

An action closely related (being against defendant's vendee for reselling the same articles concerning the original sale of which complaint is made herein) has also been to the Circuit Court of Appeals, and temporary injunction granted. Steiff v. Gimbel, 214 Fed. 569, 131 C. C. A. 21, April 7, 1914.

If complainant on this hearing confined its prayer for relief to a continuance of the preliminary injunction with a provision for an accounting, it would be enough to refer to the cases already decided and grant the decree. But by evidence and argument complainant demands so much more than it already has that the matter requires consideration differing from that heretofore necessary.

The Steiff corporation manufactures in Germany, and sells the world over, a kind of toy, which by its origin causes a certain sympathy for its maker. Margarete Steiff was a hopeless cripple who made from felt and plush and stuffing imitations of animals and men, with such mechanical cleverness, some artistic ability, and so much insight into the childish mind, that from her sick room went out a stuffed toy or doll which had not long to wait for enthusiastic welcome in nurseries of every land. Miss Steiff died in 1909 at the age of 63, before which time the business of toy and doll making was incorporated, and occupied (and still occupies) the time and energy of her several nephews; who appear now to own and manage it. The volume of business is illustrated by the statement that within a short time (apparently a single year) $1,000,000 were received for "teddy-bears" alone.

However unusual in origin this business is, it has long been like any other commercial enterprise, and can claim no immunity from competition, other than such as is accorded to other concerns, whose foundations were not laid by a crippled aunt of singular ability.

Bing, the defendant, is an American citizen, and also the salaried agent of another German corporation which has for a long time made toys, but until lately not stuffed animals.

In the spring of 1913, Bing determined to compete with Steiff in the American market for toys of this description. At that time the Steiff toys were and long had been well known in the United States, commanded a good price, and although some few stuffed toys were known as the product of other manufacturers, it is I think true that the average buyer for retail toy sellers regarded the Steiff stuffed animals and dolls as almost if not quite in a class by themselves, so nearly did they monopolize the market.

Bing Bros., the house for which defendant is agent, is a large concern, with a widely extended business, and any competition from them would probably be serious; it is on this hypothesis only that I can explain the vigor with which this litigation has been pressed.

When defendant undertook competition, however, his principals had not actually begun the manufacture of what they wanted to sell. Therefore a number of Steiff toys were procured; complainant's tags and marks partially removed, and the public invited to order from

Bing articles like the Steiff specimens shown—and at a considerable reduction from Steiff prices.

I am not satisfied that Bing or his clerks told customers that Bing Bros. had made those samples. Customers were buyers for stores, and such tales would have been silly and useless. Silly because many of the samples (e. g., elephants) still bore marks proclaiming to the practiced eye their Steiff origin; and useless because such buyers did not care who made the samples if Bing filled the order as per sample. But defendant did promise to make and sell something, using as a basis therefor not his own observation of nature, nor his own invention, but merely the mechanical skill of a journeyman in copying what complainant had perfected, and in so doing copying also some things which did not pretend to imitate nature, but were merely fanciful creations of complainant—e. g., the piebald coloring of the so-called "Circus-Horse" which Bing promised to sell to Hauser.

[1] "Unfair competition" consists in selling goods by means which shock judicial sensibilities; and the Second Circuit has long been very sensitive. These proceedings of Bing were enjoined, but in carefully narrowed language, as follows: (1) From selling, offering for sale, or filling orders with any toy animals or similar articles which in unnecessary details as to marking, decoration, wheels, and the like, and in detail of form and construction, are reproductions and duplicates of the toy animals heretofore originated and made and sold by the complainant. (2) From exhibiting toy animals made by the complainant as samples of toys made by his principal and sold by him.

Though as above stated, I do not believe (after a full hearing) that defendant made or caused to be made the false representations as to origin of samples, of which he was accused, and (apparently) convicted —on affidavits, yet it is impossible to approve the method of competition chosen by him and his principals.

[2] It is an excuse, but not a justification, that what he did would apparently have passed muster with the German courts, which give no protection to simulation of articles unprotected by patent or some form of copyright. Before 1913 there had been litigation in Germany between the Steiffs and Bings, and, while it is described in a very unprofessional manner in the evidence, I think it clear that in result the Bings considered themselves free to use Steiffs' unpatented or "unregistered" products in any way they chose.

The existing injunction against such use of the Steiff product is the penalty for that mistake. That error had been committed the Bings admitted, canceled (it is said) as far as possible the orders of 1913 based on the Steiff samples or models, and undertook to produce, by studying nature, animals of their own, in time for the 1914 market.

There are in evidence now 18 specimens of defendant's 1914 make, and a catalogue of what the Bings now manufacture. The catalogue list covers all the specimens referred to, and more; but shows an output far less varied than that of complainant. Defendants have not ventured upon dolls at all, nor have they made animal-like figures dressed in human clothing (e g, the "cat-baby," the "bear-lady") which are set forth in great variety in Steiff's catalogue.

The exact point litigated now is whether defendant can sell his principals' 1914 product.

The bill charges that:

> The Steiff animals "are not a mere mechanical output, but each kind of animal and each animal itself is given particular attention, so that it may be in itself an artistic and individual representation of the animal it is supposed to represent."

It is also said to be "a comparatively easy matter for a competitor, without investing any capital or using any ingenuity to dismember one of your orator's animals and mechanically duplicate each part thereof."

The prayers for relief now insisted on are that defendant be enjoined from selling "any toy animals which in appearance are the same or substantially the same as the corresponding toy animals sold" by complainant; and also from "doing any act * * * whereby the trade or the public may be likely to believe that toy animals of the style, configuration, appearance, color and get up (of Steiffs') can be lawfully made and placed upon the market by any person, firm or corporation other than complainant."

I think this is a far more extreme claim for protection from competition called unfair, than has ever yet been made even in this circuit, and can be shown by complainant's own evidence to amount to a demand for monopoly.

[3] The bill itself declares each Steiff animal to be an "artistic and individual representation" of the original, and the evidence shows that the living model is studied, photographs taken, and patterns made, in order that when plush, felt, or velvet is cut to the pattern and sewn together, stuffing will fill out the skin (so to speak) into an attractive verisimilitude of the model. It may be safely said that, within the limitations of the materials employed, Miss Steiff and her successors have come remarkably near to nature, and often produced something not unworthy to be called artistic. But that all this affords no reason for either protection or monopoly is very clear. The excellence of a new product may afford an explanation of fierce competition therein, but mere excellence or novelty affords no ground whatever for preventing that competition if the fight be fair.

[4] What makes the fight unfair is always the borrowing by the newcomer from the first maker of something not necessary to excellence of product, not required for functional perfection, yet almost invariably cleverly calculated to attract and fix the attention, or please the eye of the careless. But the deviser and maker of an unpatented and uncopyrighted novelty cannot object to having any one make and sell that novelty in fiercest competition, as long as what competes is the essential thing, stripped of all those adjuncts or attributes, which like the name of "Uneeda" biscuit, or the shapes of Rushmore's flare front light and the Klaxon horn, do not make the essential thing any better, but enable or assist a careless public to remember what the thing is.

It is therefore of prime importance in any case of alleged unfair competition to ascertain what is the essential thing dealt in by both

parties, and to separate essentials from accidents, functions from adjuncts, and advertising from everything.

Name, color, form, and shape are rarely essentials in function, yet they may be, and are here. In so far as the Steiff animals copy or reproduce nature, so far they can claim no protection, for every one can do that.

[5] The final inquiry is, therefore, What have Bing Bros. done since acquiescing in the temporary injunction herein? Have they merely "dismembered" complainant's animals and "mechanically duplicated each part thereof"? I see no reason to think so; on the contrary, they have employed their own artists, taken their own photographs, made their own models; and if (as is the case) many of the resultant figures look just like the corresponding Steiff animals, the reason is that both parties have attained the same degree of success in doing the same essential thing, e. g., imitating a horse in stuffed plush.

Indeed, in some instances (e. g., elephants) the Bing product is plainly nearer nature than is Steiff.

Complainant under our law was right in complaining that Bing used Steiff samples to sell potential Bing manufactures; but when claim is made that, because Steiff has produced artistic plush statuettes of certain animals, no one else can do the same, the monopolistic position is clearly seen.

If defendant had undertaken to rival the Steiff Company in grotesques, comical dolls, or singular variants from normal animals, a different and perhaps closer question would have arisen; but I am sure that both parties have equal right to copy nature, and both are now doing it.

That one is a pioneer and the other a follower is legally unimportant; indeed, as long as nonfunctional peculiarities are not poached upon, the labor and discovery of the pioneer is for the benefit of the public, even a competitor.

The existing injunction will be in the main continued and made permanent; the final decree will also specifically refuse any further or other injunction, and adjudge that none of the so-called 1914 exhibits unfairly compete with complainant.

I am not advised whether an accounting is now wanted. If one is demanded, the question of costs will await final decree; if accounting is waived and final decree now entered, defendant will pay the costs.

UNITED STATES v. D'OLIER ENGINEERING CO.

(District Court, E. D. Pennsylvania. July 17, 1914.)

No. 2516.

1. COURTS (§ 262*) — FEDERAL COURTS — EQUITY JURISDICTION — REMEDY AT LAW—RECOVERY OF OVERPAYMENT.

Under Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1163 [U. S. Comp. St. Supp. 1911, p. 237]) § 267, providing that suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law, assumpsit for money had and received is the proper remedy to recover money paid under a mistake of fact.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 797, 798; Dec. Dig. § 262.*]

2. PAYMENT (§ 85*)—RECOVERY OF MONEY PAID UNDER MISTAKE—MISCALCULATION.

Defendant contracted to furnish two boiler plants for the Canal Zone, one at Gatun and the other at Miraflores, the price to be determined by an efficiency test; plaintiff agreeing to pay $1,000 above the contract price as a bonus for each 1 per cent. of efficiency above 65, and defendant agreeing to suffer a deduction of $1,000 for each 1 per cent. of efficiency below 65. The engineers, in making the test, erred in adopting as a factor in determining the evaporation the total heat in superheated steam, instead of the total heat in saturated steam, so that the boilers were erroneously reported to have a greater efficiency than the test demonstrated that they had, on which report the government paid defendant $10,331.65 in excess of the amount to which defendant was rightfully entitled. *Held*, that the excess so received was without consideration, and defendant was liable to refund the same as money paid under a mutual mistake of fact.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 272-281; Dec. Dig. § 85.*]

At Law. Action by the United States against the D'Olier Engineering Company. On demurrer to plaintiff's statement of claim. Overruled, with leave to answer.

Warren C. Graham, Asst. U. S. Atty., and John C. Swartley, U. S. Atty., both of Philadelphia, Pa.

Wm. B. King, of Washington, D. C., for defendant.

THOMPSON, District Judge. This is a suit in assumpsit for money had and received, brought to recover the sum of $10,331.65, alleged to have been paid through a mistake of fact, with interest from May 1, 1910. The statement recites that the United States, through the Isthmian Canal Commission, had a contract with the D'Olier Engineering Company, dated November 17, 1908, for the erection of two boiler plants, one at Gatun and the other at Miraflores, in the Isthmus of Panama, at a price of $60,335 for each plant. The price of the boilers, according to the contract, was based upon an efficiency of 65 per cent. developed by a certain test provided in the contract. In case the efficiency fell short of 65 per cent., the price of the plant was to be reduced $1,000 for each 1 per cent. below the efficiency percentage, and should the test demonstrate that the efficiency exceeded 65 per

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

cent. $1,000 was to be added for each increase of 1 per cent. above the efficiency percentage. It was provided in the contract that:

"There shall be conducted on at least one boiler of said plant an official test made by the engineer of the commission in charge or his deputy designated for the purpose and an official representative of the contractor, * * * and the same to be conducted under the conditions described in paragraph 4 of the specifications given under item 1 of circular No. 444."

There were subsequent amendments of the contract, but there was no amendment of the provision in relation to the payment of $1,000 for each 1 per cent. of efficiency above 65. The statement avers that the plant at Gatun was tested in accordance with the contract, and from the record of the test the engineers having charge of the matter, as provided in the contract, made computations and found that the boiler had attained an efficiency of 79.72 per cent., an excess of 14.72 over the efficiency prescribed by the contract. Thereafter the plant at Miraflores was similarly tested, and from the record of the test the engineers made computations and found that the boiler had attained an efficiency of 82.59, an excess of 17.59 over the efficiency prescribed in the contract. It is averred that, after these tests were made, supplemental agreements were entered into February 28, 1910, and May 10, 1910, by which the government, inter alia, agreed to pay the contractor the $14,720 due for excess efficiency in the boilers of the Gatun plant and the $17,590 due for excess efficiency in the boilers in the Miraflores plant. In these supplemental agreements, arrangement was made for payment of other items under the contracts. It is then averred that:

"Thereafter, in January, 1911, the plaintiff discovered that a mistake had been made by the engineers having the computation in charge in calculating the figures of efficiency already referred to, to wit, of 79.72 per cent. on the boiler at Gatun and of 82.59 per cent. on the boiler at Miraflores. By a recalculation it appeared that the original figures had been arrived at by an erroneous method of computation; the error being based on the fact that the factor of evaporation had been determined by using the total heat in superheated steam instead of the total heat in saturated steam. A new computation was thereupon made, and it then appeared that the correct efficiency of the boiler at Gatun was 74.26 per cent. and of the boiler at Miraflores was 75.71 per cent. Instead of being entitled to a bonus of fourteen thousand seven hundred twenty dollars ($14,720) on the Gatun boiler the defendant was entitled only to nine thousand two hundred sixty dollars ($9,260), and instead of being entitled to a bonus of seventeen thousand five hundred ninety dollars ($17,590) on the Miraflores boiler the defendant was entitled to only ten thousand seven hundred ten dollars ($10,710), and had consequently been awarded an excess allowance on these two items to the extent of twelve thousand three hundred forty dollars ($12,340), of which amount ten thousand three hundred thirty-one dollars and sixty-five cents ($10,331.65) had actually been paid to the said defendant by the plaintiff. Immediately on the discovery of this mistake, the plaintiff notified the defendant and demanded the return of the excess payment, amounting to ten thousand three hundred thirty-one dollars and sixty-five cents ($10,331.65) as aforesaid, and payment was refused. No part of this sum has ever been paid by the defendant to the plaintiff, and the whole thereof is now justly due and payable."

The defendant demurs to the statement of claim, and assigns as the special grounds of demurrer required under rule 20, § 3, of the rules of this court, that the agreements of February 28, 1910, and May 10,

1910, were final settlements of the rights of the parties, and cannot be reopened on account of the erroneous method of computation alleged to have been adopted in calculating the figures of efficiency, and that the rates of efficiency fixed by the officers as a result of tests made by them, having been accepted by the defendant as one of the elements of the final settlement of disputed matters embraced in the said agreements, cannot be set aside, changed, or corrected by reason of the alleged erroneous method of computation alleged to have been made in calculating the figures of efficiency.

[1] At the argument, and in his brief, counsel for defendant further urged that an action at law was not the proper form of remedy in the case. By demurrer the defendant admits the facts set out in the statement of claim, and, if the statement is to be construed as setting up a mistake of fact upon which the plaintiff paid money to the defendant by mistake, for which there was no consideration, the action of assumpsit for money had and received is a proper remedy.

"It lies for money which exæquo et bono the defendant ought to refund; * * * it lies for money paid by mistake; or upon a consideration which happens to fail. * * * In one word, the gist of this kind of action is that the defendant upon the circumstances of the case is obliged by the ties of natural justice and equity to refund the money." Per Lord Mansfield in Moses v. MacFerlan, 2 Burr. 1005.

The action must be based upon a mutual mistake of fact. Ege v. Koontz, 3 Pa. 109; Kingston Bank v. Eltinge, 40 N. Y. 391, 100 Am. Dec. 516. Under such circumstances money paid by mistake may be recovered back. In re F. & M. Mech. Bank (D. C.) 13 Fed. 361; Brown v. District of Columbia, 17 Ct. Cl. 402; Behring v. Somerville, 63 N. J. Law, 568, 44 Atl. 641, 49 L. R. A. 578; Walker v. Conant, 65 Mich. 194, 31 N. W. 786; Hudson River Water Power Co. v. Glen Falls Cement Co., 186 N. Y. 597, 79 N. E. 1107; U. S. v. Charles et al., 74 Fed. 142, 20 C. C. A. 346; Allen v. Hammond, 36 U. S. (11 Pet.) 63, 9 L. Ed. 633; Scriba v. Insurance Co., 21 Fed. Cas. 874; Wilson v. Insurance Co. (C. C.) 5 Fed. 674.

The contract between the parties is no longer executory, except in so far as the payment of money by the plaintiff is concerned. There is no question involving the rights of other parties, or any involved method of accounting, which requires the suit to be in equity rather than at law. There is no question of restoration of the parties to their prior status, for the item in the contract under which the plaintiff agrees to pay for the excess efficiency is merely a carrying out of the express terms of the original contract, and everything else to be done has been done by the parties. The suit clearly comes within section 267 of the Judicial Code of March 3, 1911, providing:

"Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."

[2] It is apparent from the facts set out in the statement of claim that the defendant has received without any consideration therefor the amount claimed in the suit. The item in the supplemental contracts for payment of the $1,000 for each per cent. of excess efficiency was not in compromise of a claim in dispute, but was a statement of a sup-

posed existing liability under the original contract. It appears from the statement of claim, however, that it was based upon a mutual mistake of fact. It does not come within the class of cases in which the courts have refused to interfere with the findings of tribunals selected by the parties, or in which ascertained facts are to be accepted as a basis for the findings of such tribunals. The engineers were to make a test and the amount to be paid was to be in accordance with what was demonstrated by that test. The question is not what did the engineers selected to make the test report? but what did the test demonstrate as to the efficiency of the boilers supplied under the contract? The plaintiff is not seeking to have a new test made, but is accepting the test as made. At that test the efficiency of the boilers was demonstrated and the figures noted. In making a computation of the figures, however, an error was made in adopting as a factor in determining the evaporation the total heat in superheated steam, instead of the total heat in saturated steam, and the boilers were erroneously reported to have a greater efficiency than the test demonstrated that they had.

Both parties, relying upon the report of the engineers, agreed to the item liquidating the amount to be paid for excess efficiency, which amount was subsequently set out in the supplemental agreements, and, in pursuance of that liquidation, the defendant has received the money claimed in this suit, without giving any consideration therefor. The defendant is liable for repayment of the money erroneously paid by the plaintiff, and erroneously accepted by the defendant under such a mutual mistake of fact, and the form of action selected in this case is a proper one.

The demurrer is overruled, with leave to the defendant to file an affidavit of defense within 15 days.

UNITED STATES v. CAIN-BONNESS LUMBER & TIMBER CO. et al.

No. 2161.

(District Court, W. D. Washington, N. D. June 18, 1914.)

1. INDIANS (§ 17*)—INDIAN LANDS—SALE OF TIMBER—RESTRICTIONS.

Where land was patented to a Nooksack Indian under a homestead application, with a restriction that the land, in accordance with Act Cong. July 4, 1884, c. 180, 23 Stat. 96 (U. S. Comp. St. 1901, p. 1420), would be held in trust by the United States for 25 years for the sole use and benefit of the patentee, and at the expiration of that period the United States would convey the land to the patentee discharged of the trust, a sale of the timber on the land, which was merely incidental to the beneficial use thereof for agriculture, was not a violation of the restriction.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 48; Dec. Dig. § 17.*]

2. PUBLIC LANDS (§§ 106, 117*)—PATENTS—COLLATERAL ATTACK.

Where the Land Department had jurisdiction and power to dispose of public land, neither a patent for the land issued by the department, nor

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

the decisions of the department on questions within its jurisdiction relating to the land, could be collaterally attacked.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 104, 301, 302, 324; Dec. Dig. §§ 106, 117.*]

3. PUBLIC LANDS (§ 117*)—INDIAN LANDS—SALE—RESTRICTIONS.

In a suit by the United States to set aside a sale of timber on Indian lands and the grant of an easement for a right of way for 50 years, a defense, involving a determination that the decision of the land department that the Indian had not brought himself within the provisions of Act Cong. March 3, 1875, c. 131, § 15, 18 Stat. 420 (U. S. Comp. St. 1901, p. 1419), restricting alienation for five years only, was erroneous, and requiring a reformation of the patent by striking therefrom a provision that the land should be held in trust for 25 years, according to Act Cong. July 4, 1884, c. 180, 23 Stat. 96 (U. S. Comp. St. 1901, p. 1420), and the insertion of a provision against alienation for five years under the act of 1875, all by way of collateral attack on the patent sought to be reformed, was unsustainable.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 324; Dec. Dig. § 117.*]

4. INDIANS (§ 31*)—INDIAN LANDS—TRANSFER—ALIENATION—RESTRICTIONS.

Act Cong. Feb. 8, 1887, c. 119, § 6, 24 Stat. 390, conferring the right of citizenship on Indians who had severed their tribal relations and adopted the habits of civilized life, did not entitle them to enter public lands under the homestead laws free from restrictions, nor preclude the government, in issuing a homestead patent to an Indian, from including a clause that the land should be held in trust for 25 years, as provided by Act Cong. July 4, 1884, c. 180, 23 Stat. 96 (U. S. Comp. St. 1901, p. 1420).

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

5. INDIANS (§ 15*)—INDIAN LANDS—HOMESTEAD—RESTRICTION ON ALIENATION—VIOLATION—RIGHT OF WAY EASEMENT.

A Nooksack Indian having received a trust patent pursuant to a homestead application, containing a restriction on alienation for 25 years, and having sold the timber on the land, a conveyance of a right of way over the land to the grantee of the timber for 50 years, with all privileges, etc., for the construction of a logging railroad, constituted a violation of the restriction, and was invalid.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37–44; Dec. Dig. § 15.*]

In Equity. Suit by the United States against the Cain-Bonness Lumber & Timber Company and others. Decree for complainant.

Billy Tom (Sewalmus), an Indian of the Nooksack Tribe, on October 31, 1889, filed a homestead application under section 2289, U. S. Rev. St. (U. S. Comp. St. 1901, p. 1388), for the land in issue, upon which he then was and for a long time prior thereto had been residing. Final proof was submitted on the 13th day of July, 1891, further proof made February, 1895, and patent issued July 18, 1895. One of the recitals in the patent is as follows:

"Know now ye, that the United States of America, in consideration of the premises, and in accordance with the provisions of the said act of Congress of July 4, 1884, hereby declares that it does and will hold the land * * * for the period of twenty-five years in trust for the sole use and benefit of said Billy Sewalmus * * * and at the expiration of said period * * * will convey the same by patent to the said Billy Sewalmus discharged of said trust."

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

On February 4, 1907, the Indian and his wife entered into a written contract with the Cain-Bonness Lumber & Timber Company, in which:

"The said parties of the first part (Indians) for and in consideration of the sum of $700.00 to them in hand paid by the party of the second part hereby agree to convey, bargain and sell all the timber of all kinds; also fifty foot right of way for a term of fifty years, with all the privileges, etc., for the construction of a logging railroad."

After the signatures of the Indians appears the following:

"Subscribed and sworn to before me this 4th day of February, 1907. Emery Bell, Notary Public."

It is stipulated that $400 was paid for the timber and $300 for the right of way, and that 400,000 feet of timber of the value of $1 per thousand was removed from the land, and 3,145 railroad ties were cut at the cost of $448.85, which were of the value of $629. It is also stipulated that 8,000 feet was taken from the bottom land, and the remainder from the first and second bench land. The price at which the timber was sold was its reasonable market value. It is further shown that much of the timber originally on the land was sold to other parties long prior to the sale in issue here. Much testimony was presented by defendants from reputable white men who have lived in the community for many years, and who owned land of like character adjoining and in the near vicinity, and who have cleared their lands and farmed it, and cultivate their lands annually. This testimony beyond doubt establishes the fact that the chief value of the land is for agriculture.

Clay Allen, U. S. Dist. Atty., and Winter S. Martin, Asst. U. S. Atty., both of Seattle, Wash.

Coleman & Gable, of Mt. Vernon, Wash., and Jesse A. Frye, of Seattle, Wash., for defendants.

NETERER, District Judge (after stating the facts as above). [1] The facts demonstrate that the removal of the timber was an incident to the beneficial use and enjoyment of the land, and that the sale of the timber is not within the restraints on alienation. Justice McKenna, in United States v. Paine Lumber Co., 206 U. S. 467, 473, 27 Sup. Ct. 697, 699 (51 L. Ed. 1139), said:

"The land is not the land of the United States, and the timber when cut did not become the property of the United States. And we cannot extend the restraint upon the alienation of the land to a restraint upon the sale of the timber consistently with a proper and beneficial use of the land by the Indians. * * * Indeed, it may be said that arable land is of no use until the timber is off, and it was of arable land that the treaty contemplated the allotments would be made. We encounter difficulties and baffling inquiries when we concede a cutting for clearing the land for cultivation, and deny it for other purpose. At what time shall we date the preparation for cultivation and make the right to sell the timber depend? Must the axe * * * precede the plow and do no more than keep out of its way? And if that close relation be not always maintained, may the purpose of an allottee be questioned and referred to some advantage other than the cultivation of the land, and his title or that of his vendee to the timber be denied? Nor does the argument which makes the occupation of the land a test of the title to the timber seem to us more adequate to justify the qualification of the Indians' rights."

This conclusion would be decisive of this case but for the alleged transfer of an easement for the 50-foot right of way across the land. The grant of such an interest in the land necessitates a determination of the question as to whether there was a restriction upon alienation at the time it was made. Defendants contend that the patent should have been issued under the act of March 3, 1875, 18 Stat. 420, c. 131, § 15 (U. S. Comp. St. 1901, p. 1419), which provided that the land should be inalienable during a period of only five years, which period had expired at the time of the grant. This contention is based upon the holding of the Circuit Court of Appeals in Hemmer v. United States, 204 Fed. 898, 123 C. C. A. 194, that the act of 1875, which related to the acquisition of homesteads by nontribal Indians, was not repealed by the act of July 4, 1884, 23 Stat. 96, c. 180 (U. S. Comp. St. 1901, p. 1420), which embraces both tribal and nontribal Indians.

In that case the Indian had entered upon the land under the provisions of the act of 1875, and had resided upon and cultivated it for five years, and was entitled to make final proof and receive patent before the passage of the act of July 4, 1884. His actual proof was made, however, a few months after the passage of the latter act. The land department erroneously inserted in his patent a declaration that it should be inalienable for 20 years in accordance with the provisions of the act of January 18, 1881, 21 Stat. 315, c. 23. This act related solely to the Winnebago Indians of Wisconsin, and had no application to the Indian to whom the patent was issued, and was inserted therein by reason of an erroneous construction by the land department that the restrictions required by that act to be inserted in patents issued to Winnebago Indians applied to other Indians as well. In 1907 the department ruled that the decision of United States v. Saunders (C. C.) 96 Fed. 268, that the act applied only to the Winnebago Indians was correct, and that its prior construction had been wrong. Thereafter, in August, 1908, and, as the court concludes, "doubtless in reliance upon these decisions," defendant bought the land from the Indian. Subsequently, in June, 1909, the land department issued the Indian another patent, which declared that it was issued in lieu of the first patent, and contained a provision that the land should be held in trust for a period of 25 years, according to the terms of the act of 1884. In July, 1909, the United States brought a suit in equity against the immediate and remote grantees of the Indian to set aside all conveyances as having been made contrary to the provision that the land should be held in trust for 25 years, contained in the last issued patent. The court held that the provision in the first patent that the act of 1881 should govern was void, and that the only provision against alienation attached to the Indian's title was that provided by the act of 1875, under which the Indian's right to obtain patent had become vested.

[2] It is well settled that a patent issued by the land department, where there is no want of jurisdiction or power to dispose of the land, is not subject to collateral assault. 32 Cyc. 1040, and cases cited; United States v. Winona & St. Paul Ry. Co., 67 Fed. 948, 15 C. C. A. 96. It is equally well settled that the decisions of the land depart-

ment upon questions within its jurisdiction cannot be collaterally assailed.

"The land department of the United States is a special tribunal vested with judicial powers, whose decisions upon questions within its jurisdiction are impregnable to collateral attack, and conclusive until they are reversed on appeal or set aside by proper proceedings in equity." Sanborn, J., in Hartman v. Warren, 76 Fed. 159, 22 C. C. A. 30; Johnson v. Drew, 171 U. S. 92, 18 Sup. Ct. 800, 43 L. Ed. 88; McCormick v. Hays, 159 U. S. 337, 16 Sup. Ct. 37, 40 L. Ed. 171; Smelting Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875.

[3] The Indian Sewalmus could have obtained the land in question under the provisions of the act of 1884. Whether he was also entitled to obtain it under the provisions of the act of 1875 was a question which was presented to the land department at the time his application for patent was presented. The determination of that question would depend, among other things, upon whether he was a member of the special class named therein, that is, whether he had severed his tribal relations. This would be a question of fact, depending upon evidence to be presented before the tribunal having jurisdiction of the matter, and which, if presented, we must presume was acted upon by the issuance of the patent under the act of 1884. We are not concerned with the question as to whether the issuance of the patent under the act of 1884 was erroneous. The land department had the power to issue the patent under either the act of 1875 or 1884. The fact that it may have erred does not deprive it of jurisdiction, or make its determination any the less final against collateral attack. The defense set up involves: (1) a determination by this court that the decision of the land department that the Indian had not brought himself within the provisions of the act of 1875 was erroneous; (2) the reformation of the patent by striking therefrom the provision that the land shall be held in trust for 25 years, according to the provisions of the act of 1884; (3) the insertion of a provision against alienation for a period of 5 years, according to the act of 1875. All of this is asked for by way of collateral attack on the instrument thus sought to be reformed. A mere statement of such a request demands its denial.

It will be observed from the facts stated in the Hemmer Case that the provision that the land should be held in trust for 25 years, inserted in the patent at the time of its issuance, was beyond the jurisdiction of the land department; that is, that it had no power to insert therein the provisions of an act which had no application whatever. At the time the defendant purchased the land and when his rights attached thereto, there was no valid restriction against alienation contained therein, and the court determined that it was only such restrictions as that provided for under the act of 1875, under which the Indian had entered and made his proof. The court held, in substance, that, the defendant having relied upon the provisions of the act of 1875, which were by implication terms of the patent, the government should not be permitted, after the defendant had purchased the land, to insert other and more onerous provisions 23 years after the issuance of the patent. However, no element of estoppel enters into the instant case, for the restriction which the defendants are seeking to set aside

appeared upon the face of the patent at the time they acquired the easement. Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 437, 12 Sup. Ct. 239, 35 L. Ed. 1063.

[4] The defendants also contend that as section 6 of the act of February 8, 1887, 24 Stat. 390, c. 119, conferred the right of citizenship on Indians who had severed their tribal relations and adopted the habits of civilized life, they were entitled to land entered under the homestead laws as free from restrictions as any other citizen of the United States. A similar contention was made in Frazee v. Spokane County, 29 Wash. 278, 69 Pac. 779, and the court, speaking through Justice Hadley, said:

"The fact that the act of 1887 confers citizenship upon Indians who comply with certain conditions does not conflict with the law of 1884. * * * The later act does not repeal the former, unless it may be said that the provision conferring citizenship in the later one has the effect to repeal the clause in the former which places restrictions upon alienation. We do not think it had that effect. The evident design of Congress was to prepare the Indian to become a self-supporting individual, and if, as a means to that end, and for the purpose of inducing him to separate himself from his tribal relations, it saw proper to confer citizenship upon him, we are unable to see that it is repugnant to the government's still retaining a certain guardianship over him, in the way of holding title to his lands in trust for a period, so that he may not be deprived of them while he is learning the lessons and duties of citizenship." Beck v. Flournoy Live Stock Co., 65 Fed. 30, 12 C. C. A. 497; United States v. Flournoy Live Stock Co. (C. C.) 69 Fed. 886; United States v. Flournoy Live Stock Co. (C. C.) 71 Fed. 576; Frazee v. Piper, 51 Wash. 278, 98 Pac. 760.

[5] The statement of Judge Hanford in the case of United States v. Saunders (C. C.) 96 Fed. 268, that the restriction against alienation for 20 years was repugnant to the grant, and void, must be taken in connection with the rest of his opinion. When so considered, it is manifest that he did not mean that the restriction was void because it was repugnant to the grant, but because "it was not required nor authorized by any law." The only question there involved was whether a restriction imposed by an act which had no application was to be enforced. It could not therefore have been determined that the provisions of an act which did have application would have been void, if inserted in the patent. Such a determination would have been without the range of inquiry. The court decided in that case that the act of 1881 had no application because it related to a special tribe of Indians, and the act of 1884 had no application because final proof was made before the passage of that act. It does not appear what would have been the decision had the court concluded that the provisions of either act were applicable.

Let an appropriate decree be presented.

BOGERT et al. v. SOUTHERN PAC. CO.

(District Court, E. D. New York. July 13, 1914.)

1. CORPORATIONS (§ 210*)—STOCKHOLDERS—RIGHT TO SUE—PARTIES.

Where a stockholder sues to recover damages to his property, whether it consists of tangible assets or shares in the corporation the property of which if it should prove to have a surplus would be divided among its stockholders, he is not required to make the corporation holding the legal title a party, but otherwise, if his action is purely representative and he sues as a stockholder for the benefit of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 808-813; Dec. Dig. § 210.*]

2. EQUITY (§ 293*)—PLEADING—AMENDMENT—CONSTRUCTION.

Where a pleading has been dismissed on a definite ground, and the party amends or renews the pleading so as to obviate the difficulty, and the new pleading is capable of construction so as to avoid the difficulty as well as to be no different from the previous pleading, the construction which would respect the previous decision and conform thereto must be held to be the intended meaning.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 551, 565, 576; Dec. Dig. § 293.*]

3. CORPORATIONS (§ 209*)—ACTION BY OR AGAINST—BILL—LACHES.

Where complainant and his predecessor in title since 1891 had been interested in litigation to establish rights alleged in the present suit, and though complainant had never been nominally or actually a party in court, he had knowledge of the proceedings and had helped financially and by advice in their progress and brought the present suit after attempts by other parties had failed without a hearing on the merits, and it further appeared that the case could now be tried without prejudice to defendant in substantially as complete a way as if undertaken before, the bill would not be dismissed without a hearing on the merits on the ground that complainant was guilty of laches.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 806, 807; Dec. Dig. § 209.*]

In Equity. Bill by Henry L. Bogert and others, as executors of the will of Walter B. Lawrence, deceased, suing on behalf of themselves and other stockholders of the Houston & Texas Central Railway Company similarly situated, who may come in and contribute to the expenses of the action, against the Southern Pacific Company. Hearing on pleas interposed in defendant's answer. Denied, with leave to take advantage of the pleas on final hearing.

Dittenhoefer, Gerber & James, of New York City (A. J. Dittenhoefer, H. Snowden Marshall, David Gerber, Russell H. Landale, and Dudley F. Phelps, all of New York City, of counsel), for plaintiffs.

Arthur H. Van Brunt and Henry V. Poor, both of New York City, for defendant.

CHATFIELD, District Judge. Final hearing has been had upon certain pleas interposed in the answer of the defendant, and which, if any one be sustained, will make unnecessary determination of the

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

general issue on the claimed right to an accounting because of infliction of damage by the acts of the defendant, which are alleged to have been illegal and fraudulent.

The first plea has to do with the question of parties. It was previously held, in the case of Lawrence v. Southern Pacific Co. (C. C.) 180 Fed. 822, that necessary parties were absent, and appeal from the judgment of dismissal therein entered was dismissed in the Supreme Court of the United States. Bogert, as Executor of Lawrence, v. Southern Pacific Co., 228 U. S. 137, 33 Sup. Ct. 497, 57 L. Ed. 768.

[1] In the present action, the allegations of the complaint are the same as in the previous action, with the exception that the alleged wrongful acts are now set forth as the positive acts of the parties defendant, while the plaintiff (and those whom he seeks to have join with him as parties plaintiff) is basing his right to an accounting for acts causing damage upon allegations of injury to his own property by these alleged wrongful acts. If the action is purely representative, and if the plaintiff can sue only as a stockholder, for the benefit of the corporation, then the present complaint is no different from the one upon which judgment of dismissal has been granted. The cases of De Neufville Co. v. New York, etc., Ry. Co., 81 Fed. 10, 26 C. C. A. 306; Redfield v. Baltimore & Ohio R. R. Co. (C. C.) 124 Fed. 929; Ames v. American Tel. & Tel. Co. (C. C.) 166 Fed. 820; Hunnewell v. N. Y. Cent., etc., R. R. Co. (C. C.) 196 Fed. 543; Hyams v. Old Dominion Co. (D. C.) 204 Fed. 681; Niles v. New York Cent. R. Co., 176 N. Y. 119, 68 N. E. 142; Howe v. N. Y., N. H. & H. R. R. Co., 142 App. Div. 451, 126 N. Y. Supp. 1090; Thompson v. Stanley (Sup.) 20 N. Y. Supp. 317; Loewenstein v. Diamond Soda Water Co., 94 App. Div. 383, 88 N. Y. Supp. 313; Michel v. Betz, 108 App. Div. 241, 95 N. Y. Supp. 844; Knickerbocker v. Conger, 110 App. Div. 125, 97 N. Y. Supp. 127; McCrea v. McClenahan, 114 App. Div. 70, 99 N. Y. Supp. 689; Brown v. Utopia Land Co., 118 App. Div. 364, 103 N. Y. Supp. 50; Miller v. Crown Perfumery Co., 125 App. Div. 881, 110 N. Y. Supp. 806; Davenport v. Dows, 18 Wall. 626, 21 L. Ed. 938; Dewing v. Perdicaries, 96 U. S. 193, 24 L. Ed. 654; Central R. R. Co. of New Jersey v. Mills, 113 U. S. 249, 5 Sup. Ct. 456, 28 L. Ed. 949; Venner v. Great Northern Ry., 209 U. S. 24, 28 Sup. Ct. 328, 52 L. Ed. 666; Swan Land & Cattle Co. v. Frank, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577; Eldred v. American Palace Car Co., 105 Fed. 457, 44 C. C. A. 554; Morshead v. Southern Pac. Co. (C. C.) 123 Fed. 350; and contra Kuchler v. Greene (C. C.) 163 Fed. 91; Ervin v. Oregon Ry. & Navigation Co. (C. C.) 20 Fed. 577; Crumlish v. Shenandoah Valley R. R. Co., 28 W. Va. 623; Fletcher v. Newark Telephone Co., 55 N. J. Eq. 47, 35 Atl. 903; Kidd v. New Hampshire Traction Co., 72 N. H. 273, 56 Atl. 465, 66 L. R. A. 574—have been cited and argued by both sides. None of them seem to be conclusive upon the present question. But the ordinary rules of equity would seem to make it possible for an individual to claim definite damage to his own property, whether that property be tangible assets or whether it be shares of stock in

a corporation whose property (if it should prove to have surplus or assets) would be divided among its stockholders. If the plaintiff fails in proving damage, or if he fails in proving property rights to which he, as a stockholder, had a clear title (exclusive of his representative rights) then the absence of the party who had the legal title, that is, the Houston and Texas Central Railway Company, would make it impossible for a representative action to be maintained. There is nothing in the pleadings or in the situation which renders it impossible upon the record for the plaintiff to show such a state of facts as would entitle him to recover, and this plea must therefore be overruled.

[2] The present complaint has left unchanged some of the language which might have been so worded as to render the intent of the plaintiff more easily ascertained. But where a pleading has been dismissed upon a definite ground and the party amends or renews the pleading so as to obviate the difficulty, and where the new pleading is capable of construction so as to avoid the difficulty, as well as to be no different from the previous pleading, the construction which would respect the previous decision and conform thereto must be held to be the intended meaning.

[3] Another plea in bar is based upon the legal defense of the statute of limitations, and is urged in the form of an estoppel because of laches through a period exceeding that of the term defined as a defense at law. This plea comes up in several forms. In the first place, the present plaintiff and his predecessor in title has, throughout all these years, been interested in litigation which, starting with the year 1891, has continued to the present time. He has never been nominally or actually a party in court, but where the proceedings have been in equity, he had the right to join and has not done so. He knew of the proceedings and helped financially and by advice in their progress. The defendant urges that he has elected not to begin any action on his own part until the other attempts by different parties have in turn failed, and therefore elected between two inconsistent remedies. Harrill v. Davis, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153; Mills v. Parkhurst, 126 N. Y. 89, 26 N. E. 1041, 13 L. R. A. 472; In re Garver, 176 N. Y. 386, 68 N. E. 667; Henry v. Herrington, 193 N. Y. 218, 86 N. E. 29, 20 L. R. A. (N. S.) 249; Baird v. Erie R. R. Co., 210 N. Y. 225, 104 N. E. 614.

It is not necessary to consider whether, if the testator had attempted to bring some of the previous actions and had thus elected to present his claim for remedy in that form, he would now be held to have waived his rights and to be estopped from urging the same alleged rights in this present form of action. Klipstein & Co. v. Grant, 141 Fed. 72, 72 C. C. A. 511; In re Jacob Berry, 174 Fed. 409, 98 C. C. A. 360; Bobbs-Merrill Co. v. Strauss, 147 Fed. 15, 77 C. C. A. 607, 15 L. R. A. (N. S.) 766; Iversen v. Minnesota Mutual Life Ins. Co. (C. C.) 137 Fed. 268; Bracken v. Atlantic Trust Co., 167 N. Y. 510, 60 N. E. 772, 82 Am. St. Rep. 731.

It is urged by the defendant that its records have been lost, witnesses have disappeared, that the lapse of time has rendered it impossible to fairly try the case, and that this has occurred with the knowl-

edge of the plaintiff's predecessor (testator) throughout such a period that he should not now be allowed to take advantage of his previous neglect. The various records of the case, however, indicate that no serious difficulties are presented upon this score, and that, strange as it may seem, the case can now be tried with a record of the necessary testimony, in substantially as complete a way as if undertaken many years ago.

The various suits which have been instituted and the decisions rendered thereon need not be discussed, but should be enumerated as follows: Carey v. H. & T. C. Ry. Co. (C. C.) 45 Fed. 438 (1891); Id. (C. C.) 52 Fed. 671 (1892); stockholders held not entitled to decree enjoining carrying out of plan of reorganization, or to have foreclosure set aside as fraudulent. Carey v. H. & T. C. Ry. Co., 150 U. S. 170, 14 Sup. Ct. 63, 37 L. Ed. 1041 (1893); appeal to Supreme Court from decree of Circuit Court dismissed. Carey v. H. & T. C. Ry. Co., 9 C. C. A. 687, 13 U. S. App. 729 (1894); decree of Circuit Court affirmed by Circuit Court of Appeals for the Fifth Circuit. Carey v. H. & T. C. Ry. Co., 161 U. S. 115, 16 Sup. Ct. 537, 40 L. Ed. 638 (1896); appeal to Supreme Court from decree of Circuit Court of Appeals dismissed. Gernsheim v. Olcott, 7 N. Y. Supp. 872 (1889)[1]; 10 N. Y. Supp. 438 (1890)[2]; Gernsheim v. Central Trust Co., 61 Hun, 625, 16 N. Y. Supp. 127 (1891); stockholders held not entitled to reduction of assessment or to injunction against distribution of stock of new company under reorganization. MacArdell v. Olcott, 104 App. Div. 263, 93 N. Y. Supp. 799 (1905); Id., 189 N. Y. 368, 82 N. E. 161 (1907); action by stockholders to set aside foreclosure sale and annul reorganization agreement on ground of fraud dismissed. MacArdell v. Olcott, 62 App. Div. 127, 70 N. Y. Supp. 930 (1901); application of stockholder for leave to intervene denied for laches. Lawrence v. Southern Pacific Co. (C. C.) 165 Fed. 241 (1908); Id. (C. C.) 177 Fed. 547 (1910); Id. (C. C.) 180 Fed. 822 (1910); action by stockholder for accounting and other relief; motions to remand denied and suit dismissed. Bogart v. Southern Pacific Co., 228 U. S. 137, 33 Sup. Ct. 497, 57 L. Ed. 768 (1913); appeal to Supreme Court from decree of Circuit Court in Lawrence v. Southern Pacific Co., supra, dismissed. MacArdell v. Olcott (N. Y. Court of Appeals, October 29, 1907) 189 N. Y. 369, 82 N. E. 161, affirming 104 App. Div. 263, 93 N. Y. Supp. 799, supra, with statement of limitations in the complaint. In the last-named case, the court (two judges dissenting) did not attempt to consider the merits of this transaction, but expressly stated that the present form of action was not presented by that complaint.

The matter has always been disposed of upon questions of pleading, or with respect to the validity of the foreclosure action. The plaintiff seems to have at last brought the matter up in such a way that the issue can be heard. If any of the pleas in bar should be sufficient, the rights of the defendant to renew those pleas, at the close of the tes-

[1] Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 55 Hun, 606.

[2] Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 56 Hun, 644.

timony in the entire case, will be preserved to him; but upon the present record and upon the preliminary hearing, the pleas in bar will be overruled and the case put upon the calendar for hearing upon the entire issue, as well as the pleas involved herein.

JEFFREY MFG. CO. v. MOUND COAL CO.

(District Court, N. D. West Virginia. July 2, 1914.)

1. MINES AND MINERALS (§ 70*)—LIEN FOR RENT—PROPERTY CONDITIONALLY SOLD.

The rights of a conditional vendor of machinery and material, placed by the vendee on mining property leased by him, were paramount and superior to the landlord's rights under his contingent lien for rent, though the contract of conditional sale was not recorded, where such machinery and material were not so intimately embodied in the other property of the lessee as to cause more or less disintegration of the tenant's property from the removal thereof.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 192, 197; Dec. Dig. § 70.*]

2. DETINUE (§ 19*)—DAMAGES FOR DETENTION—MEASURE.

In detinue to recover property conditionally sold by plaintiff, where the money value and not the property itself is recovered, legal interest on the purchase price under the terms of the sale contract, no part of which has been paid, is the measure of damages for the detention.

[Ed. Note.—For other cases, see Detinue, Cent. Dig. §§ 37-40; Dec. Dig. § 19.*]

At Law. Detinue by the Jeffrey Manufacturing Company against the Mound Coal Company. Judgment for plaintiff.

The plaintiff filed its declaration in the Circuit, now this court, alleging that it was entitled to recover from the defendant certain machinery and material of the value of $8,380. It alleges as ground for this demand that, in May, 1911, it entered into an agreement, embraced in three specifications, with a copartnership trading as the Mound City Coal Company, whereby, in consideration of certain agreed payments to be made and covenants to be performed, it furnished this machinery and material to this copartnership. That the latter was, upon receipt of it, to pay plaintiff $2,000 of the purchase price of $8,380 in cash, and execute interest-bearing, negotiable notes at four months for the residue, the plaintiff to retain title and ownership of the property until full and final payment therefor, with right, in case of default, to repossess itself thereof, and of any additions thereto, wherever found, without liability to refund any payments or costs incurred in installation or equipment of the machinery which, it was covenanted, should not become fixture by reason of attachment to real estate. It is averred this contract was recorded August 19, 1911, in Marshall county. Entire default in payment of the $2,000 cash on receipt of the machinery is charged, and, in consequence, it is averred that this copartnership, on August 8, 1911, executed to plaintiff seven promissory notes indorsed by C. B. Sharp, Jr., and L. G. Orr, one for $1,380, payable in 60 days, four for $1,250, each payable in three, four, five, and six months, respectively, one for $1,500, payable in seven months, and one for $500, payable in eight months, to be additional security, and with the express agreement that the provisions of the original contract of sale should not be affected thereby, and the title to the machinery should remain in plaintiff, with the right to reclaim the same as though said notes had not been given and accepted. It is then averred that this copartnership wholly

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

failed to pay the first or any other of these notes as they fell due, and, without in any manner complying with its original contract with plaintiff, and with no right to the possession of the property, but with intent to defraud plaintiff, delivered the possession of this machinery to the Mound Coal Company, defendant, a corporation formed under the laws of West Virginia, having notice of and participating in the fraudulent purpose of the copartnership, which corporation, upon demand made, has refused to surrender possession to plaintiff thereof. The defendant tendered in defense a number of pleas, which set forth its real contention to be: That prior to May, 1911, to wit, on March 22, 1911, it leased to L. G. Orr, for and on behalf of himself and C. B. Sharp, Jr., doing business as a partnership under the name of Mound City Coal Company, its coal mining plant in Marshall county. That this lease was for a term of 12 years, beginning April 1, 1911, and ending March 31, 1923, at a minimum rental or royalty of $10,000 per annum, and this copartnership operated said mine under it from April 1, 1911, to the close of the month of September following; that said lease, among other things, provided: (a) That all accruing rentals or royalties should be treated as rents reserved upon contract and secured by landlord's lien; (b) that upon default in payment of royalties, insurance premiums, or taxes re-entry could be made after 10 days' notice; (c) that mining should be continuous in accord with a system to be agreed between the mining engineers of the lessor and lessee; (d) that the lessee, upon notice to lessor, might sell the compressed air plant and use the proceeds in substituting an electric plant; (e) that in case permanent improvements were made the lessee making them could charge one-half the cost thereof against any excess royalties, accruing over the minimum provided, during the first five years, not to exceed, however, $5,000, and not to include the proceeds or value of the air plant permitted to be sold or exchanged; and (f) that prior to October 1, 1911, it was expected that the lessee would install gathering motors and dispense with the use of mules. And it is thereupon alleged that this copartnership, while occupying the premises as tenant under this lease, bought the machinery in controversy from plaintiff, placed the same on the leased premises, at which time no reservation of lien or title was filed of record, whereby the landlord's lien became attached to said machinery, to secure defendant $10,000 of rental, more than the value of said machinery, and that said copartnership has been adjudged bankrupt, abandoned the leased premises, and defendant unwillingly and from necessity retook possession, soon after October 1, 1911 of the premises, including said machinery.

The pleas were demurred to, but by consent an order was entered reserving decision thereon, but issue was joined, a jury waived, and all questions of law and fact were submitted to the court. By stipulation of counsel filed it was admitted: (1) That plaintiff was a corporation of Ohio, and the defendant one under the laws of West Virginia. (2) That plaintiff sold to the Mound City Coal Company the machinery at the time and on the terms and by the written contract filed as Exhibit A. (3) That the Mound City Coal Company was a partnership formed by L. G. Orr and C. B. Sharp, Jr., to operate the coal plant leased by it from defendant. (4) That at the time of purchase of the machinery from plaintiff this copartnership was engaged in mining and shipping coal from the leased premises by virtue of the written lease from the defendant to L. G. Orr, dated March 22, 1911, and continued operations until late in September, 1911. (5) That this lease was never recorded; that plaintiff, at the time it contracted to sell the machinery, knew that it was to be used on premises leased by Orr from defendant, but had no knowledge of the provisions of the lease. (6) That the machinery was shipped in June, 1911, and delivery was made at the contract place, unloaded there from the defendant's siding connecting the mine with the Baltimore & Ohio Railroad, operated by the railroad company under agreement with defendant, the premises being part of the leased premises. That said purchaser did not comply with the terms of sale. That the notes indorsed by Orr and Sharp were given with the understanding in regard thereto as set forth in the declaration. That demand on defendant for the machinery was made on October 11, 1911, who was and has been ever since that date in possession

thereof using it in the operation of the mine. That plaintiff's reservation of title was recorded August 19, 1911. (7) That Orr, when he negotiated the lease, represented to defendant that he and associates intended to change the system of mining and install an electric plant in lieu of the compressed air one. That leave was given by defendant to sell this compressed air one and use the proceeds in the purchase of the electric one, and that it was the intention of the defendant and lessee that such electrical plant should be purchased and become the property of the defendant under the terms and conditions set forth in the lease, but of such intention the plaintiff had no knowledge, as was true also of the representations made by lessee to the effect that at least $10,000 would be expended in the purchase of machinery to be installed on the premises, by reason of which representations concessions and advantages were secured. That after this copartnership the Mound City Coal Company, had taken possession of the machinery in controversy, or a part of it, the defendant was told by Orr that $2,000 cash had been paid upon its purchase price, unsecured notes had been given for the residue, and no reservation of title had been made thereof, or any lien retained thereon. That defendant inquired at the clerk's office and was unable to find any reservation of title of record. That this reservation of title was recorded on August 19, in a deed book, and not elsewhere. That defendant thereafter relied upon the ownership of this machinery by its lessee, without lien on it or reservation of its title as security for any default in payment of royalties, and for compensation in case the lease should be abandoned. (8) That the said Mound City Coal Company had not in fact paid plaintiff the $2,000, nor any part thereof, but had given notes for all the purchase money, and had represented to the plaintiff that J. C. McKinley, the president of defendant, had promised to and would indorse the notes given for deferred payments. (9) That the notes described in the declaration were given by this copartnership in the manner and for the purposes set forth in the declaration to plaintiff, the owner thereof, and that none have been paid, nor has any part of the consideration for the machinery ever been paid to plaintiff. (10) That Orr abandoned the leased premises after September 25th, and before October 5th, within which period Orr and Sharp left the state of West Virginia, never returned to the premises, and never resumed the business; that afterwards the copartnership was adjudged bankrupt, its property sold and proceeds distributed. That in the bankruptcy proceeding defendant enforced a landlord's lien for the same items claimed in this suit against certain of its personal property, and received on account thereof the sum of $1,615.76. (11) That early in October defendant unwillingly and from necessity retook possession of the premises. The plaintiff on the 11th of that month demanded possession of the machinery, which defendant refused to surrender, claiming it had become its property by reason of the abandonment of the lease, or else it was that of the lessee upon which it had a landlord's lien. That defendant had never sued out a distress warrant, or taken any legal steps to enforce such lien against this property except in this suit, nor has the property been seized or removed from the premises by legal process sued out by any other claimant. (12) The royalties on coal actually mined under this lease amounted to $3,244.11. The lessees were entitled to credits of at least $2,230.34, including $408.03 for supplies bought from lessor. Under the lease the minimum royalty accruing October 1st was $5,000, of which $1,822.31 had been credited to lessees, leaving a balance of $3,177.69 unpaid on due royalties, less the $1,615.76 collected by defendant in the bankruptcy proceedings. It was further agreed that of said machinery the Mining Type 17A was sold and delivered under certain valid and subsisting United States letters patent set forth; that the Locomotive Serial No. 2134 was equipped with two M. H. 82B Motors, covered by like valid patent as were the armature brush holders thereon, which patents are particularly set forth and described in this clause of the stipulation. (13) The defendant claims, if it has not become owner of this machinery by reason of the abandonment of this lease, that it is entitled to a landlord's lien for one year's rent, due or to become due, of $10,000, less credits above set forth. If no rentals can be collected subsequent to the time when the defendant retook possession, the date of such retaking shall

be taken to be the 2d of October. The defendant has, since that date, been in possession of the plant, and operating it as its own estate. (14) Under the lease the lessee was bound to pay taxes and insurance, and a landlord's lien was reserved by defendant to secure payment thereof, but plaintiff had no knowledge thereof. The taxes, due October 1st, and the insurance due for the year 1911, amounted to $641.31, which sum was paid by defendant subsequent to October 1st. It was further agreed, during the taking of the evidence before the court, that the air compressor plant referred to in the lease was not removed and sold by Orr, the lessee, nor by any other person acting for him, but still remains at the mine and is part of the property of the landlord.

J. B. Sommerville, of Wheeling, W. Va., J. C. Simpson, of Moundsville, W. Va., and W. Wilson Carlile, of Columbus, Ohio, for plaintiff.
N. C. Hubbard, of Wheeling, W. Va., for defendant.

DAYTON, District Judge (after stating the facts as above). [1] It cannot be doubted that, by the terms of the contract, the sale of this machinery, made by plaintiff to the copartnership, was a conditional one, and that title to such machinery and the right to reclaim it in case of default in payment of the purchase money, were clearly reserved. Nor is it questioned that not a dollar of such purchase price was ever in fact paid. This being true the case is clearly ruled and determined by the two very recent decisions of the Supreme Court, in Holt v. Henley, 232 U. S. 637, 34 Sup. Ct. 459, 58 L. Ed. 767, and in Detroit Steel Cooperage Co. v. Sistersville Brewing Co.. 233 U. S. 712, 34 Sup. Ct. 753, 58 L. Ed. 1166. Both of these cases were taken up by certiorari from this Fourth circuit; one originating from Virginia, the other from this state and district. In both cases the rulings of the District Court and the Circuit Court of Appeals are reversed. In the first case, a conditional sale, of the kind and character involved here, and the right to remove the property, is upheld, although the contract was never recorded, as against a prior recorded mortgage providing for its lien upon all after-acquired property, as also against the trustee in bankruptcy having, under Act June 25, 1910, c. 412, § 8, 36 Stat. 838, 840 (U. S. Comp. St. Supp. 1911, p. 1500), amending section 47a (2) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438]), all the rights of a creditor holding a lien.

The second case affirms the former's ruling in this regard, and goes a step farther and defines and narrows the possible exception to it where property has gone into possession of the conditional sale purchaser and become attached to the realty, to be where—

"the property claimed has become so intimately connected with or embodied in that which is subject to the mortgage that to reclaim it would more or less physically disintegrate the property held by the mortgagee."

That the seller in these conditional sale contracts is the real owner of the property until absolute sale is fully perfected under the terms of the contract, and that the mortgagee in an existing mortgage providing for its lien upon after-acquired property is not as to such property a purchaser without notice is clearly held in both cases. In this case a

landlord, whose tenant has acquired possession of property of another under such a contract and placed it upon the leased premises, can have no stronger claim to be an "innocent purchaser," under his landlord's contingent lien for rent, than is such mortgagee to whom, under the express terms of the mortgage, the property is transferred. The right of the seller, under conditional sale contract, who is the real owner until the sale is fully consummated, is paramount to that of either, subject only to the risk he takes of having his property "so intimately embodied" in the other property of the tenant or mortgagee as to cause more or less disintegration of the latter in case of removal thereof.

[2] It follows that judgment must be rendered in this case for the recovery of this property or the value thereof, in case recovery of it cannot be had, and also damages for its detention. If a money value is to be recovered, there will be no trouble in ascertaining the damages for detention. Such damages would be the lawful interest upon the purchase price under the terms of the sale contract. If, however, the recovery is to be of the machinery itself, then it becomes necessary to determine the extent to which its retention and use has deteriorated its value. The evidence before me is wholly inadequate for this purpose, and, unless parties can further stipulate and agree as to what this damage by reason of retention and use is, this court must hear further evidence in regard thereto.

CALHOUN et al. v. CITY OF SEATTLE et al.

(District Court, W. D. Washington, N. D. June 18, 1914.)

No. 1932.

COURTS (§ 101*)—FEDERAL COURT—ENFORCEMENT OF STATUTES—"STATUTE"—"ORDINANCES"—"LEGISLATURE."

Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]) § 266, provides that no interlocutory injunction restraining the enforcement of any state statute shall be issued by any justice of the Supreme Court or any District Court of the United States, or by any judge thereof, or circuit judge acting as a District Court, for unconstitutionality, unless the application shall be presented to a justice of the Supreme Court of the United States or to a court or district judge, and shall be determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two either circuit or district judges, and unless a majority of the three shall concur in granting the application. *Held*, that the word "statute" meant the express written will of the Legislature, rendered authentic by certain described forms and solemnities, the word "Legislature" being synonymous with General Assembly of the state, and did not include city ordinances, which are laws passed by the governing body of a municipal corporation; and a federal District Court, presided over by a single judge, had jurisdiction to restrain the enforcement of city ordinances attempting to repeal the franchises of a railroad company, under a bill alleging that such repealing ordinances were violative of the railroad company's contract

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

rights under the federal Constitution citing 7 Words and Phrases, pp. 6647, 6648.

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

For other definitions, see Words and Phrases, vol. 6, pp. 5024-5027; vol. 5, pp. 4089, 4090.]

In Equity. Suit by Scott Calhoun and another, as receivers of the Seattle, Renton & Southern Railway Company, against the City of Seattle and another. On objection of complainant to the jurisdiction of the District Court to hear and determine the issue, unless determined by three judges under Judicial Code, § 266. Overruled.

Harold Preston, Will H. Thompson, and Morris B. Sachs, all of Seattle, Wash., for complainant.

James E. Bradford and Ralph S. Pierce, both of Seattle, Wash., for defendants.

NETERER, District Judge. On the 23d day of December, 1910, Judge Hanford issued a temporary restraining order against the city of Seattle, a municipal corporation of the first class, the mayor of the city, the city comptroller, and members of the city council of the city of Seattle, their servants, agents, and employés, from in any way or manner interfering with, hindering, or impairing the operation of the lines of railways now owned and operated by the complainant railway company, upon a bill in equity filed on the same day, and directed the defendant to appear on the 29th day of December thereafter, and show cause, if any, why an injunction should not be issued as prayed for in the bill of the complainant. On the 6th day of January, 1911, a temporary injunction was issued by Judge Donworth, enjoining the defendants, their servants, agents, and employés, from doing any act or thing, or taking any further proceedings, under Ordinances No. 25,963 and No. 25,962 of the city of Seattle, until the final hearing of this cause, and until the further order of this court.

From the bill of complaint and supplemental bill it appears: That complainant is the owner of a line of street railways in Seattle, maintained and operated by virtue of two franchise ordinances, being Ordinance No. 15,919, and Ordinance No. 20,088. These ordinances were duly accepted by complainant, or its predecessors in interest, and constitute the contractual rights between the parties to this action. That the city council, in December, 1910, passed two resolutions, declaring its intention to repeal these ordinances, and directing the service of written notice upon complainant of hearing before the city council, on December 19, 1910, and to show cause, if any, against such repeal. That at the time fixed complainant appeared and objected to the proposed action. That the mayor and city council, after receiving certain evidence claimed by the city to be sufficient, over the objection of the complainant, passed two ordinances, numbered respectively 25,962 and 25,963, repealing the two franchise ordinances first mentioned. That the complainant and its predecessors in interest had duly complied with all the terms and conditions of these franchise ordi-

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

nances, and that no cause for repeal existed. It was further averred that the two repealing ordinances impaired the obligation of contracts created by the franchise ordinances, and, if permitted to stand as valid ordinances, will deprive the complainant of its property in the franchise ordinances and the street railways without due process of law. Other allegations are made from which it appears that the action of the city as set forth will result in irrevocable injury to the complainant.

A demurrer was afterwards filed to this bill by the defendant, challenging the jurisdiction of the court. Judge Donworth, in deciding this demurrer, held that:

> "The prohibition of the Constitution against laws impairing the obligation of contracts, applies to all contracts, executed or executory, whoever may be parties to them"

—and treated the ordinances as legislation enacted by virtue of the lawmaking power of the state, and within the "contract" or "due process" clauses of the Constitution of the United States, and decided that the federal court had jurisdiction.

On the 10th of June, 1914, a motion for an order modifying the injunction was filed by the defendants, and the same duly noted for hearing before the court on the 15th day of June. At this hearing the complainant appeared and objected to the jurisdiction of the District Court, unless composed of three judges, to hear and determine the issue, by reason of the limited power granted, and prohibitory provisions of section 266 of the Judicial Code, which provides:

> "No interlocutory injunction, suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute shall be issued, or granted, by any justice of the Supreme Court, or by any District Court of the United States, or by any judge thereof, or by any circuit judge acting as District Court, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court, or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. * * * Said application shall not be heard or determined before at least five days notice of the hearing has been given to the Governor and to the Attorney General of the state, and to such other persons as may be defendants in the suit."

It is contended that the effect of this action is to enjoin the operation of a city ordinance, and that in legal contemplation and within the comprehension of this section it has the same dignity and status as a state statute, and to sustain this contention the decision of Judge Donworth in deciding the question of jurisdiction in this case when it was attacked by demurrer, and the cases of Iron Mountain Road Co. of Memphis v. City of Memphis, 96 Fed. 113, 37 C. C. A. 410, and Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341, are cited. An examination of these cases discloses the fact that these were cases where the rights became vested under the provisions of city ordinances, and the only question passed upon by the court was the question of jurisdiction. In these cases the

cities, by the repealing ordinances, sought to impair the obligation of their contracts created by the ordinances, and the court simply held that where a contract is made by the state, or one of the agencies of the state, by virtue of power for that purpose conferred by the Legislature of the state, the federal court will assume jurisdiction, construe such statute or ordinance, and interpret the same.

The case of Atlantic Coast Line Railroad Co. v. City of Goldsboro, North Carolina, 232 U. S. 548, 34 Sup. Ct. 364, 58 L. Ed. 721, decided February 24, 1914, is referred to with great confidence. In that case the Supreme Court uses the following language:

> "Any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state, within the meaning of the pertinent clause of section 709, R. S. (U. S. Comp. St. 1901, p. 575), or Judicial Code, section 237, which confers jurisdiction upon this court."

And further:

> "We must therefore treat the ordinances as legislation enacted by virtue of the lawmaking power of the state. They are manifestly an exertion of the police power, and the question is whether, viewed in that light, they run counter to the 'contract' or 'due process' clauses."

The language just quoted, used by the Supreme Court, was employed in determining the right of appeal from a state court to the Supreme Court of the United States, under the provisions of section 237, which provides that:

> "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute * * * or an authority exercised under any state, on the ground of their being repugnant to the Constitution, * * * or laws of the United States," etc.

Special reference was made by the Supreme Court, in the case of Atlantic Coast, etc., v. Goldsboro, supra, to this section, bringing it within the phraseology and purposes for which the section was designed. There is no question but that the language employed is peculiarly applicable to this section, and it as clearly appears to be foreign to section 266. The language, "Where is drawn in question the validity of the statute *or the authority exercised under any statute,* the passing of the municipal by-law or ordinance, enacted by virtue of power for that purpose dedicated by the Legislature of the state," comes within the meaning of the pertinent clause of section 237 of the Judicial Code, clearly distinguishing it from the provisions of section 266, which pertains to *extraordinary remedies* under *unusual conditions.* Section 266 pertains explicitly and exclusively to *"any statute of the state,"* without any qualifying phrase, or any act delegated by this statute, or authority exercised under it.

The word "statute" has a definite and well-understood meaning. It is the "expressed written will of the Legislature, rendered authentic by certain prescribed forms and solemnities." Words and Phrases, vol. 7, page 6648.

The term "Legislature" is synonymous with General Assembly. State v. Gear, 5 Ohio Dec. 569. A "Legislature" is the body of persons in the state, clothed with authority to make laws. State v. Hyde,

121 Ind. 20, 22 N. E. 644. The lawmaking power is frequently termed, in common parlance, the "Legislature"; and once, if not more, such term is used in the Constitution to designate that body. State Treasurer v. Weeks, 4 Vt. 215. The "Legislature" is the lawmaking body of the state. Article 2, Constitution of Washington.

"Ordinances," as defined in Horr & B. Mun. Ord. 1, are laws passed by the governing body of a municipal corporation for the regulation of the affairs of the corporation. The term "ordinance" is now the usual denomination of such acts, though in England and in some of the states the technically more correct term of "by-law" or "bye-law" is in common or more approved use. Bills v. City of Goshen, 117 Ind. 221, 20 N. E. 115, 117, 3 L. R. A. 261.

Laws enacted by Congress and by state Legislature are invariably designated as *statutes,* and the legislative enactments of municipal corporations are almost as uniformly designated *ordinances.* There is every reason to conclude, from whatever viewpoint approached, in the consideration of section 266, that Congress did not intend the elastic construction to be placed upon the word "statute," or that "the authority exercised under any statute," used in section 237, should be implied. The passing of the ordinance in question was an act authorized by statute and the Constitution; but this fact does not enlarge the scope of section 266, in the face of the restrictive terms used and the purpose sought to be accomplished.

The plaintiff, with some force, suggests that the construction of section 17 of the Act of June 18, 1910 (chapter 309, 36 Stat. 539), creating the Commerce Court, reported at 220 U. S. 539, 31 Sup. Ct. 600, 55 L. Ed. 575, Ex parte Metropolitan Water Co., is decisive of the question here presented. That case involved a *statute* enacted by the state of Kansas, authorizing a summary appropriation of land, and Judge McPherson, in deciding the case, without calling in the judges as provided by section 17, stated:

"That these proceedings are for the purpose by injunction of restraining the enforcement of the state statute I have no doubt. It is alleged that such state statute is absolutely void, as being in conflict with both the state and national Constitutions. The prayers are in effect that the statute be decreed void. Neither have I any doubt that the action is to restrain the action of an officer of the state of Kansas, namely, the Governor. This is so because the state statute in question provides that 'when the Governor issues his proclamation, which he has done, he shall at once take possession of the property, either in person, or he may designate the officers of the drainage board to take such possession for him and in his name, but such officers of the drainage board to act as agents for the Governor. Therefore I am of the opinion that the congressional statute is directly involved, and the question remains: Shall this court now halt these proceedings, or shall other judges be called in to take control of the cases."

And he ruled that the provision of the section merely deprived a single judge of the power to grant a temporary injunction, and the court might be held by one judge, for the purpose of decreeing that the statute might be constitutional, and refused to enjoin its enforcement, and the Supreme Court held that, the statute being of the nature stated, the provisions of the act of Congress which are relied upon apply to the case, and that as a result of their application it imperatively

appears that the hearing and determination of the request for a temporary injunction should have been had before a court consisting of three judges, constituted in the mode specified in the statute. Manifestly this case does not aid in the solution of the problem in the instant case.

To construe this act, courts must consider, not only the language employed, but the evil sought to be remedied. Instances where courts had suspended the operation of legislative enactments, or orders of state commissions, substituting the judgment of one district judge for the combined wisdom of the legislative body of the entire state, were some of the inducing causes which operated to move Congress. There was no demand nor reason for legislation guarding against suspension of city ordinances. The reasons are obvious that Congress intended the word "statute" to have its restricted definition, rather than a comprehensive definition embraced by the laws enacted under state authority. Courts will take judicial notice that there are many municipal corporations in a judicial district. Under the laws of the state of Washington, there are four different classes of municipalities. If the District Court, composed of a single judge, is without jurisdiction to hear and determine the matter in issue here, then the same disability would exist if the ordinances of any of the municipalities in the circuit should be involved in like manner.

And it is not at all reasonable to presume that Congress, in passing section 266, contemplated to charge the courts with the extensive additional burden that might arise by reason of controversies involving the constitutionality of ordinances or rules of cities and towns, many of little importance, and yet so numerous that it would be difficult, if not impossible, to have them heard under section 266, and by reason of delay occasioned thereby rights would be sacrificed and the business of the district so interrupted as to cause great inconvenience to many litigants. Clearly, giving a city "ordinance" the dignity of a "statute" can only be considered with relation to the "contract" and "due process" clauses of the Constitution of the United States, and not within the provisions of section 266.

The issue here presented has been decided by Judge Hanford, formerly judge of this district, in the case of Seattle Electric Co. v. City of Seattle et al., not published, and by Circuit Judge Dennison and District Judges McCall and Sanford of the Sixth Circuit, in Cumberland Telephone & Telegraph Co. v. Memphis (D. C.) 198 Fed. 955, in which the court, after citing Sperry & Hutchinson Co. v. City of Tacoma (also of this district) 190 Fed. 682, said:

"Considering the entire section together, and what is known as to the reason for its enactment, the majority of the court, as now constituted, considers that this section does not govern the present case. They think that the natural meaning of 'statute of a state' is a statute or law directly passed by the Legislature of the state, and the natural meaning of 'any officer of such state' is an officer whose authority extends throughout the state, and is not limited to a small district; and they believe that Congress used these phrases with this natural meaning, rather than the broader and less obvious meaning which trained lawyers might find therein. This conclusion is fortified by the requirement that notice must be given to the Governor and the Attorney General, as being real representative parties in interest. It is true that the en-

tire state, and, through the state, the Governor and the Attorney General, are interested in the validity of every municipal ordinance; but this interest is indirect and remote, and, it is thought probably was not in the congressional mind."

A consideration of the entire section, and the expression of the courts before whom this matter has been presented, leads me to believe that this court has jurisdiction to determine the issues involved.

THE TOWANDA.

(District Court, E. D. New York. May 22, 1914.)

1. SEAMEN (§ 27*)—LIEN FOR WAGES—HARBOR TUGS.

The rule that maritime liens entitled to precedence in case of harbor tugs, making no regular voyages, will be limited to such as arose within 40 days does not apply to claims for wages which may be given priority for a reasonable time.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 4, 141, 157–169; Dec. Dig. § 27.*]

2. SEAMEN (§ 27*)—LIEN FOR WAGES.

Act June 23, 1910, c. 373, 36 Stat. 604 (U. S. Comp. St. Supp. 1911, p. 1191), providing for maritime liens for repairs, supplies, etc., makes no provision for claims for wages which are entitled to preference as before its enactment.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 4, 141, 157–169; Dec. Dig. § 27.*]

In Admiralty. Suit by Otto Anderson and others, with Thomas Brickley impleaded, against the steam lighter Towanda. On motion for preference on behalf of a seaman's claim for wages. Motion granted.

Robinson & Robinson, of New York City (George L. Robinson, of New York City, of counsel), for Brickley.

Alexander & Ash, of New York City (Mark Ash, of New York City, of counsel), for Burns Bros.

CHATFIELD, District Judge. [1] The Towanda was sold under decree for repairs upon January 29, 1914. This final decree embraced claims for wages which had accrued within 40 days prior thereto. A few days after the entry of the decree of sale, another libel for wages was filed, by a seaman, for services rendered between September 1 and 23, 1913. The proceeds are insufficient to pay all of the claims, and the proctor for the seaman filing the last libel has made a motion for a preference in the payment of his decree. This is opposed by the materialmen, who claim that the priority of a lien for seaman's wages expires in the case of harbor vessels at the end of 40 days, under the decision of Judge Brown in the case of The Gratitude (D. C.) 42 Fed. 299.

A full statement of the rule with relation to the preference given to liens for seaman's wages and the reasons therefor, as well as a dis-

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

cussion of the exceptions thereto, will be found in the case of The Glen Island (D. C.) 194 Fed. 744.

In The Gratitude, supra, Judge Brown fixed a limit of 40 days within which a lien for supplies must be prosecuted, for the reason that neither the period of a voyage nor the period of a season was properly applicable to the case of vessels operating in or around the harbor, and where the people dealing with them could be reached by them within 24 hours, as these people were amenable to process at any time. But in the case of The Gratitude, however, the actual order of payment was decided as follows:

"In the above cases there will be paid (1) seamen's wages; next (2) supply liens arising within 40 days before August 28, 1889, on which day the towage lien for damage accrued; next (3) the lien for damage in towing; next (4) the residue to be divided pro rata among the remaining claims for supplies."

The wages claims seem to have been preferred in spite of the 40-day rule.

In the case of The Glen Island, supra, Judge Hough says that liens for pure torts (that is, collision) outrank all antecedent liens ex contractu, except seamen's wages, citing The John G. Stevens, 170 U. S. 119, 18 Sup. Ct. 544, 42 L. Ed. 969. He decides that the claim of Pendleton, which was for materials, was: (1) Subordinate to all claims of every kind therein under decision, accruing subsequent to a date 40 days after July 26, 1910 (this conclusion is based on the doctrine of voyages); and (2) it is also subordinate to all repair and supply claims arising within 40 days after July 26, 1910, because of the inherently inferior nature of prior tort demands, etc.

In this district, in the case of The Samuel Morris (D. C.) 63 Fed. 736, Judge Benedict held that the claims of Greason and of Palmer, accruing within 40 days of the time of the libel, should be paid before the other claims in the action, arising before the beginning of that period. Judge Benedict held that the rule laid down in the case of The Gratitude seemed to be a very proper rule to apply to that case, but made no decision at all as to the payment of wages, inasmuch as the claims considered by him were none of them wages claims.

In the case of The Glen Iris (D. C.) 78 Fed. 511, Judge Benedict again says that:

"Questions have arisen as to the distribution of the proceeds of the tug, a domestic vessel, sold under a decree of the court. Claims for wages, as to which none of these questions can arise, have been already paid."

In this case he followed the rule of The Gratitude, but made no decision with respect to wages claims, other than the general exception quoted above.

In the early case of The Live Oak (D. C.) 30 Fed. 78, seamen's wages for an entire season were sustained ahead of mortgage claimants against the vessel, but the boat in that case was a schooner, and it throws no light upon the 40-day rule.

In the case of The Nebraska, 69 Fed. 1009, page 1014, 17 C. C. A. 94, 99, we have the only Circuit Court of Appeals decision with respect to the question of liens affected by the 40-day rule. The court there said:

"With respect to vessels navigating the high seas, from an early time the limit has been by the voyage. Blaine v. The Charles Carter, 4 Cranch, 332 [2 L. Ed. 636]. And liens for wages, supplies, and bottomry arising upon a subsequent voyage are given priority to those arising upon a previous voyage," etc.

The court then goes on to say that upon the Great Lakes the time has been limited by seasons and not by voyages, and "in the open harbor, where there is no close of the season of navigation, a limit of 40 days has been determined." A number of cases are cited, but these have to do with liens for supplies, and the general reference to the 40-day rule, as having the same scope as the classification of the preceding sentence (which included liens for seamen's wages), is apparently the result of an oversight.

In the case of The Samuel Little, decided in this district upon the 26th day of February, 1914, a claim for seamen's wages upon a harbor tug was allowed and ordered paid in advance of claims of materialmen, with the following memorandum:

"In the absence of authority I am not disposed to apply the 40-day harbor rule to these wage claims. Motion granted. Van Vechten Veeder, U. S. J."

[2] Prior to 1910, the laws of New York (Consol. Laws, c. 33, art. 4; chapter 38, Laws of 1909) provided that a debt not a lien by the maritime law, amounting to more than $50 in the case of seagoing vessels, or $15 in the case of any other vessel, should be a lien and preferred to all other liens thereon except mariner's wages.

By the Act of Congress of June 23, 1910, 36 Stat. 604, a maritime lien is given for repairs, supplies, and other necessaries, to a foreign or domestic vessel. The United States statute supersedes all state statutes with relation to the same subject, but no provision is made with respect to seamen's wages, and the state law is therefore left in the same condition as before the enactment of the statute.

It must be held that seamen's wages are entitled to a preference as before the enactment of these statutes. In the case of the New York law, a period of 90 days to file a lien is given. Under the United States statute just cited, no period is stated within which the lien must be prosecuted, and hence a reasonable time would seem to be the only limit which can be imposed; that is, laches in bringing a claim should be held to be a defense.

It appears from the record that the libelant in the present matter was absent upon another voyage, and that this prevented him from bringing his action sooner. No distinct method of estimating voyages, in the case of boats around the harbor, or making a trip away from the harbor and coming back, but still employing their men either as day laborers or from month to month, with power of discharge at any time, and where the men have their homes in New York City and are in constant or frequent communication with the city, would seem to be capable of general definition, unless we fall back upon the nature and terms of each particular employment or case. If a boat is chartered for trips or voyages of sufficient duration to be properly classified as such, there would seem to be no reason why a seaman upon such a craft should not be protected as in the case of those who

have gone to sea. If a boat is working by seasons, or is put in and out of commission, or the services of the crew are interrupted by being placed upon the dry dock, or from other causes terminating the service, and if the liens of material and supply men thereby are allowed to intervene, it would seem to be no hardship to hold any seaman guilty of laches who does not take steps to protect his claim within a reasonable time, estimated from the employment or voyage upon which the boat immediately enters after the accrual of the wages in question.

In the present instance the boat had been away from the harbor on a trip for sand. Process had been awaiting her in this harbor, but service could not be made. As soon as she returned, the libels were acted upon, the vessel sold, and the claimant seaman, Brickley, having returned from a voyage of his own within the space of a few days, petitioned for leave to file his libel. As a seaman his wages are entitled to priority.

The defense of laches which is urged would seem to be insufficient, and the motion will be granted.

THE JERSEY CENTRAL.

(District Court, E. D. New York. May 26, 1914.)

COLLISION (§ 71*)—MOVING VESSEL AND BOATS LYING AT END OF PIER—EXCESSIVE SPEED IN FOG.

A tug passing down North river in the early morning in a fog, *held* in fault for a collision with a boat, which with three others comprising part of a tow had been tied up at the end of a pier, on the ground that, while working in to make a pier until the weather should clear, she was going at such speed that she could not avoid the collision after she could see the tow. The tug which left the tow there and proceeded on up the river held not in fault for not taking measures to protect it from moving vessels.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.*]

In Admiralty. Suit for collision by Thomas J. Howard against the Steamtug Jersey Central and the Philadelphia & Reading Railway Company. Decree for libelant, against the Jersey Central alone.

Herbert Green, of New York City, for libelant.

James J. Macklin, of New York City, for the Jersey Central.

Pierre M. Brown, of New York City, for Philadelphia & R. Ry. Co.

CHATFIELD, District Judge. The boats had been brought by the Philadelphia & Reading tugs, on the morning of March 14, 1913, up through the Kills and landed in the neighborhood of 4 o'clock on that morning. One of the tugs then went with certain boats up the North river and the other to Gowanus. The Berne, the tug having gone up the North river, was stopped by fog in attempting to come back to the place where the tow had been landed (that is, the Packer dock in Jersey City). She was stopped by dense fog, which delayed her arrival until

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

after the accident. The evidence shows that the accident occurred a short time after 6:15 a. m., and was caused by a blow from the Jersey Central, which had left Eighty-First street, North river, at 6:15, coming down with an ebb tide and encountering light fog until in the neighborhood of pier 50. From there on the fog was dense, and the tug was proceeding under one bell. It was endeavoring to make a pier on the Jersey side, just below the one where the tow had been landed, and was working in with the idea, according to the captain, of tying up if the fog continued so dense that it could not reach the pier to which it was going. The tow had been left with the head tier four abreast and with breast lines to both the inner and the second boat. In fixing these lines the three outside boats had been carried back by the ebb tide so that the inside boat, the Howard Bros., projected above the upper side of the pier and above the bows of the other boats in this first tier about 15 feet. The tug Jersey Central proceeded under one bell, reaching a point some hundred feet from the tow before either the tug or the boats were made out in the fog. She was maintaining a careful lookout, and a signal was given to reverse the engine as soon as the dark object was made out. Her course was both down the river and in towards shore. The helm was put to starboard, but the effect of the backing and the ebb tide and the starboard helm combined did not prevent her running the intervening distance and striking the Howard Bros. a few inches back of the forward corner upon the starboard side. The only evidence of any injury is this blow from the Jersey Central, and the serious effect of that blow may have been due to the particular condition of the Howard; but the survey shows that the deck planks were twisted by the blow, and whether it was delivered by the stem of the vessel or by the bluff of the bow makes no difference.

There being no duty upon the Howard to give fog signals when left tied up at the end of a dock, and her captain being in the cabin at the time, the first finding of fact must be against the Jersey Central, and it must be held that her speed was sufficient, so that she was unable to stop after discovering the stationary object. Whether this stationary object were the other boats in the tow or the Howard or the pier does not affect the question of her losing her headway and, although the two jingle bells after the signal to reverse were given promptly, she yet struck the blow which caused the injuries in question. She must therefore be held at fault. Endeavoring to make a pier or to work inshore, or to do any of the things which she could have been doing at the time, emphasizes the proposition that she realized the presence of other vessels; in fact she testifies that she heard whistles of boats in all directions; she knew that the pier was close by, and she took the risk of proceeding at such speed that she could not avoid contact with another boat. She must also be held to have anticipated that the consequences might be more severe than a mere casual blow. There must be a finding, therefore, that the Jersey Central was proceeding at such a rate in such a manner in fog that the responsibility for collision with a boat at rest, and not negligent on its own part, rests upon the Jersey Central.

Whether under the doctrine of Bleakley v. The Express and The S. L. Crosby, 212 Fed. 672, 129 C. C. A. 208, a portion of the responsibility for the accident should be placed upon the Philadelphia & Reading Company for the failure of its boats to properly police or guard the tow while at rest off the end of the pier needs further discussion. It is apparent from the records of the Weather Bureau that the conditions had been foggy throughout the night, and while the various boats had been able to navigate up to the neighborhood of 6 a. m. in the lower part of the Hudson river, nevertheless the conditions of storm and fog were such before the tug Berne and the tug Wyomissing left this tow that they might reasonably have expected that the fog might thicken instead of lighten, and that if they were not there to protect these boats lying helpless at the end of the pier, they would be responsible for any duty which rested upon them if they were obligated to remain there and to perform that duty.

It was held in the Express Case that where the tug-boat had not yet left the neighborhood of the tow, but was still in charge of the tow and heard the signals of an approaching boat in a fog, and knew from those signals that the approaching boat was within dangerous distance of the tow, and could not learn that the tow was there until it could be sighted, the duty rested upon the tug to give some kind of a warning other than the statutory signal that she was proceeding with a tow in a fog. In other words, the court held that the tug was still actually in charge, and, within a distance where a signal of danger could be given, and was under an obligation to warn off anybody who was apparently running into danger.

The cases of Hughes v. Pennsylvania R. Co. (D. C.) 93 Fed. 510; Id., 113 Fed. 925, 51 C. C. A. 555; New York, O. & W. Ry. Co. v. Cornell Steamboat Co., 193 Fed. 380, 113 C. C. A. 306. The McCaldin Brothers (D. C.) 117 Fed. 779, impose upon a tug, having brought a tow to a certain point and left the tow at that point, the obligation of anticipating any danger that may reasonably be expected to occur if the tow is left. And where, in case of a fog, danger arises from the swing of the tide or some condition that the tug should reasonably have expected and taken care of, the act of the tug in so doing will make her responsible.

But no case is cited which holds that if a tug has left a tow of boats tied up at the end of a wharf, made fast so that they shall not be a menace to navigation, either by their movement or their general position, then the tug bringing the boats to that point must remain there, or leave a watch which shall protect them under all conditions; this is not a case of blocking a slip, although the Howard was projecting somewhat from the line of the other vessels; for the captain of the Jersey Central testifies that he starboarded his helm so as to avoid striking the Howard, and he at that time saw the other boats in the tow, and was running toward them and away from the slip.

There is nothing to indicate that the Jersey Central was trying to run in the slip and was disabled by the fact that the Howard projected further than the other boats.

It would seem that some duty should be placed upon vessels moored at the end of a pier in case of fog to indicate their position to approaching vessels, just the same as they should maintain a light in the darkness; but until there is a duty of that sort upon the vessels themselves, it would not seem that a tug could be held negligent for failing to anticipate when, if conditions arose which would make it safer for approaching vessels to know that boats were lying at the end of a wharf, they should set a watch which would furnish protection to the moored boat if a fog came up. Until some such responsibility is thrown upon the tug it does not seem possible to extend the doctrine of the Express so as to put the protection of the moored boats upon the tug, unless the condition is such at the time the tug leaves, or while the tug is present, as to require it to give warning. Even under the doctrine of the Express and cases cited, the warning is only to a vessel which itself is seen from where it may be approaching.

In a case like the present, where the approaching vessel had warning of the moored boats and knew that there were vessels in the vicinity, and where the fault seems to be that she approached at too great a speed, and also where, at the time the tug left the fleet, it was not yet daylight and it was not evident that the fog might become so dense as to make warning signals from the moored boats necessary, I cannot find the Philadelphia & Reading responsible for a part of the liability, which I think rests mainly on the Jersey Central.

The libelant may have a decree against the Jersey Central, and the libel against the Philadelphia & Reading will be dismissed.

THE HENRY MAURER.

(District Court, D. Massachusetts. June 2, 1914.)

No. 1001.

SALVAGE (§ 13*)—NATURE OF SERVICE—ASSISTING TUG WITH BROKEN PROPELLER.

A tug, which went to the assistance of another tug and her tow, anchored in Buzzard's Bay on account of a broken propeller, in fair weather, and towed them to port, *held* entitled to compensation for a salvage service, but of a low order, as the disabled tug and her tow were in no immediate peril, nor was the rescuing tug exposed to any particular danger.

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

In Admiralty. Suit by Nathaniel P. Doane and others against the steam tug Henry Maurer; John R. Burke, claimant. Decree for libelants.

Russell, Moore & Russell, of Boston, Mass., for libelants.

William E. Burke, of Boston, Mass., for claimant.

HALE, District Judge. This is a libel for salvage. On the morning of September 29, 1913, at about 9 o'clock, the steam tug Henry Maurer, owned by John R. Burke, was towing scow No. 6, loaded with

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

750 tons of sand, from the southerly end of Cape Cod Canal, down the dredged portion of the canal, near Buzzard's Bay, for the purpose of unloading the scow at the dumping ground in the westerly part of the bay. The Maurer had proceeded about three miles, and had left the channel to go toward the dumping ground, when its propeller was broken, and dropped off, and the tug came to anchor. The weather was clear. The tide was ebbing, and was about half out; it was running in a southwesterly direction at the point where the accident happened. The wind was blowing quite strong from the southwest; the sea was choppy and rough. At a distance of about a quarter of a mile to the northeast there was shoal water; Wing's Flats lay a little more than a mile beyond; while in a northeasterly direction was the shoal water to the southwest of Mashnee Island. The scow drew 11 feet of water; the Maurer 6 feet.

The scow was valued at $3,500; the tug, at $7,000. The libelant's tug, the William H. Yerkes, Jr., was in the employ of the Furst-Clark Construction Company, which company was doing the dredging work on the Cape Cod Canal. At the time in question, the tug was lying below the railroad bridge at the southerly end of the canal, about 3 miles from the scene of the injury, when a message came from the assistant superintendent of the Construction Company that the tug was in distress off Wing's Flats. Capt. Johnson of the Yerkes immediately started down the dredged portion of the canal to go to aid the Maurer. He went out of his way some 2 miles, down the dredged part of the canal, and around the sand spit. He then turned and bore in a northeasterly direction through water which he thought was somewhat shoal, going slowly, and sounding. He reached the Maurer and the scow; he threw a line to the scow, and took it in tow, securing the Maurer by its towing hawser to the scow. He proceeded back over the same ground around the sand spit into the channel. In this way the Yerkes brought both the Maurer and the scow a distance of about 3½ miles, back to a safe position.

It is contended by the libelants that the services rendered by the tug Yerkes should be rewarded as salvage services. The respondent, John R. Burke, the owner of the Maurer, urges, on the other hand, that the services were not salvage services; that at no time was salvage within the contemplation of the parties; that the Maurer and scow were in no danger, nor was the Yerkes at any time in any danger; that if any compensation was earned by her it was on a towing basis, and not for salvage; that if any compensation was due for such services, it was due to the Furst-Clark Construction Company, which, under its contract with the owners of the tug, was entitled to the exclusive services of the Yerkes.

The testimony tends to show that the vessel was found anchored with an anchor weighing 150 pounds, and adequate to hold her; that the anchor was suitable to relieve the scow from any imminent danger; that it took some time for the Maurer to break out the anchor; that it seemed probable that the scow would remain for 2 hours or more, or until the tide turned, in practically the same position in which she was found. No storm was imminent. The Maurer was in good condition.

able and seaworthy. It was not unusual for scows to ground in and near the canal; by such grounding they were not likely to receive much if any, injury, in the soft sand where they would lie, as all along near the canal there was shallow water where a scow would find the bottom; and the farther she drifted up the canal the less sea and wind was to be encountered, and consequently there would be the less liability of injury. It is true, however, that the Maurer had lost her propeller, and that neither it nor the scow could move by its own power; that when the tide turned, if relief did not come, both vessels might be borne upon the shoals. The Maurer would have to go with the scow, or cut loose, and take the chance of being grounded.

At the time of the accident, the captain of the Maurer first shouted to the men to use the anchor in the scow; he blew at once for help. He testifies:

"I blew the whistle perhaps two or three times, perhaps three different times, six, seven, or perhaps eight blasts, simply to call the attention of some one."

He then hailed a cat boat and asked to be taken ashore, so that he could telephone that "we were down in there in a helpless condition." He does not admit that either the Maurer or the scow were in any danger, but says that he was without means of moving and simply wished to be towed in; and if that could not be done, to arrange with a certain dredge owned by the respondent, and located at Onset, about 3 miles away, to have lines and gear brought down to the Maurer and to the scow in order to secure them. Capt. Snow says, too, that there was always more or less grounding at the canal; that he had received similar assistance from other boats, and never knew any charge had been made for them; that there was a friendly, reciprocal feeling between boats at the canal, and that he supposed the services were not intended for anything more than friendly services, rendered without pay.

The whole testimony induces me to believe that the Maurer and the scow were in some danger, and in need of some assistance; the service rendered by the Yerkes was a voluntary service; but I think there was no distinct, affirmative intention to render the service without reward. The Yerkes went promptly to a vessel in distress for the purpose of rendering whatever help it could. I am not satisfied, however, that this service placed the Yerkes in any substantial peril.

She was under contract to the Furst-Clark Construction Company. There is some conflict of testimony as to precisely what this contract was; but from all the evidence I conclude that the contract called for the services of the Yerkes in "tending, dredging, and towing to sea." Whatever services it rendered to the Maurer and the scow were not, I think, within the terms of its contract with the Construction Company. The testimony does not indicate that the Yerkes was ordered by the representative of the Construction Company to go to the aid of the Maurer, but that it was permitted to render such aid as a matter of good conduct, for the relief of a vessel in some need of help. I think the reward for whatever services were rendered may properly be paid to the libelants, and not to the Construction Company.

The testimony does not, I think, warrant me in finding that the Maurer and the tug were in imminent peril at the time the Yerkes went to their relief. They were, however, in need of some assistance. The service rendered by the Yerkes was rendered, without delay, to a vessel with her propeller power disabled. In The New Camelia, 105 Fed. 637, 640, 44 C. C. A. 642, 644, the Court of Appeals for the Fifth Circuit said:

"There is much authority to hold that the New Camelia, when in the open lake, with her shaft broken, her propeller power disabled, was so far disabled as to need assistance, and, although not in immediate peril, was so in distress as to justify the use of the word 'salvage' in designating the aid she required. * * * We are constrained to sustain the court * * * in holding that the services rendered by the tug * * * were salvage services; but we must insist that they were of the lowest order of salvage services, and to be compensated on the basis of work and labor. * * * The salvage law must be construed and applied with regard to the rights of property. A vessel that is so unfortunate as to lose its propelling power, thus putting its owners to delay and expense, ought not to be mulcted with large compensation to alleged rescuers who have been minor factors in rendering assistance."

The court made an allowance of $60, although the court below had awarded a much larger sum. The Dupuy de Lome (D. C.) 55 Fed. 93; Ulster Steamship Co. v. Cape Fear Towing & Dredging Co., 94 Fed. 214, 36 C. C. A. 201; The Connemara, 108 U. S. 352, 2 Sup. Ct. 754, 27 L. Ed. 751.

In the case before me, I find that the salvage service was of a low order. It was, however, prompt, voluntary, and of some merit. I fix the award at the sum of $90 for the total amount of salvage service rendered to the tug Maurer and the scow. I award two-thirds thereof to the owners of the Yerkes, and one-third thereof to the crew of the Yerkes; and I order the libelants to distribute to the crew their proportion of the sum awarded, based upon their monthly wages. The libelants may recover costs.

UNITED STATES for benefit of STARRETT-FIELDS CO. v. MASSACHUSETTS BONDING & INS. CO. et al.

(District Court, D. Massachusetts. March 28, 1913.)

No. 326.

UNITED STATES (§ 67*)—CONTRACTS—BOND—ACTIONS—TIME—"FINAL SETTLEMENT."

Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1911, p. 1071), amending Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), provides that if the United States brings no action on a contractor's bond within six months from the completion and final settlement of the contract, any person having supplied the contractor labor or materials may sue in the name of the United States, but that no suit by any such creditor shall be commenced until after the complete performance of the contract and final settlement thereof, and shall be commenced within one year after performance and final settlement, and not later. *Held*, that where a federal contractor completed his work March 29, 1912, and the constructing quartermaster then reported to the quartermaster general that the amount due was $4,805, and on January 3d

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

the Comptroller of the Treasury reported the decision to the Secretary of War that such balance should be paid, less the cost of inspection, additional expense, and damages because of the contractor's failure to perform in time, and final payment was made January 11, 1913, the report of the quartermaster general did not constitute "final settlement," and hence a suit, brought on the bond by a private creditor of the contractor November 7, 1912, was premature.

[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.]

Action by the United States, for benefit of the Starrett-Fields Company against the Massachusetts Bonding & Insurance Company and another. On motion to dismiss. Granted.

Eaton & McKnight and Charles T. Cottrell, both of Boston, Mass., for plaintiff.

French & Curtiss and Thomas F. Strange, all of Boston, Mass., A. M. Schwarz, of New York City, and S. A. Dearborn, of Boston, Mass., for intervening petitioners.

Gaston, Snow & Saltonstall and Francis W. Bacon, all of Boston, Mass., for defendants.

DODGE, Circuit Judge. This case is submitted, upon the question whether or not suit has been prematurely brought, on facts agreed by the parties.

The plaintiff and the defendant Amity Construction Company contracted for work to be done for the plaintiff at Ft. Andrews in Boston Harbor. The contract was in writing and a copy is annexed to the declaration. The defendant insurance company became surety for the Amity Construction Company on a bond to the government, a copy of which is also annexed to the declaration. A condition of the bond was that the Amity Company should promptly make full payment to all persons supplying it with labor or materials in the prosecution of the work contracted for. All this was in May, 1911. The work contracted for was completed March 29, 1912. The constructing quartermaster then reported to the quartermaster general that there was due from the plaintiff to the Amity Company $4,805. On January 3, 1913, the Comptroller of the Treasury reported a decision to the Secretary of War that the above balance should be paid to the defendant insurance company, less the cost of inspection, additional expenses, and damages because of the Amity Company's default. On January 11, 1913, a deduction was made from the total amount due on the contract for the charge for inspection, the contract not being completed on time, and $4,473.50 was paid to the defendant insurance company as final payment on the contract.

The contract and bond and everything done with reference to them were subject to the provisions of an act passed February 24, 1905 (33 Stat. 811), which amended an act passed August 13, 1894 (28 Stat. 278). By this legislation every contractor with the United States, for construction or repairs of public buildings or works, is required to give bond conditioned upon prompt payment of all persons supplying labor

or materials in the prosecution of the work, and to any such person is given the right to intervene and be made a party to any action instituted by the United States on the contractor's bond. If the United States brings no suit within six months "from the completion and final settlement of said contract," any such person is authorized to bring suit in the name of the United States, in this court, if the contract was to be executed in this district, irrespective of the amount in controversy, for his use and benefit, against the contractor and his surety on the bond. It is provided, however, that no suit by any such creditor shall 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 no later." It is provided, further, that when any such creditor institutes such a suit, "only one action shall be brought and any creditor may file his claim in such action and be made a party thereto within one year from the completion of work under said contract and no later." If the recovery on the bond is inadequate to pay all such creditors what is found due them, each is to have his pro rata share of the total recovery.

The defendant in this case, admitting that it executed the bond declared on for $5,975, says in its answer that final settlement of the contract declared on has not yet been made, that the United States has not yet paid the balance due by it under the terms of the contract, and that this action should be dismissed because it has been prematurely brought. The date of the writ in this suit is November 7, 1912. The declaration filed in court November 15, 1912, alleges that the Starrett-Fields Company supplied the Amity Company with materials specified; that said materials were used in the construction work contracted for; that the Amity Company has failed to make full payment for them; and that it owes the plaintiff for the benefit of the Starrett-Fields Company $1,169.89. It is further alleged that the contract has been completely performed; that final settlement thereof has been made; that more than six months and less than one year have elapsed since the completion of such performance and the making of such final settlement; and that the United States itself has brought no suit on the bond. The answer above referred to was filed December 14, 1912.

On the agreed facts, six months had not elapsed when the suit was brought in November, 1912, unless the report made to the quartermaster general, upon the completion of the work in March, 1912, was "final settlement." The beneficial plaintiff contends that this report should be so regarded, because it was a final ascertainment of the amount due under the contract, irrespective of deductions.

In Stitzer v. U. S., 182 Fed. 573, 105 C. C. A. 51, the Court of Appeals for the Third Circuit, in construing this statute, held that "completion" and "final settlement" were not equivalent terms; that the former could not be made to include the latter, though the latter might be regarded as including the former. The lapse of six months was said to have been made by the statute a condition precedent to the subcontractor's right to sue on the bond; and such a suit, brought more than six months after completion of the work, but less than six

months after the settlement for it with the contractor, was held prematurely brought.

In U. S. v. Illinois Surety Co. (D. C.) 195 Fed. 306, a similar suit in the Illinois Northern District, the District Court held that a subcontractor might sue six months after the work had been completed and otherwise settled for, without regard to stipulations in the contract that the contractor should keep the work in repair for a year, and that 5 per cent. of the entire contract price should be retained during that year to secure the making of such repairs as might prove necessary.

There are no such stipulations in the contract here under consideration, and unless "final settlement" can be taken in the sense for which this subcontractor contends, it is not shown that the statutory condition precedent was satisfied when the suit was brought. There is difficulty in holding that there can be no "final settlement" of such a contract as this before full payment of everything due under it has been made. If such full payment was intended to be the beginning of the six-month period, it is difficult to see why a term whose meaning is open to so much question as the term "final settlement" should have been used to express it. But, even if it be conceded that final determination of what was due for the completed work would be the "final settlement" intended by the statute, I am unable to regard the agreed facts as sufficient to show that the quartermaster's report in March was "final settlement" in that sense. The Treasury Department, it would seem, had still to pass upon that report, and its decision was not made until January, 1913, and a suit brought before it was made would still be premature.

It is true that either "final settlement," in the above sense, or final payment, might be delayed for a year or more after completion of the work, and that in a suit brought six months thereafter no creditor could intervene, according to the strict language of the statute, which allows such intervention within a year from the completion of the contract work and not later. But even in view of this difficulty in ascertaining the true meaning of the statute, I am unable to hold that these agreed facts establish a "final settlement" six months prior to November 7, 1912. I must therefore find for the defendant and dismiss the suit.

LUCEY v. MATTESON.

(District Court, N. D. New York. July 24, 1914.)

BANKRUPTCY (§ 290*)—PREFERENCES—ACTION BY TRUSTEE—DEFENSES.

In a suit by a trustee in bankruptcy to recover a preference to the bankrupt's mother, a defense to the effect that after transfer the mother without consideration retransferred the property to the bankrupt on his representation that thereby he would be enabled to pay his creditors was not subject to a motion to strike.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 418–429, 451–455; Dec. Dig. § 290.*]

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

In Bankruptcy. Action by Dennis B. Lucey, as trustee in bankruptcy of Roswell P. Matteson, against Mary E. Matteson. Motion to strike a defense denied.

Harry M. Ingram and Frank L. Cubley, both of Potsdam, N. Y., for plaintiff.
C. A. Murphy, of Potsdam, N. Y., for defendant.

RAY, District Judge. Roswell P. Matteson, the bankrupt, is the son of the defendant, Mary E. Matteson. On the 11th day of May, 1912, a petition in involuntary bankruptcy was filed against said Roswell P. Matteson. His mother, this defendant, claims he is largely indebted to her. Matteson opposed the petition, but on a reference his insolvency was established and also the alleged acts of bankruptcy.

March 12, 1912, to secure an alleged antecedent debt of $6,000, Matteson executed and delivered to said Mary E. Matteson, his mother, a chattel mortgage on all his property, and April 22, 1912, in consideration of $4,600 (recited and being the same debt), he gave to her a bill of sale of this property and possession thereof, all while insolvent.

The trustee in bankruptcy brings suit to recover the goods and property transferred, or their value, as constituting a preference.

The answer as a first defense contains a general denial of the most of the material allegations of the complaint and as a second defense alleges as follows:

"For a second and further defense: Alleges that shortly after the giving of the bill of sale, mentioned in the complaint as 'Schedule C,' that said Roswell P. Matteson requested this defendant to retransfer to him said stock as he had an opportunity to sell the same, and would be enabled to pay all his creditors from the proceeds of said sale, and that thereupon, relying on said representation, and for the purpose of protecting the other creditors of said Roswell P. Matteson, and enabling them to receive their pay, this defendant did transfer to said Roswell P. Matteson said stock and property mentioned and described in the said 'Schedule C,' and reinvested him with the title to the same as fully as he had held the same prior to the execution of said chattel mortgage and bill of sale, and by executing said transfer placed said Roswell P. Matteson and his creditors in the same position that they occupied before the giving of said chattel mortgage and bill of sale, and to enable said Roswell P. Matteson to sell said property, and his debts pay, this defendant executed said transfer without any consideration to her passing, and this defendant did not receive any money, property, or thing of value whatever as the result of the several transfers set forth in the complaint. Alleges that, after the said retransfer to said Roswell P. Matteson of the property aforesaid, he did sell the same, which was worth about $3,000, and received the money therefor, and that no part of the proceeds of such sale were ever received by this defendant. And this defendant alleges that, instead of having secured the payment of her just claims against said Roswell P. Matteson, she has received nothing whatever thereon, and has in no way profited by the giving of said chattel mortgage or bill of sale."

The plaintiff moves to strike out this second alleged defense on the ground that if true it constitutes no defense, legal or equitable.

The title to the property by virtue of the bill of sale passed to Mary E. Matteson, and under the allegations of the complaint such transfer constituted a preference. Having received a preference by the transfer to her of these goods, delivery having been made, could Mary E.

Matteson and Roswell P. Matteson avoid the consequences to her—liability for the property or its proceeds—by her executing and delivering to him a bill of sale of such property and allowing him to take and sell the property and receive the proceeds (no consideration passing), he merely stating that he desired such property to sell and would be enabled to pay all his creditors?

When the property was turned over to Mary E. Matteson by Roswell P. Matteson, his debt to her was to that extent paid and she had received a preference. It was a completed transaction and her liability was fixed. Mary E. Matteson could have sold the property or given it away. In either event her liability to the trustee when appointed would remain. If, however, she should return the property or its value to the trustee when appointed, her liability would terminate. So if she had placed the property or its value in the hands of Roswell P. Matteson, his estate not being depleted by a purchase of such property from her, and he had turned same or its proceeds over to the trustee or had sold same and turned the proceeds over to his creditors pro rata, these facts undoubtedly would present an equitable defense. The trustee would not be permitted to recover from Mrs. Matteson that which he had received from Matteson, that or its value, he having received all he was entitled to, the creditors having received all they were entitled to as the case might be. But here we have no such facts. There is no allegation or pretense that any of the property or any of its proceeds has been received by the trustee or any of the creditors, or that it went to swell the estate of Matteson as turned over to the trustee. It has not reached the trustee or the creditors directly or indirectly. For the purpose of testing this defense we must assume that Mary E. Matteson received the property having reasonable cause to believe that a preference was intended. Having so received it, she knew her liability as she is presumed to have known the law. The defense is that she gave it back to Roswell P. to sell and dispose of on his statement that he could sell it or had an opportunity to sell and that he could pay all his creditors. It is claimed by the trustee that this is all a sham and part of a scheme to deprive the creditors of this property and its proceeds.

The defense set up and in question here does not state when the retransfer was made and the sale made by Matteson, whether before or after the bankruptcy proceedings were commenced. If prior thereto, then the property became the property of Matteson, the bankrupt, prior to the adjudication. If the retransfer was made subsequently to the filing of the petition, then it became a part of the estate of the bankrupt, and title must have vested in the trustee as of the date of the adjudication. If prior to bankruptcy proceedings an insolvent person transfers his property to a creditor in payment of a pre-existing indebtedness under such circumstances and with such knowledge that the transfer amounts to the giving and receipt of a preference, and prior to the institution of bankruptcy proceedings the creditor returns the property, no consideration being paid therefor, so that the estate is not depleted, even if the insolvent person proceeds to waste the property, and the return is made in good faith, is the one who received

the preference, but who so returned it, liable to the trustee when appointed? Does any cause of action remain? If the wrong is undone, corrected in good faith prior to bankruptcy proceedings, can the trustee complain? It seems to me not. If this property was actually returned prior to bankruptcy proceedings in good faith, and nothing was paid therefor by the bankrupt, and his estate was not depleted by the conveyance to Mrs. Matteson, the mother, it seems to me that such return ended the liability of the mother, Mary E. Matteson. Certain papers were exhibited on the trial and certain evidence presented which indicate a fraudulent transaction in which both the mother and son participated, but this court cannot try the case on the merits. On the whole, I am of the opinion that the alleged defense (2) should not be stricken out and that all the facts should be inquired into and disclosed on the trial. Substantial equity may then be done.

Motion to strike out denied.

In re COLLINS.

(District Court, N. D. West Virginia. June 25, 1914.)

1. BANKRUPTCY (§ 333*)—CLAIMS—FORM—PARTNERSHIP AND INDIVIDUAL ESTATE.

Where a firm and one of the partners were declared bankrupts, and a claim on a note of the firm, indorsed by the individual partner was entitled "In the matter of Creed Collins as an individual and as a member of the partnership of the Collins Company, composed," etc., reciting that Collins was "the person" by whom the petition for adjudication was filed, and that he was indebted to the claimant, and distinctly distinguishing in its statement and description the note and the account against the firm on which it was liable alone, the claim was sufficient in form to sustain its allowance as against the individual estate of the indorser

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 519; Dec. Dig. § 333.*]

2. BANKRUPTCY (§ 339*)—CLAIMS—FORM—ESTOPPEL.

Where a claim on a note executed by a firm and indorsed by an individual partner was filed and allowed as against the bankrupt estates of both, and the trustee took no objection to the proof of claim as against the estate of the individual partner for four years thereafter, so that the claim could not then be amended, the trustee was estopped to contend that the claim was insufficient in form to justify its allowance against the partner's estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 525, 526; Dec. Dig. § 339.*]

In Bankruptcy. In the matter of bankruptcy proceedings by Creed Collins. On petition of Brown & Hill to review and revise an order of the referee rejecting their claim as against the bankrupt's personal estate. Reversed and remanded.

W. B. & E. L. Maxwell, of Elkins, W. Va., for petitioners, Brown & Hill.

S. A. Powell and Robinson & Prunty, all of Harrisville, W. Va., for Homer Adams, trustee.

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

DAYTON, District Judge. These facts are undisputed: That in 1908 Creed Collins personally, and the Collins Company of which he was a member, were both adjudged bankrupt, and the matters involved in both cases were referred to one and the same referee, who has been, since that time, seeking to settle these large and greatly involved estates. That it has been ascertained that the personal assets of Creed Collins will pay from 50 to 75 cents on the dollar of his personal debts while those of the partnership, the Collins Company, can pay only a nominal 5 to 10 per cent. of its indebtedness. That on March 6, 1908, the Collins Company executed to Brown & Hill its negotiable note for $2,041.04, payable in 60 days thereafter at the Farmers' & Merchants' Bank of Pennsboro, W. Va., which note the bankrupt Creed Collins indorsed before maturity, and upon maturity the same was duly protested for nonpayment, legal notice of which protest was given Collins, whereby he became personally liable for the payment of such debt. That the Collins Company alone became further indebted about the same time to Brown & Hill for a car load of lumber for which a balance was due of $202.50 as of June 24, 1908. That on the 26th day of October, 1908, at the first meeting of creditors, Brown & Hill filed in the Creed Collins Case a proof of claim headed, "In the matter of Creed Collins, as an individual and as a member of the partnership of the Collins Company, composed of Creed Collins, Charles W. Sprinkle and Elbert M. Bonner," and which then recites that:

"Creed Collins as a member of the firm of the Collins Company, composed of said Creed Collins, Charles W. Sprinkle, and Elbert M. Bonner, the person by whom a petition for adjudication of bankruptcy has been filed," was indebted to this firm of Brown & Hill, and that said Collins Company was "justly indebted to said firm of Brown & Hill in the sum of $2,041.40 evidenced by a negotiable note bearing date March 6, A. D. 1908, payable 60 days after the date thereof at the Farmers' & Merchants' Bank of Pennsboro, W. Va., protested at maturity, and protest fees thereon amounted to the sum of $1.55, making the aggregate amount of said note and protest fees the sum of $2,042.59, with interest thereon from the 5th day of May, A. D. 1908." "Also in the further sum of $253.50 evidenced by an open account for one car load of hemlock lumber shipped by said Brown & Hill to said Collins Company, on April 24, A. D. 1908, payable 60 days after date, but subject to a credit by the freight thereon amounting to the sum of $51, making the balance due upon said account the sum of $202.50 as of June 24, A. D. 1908."

With this proof of claim, sworn to by one of the members of the firm of Brown & Hill, was filed the negotiable note and certificate of the notary's protest thereof. No objections to this claim were at the time made, and thereupon the referee entered an order, allowing the full amount thereof, both note and open account, against the personal estate of Creed Collins. This was on October 26, 1908. This order was set aside by him on June 21, 1909, and the claim of Brown & Hill was then allowed against the Collins Company, but was not entered as again allowed against Creed Collins, although no objections were made to its allowance against the estate of the latter until April 4, 1913, when the trustee in the Creed Collins Case filed objections to its allowance solely upon the ground that the proof of claim was not

sufficient to prove it against Creed Collins personally, but only against him as a member of the firm of the Collins Company. This contention was subsequently upheld by the referee, and an order was entered by him rejecting it in toto as a claim against the estate of Creed Collins personally, to review which order this petition has been filed. It will thus be seen that the estate of Creed Collins, individually, was unquestionably liable for the note, interest, and protest fees by reason of his personal indorsement of such note of the Collins Company, and that it was not so liable for the open account; that it has been excluded from participating in the assets of such personal estate solely upon an alleged technical defect in the proof of claim filed, accepted as sufficient at the time filed, and only objected to, on account alone of such technicality, by the trustee, more than four years after it was so filed and accepted, when the year had passed within which, without any doubt, the claimants could have filed an amended and sufficient proof in accord with the actual facts as they existed, if attention had been called to the alleged defect. I cannot reconcile it to my sense of justice and equity to allow this estate in this way to escape this just liability. I base my ruling to the contrary upon two propositions:

[1] First. While the proof of claim is somewhat ambiguous and uncertain in terms, it is to be noted that: (a) It was presented in the Creed Collins Case and recited in its caption that it was "In the matter of Creed Collins as an individual and as a member of the partnership." (b) While it says "that Creed Collins as a member of the firm," it also says "the person by whom a petition for adjudication of bankruptcy has been filed" is indebted to claimants. (c).It distinctly distinguishes in its statement and description the note and account, charging the latter to be against the Collins Company alone. (d) The note and protest certificate, it is undisputed, were filed with and as part of the proof, and they show, it is admitted, that Creed Collins had made himself personally responsible by reason of his personal indorsement of this negotiable paper. It is to be remembered that bankrupt courts are courts of equity, that courts of equity abhor technicalities and will cut across lots to do justice in accord with equity and good conscience; that, while the bankrupt forms have been provided, they have been so provided to expedite proper and prompt administration according to the very right of parties and by no means for the purpose of creating purely technical defenses; that the court is not bound by any hard or fast rule to these forms, but on the contrary any form of proof used, if sufficient to show the nature of the claim and the bankrupt's liability therefor supported by the legal affidavit of the claimant is sufficient. In this case I think the proof of claim was sufficient for this purpose, and the strongest common-sense proof of it is the fact that it remained unchallenged as insufficient for over four years.

[2] Second. I think the trustee was estopped to challenge this proof of claim after four years of silence as to its sufficiency. There must be a limit to this right of objection. Surely, when the claimants Brown & Hill came forward at the very first meeting of creditors and filed this proof of claim and secured its allowance by the referee, the trustee

ought to have filed objection within the year in which the amended proof of claim could, without doubt or question, have been filed according to the truth and facts that would have cleared all doubt of claimant's right to participate in the estate of Creed Collins personally. The claimants were prompt in filing their claim and proof. Certainly some sort of promptness was due from those objecting to it to make such objections.

It follows that the order complained of should be reversed, and the case referred back to the referee, with instructions to him to allow the claim, so far as the note, its interest, and protest fee is concerned, to participate in the distribution of the assets of Creed Collins individually as well as in the assets of the Collins Company, but to refuse allowance of the open-account claim to participate other than in the company assets.

In re HERRIN & WEST.

(District Court, N. D. Georgia. July 6, 1914.)

No. 3474.

BANKRUPTCY (§ 400*)—EXEMPTIONS—HOMESTEAD—CONFIRMATION—DISALLOWANCE.

General order No. 17 (89 Fed. viii, 32 C. C. A. xix) provides that a bankrupt's trustee, within 20 days after notice of his appointment, shall report articles set off to the bankrupt as exempt with the estimated value of each article, and any creditor may take exceptions to the trustee's determination within 20 days after the filing of such report. *Held*, that a referee's order allowing the bankrupt a homestead exemption of $1,390 was inchoate until confirmed, and hence the bankrupt having immediately transferred his exemption to a creditor before confirmation, and other creditors having filed objections, to set aside the exemption allowance as a preference, the bankrupt was properly permitted to amend his schedules and withdraw his application for a homestead exemption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670–675; Dec. Dig. § 400.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Herrin & West. Rehearing on a petition of C. H. Stewart to review a referee's order revoking a homestead exemption, in which the court filed a brief opinion April 10, 1914. Affirmed.

W. F. Brown and Adamson & Brown, all of Carrollton, Ga., and Hall & Jones, of Newnan, Ga., for petitioner.

Boykin & Boykin, of Carrollton, Ga., for trustee.

NEWMAN, District Judge. It appears that on March 22, 1913, there was set apart to W. E. Herrin, a member of the firm of Herrin & West, bankrupts, a homestead exemption, and of said exemption $1,390, allowed in cash, was transferred to C. H. Stewart "for valuable consideration," as expressed in the paper, afterwards on the same day. Within the 20 days required by the statute (that is, in 19 days), certain creditors filed objections to the allowance of the exemption to Herrin on the ground that W. E. Herrin had claimed the exemption

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

and assigned the same to said Stewart for the purpose of giving a preference to said Stewart, which objections were afterwards amended.

On October 29, 1913, it appears that both W. E. Herrin and W. W. West, his partner, withdrew their application for homestead exemption, and a petition was filed in December, 1913, by C. H. Stewart asserting that the action of Herrin in this effort to amend his schedule and withdraw his application to a homestead exemption was illegal and should not be allowed, and praying that the title to the property in question, constituting the homestead exemption of $1,390, be decreed to be in Stewart. On this the referee made the following order:

"After hearing argument in this matter and considering the same, it is considered, ordered, and adjudged that the prayer in said petition be and the same is hereby overruled and denied on the following grounds: Before the expiration of 20 days after the filing of the report by the trustee setting apart or allowing the money and property claimed as exempt by bankrupt, W. E. Herrin, as his exemption, the creditors of said W. E. Herrin filed exceptions to the allowance of said exemption by said trustee to said W. E. Herrin on the ground that said W. E. Herrin had claimed said exemption and assigned the same to the said C. H. Stewart for the purpose of giving a preference to said Stewart, and afterwards amended said objections by adding the additional ground that said W. E. Herrin was not entitled to said homestead exemption because he had concealed certain parts of his assets and refused to disclose and turn them over to said trustee. That while said objections were pending, and at the time the same had been set for a hearing, the said W. E. Herrin prayed the court to pass an order allowing him to amend his claim for homestead exemption by striking from same the sum of money claimed by him as part of his exemption, which request or prayer was granted. I hold under these facts that the right to this exemption was inchoate and had not ripened into a perfect and indefeasible right, and that the said W. E. Herrin had a right to voluntarily surrender what the court could have taken from him, should said objections have been sustained."

This order was brought before the court for review, and was affirmed in a brief opinion filed April 10, 1914, as follows:

"What the referee holds in this case I think is true, and that is that the right to homestead exemption does not become complete and transferable by the bankrupt, to whom this exemption is allowed, until it is approved by the referee. The referee says that the right to this exemption was inchoate and had not ripened into a perfect and indefeasible right, and therefore the bankrupts had the right to withdraw their claim to an exemption and to amend their schedule accordingly. General order No. 17 [89 Fed. viii, 32 C. C. A. xix] among other things provides: 'The trustee shall make report to the court, within twenty days after receiving the notice of his appointment, of the articles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report.' Until there is a confirmation of this report of the trustee, there is clearly no final allowance of the exemption, and it seems to me, so far as the practice of this court is concerned, the homestead exemption being a personal right, that the bankrupt might withdraw his claim to the same at any time. Certainly to transfer the exemption before it has been approved by the referee would not give any rights in the bankrupt in the bankrupt court. The order of the referee is hereby approved and confirmed."

I see no reason for changing the judgment of the court entered on the former hearing. It is perfectly clear that objections were filed to the allowance of the homestead, and upon grounds which, according

to some of the authorities, would be a good ground of objection. I think the effect of the decision in Moran v. King, 111 Fed. 730, 49 C. C. A. 578, decided by the Circuit Court of Appeals for the Fourth Circuit, is indicative of the holding that this would be a good ground of objection. That is, if the bankrupt seeks not in good faith to get a homestead exemption for his family, but to take the same and transfer it to one of his creditors; the effect being to give the creditor transferee in such matter a preference to that extent over other creditors. Be that as it may, however, it was an objection filed and was sufficient to prevent the referee from entering his approval of the trustee's action in setting apart the homestead exemption, and I think that is necessary to make a complete exemption, that it be set apart by the trustee and confirmed by the referee. Therefore the referee correctly decided that, at the time the transfer was made (that is, on the same day the exemption was set apart), the exemption was inchoate and incomplete.

The case cited by learned counsel representing Stewart on this motion for a rehearing (Taylor Co. et al. v. Williams, 139 Ga. 581, 77 S. E. 386) is not, in my opinion, controlling in this matter, as counsel seem to think, and it would seem to me to be an authority contrary to the position taken. In that case the headnote, and it is a headnote decision, says this:

"Where an insolvent person files a voluntary petition in bankruptcy, and prays that property be set apart to him as exempt under homestead laws of this state, and upon such petition is adjudged a bankrupt, and a trustee in bankruptcy is appointed, who sets apart to the bankrupt property as prayed, and duly files his report thereof in the court of bankruptcy, to which no exception is filed, the bankrupt has an assignable interest in the property so set apart, and it is lawful for him to assign the property in good faith for application to pre-existing debts, although the assignment be made before expiration of the 20 days allowed under general order No. 17 (Collier on Bankruptcy, 1067), within which to file exceptions."

In that case, it will be seen, no exceptions were filed to the allowance of the exemption. Perhaps, conceding this case to be controlling so far as it goes, it would be to the effect that where a bankrupt assigns his exemption after it is allowed by the trustee, and subsequently the 20 days elapse without any objections being filed, and the action of the trustee stands confirmed, the transfer of the exemption by the bankrupt would be good. This case is entirely different. In the case of Taylor Co. v. Williams, supra, it may be assumed that the application for the exemption was approved, or certainly the 20 days elapsed without any objections being filed, which would make an entirely different case from the present.

I think, and so hold, that to make a complete exemption, which would be transferable and title conveyed, there must be an approval by the referee of the exemption set apart by the trustee, or at least 20 days must elapse without any objections being filed to the allowance of the homestead. Whether in the latter case that is, where 20 days elapse without objections being filed, the title in the bankrupt would be complete it is unnecessary now to determine.

A new phase is given to this case, however, by a paper which I now find in the record for the first time, and to which my attention had

not before been called, being a petition dated April 14, 1914, in which Mr. Herrin withdraws his application to amend his schedule by renouncing and waiving his right to the homestead exemption and reclaims the same in accordance with his original claim in his schedule. What effect this will have upon the case I do not now know. The trustee should be directed to hold the funds in his hands until this matter can be heard, as I find it has not been passed upon in any way by the referee, so far as the record shows.

I adhere to my original decision in the matter approving the action of the referee, but with the statement just made with reference to the effect of Mr. Herrin to reclaim his exemption.

In re R. H. ELROD & SON.

(District Court, N. D. Georgia. December 30, 1913.)

No. 3323.

MORTGAGES (§ 244*)—ABSOLUTE DEED AS MORTGAGE—PARTIAL ASSIGNMENT OF DEBT—EFFECT.

Civ. Code Ga. 1910, § 4276, provides that the transfer of notes secured by a mortgage "or otherwise" conveys to the transferee the benefit of the security, and if more than one note is secured, and the mortgagee transfers some and returns others, the holder of the transferred notes has a preference over the mortgagee if the security is insufficient to pay all the notes. *Held*, that the words "or otherwise" should not be limited, under the rule of ejusdem generis, to transactions in which there exists only a lien in favor of the holder of the note transferred, eliminating transactions, where he holds the title, but that the statute is applicable to a security deed which was in fact a mortgage securing several notes, so that, on the transfer of one of them to the mortgagee's creditor, he was entitled to a preferred claim out of the proceeds of the mortgaged premises for the payment of the note so transferred.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 633–655; Dec. Dig. § 244.*]

In Bankruptcy. In the matter of bankruptcy proceedings of R. H. Elrod & Son. Application by the Arnold Grocery Company for a balance due to the bankrupts on the sale of real property mortgaged to them. From a referee's order denying the application, applicants appeal. Reversed.

Cobb & Erwin, of Athens, Ga., for intervener.

G. A. Johns, of Winder, Ga., for trustee.

NEWMAN, District Judge. This is a petition to review a decision of the referee in the above-stated matter. The facts appear from the certificate of the referee as follows:

That, in the course of such proceedings, an order, a copy of which is annexed to the petition hereinafter referred to, was made and entered the 21st day of July, 1913.

That on the 6th day of October, 1913, Arnold Grocery Company, interveners in such proceeding, feeling aggrieved thereat, filed a petition for review, which was granted.

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

That a summary of the evidence upon which said order was based (by agreement of the counsel for the interveners and the trustee of R. H. Elrod & Son) is as follows: Wood & Blakey was indebted to R. H. Elrod for the purchase money of a stock of goods and storehouse in which said stock was contained in the sum of $2,750, and this indebtedness was evidenced by three promissory notes made by said Wood & Blakey and payable to said R. H. Elrod in amounts as follows: Two notes for the sum of $1,000 each, and the third for the sum of $750. Among other securities deposited with and made to R. H. Elrod by Wood & Blakey to secure said purchase-money notes was a security deed to what was known as the "Jones storehouse and lot" in the town of Carl, Ga. (described and referred to in the pleadings), executed and delivered to said R. H. Elrod by J. H. Wood individually, a member of the partnership of Wood & Blakey. Afterward the firm of R. H. Elrod & Son being indebted to the Arnold Grocery Company in the sum of $698.55, R. H. Elrod transferred to said company one of the purchase-money notes, viz., the one for the $750, as collateral security for the payment of said indebtedness.

There was no formal transfer in writing of the security, or any part thereof (the said security deed of J. H. Wood) by said Elrod to said company.

Subsequently both the firms of Wood & Blakey and R. H. Elrod & Son, and R. H. Elrod and K. A. Elrod, were adjudicated bankrupts.

The "Jones storehouse and lot" having been sold by the trustee in bankruptcy, there was in the hands of the trustee of R. H. Elrod & Son the sum of $274.30 proceeds of said sale. To this fund Arnold Grocery Company filed its intervention, claiming priority as a secured creditor of R. H. Elrod by reason of being the transferee and holder of the $750 note of J. H. Wood and H. E. Blakey.

That the question presented on this review is: By reason of the transfer and assignment of the $750 note of Wood & Blakey by R. H. Elrod to Arnold Grocery Company, did the benefit of the security, under the deed of J. H. Wood to R. H. Elrod, inure to the Arnold Grocery Company without the transfer of the security or any part thereof?

This question involves section 4276 of the Civil Code of Georgia of 1910, as insisted by intervener's counsel, which is as follows: "The transfer of notes secured by a mortgage or otherwise conveys to the transferee the benefit of the security. If more than one note is secured and the mortgagee transfers some and retains others, the holder of the transferred notes has a preference over the mortgagee, if the security is insufficient to pay all the notes." See, also, sections 3345 and 3346.

The referee was of opinion that, in order for the transferee of the note in question to take and obtain any benefit from the security deed, there must have been an assignment and conveyance of the title to the land given to secure the note by the holder of the security deed, which resulted in the passage of the order complained of.

In the case of a mortgage, the title remains in the mortgagor, the debtor; in the case of a security deed, the title passes from the debtor to the creditor. Hunt v. New England Mortgage Security Co., 92 Ga. 720, 721, 722, 19 S. E. 27.

It was agreed that the two $1,000 notes had not been transferred, and remained in the hands of the trustee of R. H. Elrod & Son.

Then follows a paragraph with reference to the time within which the petition for review was made and the facts concerning the same, but the court has already decided to hear the petition to review.

The question for determination in this case arises under section 4276 of the Code of Georgia of 1910, which is referred to and quoted by the referee above. The referee found that the fact that the title had gone into Elrod made it necessary that there should have been some conveyance by Elrod to the Arnold Grocery Company, and that, under the language of the section of the Code of Georgia referred to (4276),

the transfer of the note alone would not carry with it the rights that Elrod had under this security deed.

It seems to me that the referee and counsel for the trustee attach too much importance to the word "mortgage," and not enough to the other language of this Code section. More weight should be given, I think, to the word "secure" and the last word in the sentence, "security." The purpose of the law evidently is to give to transferees the benefit of security held by persons making the transfers.

Counsel for the trustee contends that, under the doctrine of ejusdem generis, the words "or otherwise" should be restricted to transactions in which there exists only a lien in favor of the holder of the note transferred, and not to transactions where he holds title. I am unable to agree to this. The words "or otherwise" are very broad and must be considered in connection with the whole expression in the statute "secured by a mortgage, or otherwise." The deed in this case says this: "This deed is made to secure a debt for $2,750." I see no reason whatever why the lawmakers should have intended to limit the scope of this provision of the Code as contended here.

The Circuit Court of Appeals for this Circuit, in Ray v. Tatum, 72 Fed. 112, 18 C. C. A. 464, affirming a decision rendered by this court, holds that deeds like this, even where they were made under Code, §§ 3306, 3307, and there is a deed and a bond to reconvey, might be treated as mortgages for the purpose of foreclosure. In the course of the opinion Circuit Judge McCormick, for the court, states this:

"It is too plain to admit of argument that the transaction was a borrowing of money and giving a lien on land to secure the loan. This is a mortgage."

It is perfectly clear to me that the Code section in question embraces security of the kind now before the court, and that the referee was in error in holding that it does not. This security deed is of the same class as mortgages. Whether the title passes or does not pass by one of these instruments, it is only a paper executed for the purpose of securing the debt, and they are of the same class and kind, and give security only in both cases.

The facts of this case bring the Arnold Grocery Company within the other language of the Code section (4276) as follows:

"If more than one note is secured, and the mortgagee transfers some and retains others, the holder of the transferred notes has a preference over the mortgagee, if the security is insufficient to pay all the notes."

The $750 note was transferred to the Arnold Grocery Company, and Elrod retained the two $1,000 notes. The amount derived from the sale of the property was not enough to pay the Arnold Grocery Company's note, so that, under this law, I think the Arnold Grocery Company is entitled to the whole amount in the hands of the trustee.

The action of the referee is disapproved, and an order should be made by him paying the amount in hand, derived from the sale of this property, to the Arnold Grocery Company.

UNITED STATES, to Use of VAN CLIEF, v. MERRICK et al.

(District Court, E. D. New York. June 20, 1914.)

1. UNITED STATES (§ 67*)—BOND OF CONTRACTOR FOR PUBLIC WORK—SUIT BY SUBCONTRACTOR.

Under Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1911, p. 1071), relating to bonds of contractors for public work, and which provides that, if no action on such bond is brought by the United States within six months from completion and final settlement of the contract, any person supplying the contractor with labor or materials not paid for shall, on furnishing an affidavit of such facts, be furnished with a certified copy of the contract and bond, and may bring suit thereon, the requirement of such affidavit is for the protection of the United States, and may be waived, as may also the requirement for a delay of six months before furnishing the copies of the contract and bond.

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

2. UNITED STATES (§ 67*)—BOND OF CONTRACTOR FOR PUBLIC WORK—SUIT BY SUBCONTRACTOR.

In such a suit by a subcontractor, it should be shown by the certificate or otherwise that the United States did not institute a suit within the six months; and the requirements that such suit shall be brought within a year after completion and final settlement of the contract, and that personal notice shall be given to all known creditors, and by publication for three successive weeks, the last publication to be at least three months before the time limited, are jurisdictional; and such notice must be given three months before the expiration of one year from the completion and final settlement of the contract.

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

3. UNITED STATES (§ 67*)—CONTRACTOR FOR PUBLIC WORK—ACTION ON BOND.

Such suit being statutory, unless the jurisdictional conditions are complied with, the court cannot render judgment against the contractor; but such an action should be brought at law.

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

Action by the United States, to the use and benefit of William S. Van Clief, against Ernest Merrick, conducting business in the tradename of the Merrick Fireproofing Company, and the Maryland Casualty Company. Decree for defendants.

Holt, Warner & Gaillard, of New York City (William D. Gaillard, of New York City, of counsel), for plaintiff.

Meyer & Henshaw, of New York City, for defendant Merrick.

Edward J. Dowling, of New York City, for Maryland Casualty Co.

CHATFIELD, District Judge. The statute of August 13, 1894 (28 Stat. p. 278), as amended by the law of February 24, 1905 (33 Stat. p. 811), has been construed in numerous cases. In the present action, but one creditor has presented his claim. According to the record, no other creditor is known. An order was obtained dispensing with personal notice of the pendency of this action for that reason.

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

This order was made on the 3d day of May, 1913, and no "notice of publication" was given. The work was completed and settlement made by the 4th day of June, 1912, and the United States furnished the certificate required by the statute on the 12th day of September, 1912. The action was started on May 3, 1913. It was thus too late to publish any notice of the beginning of the present action for a period of three months before the expiration of the year from the 4th day of June, 1913, and the court therefore made no direction as to the method of publication.

It also appears that the War Department furnished its certificate without a request under oath from the creditor who has brought the action, and within three months after final settlement. The amount of the bond is $4,000, and the amount of the claim of the creditor is $511.63, with interest from June 29, 1912. The testimony shows that the work was done, and the previous decisions on similar points dispose of all the questions raised.

In the McCord Case, 233 U. S. 157, 34 Sup. Ct. 550, 58 L. Ed. 893, decided by the Supreme Court on April 6, 1914, it has been definitely held that the statute must be strictly complied with in all jurisdictional respects. It was therein decided that an action could not be started *before* the time after which the United States could be requested to issue its certificate.

[1] The certificate in the present case was issued before the six months expired, upon a request unaccompanied by the statutory affidavit. This provision for a request on affidavit is manifestly for the protection of the United States, and might be waived. United States v. Mass. Bonding & Ins. Co. (D. C.) 198 Fed. 923.

The suit was not started prematurely, and the surety company would not be released by a mere lack of form in the way in which the certificate from the United States was obtained. But, under the McCord decision, the record in the present action is deficient, for there is no proof that the United States did not start suit within the six months, and this should be shown by the certificate, or by the testimony, as in Title G. & T. Co. v. Crane, 219 U. S. 24, 31 Sup. Ct. 140, 55 L. Ed. 72.

[2] As to whether an action can be maintained by a single creditor, who starts his suit within the year, but who does not comply with the sections as to publication and personal service, presents a different proposition. It has been held in the case of United States ex rel. Joseph Sario v. Eldridge Const. Co. et al., decided in this district upon October 21, 1913, and affirmed by the Circuit Court of Appeals on April 22, 1914 (Merchants' Nat. Bank v. United States ex rel. Sario, 214 Fed. 200, 130 C. C. A. 548), that the requirements of bringing suit within a year, of filing claims within the year, and of complying with the statute so as to bring in all creditors, are jurisdictional. Compliance with the provision as to personal notice to "known creditors" was held negligible, if none were "known"; but the provision as to advertising was declared to be mandatory and jurisdictional, citing United States v. Stannard (D. C.) 206 Fed. 326.

The purpose of advertising claims is, of course, to notify those

creditors who may not be known personally. In the absence of affirmative proof that there are no such creditors, a compliance with the statute requiring attempted personal service would be a necessary preliminary. The phrase requiring any suit to be brought "within one year * * * and not later," is inconsistent with the provision that "in addition thereto notice of publication * * * for at least three weeks, the last publication to be at least three months before the time limited therefor," unless the last provision be taken as controlling so far as properly commencing the first action is concerned, and unless the first provision allowing any suit to be brought not later than a year is held to be a statute of limitation upon the suits upon intervening claims in a previously started action. The last word of the statute, "therefore," can relate to nothing preceding it except the time to bring suit, and the general effect is that a creditor who wishes to bring suit must see that his or some other action is properly started, so as to allow time for publication for claims, and, if that is done, then the other actions must also be brought by intervention within one year.

[3] The plaintiff has asked for judgment in any event against the contractor for the amount due; but such an action should be brought at law, and this statutory remedy on the bond does not give the court, as a court of equity, any jurisdiction to enter judgment against the contractor, unless the action is brought in compliance with the entire statute. The one-year limitation applies only to this particular action, and as to an ordinary action on contract the usual statutes would apply.

The defendants may have a decree.

UNITED STATES v. JAMES A. BLANCHARD CO.

(District Court, E. D. New York. June 2, 1914.)

DRUGGISTS (§ 12*)—INSECTICIDE ACT—CRIMINAL PROSECUTIONS.

Informations for violation of the Insecticide Act April 26, 1910, c. 191, 36 Stat. 331 (U. S. Comp. St. Supp. 1911, p. 1368), by the shipment in interstate commerce of misbranded insecticides, considered, and *held* sufficient as against demurrers and motions to quash.

[Ed. Note.—For other cases, see Druggists, Cent. Dig. § 11; Dec. Dig. § 12.*]

Criminal prosecutions by the United States against the James A. Blanchard Company. On demurrers and motions to quash informations. Overruled.

William J. Youngs, U. S. Atty., of Brooklyn, N. Y. (Samuel J. Reid, Jr., Asst. U. S. Atty., of Brooklyn, N. Y., of counsel), for the United States.

Charles W. Bacon, of New York City, for defendant.

CHATFIELD, District Judge. Information No. 1458, filed December 17, 1913:

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

This information is brought under the Act of April 26, 1910, c. 191, 36 Stat. 331 (U. S. Comp. St. Supp. 1911, p. 1368). The law appears to be constitutional and the acts charged to be within the scope of interstate rather than state commerce and legislation.

The information is not bad for multifariousness or duplicity, and the counts state offenses which can be separately charged, although based upon a single set of affidavits which contain all of the allegations afterwards separated into counts.

Objection is made to count 1 on the ground of variance because one affidavit shows (on information and belief) a shipment of goods to Oregon, while the other affidavits show the obtaining of the sample and the receipt of goods in Washington. But the statement of fact, when coupled with the statement that records in the hands of the department are the source of the direct charge that the goods were shipped to Oregon, are sufficient upon which to base an allegation that there was a violation of law in shipping goods to Oregon.

A petition for leave to file an information based upon annexed affidavits might be drawn in much shorter form than that used in the present case, but inasmuch as this petition also contains the various allegations of fact, with the sources of information and belief upon which they are made, it must be judged as an affidavit as well as a petition. It is not open to the objections of duplicity, multifariousness, or indefiniteness of pleading, because it combines the petition with an affidavit. Nor can such objections be raised because one petition or affidavit unites or contains several matters upon each one of which the information has a count under different sections of the law.

No other ground of demurrer is stated needing discussion herein.

The demurrers will be overruled, and the motions to quash, dismiss, and vacate denied.

Information No. 1461, filed December 20, 1913, under the same statute, contains five counts charging alleged violations with respect to the shipment of a product called Soluble Fir Tree Oil Insecticide.

The demurrers to this information should be overruled on the same grounds as stated with respect to the previous information.

The motions to quash, dismiss, and vacate must be denied.

It is impossible to decide either by demurrer or upon motion whether the evidence would satisfy a jury that the charges have been made out, or whether Fir Tree Oil is a product of a certain nature as to which the purchaser would be deceived if the article did not contain oil of a fir tree. Whether the words "Fir Tree Oil" are merely a trade-name or general designation of a product which in the arts and sciences is known to be composed of other ingredients than the oil of a fir tree, or whether people would be actually deceived by the name and led to buy the article because of some meaning which they gave to the words, and which meaning would not be justified by the components of the article sold, are matters that should be disposed of upon a record in the form of testimony. If the government can furnish evidence to substantiate its charges of this nature, then there is no reason shown why the sale of such product should not be prohibited under the language of the Insecticide and Fungicide Act.

Information No. 1481, filed January 10, 1914, under the same statute, contains two counts charging alleged violations with respect to the shipment of a product called "Lion Brand Whale Oil Soap," in which an alleged inert substance, viz., water, is said to be present, but not stated either specifically or by giving the percentage of the entire amount of inert ingredients with the percentages of insecticidal materials.

The questions upon the demurrers interposed must be disposed of similarly to those already covered under information No. 1458.

But objection is particularly made with respect to the counts as to Whale Oil Soap upon the motions to quash, dismiss, and vacate, in that soap is said to imply water or moisture, and that no one would be misled or deceived by not having a statement as to the percentage of this so-called inert ingredient, viz., water.

Whether water is an inert ingredient, or whether it is a necessary component of the substances for the purposes to which the soap is to be applied, is a question of fact. The act (section 8) is in the alternative; that is, either the inert ingredients may be stated by amount and name, or the insecticidal or fungicidal content may be stated by amount and name. But according to the present information, neither of these methods was followed, and the question is raised by the charge that the water present is an inert substance and is not so stated.

The propositions should be considered upon a trial, and the motions will be denied.

Information No. 1482, filed January 31, 1914, contains three counts charging alleged violations with respect to the shipment of a product called "Lion Brand Concentrated Kerosene Emulsion."

The demurrers filed should be overruled on the grounds previously stated with respect to the other informations.

The motions to quash, dismiss, and vacate call in question the sufficiency of the evidence furnished by the affidavits to support a conviction upon the charge named. Counts 1 and 2 allege that the article will not, as claimed in the label, kill plant lice and bugs in the way and to the extent which it is represented to do.

In the third count there is a charge that an inert substance, viz., water, was present, without any statement on the label in either of the alternative ways provided by the statute, showing the presence of the inert substance.

The last question has been disposed of under the decision on information No. 1481, and the question as to misrepresentation through failure on the part of the substance to kill bugs and lice as represented, or to accomplish such killing under the circumstances set forth in the label, is again a question of fact, as is also the question of the belief of the purchasers with respect to what they were buying. These questions should not be disposed of upon motion.

The defendant will be required to plead to the informations as filed.

CINCINNATI, H. & D. RY. CO. v. ORR et al.

ORR v. CINCINNATI, H. & D. RY. CO.

(District Court, E. D. New York. July 3, 1914.)

1. COURTS (§ 312*)—FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP.
Under Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [U. S. Comp. St. Supp. 1911, p. 135]) § 24, providing that the District Courts of the United States shall have original jurisdiction of civil suits arising between citizens of different states, etc., no action can be brought in the federal court by an assignee on the ground of diversity of citizenship, unless the assignor could have maintained an action in the particular United States court in which the action is instituted.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 865–875; Dec. Dig. § 312.*]

2. COURTS (§ 276*)—FEDERAL COURTS—JURISDICTION—SUIT BY ASSIGNOR.
Where an assignor begins an action in a federal court in a district in which he does not reside and defendant appears, or if the assignor brings his action in a state court in a federal district in which he does not reside and the case is removed by the defendant to the federal court in that district, that court has jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. § 276.*]

3. REMOVAL OF CAUSES (§ 12*) — RESTRICTIONS AS TO DISTRICT — FEDERAL COURTS—JURISDICTION.
Where suit is brought by an assignee on an assigned claim in a state court of the federal district of his residence and defendant appears and removes the case to the federal court of that district which is the only district to which it could be removed as provided by Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1095 [U. S. Comp. St. Supp. 1911, p. 142]) § 29, the court has jurisdiction though the assignor did not reside in such district.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 32, 33; Dec. Dig. § 12.*]

In Equity. Suit by the Cincinnati, Hamilton & Dayton Railway Company against Charles A. Orr and another, and action at law by Charles A. Orr against the Railway Company, removed from the state court. On motion to remand the latter action, and motion for temporary injunction in the former suit. Motion to remand denied, and motion for injunction granted.

Cravath & Henderson, of New York City (Stuart McNamara, of New York City, of counsel), for Cincinnati, H. & D. Ry. Co.
Tipple & Plitt, of New York City (Arthur W. Clement, of New York City, of counsel), for Charles A. Orr and Orton G. Orr.

CHATFIELD, District Judge. The plaintiff Orr is a resident of Kings county in this district. The defendant Cincinnati, Hamilton & Dayton Railway Company is a resident and citizen of Ohio. Action was brought upon a claim assigned to the plaintiff Orr by his brother, who is a resident and citizen of New York county, in the Southern district of New York. An equity action has been commenced in this

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

court, and a temporary injunction against further proceedings in the state court action is asked. At the same time an application to remand the first action has been presented. An application to remove the action was made to the Supreme Court of Queens County, and was denied in a decision filed May 27, 1914, citing the cases of In re Winn, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873, Odhner v. Northern Pac. Ry. Co. (C. C.) 188 Fed. 507, and In re Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, to show that an action can be removed to the particular United States District Court only which would have original jurisdiction over that action, and citing section 24 of the Judicial Code, Waterman v. Chesapeake & Ohio R. R. Co. (D. C.) 199 Fed. 667, Brown v. Fletcher, 206 Fed. 461, 124 C. C. A. 367, Con. Rub. Co. v. Ferguson, 183 Fed. 756, 106 C. C. A. 330, and North American Trans. Co. v. Morrison, 178 U. S. 263, 20 Sup. Ct. 869, 44 L. Ed. 1061, as authority for the proposition that the residence of the assignor is controlling upon the question of residence, for the purpose of jurisdiction, where suit is brought on an assigned claim.

[1, 2] This provision of the Code and these decisions make it apparent that no action can be brought in the United States court by an assignee, on the ground of diversity of citizenship, unless the assignor could have maintained the action in that United States court. But if the assignor began an action in the United States court in this district, and the defendant appeared, or if the assignor brought his action in the state court in this district and removal was had by the defendant to this court, the question of maintaining suit only in the district of residence of the plaintiff or defendant could have been waived. In re Moore, 209 U. S. 490, 28 Sup. Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164; In re Winn, supra; and Ex parte Harding, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392.

[3] Hence we cannot say that the court is ousted of jurisdiction by the mere assignment and the bringing of this action by the assignee in a court of the district of his residence. Any objection by the defendant has certainly been waived, and this district is the district to which removal must be had under section 29, which requires removal to the court of the district in which the court where the suit is instituted is situated. Waterman v. Chesapeake & Ohio R. R. Co., supra, seems to support the contrary view; but the assignor was not a citizen of the state where the suit was brought, and the Wisner Case was therefore of greater force.

The cases of North American Trans. Co. v. Morrison, supra, and Brown v. Fletcher, supra, were disposed of upon defects in pleading or because the assignors were residents of the same district as the defendant.

The case of Con. Rub. Co. v. Ferguson, supra, was based upon objection by the defendant and the "proper" district for removal could not be a district in another state, as suggested in the cases of Mattison v. Boston & M. R. R. (D. C.) 205 Fed. 821, or Stewart v. Cybur Lumber Co. (D. C.) 211 Fed. 343.

The case of Stimson v. United Wrapping Mach. Co. (C. C.) 156 Fed 298, was decided before the passage of the Judicial Code; but

this case seems to be exactly like the case at bar and to be a correct application of the principles involved.

The purpose of allowing removal is directly involved in the present action. The fact that both the assignor and assignee are citizens of the state of New York, and could bring action in any court in the state, makes it apparent that a change of district by assignment, for the purpose of preventing removal, should not be allowed as the basis for a forced application of the doctrine of In re Wisner, supra, under the clause allowing suit by an assignee only when the assignor might sue in the same jurisdiction. Where the defendant has waived the question of being sued in the district, the assignor could certainly maintain his action, and that is the situation we have in this case.

The motion to remand must be denied, and the motion for injunction granted.

UNITED STATES, to Use of MILLER et al., v. MITCHELL et al.

(District Court, E. D. New York. June 23, 1914.)

UNITED STATES (§ 67*)—BOND OF CONTRACTOR FOR PUBLIC WORK—ACTION BY SUBCONTRACTOR.

In a suit by subcontractors on the bond of a contractor for public work under Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1911, p. 1071), where due notice by publication has been given, in the absence of concealment or fraud, the plaintiff is required to send personal notice only to such creditors as are actually known to him.

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

Action by the United States, to the use of Patrick Miller and others, against Edmund H. Mitchell and Henry T. Mitchell, doing business as Mitchell & Co., and the Illinois Surety Company. Decree for complainants.

See, also, 213 Fed. 1022.

Carpenter & Park, of New York City (Henry E. Mattison, of New York City, of counsel), for E. S. Belden & Sons.

King & Booth, of New York City, for Miller.

George F. Engleman and H. W. Goodrich, of New York City, for J. S. Packard Dredging Co.

George W. Bristol, of New York City, for Briggs, Hazel, and Benvenutti.

Nelson L. Keach, of New York City (L. L. Kellogg, of New York City, of counsel), for Illinois Surety Co.

CHATFIELD, District Judge. A trial has been had upon the cause of action, and the parties have proceeded, by order of the court, as if the pleading originally filed had been called a bill in equity. This was done in pursuance of the decision of the Circuit Court of Appeals in this case (212 Fed. 136, 129 C. C. A. 584, on February 10, 1914), to the effect that the cause of action set up under the statute should have

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

been treated as brought in equity and the cause transferred to the equity calendar for trial. The various points involved therein have been disposed of during the course of the trial, and the testimony has been entirely reheard and the case submitted as if no previous trial at law had been had. But in the course of the hearing upon the bill in equity, the various objections to consideration of the case, to the receipt of evidence, and to consideration of the respective claims of the intervening parties, have been ruled upon separately, and in general have been disposed of in the same way as they were upon the previous trial. This has been done for two reasons: In the first place, the court sees no reason to change any of the conclusions reached upon the previous trial, except in so far as to proceed with the case in equity; and, second, it has seemed best to make the record as nearly like that upon the previous trial as may be consistent with the testimony as presented, to avoid discussion over differences in rulings upon the facts. It has been borne in mind that a hearing upon appeal in equity will allow of a determination by the Circuit Court of Appeals upon each separate claim, and thus a new trial will be avoided if any particular item should be incorrectly allowed in this court.

For these reasons no statement or findings of fact will be made other than those set forth in the record, except that each claimant will be held to have performed the work and furnished the services and to be entitled to the amount with interest from the date specified in each case, in accordance with the results reached upon the previous trial and there covered by the verdict directed.

The conclusions of law will be disposed of as indicated upon the various rulings on the trial, with respect to objections, and on motions during the course of the case, and the general objections by the defendants, on which ruling was reserved at the close of the case, will be separately overruled. The motions for a decree in favor of the defendants on each separate claim and on the various items of those claims will be denied.

The objection based upon changes by the United States in details of the contract after work was started was properly overruled. In the case of the Equitable Surety Co. v. United States, for the Use of McMillan & Son, 234 U. S. 448, 34 Sup. Ct. 803, 58 L. Ed. 1394, decided by the Supreme Court upon the 8th day of June, 1914, it was held that the surety was not released by changes on the part of the United States which did not affect the general character of the contract, citing U. S. v. National Surety Co., 92 Fed. 549, 34 C. C. A. 526.

But one point of law not previously disposed of is presented by these motions. It appears that the plaintiff and the intervening creditors published notice of the pendency of the action in a newspaper for the time and within the dates specified by the statutes, but that they obtained an order dispensing with and did not send out a personal notice to known creditors. It is now urged that the affidavit by which the order was made dispensing with the sending out of this personal notice was insufficient, in that it did not state facts showing what efforts had been made to learn the names of such creditors, and that the court was therefore not justified in dispensing with the notice.

This objection should be overruled. While the giving of notice is jurisdictional, in the sense that compliance both in the way of personal notice and by publication is necessary, and while the provision for publication is plainly intended to insure notice to as many creditors as possible, whether known or unknown, yet the provision requiring that notice shall be given to known creditors can be carried out only by giving notice to such creditors as are known to the plaintiff, or in some way made known or ascertained through the court proceedings, up to the time of sending out notice. Such a provision necessarily imputes action in good faith and reasonable effort to acquire knowledge of the creditors; but failure to discover each and every one, or failure to exercise diligence in the precise way in which the surety company may think it should have been done, could not oust the court of jurisdiction, if the general notice by advertising has been had.

In the absence of concealment or fraud, the plaintiff is only required to send notice to the creditors who may at that time actually be known, and, if other creditors do intervene, jurisdiction would not seem to be lost, if they should happen to know of other creditors to whom notice had not been sent. The advertising would be depended upon to meet the requirement.

The separate plaintiffs may recover the amount of their respective claims, with interest, and a decree may be entered providing therefor.

In re OAKLEY.

(District Court, W. D. Kentucky. March, 1914.)

BANKRUPTCY (§ 278*)—ASSETS—RECOVERY—PROCEEDINGS BY CREDITORS.

Creditors of a bankrupt, for whom a trustee had been appointed, had no right to institute proceedings against the bankrupt's attorneys to recover alleged exorbitant fees paid by the bankrupt to them to represent him in the bankruptcy proceedings; such right resting in the trustee, in the absence of any averment that the trustee had been requested to move, and had failed or refused to do so.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig §§ 418, 427; Dec. Dig. § 278.*]

In Bankruptcy. In the matter of bankruptcy proceedings of William Monroe Oakley. On review of a referee's order sustaining a creditors' petition for restitution of alleged exorbitant fees paid by the bankrupt to his attorneys. Dismissed.

Austin Peay, of Clarksville, Tenn., for creditors.

Trimble & Bell, of Hopkinsville, Ky., and John B. Baskin, of Louisville, Ky., pro se.

EVANS, District Judge. On May 3, 1913, this proceeding was instituted by creditors, who, alleging certain acts of bankruptcy against William Monroe Oakley, prayed that he might be adjudged bankrupt. Upon the service of the subpœna he employed Messrs. Trimble & Bell and John B. Baskin as his counsel, and to whom, as they allege, he

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

then paid $300 in cash as their fee jointly for the services to be rendered him in the proceeding. Before the adjudication a motion was made for the appointment of a receiver, but previous to a hearing of this motion there was an agreement reached under which an adjudication was made on May 10, 1913.

Slow progress was made in respect to the selection of a trustee, but finally, on August 6th, James Breathitt, Jr., was elected, and three days later he qualified and entered upon the discharge of his duties. On September 12th the trustee filed a report of those portions of the bankrupt's estate which he had set apart to him as exempt. Exceptions to this report were filed by the W. A. Chambers Company, a creditor, upon the hearing of which on October 31st the referee entered an order sustaining at least part of them, and on December 17th, upon a petition for review, we affirmed the referee's order. The bankrupt's counsel appeared for him in the latter matter, and alleged that they had for him also appeared in other matters, as stated in their response.

On November 19th certain of the bankrupt's creditors filed a petition in this language:

"Petitioners, the Hurst-Boillin Company, Elder Conroy Hardware Company, W. A. Chambers Company, and Hermon Bros. Lindaur Company, say:

"(1) That they have provable claims which have been filed and allowed in this estate.

"(2) That the fee of two hundred ($200.00) dollars, paid by the bankrupt to Trimble & Bell for services to him in this matter, and so disclosed in his response to the petition, is unreasonable and exorbitant, and that the fee, also, paid by the bankrupt to J. B. Baskin, is exorbitant and unreasonable.

"Wherefore these petitioners pray an order for the restitution of the funds so paid out by the bankrupt, and for the trustee to take appropriate steps to recover the same. Austin Peay, Attorney."

In response to the foregoing petition, Messrs. Trimble & Bell and John B. Baskin, among other things, objected that the petitioners had no right to the relief sought, for the reason that that right, being in the trustee, could only be exercised by him. Without going into the merits of the case, we think this objection was well taken, in the absence of any averment in the petition showing that the trustee had been requested to seek the relief asked, but had failed or refused, upon such request, to do so. See In re Lewensohn (C. C. A., 2d Cir.) 9 Am. Bankr. Rep. 368, 121 Fed. 538, 57 C. C. A. 600; In re Stern (C. C. A., 8th Cir.) 16 Am. Bankr. Rep. 510, 144 Fed. 956, 76 C. C. A. 10; 1 Loveland on Bankruptcy, § 349. There is sound reason for this rule, inasmuch as the trustee represents all the bankrupt's creditors, and has the first right to sue in respect to their interests. This right cannot be superseded, unless he refuses, upon request, to exercise it, in which event creditors would be remediless, unless they might themselves sue.

The referee's order sought to be reviewed will, for the reason indicated, be reversed, and he will be directed to dismiss the petition of the creditors hereinbefore copied, but without prejudice to the right of the trustee or creditors, if the trustee, upon request, shall refuse to do so, to file a petition seeking the relief prayed for in the petition above copied. It may be well to add that in the case of Thomas L. Jefferson, a bankrupt, we recently had occasion to point out the ele-

ments of fees which might be allowed an attorney of the bankrupt and be paid out of his assets. We there said:

"The Bankruptcy Act contemplates that the trustee and the creditors, with the aid of their counsel, if any, shall administer the assets surrendered by the bankrupt, but not that the bankrupt shall burden the estate with the cost of the services of an attorney of the bankrupt's sole employment, further than the act exacts duties of the bankrupt in the performance of which he needs the aid of counsel, or where such attorney might aid in the administration of the estate, or do something beneficial for it. We doubt, indeed, whether in strictness such latter services can be paid for, unless requested by the trustee or the creditors or accepted by them. The bankrupt is not called upon by the act to employ counsel to make 'effective an honest and fair administration of the bankrupt estate.' The law imposes that duty upon others. Otherwise, any services of the bankrupt's attorney must be paid by his employer, and not out of the surrendered assets, at the expense of the creditors who did not seek the aid of such attorney. In short, the services of an attorney of the bankrupt individually cannot, except to the extent indicated, be paid for out of the bankrupt's estate in the hands of the trustee. Any other ruling would permit the bankrupt to burden the assets far beyond what is tolerated by the act."

Without now passing in any way upon the merits of any controversy in the premises, we remit the case to the referee, so that the matters involved may either be settled or litigated, as the trustee and claimants may prefer.

An order accordingly will be entered.

UNITED STATES v. YOUNG.

(District Court, W. D. Washington, N. D. July 3, 1914.)

No. 2778.

POST OFFICE (§ 48*)—MISUSE OF MAILS—SCHEME TO DEFRAUD—INDICTMENT.

Penal Code, § 215 (Act March 4, 1909, c. 321, 35 Stat. 1130 [U. S. Comp. St. Supp. 1911, p. 1653]), provides that whoever, having devised or intended to devise any scheme to defraud or to obtain money or property by false pretenses, shall, for the purpose of executing such scheme, place or cause to be placed any letter, etc., in the post office to be delivered to the addressee, etc., shall be fined. *Held*, that in order to establish the offense denounced by the amended article it is only necessary to prove the devising of the scheme or plan to defraud, and the employment of the United States mail service in the execution of such plan or scheme; and hence an indictment for misusing the mails in furtherance of a scheme to defraud, charging that defendant devised a scheme to defraud by the sale of a certain medicine remedy, and that he intended to carry out such scheme by use of the post office department, was not fatally defective for failure to charge that part of the scheme and plan consisted of an intention by defendant to use the mails to carry out its purposes.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. § 48.*]

M. C. Young was indicted for using the post office establishment in furtherance of a scheme to defraud, and demurs to the indictment. Overruled.

Albert Moodie, Asst. U. S. Atty., of Seattle, Wash.

Douglas, Lane & Douglas, of Seattle, Wash., for defendant.

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

NETERER, District Judge. The defendant in this case, by the indictment, is charged in substance with—

"having devised and intending to devise a scheme and artifice to defraud, * * * and divers other persons to the grand jurors unknown, * * * to obtain from them * * * money by means of divers false and fraudulent pretenses, and to induce the persons intended to be defrauded to give to him, * * * in and by the name of Prof. M. G. Young and The Dr. Young Herb Remedy Co., Incorporated, such money, with the intent on the part of the said defendant to convert the same to his own use, which said scheme and artifice so devised and intended to be devised by the defendant was as follows: That he should publish a magazine and other literature of a medical and scientific nature, and thereby excite inquiry from the readers as to the diseases and treatments, and he should send to the inquirers responding to said literature symptom blanks, to be filled out and returned to him for examination and prescription, and that he should represent to those stating their symptoms to him that they were sick and in need of his remedies, and that said remedies would cure them, and that they should send a certain sum of money for said remedies so prescribed, whereas in truth and in fact those stating their symptoms to him were not sick and not in need of his remedies, and not in need of the remedies so prescribed, or any other remedies, and said remedies would not cure them."

And then alleges, "that for the purpose of executing said scheme and artifice and attempting so to do, the defendant did knowingly, willfully, unlawfully, and feloniously place, and cause to be placed, in the post office of the United States, at Seattle, Wash., to be sent and delivered by the postoffice establishment of the United States a certain sealed envelope," and then follows with the description of the envelope, addresses, etc., and the contents of the letters so deposited.

The indictment contains four counts. The defendant has demurred to each count in the indictment on the ground that sufficient facts are not stated to constitute a public offense or a violation of any statute of the United States. The indictment is predicated upon section 215 of the Penal Code, Act of March 4, 1909. This section was brought forward from section 5480 of the Revised Statutes as amended by the Act of March 2, 1889, 25 Stat. 873, c. 393 (U. S. Comp. St. 1901, p. 3696). The scope of this section is greatly enlarged over the former act. The defendant in this case relies upon Miller v. U. S., 133 Fed. 337, 66 C. C. A. 399; U. S. v. Post, 135 Fed. 1, 67 C. C. A. 569, 70 L. R. A. 989; American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90, and urges that, since the indictment does not charge that part of the scheme and plan was an intent to use the United States mails to carry out its purposes, it does not state an offense. The authorities cited by the defendant in support of this contention are based upon the former statute, in which it was provided that the entering into of a fraudulent scheme or artifice and an intent to use the United States mails for the purpose, in connection with such scheme, and the using of the United States mail in executing or carrying out such scheme or plan, was necessary to constitute the offense. An examination of section 215 of the Penal Code and section 5480 as amended by the act of Congress, 1889, discloses that the part of the section of the act of March 2, 1889, relating to the intention to use the United States mails for the purpose of carrying out such plan or scheme or artifice was omitted from the act of March 4,

1909, and that the only acts necessary to charge and prove under section 215 of the Penal Code, are: First, that a fraudulent scheme be devised, etc.; and, second, that for the purpose of executing it the defendant placed, or caused to be placed, the letter, etc., in the postal establishment of the United States, or taken therefrom. A reading of this section of the statute makes manifest the intention of Congress, and precludes any other conclusion. This conclusion is supported by U. S. v. Maxey (D. C.) 200 Fed. 997, Ex parte King (D. C.) 200 Fed. 622, and U. S. v. Goldman (D. C.) 207 Fed. 1002.

It is also contended by the defendant that the plan or scheme set forth in the indictment is not in fact fraudulent, hence no offense is stated. The act does not require that the scheme should be fraudulent on its face. Rumble v. U. S., 143 Fed. 722, 75 C. C. A. 30. The scheme must involve some plausible device, reasonably calculated to deceive. U. S. v. Fay (D. C.) 83 Fed. 839.

This is not an action for deceit or criminal action on account of fraudulent practices, but an action for the use of the United States mails in furtherance of a plan or scheme, devised to defraud, and the essential elements are: (1) The devising of a scheme or plan to defraud; and (2) the employment of the United States mail service in the execution of the plan or scheme, both of which are charged. Rimmerman v. U. S., 186 Fed. 307, 108 C. C. A. 385.

The demurrer is overruled.

THE CRAWFORD BROS. NO. 2.

FOSS (BERG, Intervener) v. THE CRAWFORD BROS. NO. 2.

(District Court, W. D. Washington, S. D. June 27, 1914.)

No. 1564.

ADMIRALTY (§ 6*)—JURISDICTION—SUITS RELATING TO AEROPLANES.

A court of admiralty is without jurisdiction of a suit to establish and enforce a lien for repairs against an aeroplane, which is not a subject of maritime jurisdiction.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 86–98; Dec. Dig. § 6.*]

In Admiralty. Suit by Andrew Foss against the aeroplane Crawford Bros. No. 2. On exceptions to libel by H. F. Berg, Intervener. Exceptions sustained.

Wedell Foss, of Tacoma, Wash., for libelant.
Hugo Metzler, of Tacoma, Wash., for intervener.

CUSHMAN, District Judge. This is a libel in rem for repairs to an aeroplane. The matter is before the court upon exceptions by an intervening libelant, asserting a salvage claim for having salved the aeroplane after it had fallen into the waters of Commencement Bay, the same being navigable waters of Puget Sound, while on a flight over

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

said bay. The intervening libelant expressly avers that he does not wish to enforce his maritime lien for salvage. The exception is that the court has no jurisdiction in the matter.

It is conceded, by counsel for libelant, that there is no precedent for this proceeding, but it is contended that, as jurisdiction in admiralty has, in the past, been extended to meet the needs of commerce and the questions arising therefrom, in the face of this new need the jurisdiction should grapple with the questions arising out of navigation of the air, and not await legislative action.

Familiar instances of the growth or evolution of the admiralty jurisdiction are pointed out: The adoption of navigability as the test of jurisdiction, rather than confining it to the ebb and flow of the tide; its extension to include steam vessels upon their advent, holding floating elevators, dry docks, rafts, and submarine vessels subject to the jurisdiction; the giving of a maritime lien for personal injuries, as well as one to the stevedore. The progress thus shown, it is asserted, warrants the court in assuming jurisdiction of this cause.

In 1909 an International Juridic Committee on Aviation was organized at Paris.

"The committee on January 16, 1910, decided upon the outline of a legal code of the air, which has since been in course of elaboration and progress upon which is regularly reported in the committee's review. The committee itself consists of jurists, lawyers, and legal students in France and French colonies, several of the states of Germany, Austria-Hungary, Belgium, Brazil, Denmark, Spain, United States, Italy, Monaco, Netherlands, Argentina, Russia, Switzerland, Turkey, Sweden, Great Britain, Scotland, Canada, and Egypt. The national membership forms a national committee acting through a representative executive committee in Paris. This executive committee makes general studies upon a point of law, and issues its preliminary decisions to national committees, which report back their opinions, the whole of which are harmonized so far as possible. The text decided upon in this way is definitely passed at annual congresses, which have been held at Paris in 1911, at Geneva in 1912, and at Frankfort in 1913." Law Notes, April, 1914, page 5.

An examination of the text of the code decided upon by the committee shows a striking similarity between its provisions, in many respects, and the rules now applicable to water craft. This appears in the rules as to the nationality and registration of air craft, flag regulations, documents, the law applicable in different jurisdictions and beyond the limits of any terrestrial jurisdiction, the requirements as to the logbook, and the aerial rules of the road, although air craft would not all, necessarily, move in the same plane. While the committee has gone into much detail and the analogy between air and water craft is strikingly manifested in the proposed code, it has not yet become law. Undoubtedly, it would be important to consider its provisions in determining what was reasonable and proper in a cause involving air craft in a common-law action. It is noticeable that, while recognizing the necessity, so far the proposed code contains no adaptation or modification of the terrestrial common or statute law, nor any application or modification of its principles which will undoubtedly be necessary in view of the passage of such craft over such jurisdictions, and their manifold relations thereto.

In a case of tort, where the jurisdiction is fixed by the locality of the tort, the Supreme Court said:

"A maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters. It may arise with reference to vessels, steamers, and rafts, and upon goods and merchandise carried by them. But it cannot arise upon anything which is fixed and immovable, like a wharf, a bridge, or real estate of any kind. Though bridges and wharves may aid commerce by facilitating intercourse on land, or the discharge of cargoes, they are not in any sense the subjects of maritime lien." The Rock Island Bridge, 6 Wall. 213, 216, 18 L. Ed. 753.

In view of the novelty and complexity of the questions that must necessarily arise out of this new engine of transportation and commerce, it appears to the court that, in the absence of legislation conferring jurisdiction, none would obtain in this court, and that questions such as those raised by the libelant must be relegated to the common-law courts, courts of general jurisdiction.

The action of the Juridic Committee on Aviation manifests a recognition of the fact that legislation is necessary for the regulation of air craft. They are neither of the land nor sea, and, not being of the sea or restricted in their activities to navigable waters, they are not maritime.

Exception sustained.

In re LOUGHRAN.

(District Court, M. D. Pennsylvania. June, 1914.)

BANKRUPTCY (§ 410*)—DISCHARGE—FAILURE TO APPLY FOR—NEW PROCEEDINGS.

Application of bankrupt for discharge not having been filed within the 18 months after the adjudication expressly limited therefor by Bankr. Act July 1, 1898, c. 541, § 14a, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), he may not, having filed a subsequent petition in bankruptcy scheduling no new assets, thereunder have a discharge, against objection.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 694; Dec. Dig. § 410.*]

In Bankruptcy. In the matter of John Loughran, bankrupt. Objection to his discharge was sustained by the referee, and he brings the cause here for review. Affirmed, and discharge denied.

R. W. Archbald, P. F. Loughran, and F. M. Monagham, all of Scranton, Pa., for bankrupt.

Richard L. Bigelow, of Hazelton, Pa., for objectors.

WITMER, District Judge. John Loughran filed a voluntary petition in bankruptcy on February 20, 1911, and on the same day was adjudicated a bankrupt. After the usual proceedings, on November 11, 1912, he petitioned for permission to apply for a discharge. Objection was made that over 18 months had elapsed since the adjudication and on February 21, 1913, on motion of the bankrupt's attorney this petition, by leave of court, was withdrawn; the purpose of the

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

withdrawal being, as stated by the attorney in a letter to the referee, "to begin bankrupt's petition anew, being convinced that after 18 months have expired the court would have no power to entertain the present leave to file."

Without this specific declaration of the bankrupt's attorney the purpose of the filing of the second petition in bankruptcy, on February 24, 1913, is very obvious. In the schedules of the petition are listed the same creditors for the same indebtedness as contained in the bankrupt's schedules filed February 20, 1911, and no assets. After due proceeding, on April 5, 1913, the bankrupt again petitioned for a discharge. Objections were again made by the same creditors, the ground taken being that, having failed to secure a discharge in the first proceedings, the bankrupt was barred of a discharge as to creditors existing and scheduled at that time. The referee, to whom the matter was referred, sustained the objection, and the bankrupt brings it here for review.

The facts here are not disputed. That the second proceedings were instituted to secure the bankrupt's discharge from his indebtedness involved in the former proceedings is beyond doubt. Now, putting it squarely, will the bankrupt, through the law, be permitted to accomplish by indirection that which the provisions of the Bankruptcy Act specifically say he may not do in the ordinary course of its administration. It is provided in section 14a that:

"Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months."

The bankrupt may file his application for a discharge within the year following his adjudication and for good reason made to appear to the court such time may be extended six months, but not longer. This is language easily understood and all that remains necessary to notice is of what it is intended the bankrupt may be discharged on his application to be made as provided. Section 17a says:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts," with certain exceptions.

To procure such discharge from his provable debts existing at his first adjudication, it was even too late to make application when filing his second petition in bankruptcy, and, though a new or another petition in bankruptcy was filed, it did not change this status. The application now under consideration is nevertheless for a discharge of an indebtedness for which an application should have been presented long before. Having failed to make such application in time, his right to such a discharge is foreclosed. It is only within the time provided by the act following the adjudication that the bankrupt may be relieved from his then existing debts. His neglect to apply for a discharge within the given time is equivalent to a denial of this right, and is in effect a judgment against him by default. To hold otherwise, and permitting the course here attempted, would put it within

the reach of every bankrupt to set aside the provision of the law relative to the time during which an application for a discharge may be filed. That the conclusion reached has been entertained by the bankruptcy court generally appears from a long line of cases collected in Bacon v. Buffalo Cold Storage Co. (C. C. A., 5th Cir.) 27 Am. Bankr. Rep. 736, 193 Fed. 34, 113 C. C. A. 358.

The findings and conclusions of the special master are affirmed, and a discharge of the bankrupt is denied.

WOGAN BROS., Inc., v. AMERICAN SUGAR REFINING CO.

(District Court, E. D. Louisiana. July 1, 1914.)

No. 14,791.

COURTS (§ 270*) — UNITED STATES COURTS — DISTRICT IN WHICH SUIT IS BROUGHT.

Sherman Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (U. S. Comp. St. 1901, p. 3202), providing that any person injured by reason of any violation thereof, may sue in any Circuit Court in the district in which the defendant resides or is found, was not repealed by the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087 [U. S. Comp. St. Supp. 1911, p. 128]), which in section 289 abolishes the Circuit Courts, in section 24, par. 23, gives District Courts jurisdiction of all suits under any law to protect trade against restraints and monopolies, in section 291 provides that when, under any law not embraced within that act, any reference is made to, or any power or duty is conferred or imposed upon, the Circuit Courts, such reference shall be deemed to refer to and confer such power and impose such duty upon the District Courts, and in section 297 provides that all acts, in so far as they are embraced within or superseded by that act are thereby repealed, since the only radical change made by the Judicial Code was the abolition of the Circuit Courts, the purpose in other respects being to codify the existing law; and hence Judicial Code, § 51, requiring certain actions to be brought in the district of defendant's residence, does not apply to suits for violations of the Sherman Act.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 810; Dec. Dig. § 270.*]

Action by Wogan Bros., Incorporated, against the American Sugar Refining Company. On exception to the jurisdiction of the court. Exception overruled.

F. Rivers Richardson and Caffery, Quintero & Brumby, all of New Orleans, La., for complainant.

Carroll, Henderson & Carroll and Denegre, Leovy & Chaffe, all of New Orleans, La. (James M. Beck, of New York City, of counsel), for defendant.

FOSTER, District Judge. This is a suit for triple damages under the act of July 2, 1890, known as the Sherman Law. The plaintiffs are citizens of Louisiana, and the defendant is a corporation organized under the laws of New Jersey, but doing business in Louisiana and found within this district.

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

Defendant excepts to the jurisdiction of the court, on the ground that the action is between citizens of different states, and is also based on an act of Congress; and hence, by virtue of section 51 of the Judicial Code, defendant can only be sued in the district of its domicile. The exception is, of course, good, unless the court has jurisdiction of the case by virtue of section 7 of the Sherman Act, which provides that any person injured may sue therefor in any Circuit Court of the United States in the district in which the defendant is found.

The defendant contends that Congress in enacting the Judicial Code and abolishing the Circuit Courts by section 289, and vesting the District Courts with jurisdiction generally over suits arising under any law to protect trade and commerce against restraints and monopolies, by paragraph 23 of section 24, has placed all suits brought under the Sherman Act on the same footing with other suits, where both diversity of citizenship and a federal question are grounds of jurisdiction.

Defendant also relies upon section 291 of the Judicial Code and the last paragraph of section 297 as evidencing the intention of Congress to repeal the provisions of the Sherman Law allowing the plaintiff to sue in whatever district the defendant might be found.

Construing all of these sections together, I cannot agree with defendant's contention. The only radical change made by the Judicial Code was the abolition of the Circuit Courts. In all other respects it was the intention of Congress to codify existing law for the purpose of compiling it in more convenient form and logical sequence. Necessarily, in giving the District Court all the jurisdiction formerly possessed by the Circuit Court, new and appropriate legislation had to be enacted; but there can be no presumption that it was intended to deprive litigants under special acts of any rights they then possessed.

Clearly section 297 can have no application to the Sherman Act. There is no express repeal, and no part of it is either embraced within, or considered by, the Code. And section 291 is entirely destructive of the defendant's theory. Section 291 of the Judicial Code provides as follows:

> "Wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon, the Circuit Courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon, the District Courts."

Power is synonymous with jurisdiction. Section 291 is plain and unambiguous, and transfers to the District Courts all the jurisdiction and power that the Circuit Courts had with regard to the enforcement of the Sherman Law.

Entertaining these views, it is unnecessary to pass upon the question of estoppel raised by the plaintiffs.

The exception will be overruled.

In re BASS.

(District Court, N. D. Georgia May 25, 1914.)

No. 453.

BANKRUPTCY (§ 314*)—CLAIMS—STOCK SUBSCRIPTION.

The receivers of an insolvent insurance company were not entitled to prove a liability on the bankrupt's subscription to the stock of the company, which it did not appear was necessary to pay debts, in order to equalize claims between the various stockholders who had paid their subscriptions, especially in the absence of proof that the bankrupt on such equalization would have been in the debtor, instead of the creditor, class.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469–473, 478, 483–487, 489, 490; Dec. Dig. § 314.*]

In Bankruptcy. In the matter of bankruptcy proceedings of J. L. Bass. Application by receivers of the Rome Insurance Company to prove a claim against the bankrupt on a subscription to the stock of the corporation. Disallowed.

Maddox & Doyal, of Rome, Ga., for claimant.

Nathan Harris, of Rome, Ga., and Alex C. King, of Atlanta, Ga., for trustee.

NEWMAN, District Judge. This is an effort to prove a claim against the bankrupt estate by certain receivers of the Rome Insurance Company appointed by the superior court of Floyd county. The amount sought to be proven is $186,001.60, being principal of $179,-493.34 and interest to date of filing of claim amounting to $6,508.26. This proof of claim is based on a subscription made by J. L. Bass to the stock of the insurance company.

It appears from the record that the Rome Insurance Company had sold its business to the Cherokee Insurance Company and had all of its business reinsured in that company; the Cherokee Insurance Company assuming all of the liabilities of the Rome Insurance Company except a comparatively small amount, based on certain items of indebtedness, the exact amount of which is not shown here. But at the most it is only a few thousand dollars, and the receivers of the Rome Insurance Company have in their hands something over $9,000 in cash with which to pay liabilities and expenses. It seems probable, from what is shown here, that the receivers have a sufficient amount in their hands to pay everything that they can be legally called upon to pay. At all events, it seems that $2,000 or $3,000 would be the most that, in any view of the case, they will need to pay all legitimate debts against the concern.

In urging the right of the receivers of the Rome Insurance Company to prove this claim, it is contended that a considerable amount will be necessary in order to equalize claims between the various stockholders who had paid their subscriptions to the stock of the company in different proportions; that is to say, it is contended that the superior court should collect enough from the stockholders who had paid a less proportion than others on their subscriptions in order to

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

reimburse stockholders who have paid in a larger proportion, so as to equalize all the subscriptions.

In proving this claim nothing was said about any claim against Bass for the purpose indicated. It seems to me, before such a claim could be made, it should appear that Bass belongs to the debtor class, instead of to the creditor class, as between stockholders in the respect indicated above. It should be shown what, in an equalization as to the amount paid in on their stock, Bass would owe in order that the other stockholders may be put on an equality with him. It is contended by counsel representing the bankrupt estate that Bass is on the other side of the matter, and that he would be entitled to collect from other stockholders, instead of other stockholders collecting from him. Certainly the claim is not put in the proof or in the evidence in such a way that it would authorize the court to allow proof of this claim upon the ground indicated, that is, the equalizing of stockholders.

It must be true that there cannot be a recovery upon stock subscriptions when the amount sought to be recovered is not needed for any of the legitimate purposes of the company in which the stock was subscribed, that is, to pay debts, etc. Tichenor, Receiver v. Williams Block Pavement Co., 116 Ga. 303, 42 S. E. 505, and authorities there cited. Certainly no court would allow the collection of a large sum like the receivers for the Rome Insurance Company are attempting to prove here, when it is apparent that the great bulk of it, if not all of it, would have to be repaid to the persons from whom it is collected, and particularly would this be true in a court of bankruptcy, because it is the duty of this court to get the affairs of the bankrupt settled as speedily as possible.

It is clear that the proof of claim as made here was properly disallowed by the referee, and his action in so doing is approved and confirmed.

In re KANTER.

(District Court, D. Maine. July 2, 1914.)

No. 9967.

1. PARENT AND CHILD (§ 5*)—RIGHT TO SERVICES—EMANCIPATION.

Though a father may claim the services of his children while under age and supported by him, he may relinquish that claim at any time, and when he does, the profits of their labor belong to themselves.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 70–73, 75, 76; Dec. Dig. § 5.*]

2. BANKRUPTCY (§ 340*)—CLAIMS FOR SERVICES—CHILDREN OF BANKRUPT—EMANCIPATION—SUFFICIENCY OF EVIDENCE.

Though in passing upon a claim by the minor children of a bankrupt for services, the relationship of the parties justifies a careful investigation, evidence which between parties unrelated to each other would clearly be convincing is sufficient to show that when the bankrupt promised to pay the children for their services in his store, he intended to relinquish his right to their services.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. § 340.*]

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

3. BANKRUPTCY (§ 314*)—PROVABLE CLAIMS—CLAIMS OF MINOR CHILDREN.
Where a bankrupt prior to the bankruptcy promised to pay his minor children for their services in his store with intent to relinquish his claim to their services, their claims for services were provable in bankruptcy.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469–473, 478, 483–487, 489, 490; Dec. Dig. § 314.*]

In Bankruptcy. In the matter of Louis Kanter, bankrupt. On petition by the trustee in bankruptcy to review an order of the referee allowing claims of Alta Kanter and another. Order affirmed.

Edward P. Murray, of Bangor, Me., for trustee.
J. A. Cahners, of Bangor, Me., for claimants.

HALE, District Judge. [1-3] This case comes before me on the petition of the trustee in bankruptcy, to review the order of the referee allowing the claims of Alta and Isadore Kanter, minor children of the bankrupt, for services as clerks in the store of the bankrupt. The testimony shows that both children are less than 21 years of age; that the father kept a store; that he promised to pay the son $5 a week, besides his board, and the daughter $3 a week. These wages have never been wholly paid; the proofs seek to recover the balance of the wages. The trustee urges that the children have never been emancipated, and the parent has never relinquished his right to their services. An examination of the testimony convinces me that when the father made the promises to which I have referred, he intended a relinquishment of his right to the services of the minor children. The law is clear that a father may claim the services of his children while they are under age, and while they are supported by him, but he may relinquish that claim at any time; and, when he does, the profits of his children's labor belong to themselves. In Vattier v. Hinde, 32 U. S. (7 Pet.) 252, 268 (8 L. Ed. 675), the question before the court was whether a conveyance of a lot of land from a father to a son was valid. It was alleged that this conveyance was made in consideration of a debt he owed for his son's land. In speaking for the Supreme Court, Chief Justice Marshall said:

"Had this transaction been in favor of any other creditor than a son, its fairness could never have been impeached. Had he, as guardian for any other person, secured a debt, under the same circumstances, the helpless infancy of the ward would not have tainted the transaction with fraud. The connection between the parties may excite suspicion, may justify a more scrutinizing investigation of all the circumstances; but if the result of this investigation be, as we think it is, that the conveyance was in payment of a debt of the most sacred obligation, a debt which a conscientious debtor ought to have paid, it is valid in law."

In the case before me, a similar issue is involved; the relationship of the parties justifies a careful investigation of all the circumstances. The plain question is, Did the father intend to relinquish his right to the services of the two minor children? If the same testimony had been given touching parties unrelated to each other, such testimony would clearly be convincing. Applying the same investigation to the case before me, I can have no question but that the father intended

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

to relinquish his right to the services of both of the minor children If so, it would be unlawful to deprive the children of the results of their labor.

The order of the referee allowing the proofs of priority debts is affirmed.

In re WIENER.

(District Court, E. D. New York. June 18, 1914.)

BANKRUPTCY (§ 378*)—COMPOSITION—FAILURE—WITHDRAWAL OF FUNDS.

Where a bankrupt obtained from a third person funds with which to comply with a composition, and on depositing the same obtained a stay of the bankruptcy proceedings, and the composition was thereafter withdrawn, the amount of expenses incurred during the pendency of the composition offer, which would not have been incurred if the orders of court previous to the composition had been carried out and the bankrupt's property sold in the usual manner, were payable out of the fund so deposited.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 601; Dec. Dig. § 378.*]

In Bankruptcy. In the matter of bankruptcy proceedings of David Wiener. Application for withdrawal of funds deposited to carry out a composition that failed. Granted on condition.

Nathan M. Hutner, of New York City, for petitioning creditors.
Isidor Block, of New York City, for Lipnitsky.

CHATFIELD, District Judge. This bankrupt offered a composition and money was deposited by him for that purpose. He obtained a stay of proceedings on adjudication, and the composition has been withdrawn. The expenses of the referee in connection with the matter of composition have been paid to him, but the receiver has incurred certain expenses for custodian, rent, light, insurance bills, and storage charges, amounting to $742.31, some part of which at least would have been saved to the estate if a sale had been had by the receiver, or if, after adjudication, the estate had been promptly liquidated after the election of the trustee. The money deposited by the bankrupt for the purpose of composition was procured by him after adjudication from a third party, was not a part of the funds of the bankruptcy estate, and is not available to pay the claims of the creditors in bankruptcy. But the expenses which have been incurred by the bankrupt, through his own efforts since his status has been determined by adjudication, to retain the property which he formerly had, and to secure the benefits of a composition, should not be borne by the creditors of the estate, and any money advanced for the purpose of putting through a composition is (like all other funds deposited in court for a special purpose) subject to any expense chargeable against this fund, and which has been incurred solely because of the deposit thereof. In the case of Jacob Stander, previously decided in this court, withdrawal of the fund deposited on composition was refused, until the consent of every creditor was obtained, after notice to the creditors of the application.

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

In the present instance opposition is made to the withdrawal, and the referee, who will be appointed special commissioner if any testimony has to be taken, should report the amount of expenses incurred during the pendency of the composition offer, which would not have been incurred if the orders of court previous to the composition had been carried out, and if the property had been sold in the usual manner.

The amounts so reported, when confirmed by the court, must be paid out of the fund offered for the purposes of the composition, and not from the general estate.

In re UNDERWOOD & DANIEL.

(District Court, N. D. Georgia. May 30, 1914.)

No. 648.

1. SALES (§ 43*)—FRAUDULENT INTENT—RESCISSION—RECLAMATION OF GOODS.
Where a seller is induced to make a sale by the buyer's fraudulent representations, such representations amount to fraud in law, which avoids the sale and entitles the seller to rescind.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 86–92, 97–100; Dec. Dig. § 43.*]

2. BANKRUPTCY (§ 138*)—SALES—RESCISSION—FRAUD—PURCHASE PRICE—RETURN.
Where a seller of goods to a bankrupt elected to rescind the sale for fraud, it was not bound to return to the bankrupt's trustee the amount paid on the price by the bankrupt, when the amount required so to be paid would be greater than the value of the goods returned.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193–204, 206–209; Dec. Dig. § 138.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Underwood & Daniel. Application by the M. C. Kiser Company to reclaim certain goods alleged to have been sold to the bankrupt through fraud. Granted.

F. L. Eyles, of Atlanta, Ga., for intervener.
M. U. Mooty, of La Grange, Ga., for bankrupts and for trustee.

NEWMAN, District Judge. The referee found in this case that certain goods bought by the bankrupt from M. C. Kiser Company were sold and delivered because of certain false representations made by the bankrupt firm to the Kiser Company.

[1] The only matter that needs consideration in the case is whether the referee, having found that the statement made by the bankrupts to the Kiser Company was untrue, and that the Kiser Company was misled by it, and that a legal fraud was committed, and the Kiser Company parted with their goods by reason of it, was correct in the further finding that it was not necessary for the statement to have been made with fraudulent intent to entitle the intervener to reclaim the goods. If this view of the referee is correct, then I think his finding

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

is correct, because the findings on the facts seem to be sufficiently supported by the evidence.

In Newman v. Claflin Co., 107 Ga. 89, 32 S. E. 943, the Supreme Court of Georgia held as follows:

"When a vendee of personal property makes a material representation, which is false, and upon which the vendor is induced to act to his injury by parting with possession of his goods, such a misrepresentation amounts to a fraud in law, which voids the sale, and equity may rescind the contract and restore the parties to their original rights, although the party making such misrepresentation was not aware that his statement was false."

In Mashburn & Co. v. Dannenberg Co., 117 Ga. 567, 44 S. E. 97, it was held that representations as to financial standing and worth, made to induce a sale on credit, when acted upon by the seller to his injury, will, if untrue, constitute such a fraud as will void the sale, at the option of the seller, though the buyer did not know they were false.

These decisions seem to me to be controlling in the matter, as the law of Georgia is applicable to the case.

[2] I do not see how the Kiser Company could be required to pay back to the trustee in bankruptcy the amount paid by the bankrupt on account of the purchase of the goods, when, according to the record here, the amount required to be paid would be greater than the value of the goods received.

I think the referee decided the case correctly, and his action is approved and confirmed.

In re GROUNDS.

(District Court, N. D. New York. July 10, 1914.)

BANKRUPTCY (§ 424*)—DISCHARGEABLE DEBTS—JUDGMENT—BREACH OF PROMISE—APPLICATION.

Though a woman could not recover at common law for her own seduction, yet she may recover for breach of marriage promise, and plead seduction as an element of damage; and hence a judgment against a bankrupt for breach of marriage promise accompanied by seduction was not dischargeable in bankruptcy, under Bankr. Act July 1, 1898, c. 541, § 17, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428), as amended by Act Feb. 5, 1903, c. 487, § 5, 32 Stat. 798 (U. S. Comp. St. Supp. 1911, p. 1496), providing that a discharge in bankruptcy shall release the bankrupt from all his provable debts, except a liability for seduction of an unmarried female.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 787, 818; Dec. Dig. § 424.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Frank Edward Grounds. On motion by the bankrupt for an order enjoining further proceedings by Katazyna Szewsky to enforce or collect a judgment obtained by her against the bankrupt for breach of promise of marriage accompanied by seduction. Denied.

Harry E. Clinton, of Troy, N. Y., for bankrupt.

Crawford & Cogan, of Albany, N. Y., for creditor.

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

RAY, District Judge. In January, 1914, Katazyna Szewsky obtained a judgment, on trial before a jury in the Supreme Court of the state of New York, against Frank Edward Grounds, the bankrupt, for $1,800 damages. The complaint in that action charged a contract to marry at a time fixed and also:

"That said defendant, through said promise of marriage and by repeating said promise of marriage, seduced this plaintiff and had illicit intercourse with her, whereby the said plaintiff became pregnant and sick with child; that she suffered a miscarriage and was confined at a hospital," etc.

Evidence was given in support of both allegations, and the verdict and judgment followed.

The defendant, the bankrupt, contends that the judgment or debt is one dischargeable in bankruptcy, and that its collection should be stayed until the question of his discharge is determined. Prior to the amendment of 1903, this would have been so; but in that year section 17 of the Bankruptcy Law was amended so as to read (so far as material here):

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, *except* such as * * * are *liabilities* * * * for seduction of an unmarried female," etc.

The defendant contends that this plaintiff could not herself have maintained an action to recover damages for the seduction, and cites Fiero on Torts, 372, Disler v. McCauley, 66 App. Div. 42, 73 N. Y. Supp. 270, and Getzelson v. Bernstein, 15 Misc. Rep. 627, 37 N. Y. Supp. 220.

Whether or not there be a direct liability on the part of the seducer under promise of marriage to the seduced female for the seduction, on which and for which she can maintain an action directly, in case of breach of promise she may maintain an action for the breach of promise to marry, and set up the seduction, and recover damages for the breach of promise and seduction, and hence there is a liability for the seduction in such cases. This was settled by the Circuit Court of Appeals in this circuit. In re Warth, 200 Fed. 408, 118 C. C. A. 560, Noyes, Circuit Judge, writing the opinion. By this I am bound, as I do not find that the Supreme Court of the United States has decided any case to the contrary under the Bankruptcy Law as amended. The judgment in question here is not dischargeable in bankruptcy.

It follows that the stay and injunction herein granted May 29, 1914, must be vacated, and a further stay or injunction restraining proceedings to collect the judgment referred to, be denied.

So ordered.

THE PRISCILLA.

(District Court, E. D. New York. May 22, 1914.)

MARITIME LIENS (§ 67*)—SUIT TO ENFORCE—PROCEDURE—SETTING ASIDE DEFAULT.

The failure of a lien claimant through inadvertence to file a pleading before the entry of a decree foreclosing other liens and ordering the sale of a vessel is not such laches as should defeat his right to come in afterward and contest any claim previously allowed, or its priority of payment from the proceeds of the vessel, on suitable terms as to costs.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 105; Dec. Dig. § 67.*]

In Admiralty. Suit by the Tebo Yacht Basin Company against the steam yacht Priscilla. On motion by S. Appel & Co. to open default. Motion granted.

Alexander & Ash and Peter Alexander, all of New York City, for libelant.

John A. Anderson, of New York City, for petitioner.

George L. Robinson, of New York City, for George M. Auten & Co.

Henry W. Baird, of New York City, for owner.

CHATFIELD, District Judge. The libelant, the Tebo Yacht Basin Company, brought an action for materials and services rendered to the yacht Priscilla, and after final decree sale was had, resulting in a sum which proved to be insufficient to pay all claims. One of the claimants, S. Appel & Co., who filed a libel for supplies after the entry of final decree, but before the sale, has sought to oppose the claims of those whose libels were filed prior to the final decree, and to contest the validity of the alleged lien as to which proof was being offered in order to determine its validity and right to payment in competition with the lien upon which the libel was based under which the vessel was sold.

Upon objection to the right of these subsequent libelants to contest the validity of the claims of those libelants who filed their libels prior to the final decree and the sale, a motion has been made for leave to open the default of those parties and to allow them to file an answer, a copy of which accompanied the motion papers, and in which they set up various defenses to the validity of the libels of the parties who seek to maintain their own claims under the decree shutting off every one whose claim had not been previously filed.

This motion will in no wise affect the sale. The yacht having been sold after final decree, all parties were bound by knowledge that the price obtained would be the only fund from which any claim chargeable against the yacht could be paid. All lienors who have the standing of libelants should have the right to protect their own claims by contesting those which are either invalid or which should be postponed in payment. The mere failure to interpose a pleading prior to the beginning of the reference, through inadvertence, is not such laches as should defeat the party, and no one has been injured by the intervening delay, except in so far as the expense of taking testimony is concerned.

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

The motion to open the default will be granted, and the answer may be filed, upon payment by the petitioning libelant of the expenses of the reference on the part of the libelant Tebo Yacht Basin Company, amounting to $21.20, as taxed, for the items accruing subsequent to the time when the petitioning libelant should have realized the fact that it was in default.

THE FLORENCE.

(District Court, E. D. New York. May 26, 1914.)

SALVAGE (§ 31*)—RESCUE OF BOAT ON FIRE—AMOUNT OF AWARD.

A tug *held* entitled to a salvage award of $400 for assisting two other boats in the rescue of a gasoline boat, which was on fire; the value of the property saved being from $3,500 to $4,500.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 75-77; Dec. Dig. § 31.*]

In Admiralty. Suit by James J. Absley against the gasoline boat Florence. Decree for libelant.

Foley & Martin, of New York City (J. A. Martin, of New York City, of counsel), for libelant.

Russell H. Robbins, of New York City, for claimant.

CHATFIELD, District Judge (orally). I do not think that we need discuss the facts very much. Both boats were there, and the actual pumping of water and rendering of services began about the same time. Mr. Strickland was in charge, and while his authority was not recognized till he got on board the Hague and commenced to direct her captain, nevertheless he actually ordered the maneuvers, and Capt. Mathis directed the taking of the boat to the dredge, without which she would probably have been lost entirely, from sinking.

As far as the putting out of the fire is concerned, the only value of it was keeping the gasoline from exploding and keeping the intense heat from warping the hull, but flooding the boat with water was done at the risk of sinking her. If all the services had been performed alongside of the dredge, it is evident that the dredge would have been entitled to credit for producing most of the benefit. As long as the dredge could not do anything until the other boats had kept the fire down and towed the Florence to the dredge, the value of the services has to be estimated from the total result, rather than from the comparative amounts that each one did.

Now, as to values, there was probably $3,500 to $4,500 worth of property saved. In the case of a gasoline fire in a small boat that was likely to sink and be a total loss, or to be raised at tremendous expense, an ordinary salvage operation by outsiders would have justified a total award of from $1,000 to $1,500. Assuming that the dredge performed the greater part of that, but that the Hague and the Jackson were at least entitled to equal credit, and that they did important work during the first half hour, and thereafter did as much as they could, on the

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evidence that the hose of the Jackson was larger than that of the Hague, but that the Hague was doing the things that were directed, while the Jackson was volunteering and pumping water, but taking into account the fact that the Jackson rushed in and immediately went at the boat, where the Hague was properly, but still with more or less risk of its being too late, exercising discretion about going alongside, I think that the two boats are entitled to about equal credit.

So, if the total service was worth, as I said, from $1,000 to $1,500, I would take $1,200 as a fair basis, and, allowing equal credit to each boat, I will give the Jackson an award of $400. The crew should get one-third anyway. Of course, there was a risk here of the loss of the tug; but I think they ought to have at least one-third. One-third to the crew and two-thirds to the owner.

The libelant may have a decree for $400.

McKENNA v. UNION S. S. CO.

(District Court, N. D. California, First Division. June 16, 1914.)

No. 15521.

SEAMEN (§ 29*)—INJURY IN SERVICE—LIABILITY OF VESSEL.

The owner of a steamship *held* not chargeable with negligence which rendered it liable for an injury to an able-bodied and experienced seaman, because it did not instruct him in the manner of performing his duties, and he without necessity chose an unsafe, instead of a safe, place from which to oil the steering gear.

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

In Admiralty. Suit by Bernard McKenna against the Union Steamship company. Decree for respondent.

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

Ira A. Campbell and McCutchen, Olney & Willard, all of San Francisco, Cal., for libelee.

DOOLING, District Judge. Libelant claims that this cause should be determined in accordance with the laws of New Jersey, as the vessel upon which the accident occurred belongs to a New Jersey corporation. It is not necessary to determine this interesting question, because the New Jersey law upon which libelant bases his claim requires as a prerequisite to the right of recovery that "the injury be caused to an employé by accident arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause," and in this case I am unable to find that any actual or lawfully imputed negligence of the employer was the natural and proximate cause of the accident which resulted in the injuries of which libelant complains.

I cannot agree with libelant that there was any obligation on the part of the libelee to instruct him in his duties, or in the way to per-

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

form them. He shipped as an able-bodied seaman. He is 33 years of age, has been going to sea since he was 14 years old, and has been for 13 years sailing up and down this coast. His is not the case of a minor, nor of one whose lack of experience on board ship would cast upon his employer the duty of instructing him in the method of performing the work which his position called for. On the contrary, the employer was entitled to believe that he fully understood all his duties, and if in fact he did not so understand them the obligation was cast upon him to seek information, and not upon the ship to furnish it unsought.

The fact that he selected a dangerous place from which to oil the steering gear, when there was an absolutely safe place provided for that purpose, does not argue negligence on the part of his employer, unless, indeed, the employer were bound so to close this place that libelant could not enter it at all, a proposition which cannot seriously be maintained. It is indeed, unfortunate that libelant suffered the severe injuries for which he brings this action; but, in the absence of negligence on the part of the libelee, he cannot recover.

I find no such negligence disclosed by the proofs, and the libel will therefore be dismissed.

DEAL v. COAL & COKE RY. CO.

(District Court, N. D. West Virginia. July 2, 1914.)

COMMERCE (§ 27*)—REGULATION—RAILROADS—STATUTORY PROVISIONS.

An employé of an interstate railroad company, who was engaged in repairing a telegraph line owned and maintained by it and used in directing the operations of interstate trains, was entitled to the benefits of the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. § 27.*]

At Law. Action by David F. Deal against the Coal & Coke Railway Company. On demurrer to the declaration. Demurrer overruled.

Harold W. Houston, of Charleston, W. Va., for plaintiff.

Price, Smith, Spilman & Clay, of Charleston, W. Va., for defendant.

DAYTON, District Judge. This demurrer presents a very interesting question of jurisdiction. The plaintiff alleges substantially that the railroad company is engaged in interstate commerce transportation; that incident to and as a necessary adjunct and part of its interstate transportation it owns and maintains a line of telegraph, using it for the purpose of directing the operations of its trains; that he was employed by the company to aid in repairing this telegraph line, and was injured while engaged in doing so. The defendant insists that these facts do not allow the defendant the benefit of the federal Employers' Liability Act, and, no other ground for federal jurisdiction being alleged, the demurrer must be sustained.

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

I confess that I cannot see where the dividing line is to be drawn between employés of interstate commerce carriers protected by this act and those who are not. That must be determined largely by future decisions in specific instances. The Supreme Court, in Pederson v. Delaware, L. & W. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, has certainly held that an iron worker engaged in carrying bolts to repair a bridge upon an interstate carrier's roadbed is entitled to the benefit of the Act. It says:

"That the work of keeping such instrumentalities in a proper state of repair while thus used [in interstate transportation] is so closely related to such commerce as to be in practice and in legal contemplation a part of it."

I am able to see little difference between the necessity for the proper repair of the bridge over which the interstate commerce passes and the necessity of repairing the telegraph line owned by the company and by the operation of which the movement of such commerce over the bridge is controlled and directed. The line of distinction may be eventually drawn at this point, but I am not willing to draw it.

The demurrer will be overruled.

In re WITMAN.

(District Court, E. D. New York. June 17, 1914.)

BANKRUPTCY (§ 384*)—COMPOSITION—CONFIRMATION—DENIAL—FALSE STATEMENT OF FINANCIAL CONDITION.

Where a bankrupt made a careless and indifferent statement as to his financial condition and obtained a rating by a commercial agency, which, though incorrect, was not shown to have been materially and intentionally false, and sales made to him on credit claimed to have been induced by such statement were made after a considerable lapse of time and under circumstances where inquiry of the bankrupt was possible, the statement did not constitute such a materially false statement in writing of his financial condition as would preclude the confirmation of a composition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 590–592; Dec. Dig. § 384.*]

In Bankruptcy. In the matter of the bankruptcy proceedings of Joseph B. Witman. On report of a special commissioner advising the denial of an application to confirm composition. Reversed, and composition confirmed.

Beekman, Menken & Griscom, of New York City (William C. Armstrong, of New York City, of counsel), for objecting creditors.

Levy & Levy, of New York City, for creditors.

Robert H. Koehler, of New York City, for receiver.

David Steckler, of New York City, for bankrupt.

CHATFIELD, District Judge. The special commissioner and referee has reported that the composition is to the best interests of the creditors, and that the grounds of objection, based upon the conduct

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

of the bankrupt and his alleged failure to answer certain questions and to keep books, with intent to conceal his assets or defraud his creditors by so doing, are not sustained. He has, however, reported that the composition should be rejected on the ground that the bankrupt had made a false statement in writing of his financial condition.

This last ground of objection is not supported by the testimony, and the report cannot be confirmed, inasmuch as the statement referred to was for the purpose of obtaining a rating by a board of trade or commercial agency, and was not specifically made for the purpose of obtaining credit on any particular sale. In re Zoffer, 211 Fed. 936, 128 C. C. A. 434. In fact, the sales were made under circumstances where inquiry of the bankrupt himself was possible, as the creditors were dealing directly with the bankrupt, and were after such lapse of time that the statement, if relied upon, should have been brought down to date and made competent for reliance thereupon by direct inquiry. As a matter of fact, the statement is not shown to have been materially and intentionally false, but was apparently carelessly and indifferently made, without regard to facts, rather than contrary to the facts.

The report is correct in overruling the other grounds of objection, and on the entire matter it would seem that the composition should be confirmed.

BOWENS v. CHICAGO, M. & ST. P. RY. CO.

(District Court, W. D. Washington, N. D. June 29, 1914.)

No. 2716.

COURTS (§ 357*)—COSTS—REMAND OF CAUSE TO STATE COURT—DOCKET FEE.

Under Judicial Code, § 37 (Act March 3, 1911, c. 231, 36 Stat. 1098 [U. S. Comp. St. Supp. 1911, p. 146]), providing that a federal court, on remanding a suit to the state court, shall make such order as to costs as shall be just, plaintiff, on such remand, is only entitled to tax a docket or attorney's fee of $10; Rev. St. § 824 (U. S. Comp. St. 1901, p. 632), providing for the taxation of a docket fee of $20, being inapplicable.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 938; Dec. Dig. § 357.*]

At Law. Action by W. A. Bowens against the Chicago, Milwaukee & St. Paul Railway Company. On objection to cost bill. Sustained.

Griffin & Palmer, of Seattle, Wash., for plaintiff.

George W. Korte, of Seattle, Wash., for defendant.

NETERER, District Judge. This cause was commenced in the state court, and removed to this court on petition of the defendant, and remanded to the state court on motion of the plaintiff. The plaintiff filed a cost bill, taxing $20 attorney's fees against the defendant. The defendant has filed an objection to the taxing of $20 attorney's fees, and states that a reasonable fee is the sum of $10.

The attorney's fee to be taxed in a case of this kind is provided by section 5 of the Act of March 3, 1875 (18 Stat. 472, c. 137), and the

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

amendments thereto, brought forward into section 37 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1098 [U. S. Comp. St. Supp. 1911, p. 146]), which provides that a federal court on remanding a suit to the state court, "shall make such order as to costs as shall be just." It has been repeatedly held that $20 docket fee provided by Revised Statutes, § 824 (U. S. Comp. St. 1901, p. 632), does not apply. Western Union Telegraph Co. v. Louisville & Northern Ry. Co. (D. C.) 208 Fed. 581.

The controlling cases, I think, on this issue, must be Pellett v. Great Nor. Ry. Co. (C. C.) 105 Fed. 194, and Riser v. So. Ry. Co. (C. C.) 116 Fed. 1014. In these cases it was held that the federal court might and should, on remanding a case for want of jurisdiction, allow a docket fee of $10, by analogy to the fee allowed by Revised Statutes, § 824, in cases at law where judgment is rendered without a jury. I think this is a reasonable deduction, and should be adopted by this court.

The objection to the cost bill is sustained, and the clerk directed to tax an attorney's fee of $10.

THE INDUSTRY.

(District Court, E. D. New York. June 6, 1914.)

COLLISION (§ 150*)—DAMAGES—FINDINGS OF COMMISSIONER.

The findings of a commissioner on conflicting evidence as to the value of a motor boat and other property lost in collision confirmed.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 302; Dec. Dig. § 150.*]

In Admiralty. Suit by Joseph McCann against the steam tug Industry. On exceptions to report of commissioner. Report confirmed.

Henry W. Baird, of New York City, for libelant.

Harrington, Bigham & Englar, of New York City, for claimant.

CHATFIELD, District Judge. The commissioner has reported the value of a certain motor boat and two items covering money and clothing lost upon the boat in a collision, as to which an interlocutory decree has been entered and the question of damages referred. One witness testified that he would replace the boat for $350, while another fixes the fair value of the hull at $1,000. The libelant claims $750, and a third builder places the value at $735.

The commissioner has reported $650 as a finding, and has arrived at this result by making certain deductions for waste time and materials because of the builder's lack of experience. There would seem to be a substantial basis of fact for the conclusions of the commissioner, and any difference of result would be merely a difference of opinion or in the finding of fact upon the same testimony on which the commissioner has acted. In such case the commissioner's finding should not be set aside unless it is plainly erroneous.

As to the other items of damage, there seems to be no reason why they should not be held correct.

The report will be confirmed.

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

WEEGHMAN et al. v. KILLIFER et al.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1914.)

No. 2643.

EQUITY (§ 65*)—MAXIMS—CLEAN HANDS.

Defendant K., a baseball player of unique and extraordinary skill and expertness, contracted to serve the Philadelphia National League Club for the season of 1913, his contract providing that his compensation should be apportioned, 75 per cent. for services rendered and 25 per cent. for his covenant to abide by his reservation by the Philadelphia Club for the succeeding season unless released before its termination in accordance with the provisions of the contract, which covenant provided that he bound himself to contract with and continue in the service of the Philadelphia Club for the succeeding season at a salary to be determined by the parties. Complainants, desiring to employ him, before there had been any conference concerning his salary with the Philadelphia Club for the 1914 season, obtained a conference, and, though knowing of the reservation asked him if he was under any obligation to play ball with the Philadelphia Club, and, he having replied that he had made no contract with them, complainants induced him to sign a contract with them by offering him a salary more than twice as large as he had previously received. After this, however, he made another contract to serve the Philadelphia Club in accordance with his reservation. *Held*, that, though such reservation was not enforceable at law as between the parties, being but an agreement to make a contract, complainants, having induced him to breach the same with knowledge thereof, and that there had been no effort to agree on terms between defendant and the Philadelphia Club, were not entitled to maintain a suit to enjoin defendant from performing his Philadelphia contract, under the maxim that he who comes into equity must come with clean honds.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185-187; Dec. Dig. § 65.*

He who comes into equity must come with clean hands, see notes to Knapp v. S. Jarvis Adams Co., 70 C. C. A. 543; Primeau v. Granfield, 114 C. C. A. 555.]

Appeal from the District Court of the United States for the Western District of Michigan; C. W. Sessions, Judge.

Suit by Charles Weeghman and another, partners doing business under the style of the Chicago Federal League Baseball Club, against William Killifer, Jr., and another. From a decree dismissing the bill, complainants appeal. Affirmed. For opinion below, see 215 Fed. 168.

The appellants sought a temporary restraining order in the court below, commanding William J. Killifer, Jr., to desist and refrain from performing any services as a baseball player for any other club than theirs during the years 1914, 1915, and 1916. The order was refused, and appeal taken. The relief asked is based upon averments of the bill of complaint that Killifer is a baseball catcher "of unique and extraordinary skill and expertness, and of such personal and intellectual character that his loss cannot be substantially compensated for by the services of some other baseball catcher," and that he had failed to keep his certain contract of January 8, 1914. The contract was made with the appellants as a copartnership doing business as the Chicago Federal League Baseball Club (herein called Federal Club); and it in terms binds Killifer to serve the Federal Club "and no other party" during

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

the Federal League baseball seasons of 1914, 1915, and 1916. On the petition of the Philadelphia National League Club (herein called Philadelphia Club) an order was entered below reciting that the "petitioner has an interest adverse to the complainants within the meaning of the equity rule," and permitting it to intervene as a party defendant with leave to answer complainants' bill. Killifer and the Philadelphia Club filed separate answers. Each of these defendants avers, in substance, among other things, that on April 18, 1913, the Philadelphia Ball Company (to the rights of which the Philadelphia Club has succeeded) and Killifer entered into a contract according to a copy attached as an exhibit. Killifer there agreed to perform for that club "and for no other party during the period of this contract * * * such duties pertaining to the exhibition of the game of baseball as may be required of him" for the National League season of 1913; and the first paragraph thereof contained this provision: "The compensation of the party of the second part (Killifer) stipulated in this contract shall be apportioned as follows: 75 per cent. thereof for services rendered and 25 per cent. thereof for and in consideration of the player's covenant to sanction and abide by his reservation by the party of the first part for the season 1914 unless released before its termination in accordance with the provisions of this contract."

By the eighth paragraph the club was given the right at any time during the period of the contract, to terminate it upon 10 days' written notice. The tenth paragraph was as follows: "In consideration of the compensation paid to the party of the second part (Killifer) by the party of the first part as recited in clause 1 hereof, the party of the second part agrees and obligates himself, to contract with and continue in the service of said party of the first part for the succeeding season at a salary to be determined by the parties to such contract."

Both defendants aver that Killifer performed the contract of 1913 to the satisfaction of the Philadelphia Club, and that "after the end of said season, and prior to January 8, 1914, he was duly notified that an increased salary would be paid to him. He thereupon promised to play" with the Philadelphia Club in 1914 "and expressed his readiness to discuss the question of salary at the proper time." Nevertheless, on January 8, 1914, Killifer contracted with the Federal Club, as stated, and on the 20th of that month he entered into a similar contract with the Philadelphia Club for the same seasons. It is averred in the bill and admitted in the answers that complainants were in need of the services of players of skill and expertness, and it is admitted by the Philadelphia Club that Killifer "is a player of unique and extraordinary skill and expertness." The only evidence offered in support of the averments of the bill and answers was in the form of affidavits, with exhibits. Several days before the Federal Club contract was executed, the complainants and their manager brought about a meeting between them and Killifer, at their office in Chicago, and opened negotiations with him to enter the service of the Federal Club. Complainants, through their manager, had full knowledge of Killifer's previous relations with the Philadelphia Club and of the above quoted clause of reservation contained in his contract of 1913. It was the standard form of contract of the National Baseball League, and complainants' manager had admittedly during that year been manager of one of the National baseball clubs. The president of the Federal Club states in his affidavit that Killifer was asked at this meeting whether he was "under any contract to play baseball for the season 1914 and subsequent seasons with any baseball club," or whether he was "under any obligation to play ball" with the Philadelphia Club, that Killifer answered that he had not "made any contract or entered into any agreement to play ball" with the Philadelphia Club, or with "any other club for the year 1914 and subsequent years, and that he was free to make a contract" with the Federal Club. Killifer's account of this meeting is, in substance, that "they all talked" to him about his contract with the Philadelphia Club, and gave reasons why they considered a contract with "a Federal League Club to be a better contract for the player"; that he "would not be able to get a satisfactory salary from the Philadelphia Club, and offered to give him a large salary if he would leave" that

club and sign with the Federal Club; that they finally offered him "a three-year contract and nearly twice as much salary as he had received from the Philadelphia Club in 1913," and because of this "inducement" he "signed a contract with the complainants." When he signed this contract, Killifer was paid $525, but this money was returned by him later. Admittedly, at the time the Philadelphia Club made the contract with Killifer, January 20, 1914, the club knew that he had entered into the contract with the Federal Club. The president of the Philadelphia Club states that after the close of the season of 1913, Killifer gave the club no opportunity to take up with him the question of salary for 1914 until about January 20th; that Killifer is playing with the Philadelphia team, and is "an integral part thereof"; that he "fits in with the other players, gives confidence to the whole team, and is a drawing card with the public." Concededly, each of these clubs agreed to pay Killifer a materially larger salary than he had received in 1913, and the salary he is receiving from the Philadelphia Club is a decided increase over that agreed to be paid by the Federal Club. Each club avers and insists that it will suffer irreparable damage if it shall lose the services of Killifer.

Edward E. Gates, of Indianapolis, Ind., and Silas H. Strawn, of Chicago, Ill., for appellants.

George Wharton Pepper, of Philadelphia, Pa., for appellees.

Before WARRINGTON and DENISON, Circuit Judges, and TUTTLE, District Judge.

WARRINGTON, Circuit Judge (after stating the facts as above). The bill of complaint is not framed upon the idea, as of course under well settled principles it could not be, that complainants are entitled to an order or decree enforcing specific performance of the contract between the Federal Club and Killifer; but the theory is that under his negative covenant they are entitled to an order restraining him from playing with any other club. The theory so relied on is not contested. The controversy turns upon a question which may be stated thus: Whether, in view of their knowledge of the clause of reservation contained in Killifer's contract of 1913, complainants were entitled both to induce Killifer to contract to enter into their employ and to enforce their contract as far as may be by the process of injunction, since they took no appropriate steps in advance of the contract to ascertain what, if any, effort had been made and the result attained by Killifer and the Philadelphia Club, or either, to agree upon his salary for the year 1914.

The contention is in effect that any such question as this is answered by the proposition that the clause of reservation is not a contract. Indeed, complainants simply asked Killifer whether he was under any "contract" to play baseball for the season of 1914 with the Philadelphia Club, and contented themselves with his answer that he was not, and his opinion that he "was free to make a contract" with the Federal Club. It is not necessary to say more of the defect in the present clause of reservation than Judge Wallace said of a similar provision, though in a case unlike this, that it is "a contract to make a contract if the parties can agree," and that the portion remaining to be agreed on ultimately, in connection with the right given to the club to terminate the contract of 1913 upon 10 days' written notice, would have prevented enforcement of the reservation. Metropolitan Exhibition Co. v. Ewing, 42 Fed. 198, 204, 7 L. R. A. 381; Metropolitan Exhibition Co.

v. Ward, 9 N. Y. Supp. 779, 781 to 783; Marble Co. v. Ripley, 10 Wall. 339, 359, 19 L. Ed. 955. But in determining whether the present complainants are entitled to the aid of an injunction in recognition and support of their contract, we are not convinced that the clause of reservation in the contract of 1913 can rightfully be ignored. This clause was in terms based upon a consideration of 25 per cent. of Killifer's salary, or $750. Killifer had received the money; true, he received it under a provision that it should be paid, but not with any disclosed purpose to release him from his undertaking with respect to the season of 1914. He had distinctly covenanted to "sanction and abide by his reservation," and conditionally promised to "continue in the service" of the club during the season of that year. Surely all these acts meant something. Can it be said that no right can be predicated of such a promise? Could Killifer both break the promise and keep the money? Evidently the conditions requisite to making a contract were present—parties, consideration, and a lawful object. The privilege of continuing the player in the club's service, not merely the first privilege of employing him, for the next season, was reserved and conditionally given for a substantial sum of money paid and received. The contract in contemplation for the season of 1914, like the one for the season before, was of the standard type, and the salary would seem to have been the only undetermined feature; and so, in view of the liberal rules in relation to implied contracts, we think enough was done to invest the club with at least an equitable right to have Killifer endeavor in good faith to agree with it upon his salary before he should enter into a similar contract with another; it is needless to add that Killifer was under a corresponding obligation. Further, what rightful concern was it of the complainants that a means of escape, through the undetermined feature of the clause, was available to either of the parties to the contract of 1913? The complainants had never been parties to that contract; and if they had not interfered, it cannot under the evidence be doubted—as the District Judge in effect said—that Killifer would have carried out his arrangement with the Philadelphia Club. Why is this not a sufficient test of the right of complainants to an injunction?

This is not a suit to recover damages for inducing Killifer to repudiate his promise to the Philadelphia Club. It is a suit to enjoin him from ultimately keeping that promise, and maintained by the very parties who induced him to break it. More than a century ago it was said by Lord Ch. J. Eyre, in speaking of the act of an army recruiting officer who had induced a servant to leave his master and enter the army when under a voidable indenture, that the defendant "had no concern in the relation between the plaintiff and his servant, he dissolved it officiously, and, to speak of his conduct in the mildest terms, he was carried too far by his zeal for the recruiting service." Keane v. Boycott, 2 Bl. Rep. 511, 515. The decision in that case has been approved and the principle it announced applied in some well-considered decisions in this country. Haskins v. Royster, 70 N. C. 601, 611, 612. 16 Am. Rep. 780; Duckett v. Pool, 33 S. C. 238, 241, 242, 11 S.

E. 689; Noice, Adm'r, v. Brown, 39 N. J. Law, 569, 572, 573. See, also, Salter v. Howard, 43 Ga. 601, 604; Benton v. Pratt, 2 Wend. (N. Y.) 385, 390, 20 Am. Dec. 623.[1]

Furthermore, no just consideration of the facts disclosed in the instant case can fail to reveal a common purpose and for the common profit of the complainants and Killifer to set at naught the latter's obligation to the Philadelphia Club to endeavor in good faith to agree with that club upon his salary. Whether this amounted to a design to injure and defraud the Philadelphia Club or not, it was a legal fraud upon its right to have the contract avoided, if at all, only through an honest effort and failure to have the salary fixed. Such a fraud does not necessarily imply, nor is its existence dependent upon, an invasion of a *legal* right. It is a matter of indifference, then, that the clause of reservation did not amount to an ultimate mutual obligation; it was not avoided, as it might have been, in an honest way, but was consciously set aside and ignored to the manifest injury of the Philadelphia Club. We, therefore, do not see how the present case can at bottom be effectively distinguished from ruling principles declared in decisions like Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30, and Angle v. Chicago, St. Paul, etc., Railway, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; for, as respects the intermeddler, it cannot be that the particular reason which would enable either party to a contract to avoid it is material.

In Rice v. Manley, an agreement had been made to purchase a quantity of cheese at a future date. There had been no compliance with the statute of frauds, and the agreement was not binding on either party for that reason. Both parties would have performed the agreement

[1] We are not unmindful of the insistence, nor of its force, that an action for damages cannot be maintained at law for the procurement of breaches of contract between employer and employé unless the contract is valid and binding; but, not deeming it necessary here either to determine that question or the alternative one touching the need of de facto service, we may remark upon complainants' citations in that behalf: Lord Denman's suggestion, when considering a contract that "was altogether on one side," that a third person would not be heard to take objection to the invalidity of a contract between a master and servant where "the servant was de facto continuing in the service," was hardly necessary, because in the case before him the servant "had quitted his master and taken his chance in hiring himself to the defendant." Sykes v. Dixon, 9 Ad. and El. 693, 699; Cockburn, C. J., thought that a count for enticing away an apprentice could not be sustained under the statute (8 Ann. c. 9) for the reason that it was clear and peremptory, saying: "There is no valid contract of apprenticeship. But we incline to think that, if the action had been brought on the footing of the youth being the *servant* of the plaintiff, the defendant would have been liable, there being evidence of enticement." And the case was sent back for amendment and new trial. Cox v. Munsey, 6 C. B. (N. S.) 376, 383. In Campbell v. Cooper, 34 N. H. 49, the action for enticing a minor to quit the service of his employer failed, because the agreement of the servant had been signed by his father instead of the servant himself, and so was not in accord with the statute of the state. Davidson v. Oakes (Tex. Civ. App.) 128 S. W. 944, holds that an action to recover damages for inducing one to break his oral contract to convey real estate to another cannot be maintained. In Case Machine Co. v. Fisher, 144 Iowa, 45, 122 N. W. 575, it did not appear that the defendants had knowledge of the existence of any contractual relations which would prevent them from offering inducements to the agents whose conduct was in question.

but for the fraud of the defendant. The defendant, knowing of the agreement, for the fraudulent purpose of defeating its performance by the seller, of depriving the purchasers of the benefit thereof, and of himself obtaining the cheese, employed a fictitious telegram to induce the seller to change the sale from the original buyers to the defendant. The referee allowed damages, and was ultimately affirmed. In the course of the opinion, Earl, J., said (66 N. Y. 84, 23 Am. Rep. 30):

"What difference can it make that plaintiffs could not enforce their agreement against Stebbins? The referee found that Stebbins would have performed the agreement, and that plaintiffs would have had the benefit of it but for the fraud of the defendant. How, then, can it be said that plaintiffs were not damaged; that there was not both fraud and damage so as to satisfy the rule above laid down? Plaintiffs' actual damage is certainly as great as it would have been if Stebbins had been obliged to perform his contract of sale, and greater, for the reason that they cannot indemnify themselves for their loss by a suit against Stebbins to recover damages for a breach of the contract."

In Angle v. Chicago, St. Paul, etc., Railway, the state of Wisconsin had, for the purpose of constructing defined railroads, granted certain lands to a company called the Omaha Company, and another portion to a company called the Portage Company. The latter grant was conditional upon the completion of the road within a fixed time. After passing through various financial embarrassments and difficulties the Portage Company at last effected a plan to complete the road within the extended time granted. The plan involved a construction contract about the validity of which, it is true, no question was made; but the important feature of present relevance was the legislative right to avoid the land grant. The Omaha Company, having designs on this land grant, so interfered with the performance of this contract as to induce the Legislature to revoke the grant and to make a regrant to the Omaha Company. To a suit to subject the lands to the payment of a judgment for damages previously recovered because of such interference, numerous defenses were set up. One was that the Portage Company was in default, and the Legislature had the absolute right to forfeit the grant. To this Mr. Justice Brewer (approving Rice v. Manley) answered, 151 U. S. 23, 14 Sup. Ct. 248, 38 L. Ed. 55:

"Assuredly it does not lie in the power of the wrongdoer, the party whose wrongs created that condition which induced the legislative forfeiture, to excuse its wrongs on the ground that the Legislature had the power to forfeit, and might have done it anyway."

Is it to be said then that the complainants are in a position rightfully to invoke the process of injunction in aid of the enforcement of their contract? We are thus led to agree with Judge Sessions that the complainants' suit could not be sustained under the maxim: "He who comes into a court of equity must come with clean hands"; and the application of the rule is made exceptionally clear by the learned trial judge.[2]

[2] Otis v. Gregory, 111 Ind. 504, 508, 13 N. E. 39, 43, does not sustain the claims made under it by the present complainants. It was a suit to quiet title to real estate. The defendant had released a mortgage on certain land in Michigan to assist plaintiff, a married woman, to sell the property and reinvest in land in Indiana, but he did so under a promise of plaintiff that she would give him a mortgage upon her Indiana property to secure payment of

It is vain to urge that he abused his discretion. It is claimed that the competitive conditions requisite to baseball leagues, baseball clubs, and the players themselves, entitle the complainants to relief. The obvious answer is that frank and prompt dealings on the part of clubs and players signing contracts of reservation would avoid all delay and embarrassment. Indeed, there is no perceivable reason why Killifer alone could not have duly brought the question of his salary and further connection with the Philadelphia Club to a close and in time to have obtained employment elsewhere if found necessary. Moreover, it is by no means certain that a restraining order would result in causing Killifer to enter the service of the Federal Club, but under the evidence it is certain that serious injury to the Philadelphia Club would ensue; and it cannot escape attention that the foundation of an order that would inflict such an injury upon one of the defendants would, in its last analysis, be the conduct of the complainants and Killifer. It scarcely need be added that complainants are in no position to urge that either party to the contract of 1913 was guilty of laches respecting the exercise of the privilege reserved and given under the clause of reservation.

The order denying a temporary injunction is affirmed, with costs, and with direction to dismiss the bill, unless complainants show to the satisfaction of the trial judge that, under appropriate amendment to their bill of complaint, they are able to and will at final hearing produce additional and substantial evidence; but such dismissal, if ordered, shall be without prejudice to the rights of any of the parties to institute such actions at law as they may be advised respecting the subject of the present suit.

the amount of the released mortgage. By the statute of Michigan, married women were empowered to convey or mortgage their separate real estate in all respects as if they were unmarried; but this was not so in Indiana. The mortgage so to be given in exchange was executed alone by the plaintiff, and the object of the suit was in reality to escape payment of the Michigan loan. The plaintiff failed, and the suit was remanded with leave to both parties to reform their pleadings, so that the loan of defendant could be provided for. This was done in recognition of the maxim, "He who seeks equity must do equity."

AMERICAN SHIPBUILDING CO. v. COMMONWEALTH S. S. CO.

(Circuit Court of Appeals, Sixth Circuit. June 2, 1914.)

No. 2483.

1. CORPORATIONS (§ 448*)—CONTRACTS—SUIT FOR RESCISSION—"TRUSTEE."

Defendant contracted with certain persons, who were named as "trustees," to build a steamship. Such persons, in accordance with a previous agreement with defendant, had taken steps to organize a corporation to own and operate the ship, and at the time of the contract all the stock of the corporation had been subscribed. The corporation was organized, assumed the contract, and on its completion accepted delivery of the vessel and paid for it. *Held*, that the real purchasers by the contract were the stock subscribers for whom the persons signing the same were agents, of which fact defendant had full notice, by the use of the word "trustees" if not otherwise, and that the then contemplated and subsequently organized corporation succeeded to all of their rights, and as such successor and the recognized purchaser to which delivery was made could maintain a suit in equity for a rescission of the sale and purchase for fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1786, 1788, 1807; Dec. Dig. § 448.*

For other definitions, see Words and Phrases, vol. 8, pp. 7128–7133, 7822.]

2. SALES (§ 38*)—RESCISSION BY BUYER—FRAUD.

The contract for the building of the vessel was made pursuant to an option given by defendant to the persons who signed the contract as a basis for forming the corporation, of which they became stockholders, and included in the price named a secret commission which defendant agreed to, and did, pay to such persons for organizing the corporation and securing the contract. *Held*, that such payment and concealment, to which defendant was a party, constituted a fraud on the corporation which, upon prompt election after its discovery and restoration of the status quo, entitled it to rescind.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 65–77, 85; Dec. Dig. § 38.*]

3. CANCELLATION OF INSTRUMENTS (§ 10*)—ADEQUATE REMEDY AT LAW—JURISDICTION.

The vessel having been used for six seasons before the fraud was discovered, and having deteriorated in value by reason of such use, and from other causes, and also being incumbered by a mortgage to secure bonds of the purchasing corporation, which were widely scattered and not due, rendering it difficult or impossible to return it with a clear title, the remedy of the purchaser at law by a return and an action to recover back the purchase price was not adequate, and a court of equity which could afford a more practical and efficient remedy had jurisdiction.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 7, 9, 18–22; Dec. Dig. § 10.*]

4. CANCELLATION OF INSTRUMENTS (§ 60*)—RESCISSION BY BUYER—ACCOUNTING BETWEEN PARTIES.

By a decree rescinding a sale of a steamship on the ground of fraud on the part of the seller, which was not discovered by the purchaser for six years during which it had the use of the vessel, the seller was charged with interest on the purchase money received. *Held*, under the peculiar circumstances of the case, there having been no misrepresentation as to the vessel, which was in all respects what complainant contracted for,

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

that it should be charged with a sum each year which, as stipulated, would cover the depreciation of the vessel from age and wear during such year, and also with the net earnings made above such sum, if any, in each year, with interest on such sums from the end of the year.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 127-129; Dec. Dig. § 60.*]

Appeal from the District Court of the United States for the Northern District of Ohio, Eastern Division, William R. Day, Judge.

Suit in equity by the Commonwealth Steamship Company against the American Shipbuilding Company. Decree for complainant, and defendant appeals. Modified and affirmed.

For opinion below, see 197 Fed. 797.

Without distinguishing between proof by direct testimony and by inferences which we think clearly proper, and without reference to many details not of ultimate importance, the record shows these facts:

The American Shipbuilding Company (spoken of herein as defendant) was engaged, at Cleveland, in the business indicated by its name. W. A. and H. A. Hawgood, also of Cleveland, were engaged in the vessel business, both on their own account and as managers of lines owned by others, and had a high local reputation for ability and success in this business. After some negotiation, it was, on July 1, 1905, agreed between the Shipbuilding Company and the Hawgoods that the latter should undertake to organize a corporation or otherwise assemble capital to buy a ship to be built by the company, and that, for thus making the sale, the Hawgoods should receive a commission of $15,000. Pursuant thereto, the Shipbuilding Company wrote to one of the Hawgoods a letter describing the proposed ship and giving him an option for the price of $385,000, to be paid $195,000 in cash and $190,000 in purchase-money mortgage bonds. The commission bargain was not mentioned in the letter, but it was understood that the price named included the commission, and that the net amount of cash required would be $180,000. The Hawgoods and their associates then prepared a prospectus of a proposed Ohio corporation, to be called the Commonwealth Steamship Company (called herein plaintiff). The capital stock was to be $200,000, and $200,000 of mortgage bonds were to be issued. The Hawgoods were to be two of the directors, and were to be agents for the company. The vessel to be built and acquired was described in general terms, and it was said that "under option already given by the American Shipbuilding Company to W. A. Hawgood & Company, Cleveland, Ohio, this steamer will be built at a cost of $385,000, and ready for delivery at the opening of navigation in 1906." The prospectus set out much general information regarding the vessel business on the Great Lakes, estimated the gross earnings and the operating expenses of the proposed ship, and indicated annual net earnings of $61,000, which would pay the first year's interest on the bonds, 10 per cent. dividends on the stock, retire $20,000 of the bonds and leave $11,000 for surplus. To the prospectus, a subscription agreement was attached promising payments to Hawgood & Co. in installments as called by them. The Hawgoods subscribed $20,000, and the remainder of the proposed capital was taken by a large number of subscribers. Thereafter, and on August 16, 1905, a formal contract for the construction and sale and purchase of the ship, to be called the "Abraham Stearns," was entered into between the Shipbuilding Company and the Hawgoods. The purchasers were named in the contracts as, and signed the same as, "trustees," and all parties understood that the Hawgoods were making this contract as trustees for the subscribers. Installment payments were called for and were made by the subscribers in August, and again in October, and the sums so received by the Hawgoods were paid over to the Shipbuilding Company. The formal organization of the Commonwealth Company did not take place until November, 1905. Articles of association were then subscribed by the two Hawgoods and three other prospectus signers, and these

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

five persons proceeded to organize the corporation and hold the first stockholders' and directors' meetings, whereby, on November 22, 1905, the corporation first acquired complete legal existence. At this organization meeting, a stockholders' resolution was passed, reciting that the contract with the Shipbuilding Company had been made by the Hawgoods on behalf of the subscribers of the capital stock to the Commonwealth Company, and taking over the contract for the corporation. On the same day, the directors passed a resolution reciting that several named persons had rendered valuable services for the corporation "in the way of selling its capital stock and otherwise looking after its interests," and that the Hawgoods "have contracted for the steamer 'Abraham Stearns,' and have promised and agreed to convey the same to the Commonwealth Steamship Company for $10,000 less than such steamer can now be purchased, and have otherwise carefully guarded the company's interest," and thereupon directing that the Hawgoods be paid $5,000 and that each of the other named persons be paid specific sums for their respective services. This compensation was additional to, and given wholly in ignorance of, what the Hawgoods were to receive from the Shipbuilding Company, which paid the Hawgoods the $15,000 commission at about the time the first payment was made on the ship.

The carrying business on the Great Lakes was notoriously subject to great fluctuations, having periods of great prosperity and periods of depression. This was known to the prospective subscribers. The ship was built and delivered in the spring of 1906, and was operated for the Commonwealth Company under the management of the Hawgoods for five seasons, and, in 1911, until September. The net earnings in 1906 were $62,000; in 1907, $46,000; for the three seasons of 1908, 1909, and 1910 the earnings and operating expenses about balanced; the boat was not operated all the time; and, in the season of 1911, the boat was tied up. During the last-named year, other directors than the Hawgoods first learned, and so it may be said that the corporation first knew, of the payment of the $15,000 commission. Thereupon, and in September, 1911, the Commonwealth Company filed this bill, setting out that the payment of the secret commission was a fraud by the Shipbuilding Company against the Commonwealth Company entitling the latter to rescind, tendering back the ship, offering to do equity, and asking a decree which would determine the proper conditions, effectuate the rescission, and compel the repayment of the purchase price. A decree was rendered for the Commonwealth Company ([D. C.] 197 Fed. 797) awarding rescission, directing the repayment of the full purchase price, with interest at 6 per cent., less the net earnings of the ship during the whole period, and less the amount of the outstanding unpaid mortgage bonds which were to be assumed by defendant. From this decree, defendant appeals.

A. C. Dustin and Richard Inglis, both of Cleveland, Ohio, for appellant.

A. B. Thompson, C. P. Hine, and C. R. Bissell, all of Cleveland, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] The Shipbuilding Company's primary defense, while stated in varying forms, is essentially that there never was any sale contract from the Shipbuilding Company to the Commonwealth Company, and hence that there can be no rescission of such contract. The argument is that the defendant's agreement to build and sell the ship was made on August 16th, and was made with the Hawgoods, three months before the Commonwealth Company was organized, and that the bill should have been filed against the Hawgoods to obtain a rescission of the taking over

contract of November 22d. It is clear that the contract of August 16th was not merely a sale to the Hawgoods personally. It was made expressly to them "as trustees." It does not say for whom they were trustees, but the subscription to the corporate prospectus was then completed, and we think it was fully understood by both parties that the Hawgoods were acting as trustees for these subscribers, and that the contract was really in the interest of, and was made for the purpose of being transferred to and assumed by, the corporation which was about to be organized. The circumstances and the conduct of the parties before and after August 16th fully support this conclusion. In this situation, the word "trustees" is, in equity, to be treated as something more than a mere description of the person; and this view is not necessarily inconsistent with the existence of full personal liability by the Hawgoods and with the right of the Shipbuilding Company to enforce the contract against them personally, if it desired to do so. A trustee is an agent, and whether we call these subscribers beneficiaries of the trust or principals of the agent is immaterial. In either event, they were, in equity, the real purchasers of the ship from the Shipbuilding Company by this contract of August 16th; and of this fact the Shipbuilding Company had full notice, by the use of the word "trustee," if in no other way. R. R. v. Durant, 95 U. S. 576, 579, 24 L. Ed. 391; Geyser Co. v. Stark (C. C. A. 8) 106 Fed. 558, 561, 562, 45 C. C. A. 467, 53 L. R. A. 684.

The situation which we have recited makes immaterial much of the argument presented regarding the right of a corporation to sue for wrongs done before its existence. If a particular fraud is calculated to injure, not any existing persons, but only a corporation which may thereafter be organized and the stockholders of which are uncertain, or not all of whose stockholders may be charged with full notice, a right of action may be found in the subsequent corporation with difficulty, or not at all. Old Dominion Co. v. Lewisohn, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025; Davis v. Las Ovas Co., 227 U. S. 80, 33 Sup. Ct. 197, 57 L. Ed. 426. No such difficulty here exists. August 16th the full plans had been made and individuals had agreed to subscribe all the stock. If a wrong was done to these expectant stock subscribers, any appropriate equitable remedy accrued at once to them, though at the instant they were only prospectus subscribers. If defrauded, they could have maintained suit for rescission of the contract which their agent had made for them. What they did do was to proceed exactly as planned, organize the corporation, exchange their subscription rights for capital stock, and then, as a corporation, take over and complete the contract which their agent had made. The transaction is, in effect, the same as if the body of individual associates had ratified and taken over the purchase contract from their agent and then had transferred the contract to the corporation. That would be, and the present contract of assumption is, an assignment in form, but in real substance it is a matter of succession, not of transfer.

It is also to be remembered that we are not dealing with what is even in form a transfer of existing property, but with a substitution of parties in a contract relating to property under construction; that the

sale was never complete and the entire title to the ship never passed till the delivery of the ship, in April, 1906, from the Shipbuilding Company, the contract vendors, to or for the Commonwealth Company, the then existing contract vendee. Of the purchase price, all except the first $56,000 was paid after the corporation was formed and (practically) from its funds. The cash did not, in form, go through its treasury, though what was done amounted to that; but the bonds were issued directly by the corporation, and they or their proceeds were paid by or for the corporation to the Shipbuilding Company. Whatever might be the rule under other situations, we have no doubt that these circumstances permit the Commonwealth Company to be heard on the merits of its demand for rescission against the Shipbuilding Company, and constitute a sufficient answer to the claim that to proceed against the Hawgoods for causing the November taking over contract is the exclusive remedy. Mudsill Co. v. Watrous (C. C. A. 6) 61 Fed. 163, 9 C. C. A. 415; Alger v. Keith (C. C. A. 6) 105 Fed. 105; Donovan v. Campion (C. C. A. 8) 85 Fed. 71, 29 C. C. A. 30; Morawetz, § 548; Veazie v. Williams, 8 How. 134, 12 L. Ed. 1018. It is not important that the specific prayer of the bill is for a rescission of the original contract of August, 1905, while it turns out that the vital thing to be rescinded is the conveyance of April, 1906. The two were parts of the same transaction, each involved the other, and the prayer for general relief is ample to support a decree directed primarily against the final step (Lockhart v. Leeds, 195 U. S. 427, 436, 437, 25 Sup. Ct. 76, 49 L. Ed. 263), and this is the effect of the decree, whatever its form. It is overnice to attempt to distinguish between the parts of this continuous and unbroken transaction. The building contract was made in August, the parties, on one side, were renamed in November, and the completed boat was delivered and the balance of the purchase price paid in the next April. This bill was filed to get the money back and to return the boat, and it was rightly filed against the party which had received the money and had furnished the boat.

[2] The record sufficiently discloses the Shipbuilding Company's knowledge that the payment by it of the $15,000 commission to the Hawgoods was to be concealed from the principals or beneficiaries for whom the Hawgoods were acting—indeed, it shows participation as well as knowledge. The naming of the gross price which included the commission, and the insertion of this price in the option which must have been intended to be used as the basis of raising money to carry it out (and which was in fact recited in the prospectus) is convincing evidence that the Shipbuilding Company deliberately aided the Hawgoods in concealing the commission. Such payment and concealment, under the circumstances here shown, constituted a fraud against the purchaser which, upon prompt election, and upon restitution of the status quo, would have entitled it to rescind. Yeiser v. U. S. Co. (C. C. A. 6) 107 Fed. 340, 46 C. C. A. 567, 52 L. R. A. 724; Erlanger v. New Sombrero Co., 5 L. R. (Ch. Div.) 73; Davis v. Las Ovas Co., supra.

[3] At all stages of the case, the Shipbuilding Company has insisted that the purchaser had an adequate remedy at law and could

not proceed in equity. This contention does not depend alone on the theory that an action for damages is the vendee's only remedy; it insists that, even though a rescission may be called for, that rescission may be had at law, the property involved being personalty, by tendering back the property and suing for the purchase price. To the suggestion that fraud is a sufficient basis for the relief, it is answered that fraud alone will not give equity jurisdiction (Equitable Society v. Brown, 213 U. S. 26, 50, 51, 29 Sup. Ct. 404, 53 L. Ed. 682), and to the claim that an accounting is involved, it is replied that a court of law can take an account of damages (Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975). It has often been held that the remedy at law, to be "adequate," must be "as practical and efficient" as that in equity. Tyler v. Savage, 143 U. S. 79, 95, 12 Sup. Ct. 340, 36 L. Ed. 82. In the instant case, the legal remedy by tender of the property and suit for the purchase price is, for two reasons, inadequate under these definitions: The first is that the parties cannot be placed in statu quo —a mere return of the property would not accomplish this result. The ship had been used for six seasons. It was, in value, a very different piece of property from that originally received, not only because of its deterioration from use, but on account of different business conditions and prospects. It is not necessary to say that the impossibility of putting the parties back where they were would wholly defeat a rescission at law, but it would present a troublesome obstacle. This case is peculiarly appropriate for balancing of equities involved in treating the changed conditions. The extent to which interest on the one side and the value of the use of the boat on the other should be considered, the many complications attending determining the fair value of that use for which a counter liability ought to exist, the extent of the duty of plaintiff to account for the profits which it had received while it used the boat, which profits, in the event of rescission, take on something of the character of a trust fund—all these considerations, in connection with the extent to which fraud is at the basis of the complaint, make apparent that the controversy is suitable for the court of equity, and that a suit or proceeding at law would not be so completely "efficient for the ends of justice" as to make that remedy wholly adequate and therefore exclusive.

The other reason is this: The purchase money bonds had been scattered into the hands of many innocent holders, they were not due, and the Commonwealth Company could not restore the boat free from incumbrance. It was perhaps not impossible to meet this situation at law; but it was practically necessary to provide, as was done by the decree below, that the Shipbuilding Company should take the boat subject to this incumbrance, which it should assume and pay, and that it should have credit for the amount so assumed.

[4] The subject of restoring the status quo presents unusual complications. A perfect restoration cannot be made. From age and ordinary wear and tear, there was an annual (stipulated) depreciation of 2½ per cent., or a total of 15 per cent. for the six seasons that were involved (the remainder of the sixth season after September being for this purpose negligible). This depreciation, computed upon $370,000

(the sum fixed by the master as the net value for this purpose), would be $55,500. By the use of the boat during this period plaintiff received net earnings of $123,741. These earnings were computed without allowing any depreciation as an operating expense. It is strenuously contended that a fair rental value of the boat, or the net earnings which plaintiff would have received, if the boat had been managed with the sole purpose of earning as much as possible, would have averaged at least $40,000 per season, or $240,000 for the period. On the other hand, interest at the legal rate in Ohio, upon the purchase price, until the date of the decree below, amounted to about $154,000. The circumstances affecting the relative equities of the parties are unique. There was no misrepresentation or fraud as to the thing sold. The purchasers got exactly what they desired and expected to get. Neither were they deceived in the business in which they expected to engage; it was reported to be profitable, and it was. Allowing for interest upon the full amount of mortgage bonds and without regard to the depreciation, the business showed earnings upon the subscribers' investment, for the first season, of about 27 per cent., and, for the second season, about 18 per cent. With the stipulated allowance for depreciation, these earnings would have been, respectively, 22 per cent. and 13 per cent. It is improbable that if the deception as to the purchase price had been fully disclosed at any time during the first two years, the plaintiff would have desired to rescind; the inferences to be drawn from usual human conduct indicate that plaintiff would have elected to affirm the sale, and would have proceeded at law for its damages. Only after the several indifferent and bad seasons which were due to general business conditions did the Commonwealth Company seek this relief, and we cannot resist the conclusion that a rescission, instead of some other remedy, is really desired, not because of the usual reasons inducing that election, but because the bargain turned out to be an improvident one. The delay in the discovery of the fraud satisfies the requirement that a rescission must be promptly demanded, but it does not change the aspect of the case of which we now speak. These views strongly impel us to direct that defendant may avoid a rescission by refunding to plaintiff a portion of the price paid. Such a decree would be a recognition and application of the principle on which relief was determined in Veazie v. Williams, 8 How. 134, 12 L. Ed. 1018, and, broadly speaking, would do real justice between the parties. However, we are unable to see any sufficiently accurate basis for such a decree. There is not here, as there was in Veazie v. Williams, any distinct boundary line to the results of the fraud, and if we undertake to fix a sum which should compensate plaintiff for all the injuries coming from the bribery of its agents, and which should, in addition, penalize defendant so as to discourage similar transactions, we would be without any guide. The power of the equity court to make any such conditions which, however vaguely, appeal to it as equitable is not to be doubted, but we cannot approve an apportionment resting so wholly on surmise. Notwithstanding this conclusion, these matters just stated may be given due effect in fixing the equitable conditions to be attached to the decree. In the ordinary case of rescission, where the

purchase price is to be repaid, the rule would be that the defendant should pay interest on the money and the plaintiff should account only for the sums which, while managing the property in good faith, it had actually received, and should not be liable for depreciation (Pomeroy's Eq., [3d Ed.] vol. 6, § 688; Neblett v. MacFarland, 92 U. S. 104, 23 L. Ed. 471); but to apply this rule where, after six years, and because of a fraud just discovered, plaintiff claims a rescission which it would neither have demanded nor accepted if the discovery had been prompt, is to show lack of due regard for cause and effect, and to transform what should be an elastic rule into one hard and fast. Under the conditions shown by this record, to attempt to impose on plaintiff a liability for rental value, or for earnings it should have made, is to resort to a standard too vague and speculative for safe use; but we think it will impose upon plaintiff a suitable burden on account of the business hazards which it deliberately accepted, and will, at the same time, not unduly relieve defendant, to require that defendant repay the purchase price with interest at the legal rate, and to require the plaintiff to account for the depreciation each year and for any net earnings which it may have received in any season over and above the stated depreciation. The theory of this is that plaintiff, for the business chances and opportunity which it desired and which it has had, must pay at least the amount of the regular and normal wear and tear and depreciation of the property which it has been using, and this fixed liability—or liability at all events—it must balance against its chance to have made a much larger sum as profits, and that in addition plaintiff must account for any sum which it actually did receive in each season above this arbitrary liability. It should not be required to pay, for any one season, both depreciation and its entire net receipts, but only the excess of its net receipts above depreciation. This is only accounting for earnings, but is requiring plaintiff to earn at least this minimum. It should also account for interest upon all net earnings which it actually did receive in any season, whether above or below this arbitrary standard. This liability to pay interest upon the fund which was accumulating in its hands, and computed from the time of receipt, is the equitable counterbalance to the defendant's liability to pay interest on the fund which it received. The fund received and retained in the hands of defendant, and ultimately to be returned to the plaintiff, is allowed to draw interest; it is only treating both parties alike to say that the fund accumulating in the hands of plaintiff and eventually to be (in effect) paid to defendant should likewise draw interest.

This principle is not affected by the fact that in a single season plaintiffs may have made no profits, or may even have suffered a loss. The seasons are very distinct. Each may well be considered an independent unit. In some other business, it might be that the whole period would be the appropriate unit; but we are dealing with the facts of this case. To permit the loss suffered during a properly separable and independent period to be deducted from the gains made during other independent periods is in effect to permit the recovery of damages which are too speculative and remote. Plaintiff is treated with sufficient liberality in holding that it need not account for profits which

perhaps it should have made but did not. Interest computations should be made from the close of each season—from January 1st would be a suitable date—and should be continued until the date of filing the bill. At that date, plaintiff had done everything possible to rescind, and the decreed rescission should take effect by relation as of that date, and the net amount so fixed bear interest from that date.

Except as here indicated, the decree below will be affirmed. Appellant will recover the costs of this court. The entry of an order remanding will be delayed 20 days from the filing of this opinion. If within this time, counsel can stipulate as to the decree which should be entered below pursuant to this opinion, the order will direct the entry of that decree, and our order will then be final (Merrill v. National Bank, 173 U. S. 131, 134, 19 Sup. Ct. 360, 43 L. Ed. 640), so that there will be no lack of finality to embarrass any available review. In the absence of such stipulation, the case will be remanded in order that the necessary computations may be made below and a decree then entered pursuant to this opinion.

AMERICAN SHIPBUILDING CO. v. COMMONWEALTH S. S. CO.

(Circuit Court of Appeals, Sixth Circuit. June 2, 1914.)

Nos. 2484, 2485.

CORPORATIONS (§ 589*)—CONSOLIDATION—MERGER—CONTRACTS.

Separate corporations, each of which owned and operated a steamship on the Great Lakes, and some of which had common stockholders, owing to a falling off in business, and to cut off the expense incident to the unnecessary and unprofitable operation of all the vessels, decided to place the ownership of all in one corporation, and to that end one increased its capital stock and exchanged such additional stock for that of the others, which thereupon transferred to it all of their property, including all choses in action, claims and demands, and were then dissolved. *Held*, that such transaction was in effect a merger or successorship in interest, and not a transfer of property from one owner to another, and that on a subsequent discovery that the contracts by which the several corporations acquired their vessels were voidable for fraud of the seller, which was the same in each case, the succeeding corporation could exercise their right of election to rescind such contracts and maintain suits to enforce such rescission.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2354–2360; Dec. Dig. § 589.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; Wm. L. Day, Judge.

Two suits in equity by the Commonwealth Steamship Company against the American Shipbuilding Company. Decrees for complainant (197 Fed. 797) and defendant appeals. Modified and affirmed.

These are companion cases to American Shipbuilding Company v. Commonwealth Steamship Company, 215 Fed. 296, — C. C. A. —, No. 2483, an opinion in which is this day filed. The controlling facts are so closely analogous to the facts in that case as not to require further statement, except in one particular.

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

The steamship Sheldon Parks was built for and delivered to the Cuyahoga Steamship Company, for the price of $410,000, out of which the Hawgoods received a secret commission of $25,000, and the steamer J. Q. Riddle was furnished to the Milwaukee Steamship Company for the same price and with the same secret commission. Each of these corporations was a company organized for the purpose of buying and operating the boat which it did acquire, and the steamboats Abraham Stearns, Sheldon Parks, and J. Q. Riddle were separately operated till 1911. There were four other boats similarly promoted and built and sold, the entire seven within two or three seasons. The seven distinct corporations had many common stockholders, but there was nothing approaching identity of stock interests, and the chief thing in common was that all were operated and managed by the same agents.

Before 1911, it developed that in the business conditions which had then arisen there was not traffic enough for all the boats, and that it would be better policy to keep part of the boats fully occupied and the remainder tied up, whereby the total overhead expenses would be vastly lessened; but the lack of common ownership made this plan not feasible. In addition, it was difficult for the common agents to distribute the business among the boats without continual dissatisfaction. With these as the main reasons, it was, in the spring of 1911, determined to put all seven boats into the ownership of one corporation. Accordingly, the capital stock of the Commonwealth Company was sufficiently increased, and all the stockholders in the other six corporations surrendered and canceled their stock therein and received in exchange practically the same amount of stock in the Commonwealth Company. All the stock had been originally issued to represent the purchase price of the boats (above the bond issue) at par, and the same figures were used when the exchange stock was issued in the Commonwealth Company, except that there was a slight change designed to equalize more perfectly. Thereupon, each of the other corporations, including the Cuyahoga Company and the Milwaukee Company, executed and delivered to the Commonwealth Company a formal transfer and conveyance of "all properties of every kind and all choses in action and of all claims and demands of whatever kind and nature whether in law or in equity." The Commonwealth Company assumed all the indebtedness of the assignor companies, and each of the latter, including the Cuyahoga and Milwaukee Companies, was, under the laws of Ohio, formally dissolved and wound up.

A. C. Dustin and Richard Ingles, both of Cleveland, Ohio, for appellant.

A. B. Thompson, C. P. Hine, and C. R. Bissell, all of Cleveland, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). Upon this state of facts, defendant urges that the sale of their steamers by the Cuyahoga Company and the Milwaukee Company, before these companies had elected to rescind the purchase from the defendant, did not give to their vendee, the Commonwealth Company, any power to exercise such an election. Plaintiff insists that each of its assignor companies had been defrauded, and that the right to pursue any appropriate remedy for this fraud passed to it by assignment; defendant concedes this position as to the right to sue for damages for the fraud, but denies it as to the right of rescission, because no right of action to enforce a rescission arose until the election had been made. It is clear that the difficulties in the way of permitting a rescission to be made by the vendee of a defrauded vendee are considerable, and

where the property had been sold by the original vendee at a reduced price because of the damage resulting from the then undiscovered fraud, and where the second vendee sought to rescind without regard to the rights of the first vendee, these difficulties might be insuperable. We find it unnecessary to follow counsel in their exhaustive arguments and study of precedents involving these questions. The objection to allowing a rescission by a second vendee rests on the affirmance implied from the sale by the first vendee and on the thought that the right of election is a strictly personal right. This objection of course disappears if there has been no transfer from one person to another, but if substantial identity of ownership continues. The facts of the transaction, by which the properties of the Cuyahoga Company and the Milwaukee Company came to the Commonwealth Company and the stockholders of the former exchanged their stock for that of the latter, stamp it as substantially and equitably a matter of merger or successorship in interest, rather than of assignment between strangers. Williams v. American Ass'n (C. C. A. 6) 197 Fed. 500, 118 C. C. A. 1; Bank v. McIntyre, 40 Ohio St. 528; Shadford v. Detroit Ry., 130 Mich. 300, 89 N. W. 960; Church v. Railroad (C. C.) 41 Fed. 564; note, vol. 11, L. R. A. (N. S.) 1125, 1127–1130. The distinction would be, for some purposes, not at all important, but from the standpoint of the court of equity decreeing rescission, it becomes sufficient. The Cuyahoga Company and the Milwaukee Company are out of existence, no person interested can ever be called upon to respond to either of them, and the right to exercise an election and demand a rescission must go to their successor corporation.

We do not see any controlling distinction in the fact that other stockholders than the original ones of the Cuyahoga Company and the Milwaukee Company have become beneficially interested in the recovery. The same thing is equally true in the other case, No. 2483, where the recovery will inure for the benefit of all the new as well as all the old stockholders of the Commonwealth Company, and the same thing is true in regard to any corporation whose stockholders are changing.

The plaintiff, in each of these cases, is entitled to relief for the same reasons and to the same extent discussed in the opinion in No. 2483, and corresponding orders will be entered in these two cases.

STATE OF IOWA et al. v. OLD COLONY TRUST CO. OF BOSTON, MASS., et al.

(Circuit Court of Appeals, Eighth Circuit. April 1, 1914.)

1. RAILROADS (§ 214*)—DUTY TO OPERATE ROAD—ABANDONMENT OF BRANCH OR CONNECTING LINE.

While as a general rule it is the duty of a railroad company to maintain its entire line of road in a reasonably safe and operative condition, and to operate the same, there may be conditions which will excuse the full performance of this duty, and justify the abandonment of a branch or connecting line which cannot be operated without great loss and for which there is no great public necessity.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 711, 712; Dec. Dig. § 214.*]

2. RAILROADS (§ 215*)—DUTY TO OPERATE—RIGHT TO ABANDON BRANCH OR LATERAL LINE.

Defendant railroad company owned and operated an electric line of road 125 miles long which was of large public importance. It also owned and operated by steam a connecting line 27 miles long which was not equipped for operation by electricity. This line was little used and there was little public necessity for its operation. It did not pay operating expenses, was in a dilapidated and dangerous condition for use, and required the expenditure of a large amount of money to rehabilitate it. Defendant was hopelessly insolvent, and a suit for foreclosure of mortgages on its property was pending in which receivers had been appointed who had operated the steam line at a large loss, and under an order of the court had tried unsuccessfully to sell the same. Neither defendant nor the receivers could obtain the money necessary to put it in safe operative condition and to require its operation by any purchaser of the entire property would seriously embarrass, if not prevent, the successful operation of the electric line. *Held*, that under such conditions neither defendant nor a purchaser was under the duty to continue to operate such steam line.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 215.*]

3. RAILROADS (§ 207*)—FORECLOSURE SUIT—JURISDICTION OF COURT TO ORDER ABANDONMENT OF PORTION OF ROAD.

In such case the federal court in which the foreclosure suit was pending had jurisdiction in such suit, on petition of the receivers, defendant, and the creditors interested in the property, to order the receivers to abandon the steam portion of defendant's road, to dismantle the same, and sell the salvage for the benefit of the creditors.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 683, 684; Dec. Dig. § 207.*]

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

Suit in equity by the Old Colony Trust Company of Boston, Mass., and others, against the Ft. Dodge, Des Moines & Southern Railroad Company. From an order directing receivers to abandon and dismantle a portion of defendant's line of railroad, the State of Iowa and others appeal. Affirmed.

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

In a suit to foreclose a mortgage given by the Ft. Dodge, Des Moines & Southern Railroad Company to secure the payment of a large issue of bonds, the court below, on the petition of the receivers appointed in that case, joined in by the railroad company itself, by the Old Colony Trust Company, complainant in the foreclosure suit, and by the American Trust Company, an intervener in that suit and trustee in a second or junior mortgage given by the railroad company to secure an issue of $3,500,000 of refunding bonds. on December 7, 1912, made an order directing the receivers to dismantle and abandon a stretch of about 27 miles of the road in their possession, extending from Goddard near its southeastern extremity to Des Moines Junction and to sell and dispose of the rails, ties, and other movable property constituting the roadbed along that stretch and also to sell as an entirety so much of the line of road as lies between Colfax by way of Goddard and Newton. From this order the state of Iowa, the railroad commissioners of that state, and some individual patrons along the line of the road prosecute an appeal.

Prior to the filing of that petition, the state of Iowa joined by several patrons of the road had filed a petition to compel the receivers to continue the operation of the line sought to be abandoned. The petition was heard by the court on voluminous evidence taken, and overruled. At that hearing the court found that there was not sufficient public patronage on that line to justify its continued operation, but ordered the receivers to continue its operation in a limited way for a period of four weeks, and that for a period of 90 days special efforts should be made to sell or lease the line to some party or parties who would operate it; and if neither of these expedients proved successful that an application for its abandonment would be considered. The parties seem to have acquiesced in this order. No appeal was taken from it. Neither of these expedients proved successful, and the present petition of the receivers to abandon followed.

The petition stated that the main line of road extending from Des Moines through Des Moines Junction to Rockwell City and other places had been constructed, extended, and reconstructed so as to form at the time the petition was filed a continuous connected system operated by electricity of about 125 miles; that the line extending from Des Moines Junction southeasterly to Goddard and thence to Newton had never been reconstructed like the balance of the system so as to be operated by electricity, but was operated by steam; that it was in a dilapidated and unsafe condition with ties rotten and bridges out of order; that to repair it so as to operate it by steam would require an expenditure of $125,000, and to repair and equip it for operation by electricity would require an additional amount of $275,000; that the receivers had no money and no means for raising the money for either such purpose; that there were few patrons only residing or doing business on this steam line that could not be accommodated by other lines of road constructed and operated in that region; that there was little public necessity for the operation of this line; and that the attempt to do so would imperil the successful operation of the balance of the system for which there was a great public necessity.

The petition stated that a part of this line located near its southeastern extremity extending from Colfax to Newton by way of Goddard, a distance of about 14 miles, was by reason of the fact that it could be used as a connection between a Des Moines interurban line and Newton, of some value above its junk or dismantled value, and might be sold for its reasonable value to the interurban line.

The prayer was that the petitioners might be authorized to dismantle and abandon the line of road between Des Moines Junction and Goddard and dispose of the salvage as best they could and that they might be authorized to sell the short line between Colfax, via Goddard and Newton, and that the court would order a proper and equitable disposition of the proceeds of such sales. There was also a prayer for general relief.

The state of Iowa by its Attorney General and the railroad commissioners

of that state and some residents along the line sought to be abandoned, intervened and joined issue with the petitioners on the averments of the petition and pleaded affirmatively that there was an implied contract between the state and the original railroad company which constructed the line of road sought to be abandoned, that it should be perpetually operated, and that on the assurance that it would be perpetually operated certain persons had made donations and subscriptions for the construction of the road, and for that reason estoppel arose against its abandonment.

The issues so joined were submitted to the court "on the evidence and on the argument of counsel"; but no such evidence is preserved in the record. We therefore cannot enter upon any original consideration of the testimony introduced before the trial court. All we have are the pleadings and facts found and incorporated in the order and decree of December 7, 1912, appealed from in this case.

The question therefore is whether on the pleadings and facts found the District Court erred in ordering the dismantling and abandonment and the sale and disposition respectively of the two portions of the line in question.

The decree discloses the following facts: On June 4, 1910, when the foreclosure suit was instituted, the Ft. Dodge, Des Moines & Southern Railroad Company was hopelessly insolvent. There were then outstanding bonds secured by the mortgage being foreclosed amounting to $3,500,000 in face value. There had been expended by the Ft. Dodge, Des Moines & Southern Railroad Company and the Newton & Northwestern Railroad Company, its predecessor, in the way of construction and reconstruction of the system of road, the aggregate sum of $5,146,189. There never had been net earnings available to pay interest on the mortgage debt or any return on the investment. Under orders of the court efforts had been made by the receivers and by Robert Ryan, one of the attorneys of patrons of the road residing along its line who had been appointed special master for that purpose, to sell, lease, or otherwise dispose of the line of road sought to be abandoned to some person or company that would operate it, but such efforts had proven ineffectual.

The decree then in the language of the trial court proceeds as follows:

"The court finds that the line of road from Des Moines Junction to Newton, and the line from Colfax to Goddard, is in a very dilapidated condition, and, not being operated, it is impossible to care for same, and the same is in a much more dilapidated and run down condition than it was at the commencement of this foreclosure proceeding, and such line of road is rapidly depreciating in value; that the bridges need rebuilding, the tracks need reconstruction and new ties, and it would be dangerous and impossible to operate said line of road in its present condition. The court further finds: That the said Ft. Dodge, Des Moines & Southern Railroad Company and its receivers have no equipment, motive power, or rolling stock with which such line of road could be operated. * * * That the portion of the line sought to be abandoned could not be safely operated without being rebuilt or reconstructed, and to rebuild and reconstruct this line of road, so that same could be operated by steam, with reasonable safety, would require an expenditure of at least $126,000, that, if the said line of road above described was electrically equipped, so that same could be operated with electricity, as the balance of the line of the Ft. Dodge, Des Moines & Southern Railroad is operated, it would require an additional expenditure of at least $147,000, making the financial outlay necessary to electrically equip the said line of road from Des Moines Junction to Newton, with the branch from Colfax to Goddard, in excess of $273,000. That the receivers of the Ft. Dodge, Des Moines & Southern Railroad Company, and the said railroad company, are wholly without means or credit to so reconstruct and rehabilitate said line of road.

"The court further finds that during the ten months from January 1 to November 1, 1910, while the said line of road from Des Moines Junction to Newton, a distance of 37 miles, was being operated, the gross earnings for

such period were $25,266.45 less than the operating expenses, and in this deficit of operation expenses over gross earnings there was not included any charge for the maintenance of locomotives or freight cars, nor was there included any item of interest or general depreciation of the property. The court finds that at this time the said Ft. Dodge, Des Moines & Southern Railroad Company is wholly insolvent; that there is outstanding, in bonds secured by the first mortgage, held by the Old Colony Trust Company, complainant herein, $3,500,000 with accrued interest; that there are outstanding bonds, secured by second mortgage, held by the American Trust Company, intervener, in the aggregate sum of $2,773,900 with accrued interest, and, in addition to these amounts, there are obligations of the receivers, issued and incurred in this foreclosure proceeding, and used in the reconstruction and preservation of the electrically operated portion of said road, in excess of $800,000; that the said Ft. Dodge, Des Moines & Southern Railroad Company, and its receivers, are wholly without means with which to equip, reconstruct, and operate the portion of the line of road sought to be abandoned, and are without ability or credit to raise a sum sufficient to operate same.

"The court further finds that the portion of the railroad sought to be abandoned will not pay its mere operating expenses; that the public patronage and the interest of the public in such line is not sufficient to justify the operation of same; that, in effect, the present condition of the said Ft. Dodge, Des Moines & Southern Railroad presents two systems of railroad, one operated by electricity and the portion sought to be abandoned, which has been heretofore operated by steam; that the revenues of the entire line of said road would not justify the reconstruction and operation of that portion of the road sought to be abandoned; that the present line of road, as now operated by electricity, consists of about 125 miles of main line; that the continued operation of said electric line is of large public interest to the citizens of the state of Iowa; that, as at present operated, said electric line gives frequent service between the important cities of Des Moines, Ames, Boone, Ft. Dodge, and Rockwell City, and serves a populous portion of the state of Iowa; that up to this time there have been no net earnings on such electric line, in excess of the requirements of operation and proper maintenance, and the court finds that if it should compel the receivers, or subsequent purchasers of the line sought to be abandoned, to operate same, it would seriously embarrass if not prevent the successful operation of the entire line of road, and would prevent the reorganization of the said electric line of road, and any effort made to place same in a solvent and prosperous condition.

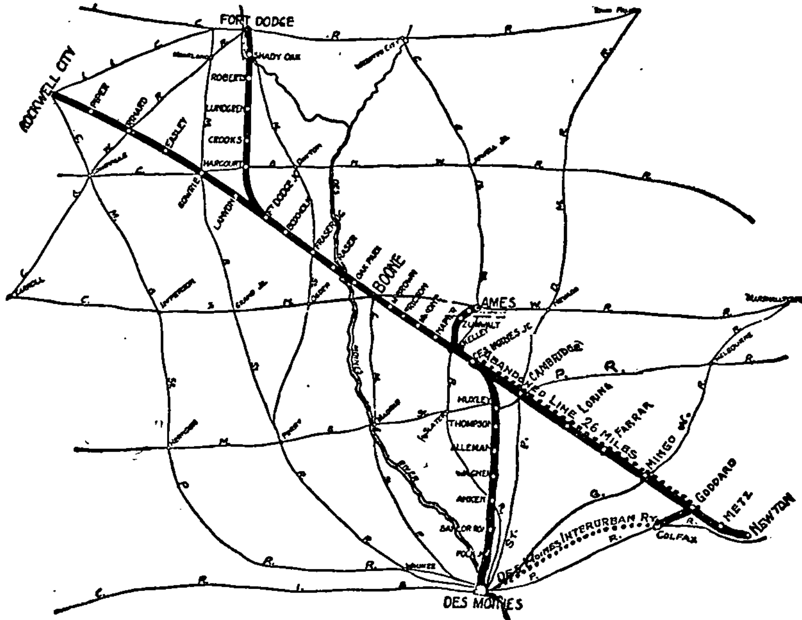
"The court further finds that the line of road from Des Moines Junction in Story county, Iowa, to Goddard, in Jasper county, Iowa, a distance of some 27 miles, should be permanently abandoned, and that the receivers, subject to the terms and conditions hereinafter described, should be and are hereby authorized to permanently remove and dispose of, for the benefit of the parties interested herein, all the salvage and property upon said line.

"The court further finds that the said line of road from Colfax, in Jasper county, Iowa, to Newton via Goddard, in Jasper county, Iowa, a distance of some 14 miles, should, if possible, be disposed of to some person or corporation which will operate same, and that, under the terms and conditions hereinafter expressed, the receivers should be and are hereby authorized and empowered to so dispose of said line of road."

Then follows the order and decree itself authorizing the receivers to permanently abandon the line of road extending between Des Moines Junction and Goddard and dispose of its rails, ties, spikes, switches, station houses, platforms, and property of every kind and description, save and except the right of way, and authorizing the receivers to sell as an entirety so much of the line of road as lies between Colfax and Newton, via Goddard, all subject to the approval of the court.

The court then reserved jurisdiction to make such orders as to the disposition of the proceeds of sale as might seem right.

For a clear apprehension of the physical facts of the case, a blueprint showing the location of the road sought to be abandoned and its relation to the electric system and to other roads intersecting it is here reproduced:



Robert Ryan, of Des Moines, Iowa (F. G. Ryan, of Des Moines, Iowa, on the brief), for appellants.

George Cosson, of Des Moines, Iowa, for appellants State of Iowa and for Railroad Commissioners of Iowa.

James C. Davis, of Des Moines, Iowa (S. R. Dyer, of Boone, Iowa, and Currier, Rollins, Young & Pillsbury, of Boston, Mass., on the brief), for appellees.

Before HOOK, ADAMS, and SMITH, Circuit Judges.

ADAMS, Circuit Judge (after stating the facts as above). Some general criticism of the proceedings in the foreclosure suit, of the management of the road by the receivers, of the issue of receivers' certificates for $800,000, and the expenditure of that amount of money in the improvement or operation of the main line, hereinafter sometimes referred to as "the electric line" instead of upon the line sought to be abandoned, hereinafter sometimes referred to as "the steam line," was indulged by counsel for appellant in their argument, but in their brief they reduce the questions for our consideration to a narrow compass. At the outset they disclaim any intention of seeking a review of (1) the order appointing the receivers, or continuing them in the operation of the road, (2) or of the order allowing the receivers to cease operation of the steam line pending the foreclosure proceeding, (3) or of the order authorizing the issue of receivers' certificates, (4) or of

the finding that the operation of the steam line had been at a loss. Two propositions only are argued in their brief: (1) That the District Court was without power or jurisdiction in the foreclosure suit to order an abandonment of the steam line; (2) that the law imposed upon the railroad company as a consideration for the rights, privileges, and franchises granted to it by the state the duty of continuously furnishing adequate service to the public throughout its entire line even if a pecuniary loss should be sustained thereby.

It will be convenient to consider these propositions in the reverse order in which they are stated.

In view of the pleadings and record in this cause and of the disclaimer of counsel, we are relieved from any consideration of the causes which brought the steam line into the physical condition disclosed by the record, and for the purpose of determining whether the court below erred in ordering that line abandoned we must view its condition as it stood at the time of the hearing in the trial court, and, inasmuch as there is no evidence preserved in the record relating to that condition, we must take the facts disclosed by the pleadings and the findings of the trial court as expressed in its final order of December 7, 1912, authorizing the abandonment, to be true. They are stated with much detail in the preceding statement of facts but may be summarized as follows: The short stretch of road sought to be abandoned is equipped for operation by steam only, while the balance or main part of the system is equipped for operation by electricity; there is little public necessity for the continued operation of the steam line; it is in a wretched physical condition, unfit and dangerous for use and requiring the expenditure of a large amount of money to rehabilitate it; the railroad itself is hopelessly insolvent; neither it nor the receivers have money or means for raising money requisite for such a rehabilitation; the continued operation of the main or electric line is of large public importance; the steam line in and by itself does not pay its operating expenses, and to compel the receivers or any subsequent purchasers of the property to operate it would seriously embarrass if not prevent the successful operation of the electric line; the revenues of the entire line of road do not justify the reconstruction and operation of the portion of it sought to be abandoned.

[1, 2] A railroad corporation is in an important sense a public corporation. It is dependent upon the public for its franchises to exist and carry on business, and in consideration of these franchises it assumes and must perform certain duties and obligations for the benefit of the public. Among them, as a general rule, is the duty of maintaining its entire line of road in a reasonably safe and operative condition and for a fair consideration to carry passengers and freight over it at all reasonable times whenever requested to do so. These propositions are elemental and lay down a general rule which cannot be gainsaid or denied. But there are some conditions which necessarily excuse full compliance with the requirements of these rules and, in our opinion, the present case affords a striking example of such conditions. Here is a case where the line sought to be abandoned is not only not self-supporting, but its continued operation jeopards the

successful operation of the entire ystem of which it is merely a part. Moreover, its continued operation in its present condition is dangerous to life and property and there is no money or financial ability to improve its condition. Not only so, but there is little public necessity for its continued operation, whereas, there is a great public necessity for the continued operation of the balance of the system.

In such circumstances the railroad company may abandon such an unprofitable and irreclaimable part of its road and neither the state nor unfortunate investors along the line can justly complain. They cannot force a railroad company to do the impossible Jack v Williams (C. C.) 113 Fed. 823; Id., 76 C. C A. 165, 145 Fed. 281; Commonwealth v. Fitchburg Railroad Co 12 Gray (Mass.) 180; People v. Albany & Vermont Railroad Co, 24 N. Y. 261 82 Am. Dec 295; Morawetz on Private Corporations, § 1119. The principles announced in these cases seem especially applicable to railroads organized under and subject to the laws of the state of Iowa. In that state authority is directly conferred to change or remove a line of road after it has been permanently located and constructed. Such is the declared public policy of the state. Sections 2092–2098, Iowa Code 1897. This statute is invoked for another purpose presently to be considered, and reference is now made to it only for the purpose of disclosing the policy of the state of Iowa, which, it is thought, is in essential harmony with the right to abandon a line of road under certain conditions.

On the assumption that the receivers and other petitioners base their petition to abandon upon the provisions of sections 2092 to 2098 of the Code of Iowa, counsel for appellants construct an argument of this kind; that, as these sections provide that any railroad company, desiring "to change or remove" a line of its road after the same has been permanently located, may file a petition "in the district court in any county wherein the change or removal is proposed to be made," and, after giving a certain specified public notice of the filing of such petition, may secure the relief contemplated by the statute, the proceeding is a special one and the district court of the state is a special tribunal designated for administering that relief and is the only tribunal authorized to do so.

Moreover, they contend that authority to "abandon" a part of a line of a road is not comprehended within the language "to relocate, change or remove," and, as a result, that the District Court of the United States has no jurisdiction over the present inquiry.

While the petitioners, after setting forth with much detail the facts already referred to, touching the inability of the receivers or of the railroad company to rehabilitate and operate the steam line and other conditions already referred to, which in their opinion rendered the abandonment of the steam line advisable, pray for leave to proceed under and in accordance with the Iowa statute, they also pray for such other and further relief as the facts justify and to equity and good conscience belong.

We have already seen that on a state of facts such as disclosed by the pleadings and proof in this case any railroad company would have been justified on general principles of the common law in abandoning

a part of its road in similar condition to that sought to be abandoned in this case, and without doubt could have received judicial sanction for such abandonment at common law irrespective of any statute. The prayer for general relief in this case is quite sufficient to enable the court to grant all proper relief whether the right be based on statute or common law.

But it is earnestly contended that receivers placed in the custody of railroad property pending foreclosure proceedings cannot initiate proceedings for abandonment, and that the court itself, in a foreclosure suit, the main purpose of which is to enforce the lien of a mortgage, had no jurisdiction to order such abandonment. In the first place, the receivers were not the only parties moving for the abandonment. They did not alone initiate this proceeding. The railroad company itself, the Old Colony Trust Company, which represented the bondholders secured by the first mortgage, and the American Trust Company, which represented bondholders secured by the second mortgage, joined the receivers in their petition to abandon. All the actual and contingent interests in the property, therefore, desired the abandonment of the line in question and prayed the court to order it.

[3] Did the court have jurisdiction in the foreclosure suit to grant the relief prayed for?

The road including the electric line and the steam line were in custodia legis to be cared for and preserved for the best interests of all concerned. The electric line 125 miles in length constituted in itself a system of considerable importance, both to the owners and to the public at large, and was in a fair operative condition; the steam line was short, of some but comparatively little public importance, was in a dilapidated, worn-out condition, unfit and unsafe for operation; no money was available for its restoration, and its operation in its then condition would have imperiled the successful operation of the more important electric system; all reasonable efforts had been exhausted to secure such a lease, sale, or other disposition of the steam line as would result in its continued operation, and these had proved unavailing; efforts had been made to operate the line in a limited way to serve the convenience of the comparatively few interested patrons; neither the parties to the suit nor others interested had taken any steps to secure a sale of the entire road, electric and steam, so as to bring about an operative reorganization of it. In these circumstances, what could the court charged with the duty of caring for and protecting the whole property have done except order the abandonment of the steam line and the sale of its salvage? It certainly could not have ordered its restoration without any money or means for raising money to defray its costs. It could not have continued to operate it and endanger the lives and property of unfortunate patrons. It ought not to have done any of these things for the convenience of a few patrons only, when by so doing it would have imperiled the successful operation of the electric line and inconvenienced many patrons. We think the court not only had the power to make the order complained of in the foreclosure suit, but that its exercise under all the facts and conditions of this case was wise and for the best interests of all concerned.

As the stretch of road extending 14 miles between Colfax and Newton via Goddard was in an inoperative and irreclaimable condition, its sale to some connecting line that might reclaim and operate it was the most reasonable disposition that could have been made of it, and, as counsel for appellants make no special complaint against that part of the order appealed from, either in their argument or brief, we shall refrain from any further consideration of it.

The decree of the District Court is affirmed.

JARRELL et al. v. COLE et al. †

(Circuit Court of Appeals, Fourth Circuit. May 5, 1914.)

No. 1244.

1. ATTORNEY AND CLIENT (§ 70*)—AUTHORITY—PRESUMPTIONS.
Where, in a suit against the administrators and heirs of a decedent to obtain a decree for the sale of real estate to pay debts, exceptions were filed to a commissioner's report by one signing himself "attorney for widow and heirs," the legal presumption is that he was the authorized attorney for the widow and heirs of the decedent.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 95; Dec. Dig. § 70.*]

2. JUDGMENT (§ 489*)—COLLATERAL ATTACK—WANT OF JURISDICTION.
Where a court has jurisdiction of the subject-matter and of the parties, its judgment cannot be collaterally attacked on the ground of its want of jurisdiction to grant the relief adjudged, because of error, insufficiency of recitals in the record, or any defect or irregularity in the pleadings or proceedings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 924, 925; Dec. Dig. § 489.*]

3. JUDICIAL SALES (§ 47*)—DECREE FOR SALE OF DECEDENT'S LANDS TO PAY DEBTS—COLLATERAL ATTACK.
A decree in a creditors' suit against the administrators and heirs of a decedent, under which real estate belonging to the estate was sold to pay debts, *held* good as against a collateral attack made after 35 years.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 89; Dec. Dig. § 47.*]

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Suit in equity by Paris Jarrell and others against James O. Cole and Clinton Crane. Decree for defendants, and complainants appeal. Affirmed.

John E. Blake, of Madison, W. Va. (Maynard F. Stiles, of Charleston, W. Va., on the brief), for appellants.

Cary N. Davis, of Huntington, W. Va (F. P. Murphy, of Madison, W. Va., and Campbell, Brown & Davis, of Huntington, W. Va., on the brief), for appellees.

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

† Rehearing denied June 2, 1914.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. This is an appeal from a decree of the District Court dismissing on demurrer the original and amended bills filed herein to set aside certain deeds as clouds upon the title of the lands therein described, which are alleged to be owned by the appellants. The material facts appear to be these:

Simeon Jarrell died intestate, in 1862, seised of several tracts of land, aggregating some 2,300 acres, in Boone county, W. Va., and leaving surviving him his widow and seven children, three sons and four daughters. The appellants are his heirs at law and those claiming under them. In 1871 a chancery suit, in the nature of a creditors' bill, was brought in the circuit court of Boone county for the purpose of subjecting the real estate of Simeon Jarrell to the payment of his debts. The facts concerning this suit, and the contentions of appellants in regard thereto, will be more fully stated as this opinion proceeds. In September, 1872, none of the parties having answered, the cause was referred to a commissioner in chancery, who made a report in February following. Upon the petition of two of the sons, the matter was recommitted to the commissioner, and he made a further report in September, 1873. Something over a year later exceptions to this report were sustained, and another commissioner appointed, one William Thompson, who afterwards made a report which was confirmed, save in a respect not now important, in September, 1875. Meanwhile there was an assignment of dower to the widow and some 300 acres set off to her. Subsequently, in May, 1876, a decree was entered in the chancery suit, which directed a sale of the lands in question unless certain debts therein specified were paid "within 30 days after the rising of this court." In accordance with this decree, the lands were sold within the following year and deeds executed to the purchasers. Under these purchasers, or their successors in title, the appellees herein assert their claims to the timber heretofore conveyed to them.

As above stated, this suit seeks to set aside the various conveyances mentioned as clouds upon the title, and also to annul the decree of the Boone county circuit court and all proceedings thereunder, on the theory that this decree is void and of no effect, because the court was wholly without jurisdiction to make it. It is not denied and cannot be doubted that the circuit court had plenary jurisdiction of the subject-matter of the suit, and also of the several parties thereto, if they were properly served with process, or came in by voluntary appearance. The charge that the decree is a nullity rests, therefore, not on any inherent lack of judicial power, but on the alleged failure of the bill of complaint to set forth facts upon which judicial power could be exerted.

This makes it necessary to examine the bill in the light of appellants' contention. The caption of the bill reads as follows:

"The Bill of Complaint of Nelson Hill, Adm'r of George Hill, Dec'd, v. Floyd C. Jarrell, Administrator, and Virgin Jarrell, Administratrix of Simeon Jarrell, Dec'd, and in Their Own Right, H. H. Hopkins, Paris Jarrell, Simeon R. Jarrell, Charles N. Mullins and Acintha Mullins, His Wife, Henry C. Mullins and Caroline Mullins, His Wife, Floyd White and Emily White, His

Wife, David Mullins, and Harriet Mullins. To the Hon. C. W. Smith, Judge of the 12th Judicial Circuit."

The bill then alleges that a judgment for the use of plaintiff had been recovered against the administrator and administratrix of Simeon Jarrell, that execution had been issued on such judgment and returned unsatisfied, and that copies of the judgment and execution marked as exhibits were filed with and asked to be made a part of the bill. It is further averred that Simeon Jarrell died intestate, seised and possessed of certain tracts of land, a list of which is given, that the title thereto appears to be vested in his heirs, and that the personal estate of the decedent is insufficient to pay the plaintiff's judgment. The prayer of the bill is that the real estate of Jarrell be decreed to be sold to pay the aforesaid judgment and costs of suit, that leave be granted to other creditors of the deceased "to come in and participate in the advantages of this suit," that a commissioner be appointed to ascertain the claims of the several creditors, and to perform such other and further order of the court as may be required in the premises, and for general relief.

It appears that the persons named in the caption of the bill included all the heirs at law then living, and that each of them was served with a summons or notice to appear before the judge of the circuit court, at rules to be held on the first Monday of the following August, "to answer a bill in chancery exhibited *against them* in our said court by Nelson Hill, administrator of George Hill, deceased."

The first and principal contention seems to be that this bill failed to confer jurisdiction to sell the lands in question, because it did not make the heirs of Simeon Jarrell, who became the owners on his decease, parties to the suit, and therefore did not bring them or the lands they inherited before the court, and because it did not set up a claim or show the existence of debts for which the estate of the decedent was liable, or allege the insufficiency of personal property belonging thereto.

To the objection that the heirs were not made parties, we think convincing answer is given by the West Virginia Code of 1868 (chapter 125, § 37), which outlines the form in which the plaintiff's bill may be framed, and also provides that:

"Every person designated in the caption of such bill as a defendant shall be a defendant therein, without a prayer that he be made such, and shall be required to answer the bill in the same manner and to the same extent as if he were therein called upon to do so."

We discover nothing in the bill under review which prevents the application of this provision, and are therefore of opinion that it operated to make the persons named in the caption parties to the suit and bring them properly before the court.

It is further said that the bill contains no averment which connects these persons with the subject-matter of the suit, or shows that anything to be done therein would affect their interests as owners of the lands in question or otherwise. But it is alleged that Simeon Jarrell died intestate, that he was possessed of certain lands which are described by tracts, and that such lands "appear vested" in his heirs at law. It is not in terms stated that the persons sued are the heirs of the de-

cedent, but this would seem to be the natural and reasonable inference from the express allegations. If the bill be otherwise sufficient, we are persuaded that the failure to show by specific averment the identity between the named defendants and the heirs of the intestate cannot be regarded as an omission which deprived the court of jurisdiction.

It is also asserted that there is no showing of any debt or claim for which the estate of the decedent was liable, or for which the real estate he left could be sold. But the bill avers that plaintiff had recovered a judgment against the personal representatives of Jarrell's estate, that execution had been issued and returned unsatisfied, and that the personal property was insufficient to pay this judgment. True, it is not alleged that the personal property was insufficient to pay all the debts of the estate; but the prayer for relief asks that leave be granted to creditors generally to come in, and that a commissioner be appointed to ascertain their several claims. If these allegations, coupled with the others mentioned, did not suffice to give the court jurisdiction, it must be because as matter of law the judgment described in the bill is not a judgment against the estate, but only against the administrator and administratrix as individuals. But the bill states that a copy of this judgment was filed with and made a part of the same, and we think it should be presumed, for the purposes of this case, that the judgment actually rendered was a judgment against the estate. Certainly the contrary presumption is not to be indulged for the purpose of defeating jurisdiction.

[1] In this connection it seems proper to refer to the controverted appearance of the widow and heirs of Jarrell in the chancery suit. After the second report of the first commissioner was presented, and in September, 1874, exceptions to both his reports were filed, setting up in substance that the accounts of the administrators had not been settled, that the creditors had not been notified as required by statute, and that the widow had not elected whether to take her dower in money or land. These exceptions are entitled in the case and signed by "Laidley, Atty. for Widow and Heirs." It is true that this recital does not specify whose widow or what heirs Laidley assumed to represent; but the only rational inference, in view of the objections stated, is that he was the authorized attorney of the widow and heirs of Jarrell, and this in our opinion is the legal presumption. Even if it should be held that this appearance, to call it such, was ineffectual to cure any defects in the bill of complaint, which we are not prepared to concede, it does at least indicate that all the parties in interest were aware of the nature of the suit and the purpose for which it was brought.

[2] The courts go to great lengths in upholding judgments and decrees which are assailed in collateral proceedings for want of jurisdiction to render them. Especially is this so where, as in the case at bar, the adjudicating tribunal had jurisdiction of the parties and the subject-matter. Indeed, it is little less than surprising to note the omissions and defects, the lack of material averments and other irregularities, which have been held insufficient to impeach jurisdiction. This branch of the law is exhaustively treated and almost numberless authorities cited in Van Fleet on Collateral Attack. In the course of an extended

discussion of the questions here involved, the learned author sets forth the principles which have been long established and refers to numerous cases which illustrate their application. For example, in section 61, p. 79, he says:

"The rule is this: Can it be gathered from the allegations, either directly or inferentially, that the party was seeking the relief granted, or that he was entitled thereto? If it can, the allegations will shield the judgment from collateral attack. All the cases agree that if the allegations tend to show, or colorably or inferentially show, each material fact necessary to a cause of action, they will uphold the judgment collaterally."

Further along in the same section is the following:

"These illustrations show that there is no connection between jurisdiction and sufficient allegations. In other words, in order to 'set the judicial mind in motion,' or to 'challenge the attention of the court,' it is not necessary that any material allegation should be sufficient in law, or that it should even tend to show facts that are sufficient. If that were the rule, the absence of any material allegation would always make the judgment void, because it cannot be said that such a complaint has any tendency to show a cause of action. It will be seen from the cases about to be cited that, when the allegations are sufficient to inform the defendant what relief the plaintiff demands—the court having power to grant it in a proper case—jurisdiction exists, and the defendant must defend himself. * * * Hence I conclude that allegations immaterial and wholly insufficient in law may be sufficient 'to set the judicial mind in motion,' and to give a wrongful but actual jurisdiction, which will shield the proceedings from collateral attack."

And again, in section 256:

"If the object of the petitioner can be ascertained from the allegations, no matter how defective they are or how many necessary ones are omitted—the court having power to grant the relief sought, and having the parties before it—the judgment is not void. * * * A judgment is never void for defects in a petition which is amendable. * * * The cases all agree that if the allegations tend to show, or colorably or inferentially show, each material fact necessary to constitute a cause of action, they will shield the judgment from collateral attack."

In support of these propositions we refer here to a few decisions which are especially applicable to the pending case:

In Grignon's Lessee v. Astor, 43 U. S. (2 How.) 319, 339 (11 L. Ed. 283), the court says:

"The granting the license to sell is an adjudication upon all the facts necessary to give jurisdiction, and whether they existed or not is wholly immaterial, if no appeal is taken. The rule is the same, whether the law gives an appeal or not; if none is given from the final decree, it is conclusive on all whom it concerns. The record is absolute verity, to contradict which there can be no averment or evidence; the court having power to make the decree, it can be impeached only by fraud in the party who obtains it. [United States v. De la Maza Arredondo] 6 Pet. 729 [8 L. Ed. 547]. A purchaser under it is not bound to look beyond the decree; if there is error in it, of the most palpable kind, if the court which rendered it have, in the exercise of jurisdiction, disregarded, misconstrued, or disobeyed the plain provisions of the law which gave them the power to hear and determine the case before them, the title of a purchaser is as much protected as if the adjudication would stand the test of a writ of error."

In Florentine v. Barton, 69 U. S. (2 Wall.) 210, 217 (17 L. Ed. 783), which seems very much in point, the following appears:

"In making the order of sale, the court [is] presumed to have adjudged every question necessary to justify such order or decree, viz., the death of the owner, that the petitioners were his administrators, that the personal estate was insufficient to pay the debts of the deceased, that the private act of assembly. as to the manner of sale, was within the constitutional power of the Legislature, and that all the provisions of the law, as to notices which are directory to the administrators, have been complied with. 'The court having a right to decide every question which occurs in a cause, whether its decision be correct or otherwise, its judgment, until reversed, is binding on every other court.' The purchaser, under such a sale, is not bound to look further back than the order of the court, or to inquire as to its mistakes."

In Kirk v. Hamilton, 102 U. S. 68, 78 (26 L. Ed. 79), the court says:

"He knew, as we have seen, that the defendants claimed the property under a sale made in an equity suit to which he was an original party. The sale may have been a nullity, and it may be that he could have repudiated it as a valid transfer of his right of property. Instead of pursuing that course, he, with a knowledge of all the facts, appeared before the auditor and disputed the right of certain creditors to be paid out of the fund which had been raised by the sale of his property. He forbore to raise any question whatever as to the validity of the sale, and by his conduct indicated his purpose not to make any issue in reference to the proceedings in the equity suit. Knowing that the defendants' claim to the premises rested upon that sale, he remained silent while the latter expended large sums in their improvement, and, in effect, disclaimed title in himself. He was silent when good faith required him to put the purchaser on guard. He should not now be heard to say that that is not true which his conduct unmistakably declared was true, and upon the faith of which others acted."

In Lemmon v. Herbert, 92 Va. 653, 24 S. E. 250, it is said:

"The court here had the power to decide whether the case made by the bill was within the jurisdiction of a court of equity, and, having proceeded in the case to a final decree, must of necessity have determined that question in favor of its jurisdiction. It may have erred in its decision, but such error would not avoid its decree. The decree would merely be erroneous, but conclusive until reversed or vacated. This court could not determine whether the case was one of equitable jurisdiction or not without an inquiry into the facts; and, where inquiry is necessary, a decree, however erroneous, is not void" (citing several decisions).

And the same doctrine is announced, with convincing argument and citations, in a recent case in this court. Wood v. Browning, 176 Fed. 273, 100 C. C. A. 161.

We have carefully examined the dozen or more West Virginia cases referred to in the briefs of appellants' counsel, and find nothng at variance with the views herein expressed, or the principles laid down in the opinions from which we have quoted. These cases certainly afford no indication of a different rule in that state from the rule which prevails in other jurisdictions. With a single exception (Oneal v. Stimson, 61 W. Va. 551, 56 S. E. 889), all the West Virginia decisions cited, which have any bearing upon the present controversy, are cases in which direct appeal of some sort was taken in the original suit. The Oneal Case was brought to partition lands in which an interest was owned by certain infants, who were not made parties or served with process. For that reason it was held that the sale ordered was not binding upon them, and that they could maintain an action against the purchasers. In this case, as we hold, all the persons who then owned the lands in question were made parties defendant and properly brought into

the Circuit Court; and, since that court had full jurisdiction of these parties and of the subject-matter involved, we are of opinion that the allegations of the bill, however incomplete or defective, were sufficient to authorize the court to proceed with the case, and to protect its action from collateral attack. In short, we are persuaded that the appellants cannot maintain this suit upon the theory that the court which directed the sale was without jurisdiction.

The further contention is made that, even if the bill of complaint was sufficient to give the Circuit Court jurisdiction, the decree of sale is nevertheless a nullity, because it does not establish any debts or claims against the estate or determine the want of personal property to pay the claims set forth in Commissioner Thompson's report. This contention is believed to be answered by what has already been said, and the argument need not be repeated. It may, however, be observed of this report, which was confirmed by the court, that it indicates a painstaking attempt to set forth the actual condition of the estate at that time, for it includes, among other things, a list of the unpaid claims and a schedule of the several parcels of land owned by decedent, with the estimated value of each parcel. It is, perhaps, also worthy of note that the aggregate amount of claims listed approached the gross valuation of all the real estate sold, and considerably exceeded the sum obtained therefor after apparent effort to get a larger price.

[3] The decree of sale may be inartificially drawn, in the estimation of trained and experienced lawyers, but it carries on its face evidence that it was not carelessly prepared. To our minds the inaccuracies shown are matters of form, rather than of substance, and we are constrained to hold that it was adequate to accomplish its intended purpose. It is one thing to say that a decree may be set aside on direct appeal, because it fails to recite jurisdictional facts, or is otherwise defective; it is quite another thing to say that such a decree is equally open to attack in a collateral proceeding. Indeed, we regard the doctrine as elementary, where a court has jurisdiction of the parties and the subject-matter, and is acting within the general scope of its authority, that no collateral inquiry will be permitted respecting the regularity or sufficiency of its proceedings. And this is undoubtedly the settled law of West Virginia.

"Where a court has jurisdiction of the parties and the subject-matter in the particular case, its judgment, unless reversed or annulled in some proper proceeding, is not open to attack or impeachment by parties or privies in any collateral action or proceeding whatever." Lee v. Smith, 54 W. Va. 98, 46 S. E. 355.

It was upwards of 35 years after the sale of Simeon Jarrell's land before this suit was instituted, and that sale should not now be disturbed, except for reasons which are found to be conclusive. We are convinced that such reasons are not disclosed in the record on this appeal.

In our judgment, the case was correctly decided by the learned District Judge, and his decree will therefore be affirmed.

STAPLES et al. v. ADAMS, PAYNE & GLEAVES, Inc.

In re T. W. KIRKBRIDE, Inc.

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

No. 1225.

1. MECHANICS' LIENS (§ 113*)—RIGHTS AS TO MONEY DUE CONTRACTOR—CONSTRUCTION OF STATUTE—"OWNER."

Code Va. 1904, § 2479, provides that a subcontractor may give notice in writing to the owner of his contract, stating the probable amount of his claim, and, on furnishing the owner, within 30 days after completion of the contract, with a correct copy of his account, the owner shall be personally liable for the same, provided it does not exceed the sum due from him to the general contractor when the notice is given or which thereafter becomes due under the contract. *Held* that, within the meaning of such statute, the "owner" is the person who contracts as such for the erection of the building, regardless of who owns title to the land; that where a railroad company contracted for the erection of a building on land of which it was in fact the owner, although the title was in a subsidiary company of which it owned all the stock, notice by a subcontractor was properly given to the railroad company.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 148; Dec. Dig. § 113.*

For other definitions, see Words and Phrases, vol. 6, pp. 5134–5151; vol. 8, p. 7744.]

2. MECHANICS' LIENS (§ 113*)—RIGHTS AS TO MONEY DUE CONTRACTOR.

Under such statute, as construed by the Supreme Court of Appeals of the state, a subcontractor cannot avail himself of its benefit unless he serves his notice prior to or during performance of his contract and before its completion.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 148; Dec. Dig. § 113.*]

3. MECHANICS' LIENS (§ 113*)—"SUBCONTRACTOR."

One who furnished materials to a contractor for the construction of a building is not a "subcontractor" and entitled to the benefits of a mechanic's lien statute as such, unless the same were furnished under a continuing contract and not purchased separately on orders as needed.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 148; Dec. Dig. § 113.*

For other definitions, see Words and Phrases, vol. 7, pp. 6704, 6705; vol. 8, p. 7806.]

4. MECHANICS' LIENS (§ 113*)—RIGHT TO BENEFIT OF STATUTE—CONTRACT.

A subcontract to furnish materials for a building terminated on the making of a general assignment by the contractor, and materials subsequently furnished to the owner, who completed the building, are not chargeable thereunder for the purpose of extending the time for filing a lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 148; Dec. Dig. § 113.*]

Appeal from the District Court of the United States for the Western District of Virginia, at Roanoke; Henry Clay McDowell, Judge.

In the matter of T. W. Kirkbride, Incorporated, bankrupt. From an order adjudging a fund in court to Adams, Payne & Gleaves, Incorporated, A. P. Staples, Jr., trustee, and W. A. Bodell and others, mechanic's lien creditors, appeal. Reversed.

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

A. C. Hopwood and A. B. Hunt, both of Roanoke, Va. (L. J. Holland, of Bluefield, W. Va., and Poindexter & Hopwood, of Roanoke, Va., on the brief), for appellants.

M. M. Caldwell and H. T. Hall, both of Roanoke, Va. (C. S. McNulty, of Roanoke, Va., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. In the latter part of April, 1910, the Norfolk & Western Railway Company entered into a written contract with T. W. Kirkbride, Incorporated, a Virginia corporation, whose home office was in Roanoke, for the construction of a railroad Y. M. C. A. building at Crewe, Nottoway county, Va. The contract price agreed upon was $25,670.

As may here be stated, the title to the land on which this building was erected was held by the Virginia Company, which is a Virginia corporation organized by the Norfolk & Western Railway Company for the purpose of taking title to such lands as it might desire to purchase without subjecting them to the lien of the general mortgages covering its railroad property. Of the 1,000 shares of stock of the Virginia Company, 993 were owned by the railway company; the other seven shares being issued to its directors, all of whom were officers or directors of the railway company. The officers and directors of both companies were the same. The railway company furnished the funds with which the land at Crewe was bought, and the Virginia Company not only claims no interest in this land, except as the holder for convenience of the legal title, but avers that the railway company is the beneficial owner thereof and entitled to a conveyance of the same whenever requested.

For use in the construction of the building in question, the contractor, T. W. Kirkbride, Incorporated, purchased some thousands of dollars worth of materials from the appellee, Adams, Payne & Gleaves, Incorporated, which is also a Virginia corporation carrying on business at Roanoke. From the account of sales as printed in the record, upon which some further comment will be made later in this opinion, it appears that the materials furnished by this concern between May 6, 1910, and November 7, 1910, amounted in the aggregate to $6,106.66, of which $1,345.20 had been paid in cash and freight charges prior to the last-mentioned date.

Not long afterwards, T. W. Kirkbride, Incorporated, became financially embarrassed, and on December 30, 1910, made a general assignment for the benefit of its creditors; the deed of assignment being recorded on the following day in the clerk's office of the corporation court for the city of Roanoke. At that time the Y. M. C. A. building at Crewe was about 90 per cent. finished. The assignee continued the work to some extent until January 12, 1911, when he abandoned it altogether, for reasons which do not appear. The railway company thereupon took possession and completed the building, as it had a right to do under the terms of its contract. For this purpose the railway company procured materials from appellee to the amount of $367.31, but appellee charged the same to the contractor, in continuation of the previous account, and declined to accept pay therefor from

the railway company. Prior to the assignment the railway company had paid on account of the contract price the sum of $21,324.08, including freight charges of $595.56, and the amount expended in completing the contract, between January 12th and February 15, 1911, was $1,007.46, leaving an admitted balance of $3,338.46, which is the subject of this litigation.

In the meantime, on January 4, 1911, Adams, Payne & Gleaves, Incorporated, served notice on the railway company, under section 2479 of the Code of Virginia, to the effect that it was furnishing materials to the contractor, T. W. Kirkbride, Incorporated, for the erection of said building, and that the probable amount of its claim would be $7,000, and asked the railway company to retain a sufficient amount to pay its demand from the moneys remaining due on the contract. This notice was served on the railway company but not on the Virginia Company. About this time a number of mechanics' liens were filed by various creditors in the circuit court of Nottoway county against the Virginia Company, the Norfolk & Western Railway Company, and T. W. Kirkbride, Incorporated, for materials furnished and work done in the construction of said building, and in March following suits were brought in that court for the purpose of enforcing such liens.

On February 15, 1911, which was within 30 days after the completion of said building, Adams, Payne & Gleaves, Incorporated, served an itemized and verified statement of their claim on the treasurer of the railway company, and also, three days later, on the secretary and treasurer of T. W. Kirkbride, Incorporated, but no service was made or attempted to be made on the Virginia Company. Thereafter, at the first April rules, 1911, of the corporation court, Adams, Payne & Gleaves, Incorporated, filed suit against the railway company, based upon the notice served as above stated, to recover the sum of $5,182.77, with interest from January 28, 1911, which was the unpaid balance for materials it had furnished for the construction of the building in question. This balance included the $367.31 for items furnished after the assignment of the contractor.

Thereupon, on May 12, 1911, and before the suit just referred to came to trial, the railway company filed a bill in the same court, in the nature of an interpleader, setting up the facts relating to its contract with T. W. Kirkbride, Incorporated, and also the fact that suits had been brought to enforce the mechanics' liens mentioned, alleging that it had said balance of $3,338.46 in its hands, that there were various claimants to this fund, that it desired to pay the same in such manner as to protect itself in the premises, and asking that Adams, Payne & Gleaves, Incorporated, be enjoined from prosecuting its suit at law, and that the court take charge of the fund and determine the rights of the parties making claim thereto.

On May 16, 1911, on the petition of certain of its creditors, T. W. Kirkbride, Incorporated, was adjudicated an involuntary bankrupt. The trustee in bankruptcy soon after his appointment filed a petition in the equity suit which the railway company had brought as above recited, asking that the fund in question, which was alleged to belong to the bankrupt's estate, be turned over to him as such trustee, on the ground that the District Court for the Western District of Virginia

had prior jurisdiction to determine the rights and priorities of the contending creditors. Adams, Payne & Gleaves, Incorporated, filed an answer to this petition, and the corporation court, by decree entered April 20, 1912, stayed and enjoined all further proceedings in that suit until the issues involved were determined in the bankruptcy court.

In compliance with an order later entered in the bankruptcy proceeding, the railway company turned over to the trustee the aforesaid balance due upon its contract with the Kirkbride Company. No appeal was taken by Adams, Payne & Gleaves, Incorporated, from the decree of the corporation court of April 20, 1912, nor did it file any proof of debt against T. W. Kirkbride, Incorporated, in the bankruptcy court until February 26, 1913, when it filed a petition in the bankruptcy proceeding, setting up its claim to the fund, and asking that such petition be treated, if necessary, as a proof of debt. The trustee and certain creditors objected, and the referee, after hearing, dismissed the petition, holding that the appellee had no valid claim to or interest in the fund in question.

Upon appeal to the District Court the order of the referee was reversed and the trustee in bankruptcy directed to pay to the appellee the fund in controversy. From that decree the trustee and creditors appeal to this court. No opinion was written by the learned District Judge, and we are therefore not advised of the grounds upon which he based his decision.

[1] The case thus presented turns upon the construction of section 2479 of the Code of Virginia, which reads as follows:

"Any subcontractor may give notice in writing to the owner or his agent, stating the nature and character of his contract, and the probable amount of his claim, and if such subcontractor shall at any time after the work done or material furnished by him and before the expiration of thirty days from the time such building or structure is completed, or the work thereon otherwise terminated, furnish the owner thereof, or his agent and also the general contractor with a correct account, verified by affidavit, of his claim against the general contractor for the work done or materials furnished and of the amount due, the owner shall be personally liable to the claimant for the amount due to said contractor by said general contractor: Provided, that the said amount does not exceed the sum in which the owner is indebted to the general contractor at the time the notice is given or may thereafter become indebted by virtue of his contract with said general contractor."

Upon the facts above stated regarding the Virginia Company and its relations to the Norfolk & Western Railway Company, we have no hesitation in holding that the railway company is the owner of the building in question, within the meaning of that term as used in the section quoted. In every substantial respect and for every practical purpose, this property is the possession of the railway company, and that company must be deemed the owner thereof, under the circumstances of this case and for the purposes of this statute, although the naked title is held by another corporation which the railway company has organized to serve its own convenience. The Virginia Company is merely an instrumentality which the railway company uses for a special purpose; and for that purpose it is in effect the railway company itself under another name.

Moreover, as it seems to us, the contrary view misconceives the real intent of the statute here considered. That statute was not designed

to give the subcontractor a lien upon the land, but to enable him to charge with personal liability the party with whom the general contractor has agreed to erect a building and by whom the contract price is agreed to be paid. The notice to be served operates to arrest further payment to the general contractor and lays the foundation for enforcing the claim of the subcontractor against the person who has promised to pay for the structure in process of erection. The recipient of the notice is thereby apprised that the subcontractor serving the same is performing work upon or furnishing materials for the building under construction; and the required statement of the probable amount of the claim measures the sum for which he may become personally liable and which he may therefore withhold from the moneys due or to become due to the general contractor. The statute assumes that there is a construction agreement, under which moneys will be payable to the general contractor, and it gives to the subcontractor complying with its provisions a preferred claim against this fund, with the right of action to recover the same. This authorized suit is not based upon the title to the land, but upon the agreement to pay for constructing the building. The obligation entered into with the general contractor is the foundation of the subcontractor's right of action, and that right of action is independent of the ownership of the land on which the structure is erected. Indeed, as we see the matter, the question of who holds the paper title to the property is quite immaterial, since the person who has undertaken to pay for the building is the person who may be made liable under this section of the Virginia Code. Without amplifying the argument, we hold that the notice of the appellee in this case was properly served on the railway company, and that its claim to the fund in question cannot be defeated by the circumstance that no notice was served on the Virginia Company, which happened to hold the legal title.

[2] The real question to be decided is whether the appellee has brought itself within the provisions of section 2479; that is, to come to the ultimate inquiry, whether the notice of January 4, 1911, was served in time. This requirement of the section has been construed quite recently by the Supreme Court of Appeals of Virginia in Steigleder v. Allen, 113 Va. 686, 75 S. E. 191, in which the point was directly involved, and it was distinctly held that it is too late to serve the notice after the work has been performed or the materials furnished by the subcontractor. In that case, after commenting upon the provision that the subcontractor shall give notice to the owner of the "nature and character of his contract and the probable amount of his claim," the court, among other things, says:

"The language of the statute unmistakably indicates that the notice must be given before the actual amount of the claim is ascertained, before the material is furnished or the work completed, to apprise the owner of the nature of the contract under which the subcontractor will have a debt due to him, while the requirement that the subcontractor shall, within a prescribed period, servé the owner and general contractor with a verified account, etc., was intended to have the owner informed as to the actual amount of the subcontractor's claim against the general contractor. The right of the subcontractor to recover of the owner, personally, in such a case, like the right of such a contractor to enforce a mechanic's lien against the owner's property, is purely the creation of the statute, and it must be availed of, if at all, upon

the terms and conditions which the statute prescribes. Section 2479 of the Code prescribed in express, plain, and unmistakable language the way, and the only way, in which an owner of property can be bound personally to a subcontractor for a debt due him from the general contractor, with whom the owner alone contracted for improvements upon his property."

In accordance with a familiar rule we are bound to accept this construction of the statute by the highest court of the state, and it must therefore be held that the subcontractor cannot avail himself of the benefits of this section unless he serves his notice prior to or during the performance of his contract and before its completion. The theory of the statute seems to be that the subcontractor may extend credit to the general contractor in reliance upon the protection secured by giving notice to the owner of the nature of his contract and the probable amount of his claim; and this clearly implies that the notice cannot be deferred until after his contract has been performed.

[3] It is to be noted in the Virginia case just cited that Steigleder, the subcontractor, had made an express contract with Walton, the general contractor, to do the entire cement and concrete work in the house in question, which was the subject of the general contract between Walton and the owner, for a sum fixed by the terms of his subcontract, and that the notice to the owner was not served until after the completion of such subcontract. And this brings us to consider whether the case at bar differs in any substantial respect from the Virginia case which construed section 2479, as above stated. In the first place, it is much to be doubted whether the appellee was a subcontractor, as that term is commonly understood, or had any contract at all with T. W. Kirkbride, Incorporated, the general contractor. There is no evidence that the relation of contractor and subcontractor ever existed between them, except the fact that appellee furnished a quantity of materials to the general contractor, and such inferences as may be drawn from the verified account served on the railway company. We have carefully searched the record without finding the slightest proof of a contract under which these materials were supplied, much less a contract which was subsisting and uncompleted when the appellee notified the owner that it claimed the benefit of section 2479. Taylor Gleaves, the manager of appellee, was a witness before the referee in bankruptcy, but he gave no testimony which tends in the least to show that an agreement to furnish materials for the building at Crewe had ever been made with the Kirkbride concern. Indeed, no attempt was made in any way to prove the existence of a contract entered into at any time, or for any definite quantity of materials. It is merely repeating to say that the only evidence of a contract is the fact that materials for this building were procured from the appellee, and the inferences permissible from the form and contents of the account afterwards rendered.

Inspection of this account shows that it begins with a debit, under date of May 6, 1910, of enumerated articles, such as would be used in the construction of a building, for which there is a lump charge of $3,963.40, or nearly two-thirds of the total amount furnished. It may be possible to infer from this entry that these materials were furnished in pursuance of an estimate and for an agreed price of the aggregate stated. There is, however, no reference to any contract and no sug-

gestion of an agreement for further supplies. The balance of the account consists of items and amounts charged on various subsequent dates; the last date prior to the assignment of the contractor being November 7, 1911, when charges were made to the amount of $151.33. There is nothing in the form or contents of this account which permits the inference of a continuing contract for the articles furnished after the date of the first entry. It is nothing more than an ordinary running account between a dealer and his customer. For ought that appears, the contractor was under no obligation, after the first purchase, to keep on buying from the appellee, and we think it should be presumed, in the absence of proof, that it was free to purchase elsewhere. If, as we suppose, there is a clear distinction between a subcontractor and a materialman, we are unable to see that the appellee was anything more than a materialman, at least as to the purchases following the first. There was buying and selling from time to time, but each instance was a separate transaction, so far as is shown, which had no connection with subsequent dealings. In short, there is nothing to indicate that the relations of contractor and subcontractor, if they ever existed, were continued during the period when the later purchases were made.

[4] Even if it should be held otherwise as to the transactions just considered, it seems clear to us that any contract relations which may have previously existed were terminated by the assignment of the contractor. No obligation to procure further materials from appellee passed to the assignee, and no purchases were in fact made by him during the short time he continued the work. When the railway company took possession of the property, the contract with T. W. Kirkbride, Incorporated, was in effect annulled. Plainly the railway company incurred no obligation to deal with appellee, but was free to get materials for the completion of the building wherever it chose. The circumstance that it did buy a small amount from the appellee is of no legal significance, and could not have the effect of giving to appellee rights not otherwise possessed to recover its debt under the provisions of section 2479. It is evident that appellee charged these materials to the contractor and declined to receive pay therefor from the railway company for the sole purpose of claiming that there was a continuing contract which was uncompleted when its notice was served on the railway company. But we are convinced that these sales to the owner of the property cannot be tied up with the prior sales to the contractor, even if the latter had any binding connection with each other, and that the appellee, when it served its notice on the railway company, had lost its right to reach the unpaid balance of the contract price by proceedings under the section in question. In a word, we perceive no sustainable principle which distinguishes this case from the Steigleder Case decided by the Virginia court of last resort.

The claim is advanced that it was admitted that appellee had a contract to furnish materials for the building in question, but this claim is not sustained by anything found in the record. It is true that the notice served on the railway company alleges that these materials were furnished "under contract," though the nature of the contract and the kind of materials are not shown, and this allegation is repeat-

ed in appellee's action at law against the railway company, in its answer in the equity suit and in the petition filed in this proceeding. But nothing appears to indicate that the asserted admission has ever been made by the appellants or even by the railway company. No answer was made to the petition in the bankruptcy proceeding, and the referee seems to have heard the matter on the petition itself. Under such circumstances, it was plainly incumbent upon the appellee to establish the facts necessary to maintain its contention.

The point is also made, if we understand the brief of appellee's counsel, that the assignments of error do not bring up the question of notice which we have discussed, but we are satisfied that this question is sufficiently raised by the third assignment, and the objection is therefore without substantial merit.

It goes without saying that the trustee in bankruptcy received the fund in question subject to the rights and equities of appellee the same as though it had remained in the hands of the railway company. For the purpose of reaching this fund under section 2479, the petition of appellee was seasonably filed, but, as a proof of debt against the bankrupt's estate, we are of opinion that it was properly rejected by the referee because not filed within the time required by the Bankruptcy Act. We are also of opinion, for the reasons above stated, that the referee was right in dismissing the petition because the appellee is not entitled to the fund; and it follows that the decree appealed from should be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

PRINCESS FURNACE CO. v. VIRGINIA-CAROLINA CHEMICAL CO.

(Circuit Court of Appeals, Fourth Circuit. June 12, 1914.)

No. 1196.

CONTRACTS (§ 352*)—ACTION FOR BREACH—DIRECTION OF VERDICT.

In an action for breach of contract, where the breach is proved and there is exact and uncontradicted proof as to the amount and date of the losses sustained by plaintiff, it is not error to direct a verdict both for damages and interest.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1200, 1828; Dec. Dig. § 352.*]

In Error to the District Court of the United States for the Western District of Virginia, at Roanoke; Henry Clay McDowell, Judge.

Action at law by the Virginia-Carolina Chemical Company against the Princess Furnace Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Benjamin Haden, of Fincastle, Va., for plaintiff in error.

David H. Leake and Robert E. Scott, both of Richmond, Va. (Scott & Buchanan, of Richmond, Va., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The plaintiff in error, defendant below, is a Virginia corporation which operated a blast furnace at Glen-Wilton,

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

Va., and in connection therewith maintained a desulphurizing plant for the extraction of sulphur from pyrites cinder and nodulizing the same for use with its raw ores in the production of pig iron.

The defendant in error, plaintiff below, is a New Jersey corporation which was engaged, among other things, in the reduction of pyrites ores and extracting sulphur therefrom for the manufacture of sulphuric acid, leaving a by-product known as pyrites cinder which contains a large percentage of iron. It maintained several plants, one of which was located near Lynchburg, Va., and another at Richmond, Va., known as the Allison & Addison plant.

Pyrites ores are of two sizes or classes, namely, one known as lump and the other as fines, and each class requires a different furnace for its treatment. Lump ores were treated at the Allison & Addison plant and fines at the Lynchburg and other plants. The cinder produced from the treatment of lump ore is known as lump pyrites cinder, while that produced in the treatment of fines ore is known as fines pyrites cinder. The general term "Pyrites Cinder" embraces both classes.

In April, 1907, the parties named entered into a contract whereby the furnace company purchased the entire output of fines cinder from certain plants of the chemical company, amounting to approximately 1,000 tons a month, for a period of five years. Prior to June, 1909, the furnace company was in default under this contract, and a large amount of fines cinder accumulated on the hands of the chemical company, entailing a loss of some $6,000 for which the furnace company appears to have been liable. Various negotiations thereupon followed, with the result that a new contract was made under date of June 12, 1909, which is the basis of the present suit. The provisions of this contract, so far as they require recital, are substantially as follows:

The prior contract of April, 1907, was annulled without recourse or claim of damages by either party.

The chemical company agreed to sell to the furnace company all of its stock of cinder on hand at its plant known as the Allison & Addison plant at Richmond, and all of its stock of cinder at its plant near Lynchburg, together with all cinder that should be produced at these plants prior to June 1, 1912; and it was specified that the chemical company made no representations as to the amount or quality of its stocks of cinder then on hand, nor as to the amount or quality of cinder which it might produce during the period mentioned.

The furnace company agreed to purchase from the chemical company, and pay for at the rate of $1.25 per ton, a minimum of 500 tons of pyrites cinder per month, beginning with June, 1909, and to continue to order and receive cinder at the rate of not less than 500 tons per month during the life of the contract.

In case the furnace company failed to order and receive as much as a thousand tons of cinder in any two consecutive months, the chemical company had the option of revoking the contract and demanding payment from the furnace company of $5,000 as liquidated damages.

It will be observed that the first contract related specifically to "fines" cinder, while the second contract covered all the "cinder" output of two named plants, one of which produced only lump cinder. There may have been at one time some misunderstanding on the part of the

furnace company as to the kind of cinder which it had agreed to take. but the contract in that regard is perfectly plain, and the chemical company was entitled to have it performed according to its terms.

Shipments of cinder under this contract were begun about the date of its execution and continued from time to time, in varying amounts per month, until some time in November, 1910. There were no shipments after that date. In November, 1911, the chemical company, alleging that the furnace company had made default and become liable under the terms of its contract, served a notice of revocation and informed the furnace company that at the expiration of 90 days it would demand payment of the $5,000 liquidated damages provided in the contract. Thereafter in July, 1912, this action was commenced. The defendant pleaded the general issue and also filed a number of special pleas setting up various defenses. Upon the trial of the case, and after all the evidence was submitted, the District Court refused to direct a verdict for the forfeiture named in the contract, but did direct a verdict for actual damages in the sum of $3,115.20, together with interest in the sum of $1,238.50, or a total of $4,353.70.

This was the amount of damages shown by undisputed evidence which is summarized in the following statement:

	Lynchburg.	A. & A.
Stock on hand June 1, 1909	2,392	12,928
Produced from June 1, 1909, to June 1, '12:		
At Lynchburg plant 8,386		
Less used by company 3,038		
	5,348	
At A. & A. plant		8,175
	7,740	20,103
Total stock June 1, '09, and production to June 1, 1912 .... 27,843 T		
Per cent. to be shipped (as 18,000 tons are to 27,843 tons) 64.62 plus %		
Tons to be shipped from each plant (if only 18,000 tons taken), on basis of 64.62%	5,003	12,992
Actually taken	2,417	3,470
	2,586	9,522

Amount of Claim.

For handling 2,586 tons at Lynchburg	$ 258 60
For loss of 30 cents per ton on 9,522 tons at A. & A. plant	2,856 60
	$3,115 20
Interest at 6% as follows, viz.:	
Total to be taken in 3 years .... 18,000 tons	
Actually taken .... 5,887 tons	
Balance not taken .... 12,113 tons	
Actual taking equal to first twelve months leaving untaken 12,113 tons, less Lynchburg quota of undelivered 2,586 tons, and then leaving 9,522 tons of A. & A. cinder undelivered, at $1.25 per ton, equal to $11,908.75, of average due date of June 1, 1911, say from January 1, 1911, to February 25, 1913, interest at 6% for 1 yr., 8 mo. and 24 days	1,238 50
Total	$4,353 70

The assignments of error present three general questions, only one of which goes to the real merits of the controversy. It is contended by the furnace company that there was no violation of the contract on its part because the chemical company had consented to postpone shipments and in effect waived its right to cancel the contract and demand damages for nonperformance. A careful examination of the record satisfies us that this contention cannot be sustained. The numerous letters which passed between the parties indicate that the business of the furnace company was not prosperous, and consequently it was not in a situation to make use of the quantity of cinder for which it had contracted. The chemical company was asked to defer deliveries and thus give the furnace company an opportunity to take advantage of more favorable business conditions. Without going into the correspondence in detail, it is sufficient to say that the furnace company was seeking delay and the chemical company disposed to be accommodating. Shipments were in fact suspended at one time and another, but we find nothing which can be fairly construed as a waiver by the chemical company of its right to have the contract executed in accordance with its terms. The situation in this regard, as we see it, is summed up in a letter of the chemical company of September 18, 1911, which reads as follows:

"Shipments under this contract were suspended, as you know, at the urgent request of your company, although the Virginia-Carolina Chemical Company has always been ready and anxious to make shipments to your company in compliance with the contract.

"We now write to say that, in reply to your request to still further defer the resumption of shipments, we will be willing to defer shipments of cinder to your company until November 1st next, provided you will write and forward to us the inclosed letter stating that our noninsistence on your taking the cinder as provided for in the contract with your company shall in no way impair or annul our contract with your company and our rights under the same, and that you will begin to accept on or before November 1st next shipments of cinder in accordance with the contract and fulfill the requirements of the same thereafter; it being understood that the Virginia-Carolina Chemical Company is not in any way to be prejudiced by acceding to your request for indulgence now or heretofore, nor by your default in complying with this contract.

"We beg to add that the accumulation of cinder at both plants (the product of which are sold to you) has now become such that we are put to considerable expense in order to store it, and we shall look to your company to reimburse us for such costs as are thus incurred."

This communication makes it plain that the chemical company, appreciating the condition in which the furnace company found itself, was willing to grant additional time, provided the furnace company would state in writing that such extension should in no way impair or annul the contract in question, and that the furnace company would begin to accept shipments on or before the 1st of November following and thereafter perform all the requirements of its obligation. The furnace company failed to give such assurance, but replied to the effect that it could not undertake to meet the condition of the proposed extension because its furnace was shut down and it would be impossible to have it in blast within the next sixty days.

Again, on October 10th, another letter was written in which the following proposal was made:

"I am therefore willing to agree to extend the life of the contract a sufficient number of months to cover the various periods of time within which you have not taken the cinder, with the understanding that you will resume taking it as soon as you start your furnace up, said limit of continued cessation to be six (6) months from October 1, 1911, and with the further understanding that no action on our part, either heretofore or in the future, shall in any way change the conditions of the contract or any of our rights thereunder, except as to the extension of the time within which the said contract was to be fulfilled."

This proposition was not accepted and the reply of the furnace company disclosed a virtual refusal to accept further shipments at any definite time in the future, as the writer says:

"But I have not been able to arrive at any point where I could say that at such and such a date I will be in a position to take this material."

Thereafter, on November 8th, the chemical company served formal notice that on account of the "continued failure and refusal to order and receive, take, or accept, delivery of pyrites cinder, though repeatedly tendered to you, at any time or in any quantities, during this year," it exercised its right under the contract to cancel the same, and demanded payment of the alternative sum of $5,000.

Bearing in mind that nearly a year had then elapsed since the furnace company had ordered or been willing to receive any further consignments of cinder, we are clearly of opinion that the failure of the furnace company to meet its engagement was not excused by any consent or waiver of the chemical company, and that the latter was within its rights in giving notice of cancellation and demanding the payment of the stipulated forfeiture. In other words, the breach of the contract was established, and the liability of the furnace company to respond in damages followed in consequence.

It is nevertheless urged that the question of the amount of damages should in any event have been submitted to the jury, and that the trial court therefore erred in directing a verdict; and that this is especially so as to the item of interest included in the amount directed, because it is said that the question whether interest shall be allowed on damages rests in the discretion of the jury.

But this is not a case, like an action for personal injuries, where the damages are uncertain because they depend upon the differing judgments which may be formed upon facts and circumstances which it is the province of a jury to consider. This is an action for breach of contract, and, the breach having been proven, the damages of the injured party became a mere matter of calculation from definite and certain data. Assuming that the furnace company defaulted, as we hold to be established, there was exact and uncontradicted proof both as to the aggregate losses of the chemical company and the date when each loss occurred.

A verdict for the actual losses without interest, if the case had been submitted to the jury, would have been inadequate under the evidence adduced, and could have been set aside for that reason. In

other words, there was no question of fact to be determined, and that being so a verdict including interest was properly directed.

The errors assigned because certain testimony of witnesses for the furnace company was excluded are without substantial merit. The questions asked call for an expression of opinion as to the construction of the contract or the meaning of various statements appearing in the correspondence. The correctness of the ruling in that regard is not open to serious doubt. Besides, it is impossible to see that any prejudice resulted to the furnace company because these questions were not permitted to be answered.

The record indicates that the case was tried with great liberality toward the furnace company, and that the learned District Judge, in declining to enforce the stipulated forfeiture and giving judgment for damages on the basis outlined in the statement above quoted, took a considerate view of the furnace company's situation, and one of which it cannot justly complain.

We are satisfied that no reversible error was committed, and the judgment is therefore affirmed.

ILLINOIS SURETY CO. v. UNITED STATES, to Use of PEELER, et al.

(Circuit Court of Appeals, Fourth Circuit. May 6, 1914.)

No. 1242.

1. UNITED STATES (§ 67*)—PUBLIC IMPROVEMENTS—CONTRACTOR'S BOND—ACTIONS—COMMENCEMENT—"FINAL SETTLEMENT."

Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1911, p. 1071), provides that, if no suit is brought by the United States within six months from the completion of a public improvement under a contract with the United States and final settlement of such contract, then the person or persons supplying the contractor with labor and materials may sue on the contractor's bond after the expiration of such six months' period and within a year from the complete performance of the contract and final settlement thereof. *Held* that, where a supervising architect reported the completion of a contract to the secretary of the treasury under date August 21, 1913, and on August 26th a voucher issued for the balance due was approved by the contractor, the approval of such voucher constituted the "final settlement" of the contract within the statute, and the six months' period began to run from that date and not from the date of the execution of a check for the balance due in payment of the voucher.

[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.]

2. STATUTES (§ 219*)—CONSTRUCTION—ADMINISTRATIVE OFFICERS.

Construction given to a federal statute by officers charged with its administration will be upheld by the courts, in the absence of convincing reason to the contrary found in a language or purpose of the enactment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. § 219.*]

3. LIMITATION OF ACTIONS (§ 127*)—COMPLAINT—AMENDMENT.

Where plaintiffs sued on a federal contractor's bond within the time specified by Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901,

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

p. 2523), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (U. S Comp. St. Supp. 1911, p. 1071), but by inadvertence or mistake plaintiffs failed to allege in terms that there had been a completion of the contract and final settlement between the government and the contractor, and when the contract was completed and final settlement had, or that such completion and final settlement occurred more than six months and within a year before the date of the commencement of the suit, the court was authorized by Rev. St. § 954 (U. S. Comp. St. 1901, p. 696), relating to amendments, to permit plaintiffs to amend by alleging such facts which in fact existed.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543–547; Dec. Dig. § 127.*]

4. APPEAL AND ERROR (§ 1034*)—METHOD OF SUIT—WAIVER OF JURY.

Where a jury was waived in the action tried by the court, it was immaterial that it was tried on the law instead of the equity calendar.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4063–4068; Dec. Dig. § 1034.*]

5. INTEREST (§ 39*)—RIGHT TO INTEREST—UNLIQUIDATED DEMAND.

Where amounts due respective subcontractors had not been ascertained and determined until the trial of an action on a federal contractor's bond, interest was properly allowed only from the date of the order awarding judgment.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 83–89; Dec. Dig. § 39.*]

Cross-Writs of Error to the District Court of the United States for the Eastern District of South Carolina, at Columbia; Henry A. Middleton Smith, Judge.

Action by the United States, to the use of J. A. Peeler and others, trading as the Faith Granite Company, and others, against the Illinois Surety Company. Judgment for plaintiff for less than the relief demanded, and both parties bring error. Affirmed.

Writ of error allowed to Supreme Court, 215 Fed. 1007.

W. H. Townsend, of Columbia, S. C., for plaintiff in error and cross-defendant in error.

Benjamin E. Pierce, of Augusta, Ga., and D. W. Robinson, of Columbia, S. C. (J. L. Rendleman, of Salisbury, N. C., Pierce Bros., of Augusta, Ga., and Croft & Croft, of Aiken, S. C., on the brief), for defendants in error and cross-plaintiffs in error.

Before KNAPP and WOODS, Circuit Judges, and DAYTON, District Judge.

KNAPP, Circuit Judge. This suit was commenced on March 4, 1913, under the act of Congress of August 13, 1894, as amended February 24, 1905, which gives to subcontractors under certain conditions a right of action upon the bond of a contractor for the erection of a public building. For convenient reference the material parts of this statute are reproduced in the margin.[1]

[1] "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

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

The defendant contractor and his surety, the plaintiff in error, filed separate answers to the complaint on April 4, 1913. Notice was published as provided by the act, and two other subcontractors intervened, one on April 26th and the other on June 27, 1913. On the 22d of September, 1913, the defendants filed notices of motion, in the nature of a demurrer, to dismiss the complaint, and also the petitions of intervention, on specified grounds which were in effect that neither the complaint nor the petitions stated a cause of action. It was also alleged that the court had no jurisdiction because the right of action is equitable in its nature and the issues cannot be determined in a suit at law. Upon the hearing of these motions the plaintiffs and interveners asked for and received leave to amend. Amended pleas were thereupon filed, to which answers were duly interposed by the defendants. The contractor set up a special defense, which was sustained, that he had been adjudicated a bankrupt and received his discharge. The case was tried by the District Judge; all parties having stipulated in writing to waive a trial by jury and resulted in a judgment against the plaintiff in error and in favor of the several subcontractors mentioned, both plaintiffs and interveners. To reverse this judgment the surety company prosecutes this writ of error. The cross-writ alleges error because interest was allowed only from the date of the order directing the judgment.

[1] Apart from some minor issues which will be later considered, the two principal contentions are: First, that the action was prematurely brought and must fail for that reason; and, second, that the trial court erred in allowing the complaint and petitions to be amended. If the first of these contentions is well founded, the case is at an end, as the Supreme Court has recently held in United States v. McCord et al., 233 U. S. 157, 34 Sup. Ct. 550, 58 L. Ed. 893, decided April 6, 1914. The point was directly involved, and the decision unequivocal. Among other things, the court says:

"By this statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause of action did not exist before, and is the creature of the statute. The act does not place a limitation upon a cause of action theretofore existing, but creates a new one upon the terms named in the statute. The right of action given to creditors is specifically

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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 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."

conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well-settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself. * * * The right to intervene is given in the statute when the action is brought by the United States, and the creditors may have their rights adjudicated in such action. And in the case of an action begun by a creditor in accordance with the statute, the right to file a claim is given to creditors. These rights to intervene and to file a claim, conferred by the statute, presuppose an action duly brought under its terms. In this case the cause of action had not accrued to the creditors who undertook to bring the suit originally. The intervention could not cure this vice in the original suit. * * * No service was made or attempted to be had upon it, as required by the statute when original actions are begun by creditors. As we read the certificate, the intervention was what it purported to be—an appearance in the original suit, already brought, and in our view must abide the fate of that suit."

In the case at bar the facts relating to the commencement of the action are these: The work required of the contractor appears to have been practically completed some time in June, 1912. The supervising architect so reported in a communication to the secretary of the treasury, under date of August 21, 1913, which contains "a condensed statement of the account," including contract price, additions, and deductions made from time to time, payments on account, and charges of actual damages for delay, and recommends that authority be given "for the issue and payment of a voucher" in favor of the contractor for $3,399.01, the balance found due to him. On the same date this statement and recommendation were approved by the assistant secretary of the treasury. Under date of August 23, the contractor was notified of the amount so stated and determined to be due him, and that authority had been given for a voucher in his favor for the ascertained balance, and he acknowledged the same two days later by letter to the supervising architect. The voucher was issued on August 26th, and he signed his approval thereof on or about that date. The check in payment was drawn on the 11th of September, and paid on the following day. This check, as will be seen, was issued and paid less than six months before the suit was commenced, and if that be the date of the "completion and final settlement" of the contract, within the meaning of the statute, the action was prematurely brought and cannot be maintained.

But we are clearly of opinion that the final settlement in this case was effected on or before the 26th of August, when the contractor signed the voucher which bears that date, and in which he certified "that the above bill is correct and just and that payment therefor has not been received." Surely, nothing then remained to be settled. Indeed, there is no indication in the record that anything had been in dispute between the contractor and the government. There was no disagreement as to the additions to the work for which he was entitled to additional pay, or as to deductions for items not furnished. Under the penalty clause of the contract, the government had the right to make a further and large deduction for delay in completing the

work, and the contractor was of course aware that this could be done. The government, however, was satisfied to charge against this accumulated penalty only such actual expenses as had been occasioned by the delay, and the contractor was presumably well satisfied with what was done in that regard. At any rate, he accepted the basis of settlement proposed without question or demur, and promptly signed the voucher which stated the account in detail on that basis, and contained a certificate that the bill was just and correct. The contract had been performed, the work accepted, the balance ascertained, which the government admitted he was entitled to receive, and he assented unreservedly to the settlement which the government offered. If there can be a settlement of a contractor's claim without payment of the balance due him, which we do not at all doubt, there was a complete and final settlement of the contract in question. The circumstance that something over two weeks elapsed before a check was made out for the balance agreed upon does not in the least alter the fact that the settlement was complete when the contractor signed and returned the voucher. In our opinion the learned District Judge was entirely correct in his conclusion that this suit was not brought until more than six months after the final settlement of the contract.

This accords with the construction of the statute by the treasury department, as appears from a regulation which reads as follows:

"The department treats as the date of final settlement mentioned in said acts the date on which the department approves the basis of settlement under such contract recommended by the supervising architect, and orders payment accordingly."

[2] It is familiar doctrine that the construction given to a statute by officials charged with its administration will be upheld by the courts unless convincing reason to the contrary is found in the language or purpose of the enactment. New Haven R. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 401, 26 Sup. Ct. 272, 50 L. Ed. 515.

We have discovered only two cases under this statute which bear directly upon the point here considered, and both of them give support to the views above expressed. United States v. Winkler (C. C.) 162 Fed. 397; United States v. Bailey (D. C.) 207 Fed. 782. In the latter case, District Judge Bourquin, after reciting the steps taken in the adjustment and settlement of contractors' accounts, uses the following language:

"When this is done, and not until then, in respect to government contracts performed, there is final settlement thereof, though further time be necessary for mere ministerial acts, to issue and deliver warrants. In no other wise can there be final settlement of contract obligations of the United States, and this is the final settlement contemplated by the Act February 24, 1905, aforesaid. And, from the date of said auditor's settlement and certificate forthwith as the evidence thereof, the limited time within which actions like unto this must be commenced begins to run."

[3] The other contention above mentioned alleges error in the allowance of amendments to the pleadings after the expiration of a year from the date of the final settlement of the contractor's account. The original complaint did not allege in terms that there had been

a completion of the contract and final settlement thereof between the government and the contractor; nor did it allege when the contract was completed and final settlement had; nor that such completion and final settlement occurred more than six months, and within a year, before the date of the commencement of the suit. Similar omissions or defects appear in the original petitions of intervention.

We are unable to see any substantial reason why the discretionary power of the court to allow amendments could not be exercised because the time within which the suit could be begun had then elapsed. The suit was in fact commenced, as we hold, more than six months and less than a year after the final settlement referred to in the statute. At that time a complete cause of action under the act existed in favor of the plaintiffs. By some mistake or inadvertence they failed, as we will assume, to set forth in their complaint all the facts necessary to establish their cause of action, although the omitted facts actually existed. Why should they be deprived of the benefits conferred by this statute, when their action was seasonably brought and the facts entitled them to recover, merely because through some mischance certain of those facts were omitted from their complaint? Why should not the court permit the omissions to be supplied, and upon what sustainable theory can it be said that the court was powerless to grant relief after the time limited for commencing the action had expired? The amended complaint sets up no new cause of action, and alleges no facts which were not in existence when the suit was begun; it merely supplies omissions and corrects defects in the original complaint. If the suit had been prematurely brought, or brought too late, the court would have been without jurisdiction, because under those circumstances the plaintiffs would not be within the conditions of the statute, and therefore could not avail themselves of its provisions; and no amendment would be of value in that case because there would be nothing to amend, as the Supreme Court says in the recent case above cited. But this suit was commenced within the period allowed by the act, and the right of recovery depends upon the state of facts which existed at that time. It is elementary that an amendment dates back to the beginning of the suit and is designed to cure defects in the statement of the cause of action then existing, and there is abundant precedent for permitting amendments of that character and for that purpose, to the end that errors or mistakes of pleading may not result in a miscarriage of justice. In our judgment the amendments in question were properly allowed under the provisions of sections 954 of the Revised Statutes and the authority of M., K. & T. Ry. v. Wulf, 226 U. S. 576, 33 Sup. Ct. 135, 57 L. Ed. 355.

[4] The remaining assignments of error do not go to the merits of the controversy and need but a word of mention. Whether the action authorized by the statute in question is an action at law or in equity seems to us of no practical importance in this case, and therefore requires no discussion, because both parties duly waived a trial by jury and thereby in effect requested the court to try the case without a jury. Under those circumstances, no reversible error was com-

mitted, even if it be assumed that the cause should have been placed on the equity calendar and not on the law calendar.

We agree with the trial court that the incorporation of the Carolina Electric Company and the Electrical Engineering & Contracting Company was sufficiently proved by the certificates received in evidence. There was no dispute as to the fact or amount of the contractor's indebtedness to the former company, and the obligation of the plaintiff in error to pay the same was properly established. The direction to pay the sum found due "to such person as may be authorized by law to receive it" gives adequate protection to the plaintiff in error and appears to be a suitable disposition of the case in that regard.

[5] We are also of opinion that the learned District Judge was right in allowing interest only from the date of the order awarding judgment, because the amounts due the respective subcontractors were not ascertained and determined until the trial of the action.

For the reasons thus briefly stated, the judgment is affirmed.

DARRAGH v. ELLIOTTE et al. W. S. BILES & CO. v. SAME. ELLIOTTE v. W. S. BILES & CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 12, 1914.)

Nos. 2467-2469.

1. CHATTEL MORTGAGES (§ 8*)—PLEDGE DISTINGUISHED FROM MORTGAGE—DELIVERY OF POSSESSION.

A bankrupt partnership, which was a dealer in automobiles, ordered a car from the maker, which was shipped for delivery only on payment of a draft for the purchase price. Not having sufficient money to make the payment, $2,600 was advanced by claimants, who took a note from the bankrupt for $2,800, reciting that the car and an insurance policy thereon were pledged as collateral. At the same time a bill of sale was executed by bankrupts, under which the car was delivered to claimants, and was in their possession when suit for its recovery was brought by the trustee in bankruptcy. *Held*, that the bill of sale and note did not constitute a mortgage, necessary to be recorded as such under the state law, but a valid pledge, which could only be redeemed by the trustee by payment of the note.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 20-22; Dec. Dig. § 8.*]

2. PLEDGES (§ 11*)—VALIDITY—BAILMENT OF PROPERTY TO PLEDGOR.

The keeping of the car by claimants in the sales and storage garage of bankrupts, where they kept others owned and used by them, was merely a bailment, and did not invalidate the pledge under the law of Tennessee.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 28-35; Dec. Dig. § 11.*]

Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Suit in equity by C. H. Elliotte, trustee of the Merriman Bros. Auto Company, a partnership, bankrupt, against W. H. Darragh and W. S.

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

Biles & Co. Decree for complainant against Darragh, and for Biles & Co. against complainant and Darragh. From the decree, the trustee, Darragh, and W. S. Biles & Co. appeal separately. Modified and affirmed.

In Darragh v. Elliotte (No. 2467):
R. M. Barton, of Memphis, Tenn., for appellant.
C. S. Dashiell, of Memphis, Tenn., for appellees.
In W. S. Biles & Co. v. Elliotte (No. 2468):
W. H. Fitzhugh, of Memphis, Tenn., for appellants.
C. S. Dashiell, of Memphis, Tenn., for appellees.
In Elliotte v. W. S. Biles & Co. (No. 2469):
C. S. Dashiell, of Memphis, Tenn., for appellant.
W. H. Fitzhugh, of Memphis, Tenn., for appellees.

Before DENISON, Circuit Judge, and EVANS and SESSIONS, District Judges.

EVANS, District Judge. These three appeals were heard upon one record and may be disposed of in one opinion.

A. G. Moss and N. S. Bruce composed a partnership firm styled Merriman Bros. Auto Company, which did business in Memphis, Tenn. On December 9, 1910, Moss filed a petition in the District Court, alleging the insolvency of the firm, and prayed that it might be adjudged bankrupt. On the next day Bruce, the other partner, filed an answer denying the insolvency of the firm; but this answer was subsequently withdrawn, and on January 2, 1911, the adjudication was made. In due course C. H. Elliotte was elected and qualified as trustee of the bankrupts. The only property claimed to be assets of the bankrupts with which we are now concerned was three automobiles, one a Franklin, another a Pope Toledo, and another a Thomas Flyer. Pending certain litigation in the courts of Shelby county, Tenn., the details of which are not now material, Elliotte, the trustee in bankruptcy, filed a bill in the court below, in which a decree was sought adjudging him to be entitled to each of these cars as against Darragh, and to the Thomas Flyer as against W. S. Biles & Co., which last party we shall call Biles & Co. The defendants, by appropriate pleadings, set up their respective claims to the cars. Under an agreement of the parties the cars were sold. Biles & Co., on May 1, 1911, bought the Thomas Flyer for $3,000 and retained the money subject to the decision of this case, and Darragh bought the other two cars for $945 and retained the price on the same conditions. The court below decreed that Biles & Co. were entitled to retain only $2,600 and interest thereon out of the $3,000 in their hands, that the trustee was entitled to the remainder of the $3,000, and that the trustee was also entitled to recover from Darragh the $945. The costs were divided equally, and each party has separately appealed.

Case No. 2467. Darragh's Appeal.

Wm. H. Darragh on or about November 1, 1910, at the request of N. S. Bruce, his nephew, and as surety of the bankrupts, signed three

of their notes each for $500, and due, respectively, on November 30, 1910, December 31, 1910, and January 31, 1911. No security was then given Darragh though it is claimed, but not proved to our satisfaction, that it was agreed at the time that if the first note was not paid at maturity security should be given. The first note was not paid by the bankrupts, and on December 1, 1910, they executed a deed of trust to John J. Darragh (brother of Wm. H.), as trustee, and thereby transferred to him the three automobiles as security for the payment of the notes described. The deed of trust contained a clause in this language:

"There is due and unpaid on the Thomas car above described a balance on purchase money and only the equity of the makers hereof in this car is conveyed."

This deed of trust was recorded on December 8, 1911.

There is much conflict in the testimony as to whether the bankrupts promised to give Wm. H. Darragh any security; but whether there was such promise or not, and whether it would be important if there had been, in fact no security was given until the deed of trust was executed on December 1, 1910. Manifestly this deed of trust was made to secure an antecedent indebtedness, and was not given for a present consideration. It was given within less than 10 days before the petition in bankruptcy was filed on December 9, 1910, and in terms recognized alike the existence and the priority of the lien for the balance of the purchase money due on the Thomas car. Under these circumstances it is too plain for argument or citation of authority that Darragh's claim to priority cannot be maintained, either against the trustee, Elliotte, or against Biles & Co., to the latter of whom was due the balance of purchase money on the Thomas car referred to in the deed of trust.

Consequently the judgment complained of by Darragh in case No. 2467 was proper, and must be affirmed.

No. 2468. Appeal of Biles & Co.

[1] While there is some obscurity as well as conflict in the testimony, we find the essential facts to be as follows:

In October, 1910, the bankrupts had ordered the Thomas car from its maker. It had been shipped by rail to Memphis, and the bill of lading with a draft for $3,100, the price of the car, attached, had been sent to the Union & Planters' Bank & Trust Company in that city. The car was not to be delivered to the bankrupts until the draft was paid. The bankrupts not being able to meet the draft, except to the extent of $500, called upon Biles & Co. for assistance, and the latter supplied the necessary $2,600. As part of the agreement upon which this was done Biles & Co. took from the bankrupts a bill of sale as follows:

"Memphis, Tenn., Oct. 22, 1910.

"For the consideration of twenty-eight hundred dollars, cash in hand, paid by W. S. Biles & Co. to Merriman Bros. Auto Co., the receipt of which is hereby acknowledged by the Merriman Bros. Auto Co., I hereby sell, transfer, and deliver to the said W. S. Biles & Co. one auto, free from all incum-

brances, described as the Thomas Flyer, four-door, seven-passenger touring car, No. 1076, motor 1099, trans. No. 1116, body No. 1064.

"Witness our signature on this 22d day of October, 1910.

"Merriman Bros. Auto Co.
"A. G. Moss.
"N. S. Bruce."

It was also agreed that the bankrupts might repurchase the car at the price of $2,800, and that agreement was put into effect when, also on October 22, 1910, the bankrupts executed to Biles & Co. a note for that amount, secured by a pledge of the car and a certain policy of insurance thereon. The note, including the contract of pledge, was in the very explicit language which follows:

"2,800.00. Memphis, Tenn., 10—22, 1910.

"November 5th, after date, we promise to pay to the order of W. S. Biles & Co. twenty-eight hundred and no/100 dollars, for value received, and all attorneys' fees and other costs and charges properly incurred in the collection of this debt. Payable at Union & Planters' B. & T. Co., in Memphis, Tenn. As security for the payment of this note, and to secure any other indebtedness that may be in existence at maturity, from and to the parties as herein, collateral securities have been pledged herewith, to wit:

"One Thomas Flyer automobile, as per bill of sale attached.

"Insurance policy covering same, attached.

"And we agree, in the event of a decline in the market value of said collaterals, to deposit additional securities from time to time, in such sufficiency that the salable value of the entire collaterals shall be at least 20 per centum in excess of this specific debt. A failure to deposit additional collaterals as agreed, or to pay this note at maturity, shall be full and specific authority for the holder to sell the aforesaid collaterals, at public or private sale, with or without notice, the net proceeds thereof, in whole or in part, as may be necessary, to be applied toward the liquidation of this and other indebtedness herein contemplated. [Signed] Merriman Bros. Auto Co.
"[Signed] N. S. Bruce.
"[Signed] A. G. Moss."

Biles & Co. were then given possession of the car, and they retained it, though they put the car in the storage and sales garage of the bankrupts, as they did other cars owned and used by them. One object of this was to afford opportunity for demonstration and sale of the car. Efforts to sell the Thomas car were not successful before the bankruptcy. This situation continued until Darragh, without the knowledge or consent of Biles & Co., got possession of the car about December 8, 1910, from the bankrupts, one of whom was his nephew. In January, 1911, Biles & Co., through their replevin suit in the state court against Darragh, again got possession of the car, and held it when this action was brought by the trustee in bankruptcy in February, 1911. The note to Biles & Co., due November 5, 1910, was not paid by the bankrupts.

It is insisted by the trustee that the bill of sale and the collateral note, which were made on the same day and which we have inserted above, together constitute a mortgage, and nothing more, and that Biles & Co. lost all claim to priority thereunder because it was not recorded as required by the law of Tennessee. We have concluded, however, as already sufficiently indicated, that Biles & Co. became the owners of the car when the bill of sale was made to them, that they then got possession of it, that they sold it to the bankrupts,

and that the latter pledged the car and the policy of insurance thereon as collateral security for the payment of the note given for the price.

There is a plainly recognized difference between a mortgage and a pledge. In case of the former possession is not necessarily given to the mortgagee, while in the latter possession in the pledgee is essential in all cases. This is elementary. It is doubtless for that reason that a contract of pledge is not required to be recorded. This distinction is recognized in Tennessee, and the recording statute of that state (Shannon's Code, § 3749) in terms embraces "deeds of trust" and "mortgages," but not pledges. Crisp v. Miller, 5 Heisk. (Tenn.) 700, and other cases so hold.

[2] The form of contract in this instance clearly manifests the intentions of the parties, and we conclude that Biles & Co., being pledgees in possession of the pledged property, lost nothing by not recording their contract. We do not overlook the fact that the car was in the bankrupts' storage and sales garage, as were other cars of Biles & Co.; but the bankrupts only kept it as bailees, and not as owners. They also were interested in efforts to sell it in order to redeem it from the pledgees. Under the circumstances none of this was unlawful. Grange Warehouse Association v. Owen, 86 Tenn. 355, 7 S. W. 457; McClung v. Colwell, 107 Tenn. 592, 64 S. W. 890, 89 Am. St. Rep. 961; Johnson v. Smith, 11 Humph. (Tenn.) 400–404; Story on Bailments, §§ 297, 299.

We need not notice in detail other contentions of the parties, as these considerations lead to the modification of the decree in No. 2468, because it limited the right of Biles & Co. to retain only $2,600 and interest, when they were entitled to retain the amount the bankrupts stipulated in the collateral note to pay, to wit, $2,800, with interest thereon from November 5, 1910, to May 1, 1911, at which last date Biles & Co. bought the car under the stipulation between the parties.

The judgment, so far as appealed from in this case, is modified to the extent, first, of allowing W. S. Biles & Co. to retain out of the $3,000 in their hands the sum of $2,800, with interest thereon from November 5, 1910, to May 1, 1911; and, second, to the further extent of directing that the balance of the money then remaining in their hands be paid to C. H. Elliotte, trustee, with interest on such balance from May 1, 1911, until paid. As thus modified, the judgment, so far as appealed from in case No. 2468, is affirmed; but the appellants, W. S. Biles & Co., will recover their costs on this appeal. The case is remanded to the District Court, with directions to modify its judgment in conformity with this opinion.

No. 2469. Appeal of Elliotte, Trustee.

What we have said in respect to the appeals in cases Nos. 2467 and 2468 applies to the appeal of Elliotte in case No. 2469, and leads to the conclusion that the decree complained of by the trustee in this case must be affirmed.

McLAURIN v. McLAUCHLIN et al.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1914.)

No. 1221.

1. ARBITRATION AND AWARD (§ 7*)—AGREEMENT TO ARBITRATE—CONSTRUCTION.
An arbitration under an agreement which, although stating that it is under a statute, differs materially from the requirements of the statute is a common-law arbitration.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 28; Dec. Dig. § 7.*]

2. ARBITRATION AND AWARD (§ 78*)—SUIT TO SET ASIDE AWARD—JURISDICTION OF EQUITY.
A court of equity has power to set aside the award in a common-law arbitration because of misconduct or mistake on the part of the arbitrators.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 409–419; Dec. Dig. § 78.*

Setting aside award for interest, prejudice, or misconduct of arbitrators, see note to Nolan v. Colorado Cent. Consol. Min. Co., 12 C. C. A. 592.]

3. ARBITRATION AND AWARD (§ 78*)—SETTING ASIDE AWARD—GROUNDS.
The refusal of arbitrators to receive evidence on one of the principal questions of fact in controversy is ground for setting aside their award, and actual prejudice from such action need not be proved.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 409–419; Dec. Dig. § 78.*]

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Suit in equity by W. B. McLauchlin, as receiver of the Linson Lumber Company and as an individual, and J. W. McLauchlin against H. J. McLaurin, Jr. Decree for complainants, and defendant appeals. Affirmed.

R. O. Purdy, of Sumter, S. C. (R. D. Lee, of Sumter, S. C., on the brief), for appellant.

C. L. Prince, of Cheraw, S. C. (W. F. Stevenson, of Cheraw, S. C., on the brief), for appellees.

Before KNAPP and WOODS, Circuit Judges, and DAYTON, District Judge.

KNAPP, Circuit Judge. The decree from which this appeal is taken sets aside the award made in an arbitration of certain differences between the parties thereto, because "the refusal of the arbitrators to hear the evidence offered by the Linson Lumber Company on the question of the amount of wastage was in violation of the rules of law governing the conduct of arbitrators."

It appears from the record that in December, 1906, the appellant McLaurin conveyed to the McLauchlins and one Johnson the standing timber on a tract of land near Mayesville, in Sumter county, S. C. The purchasers organized a corporation, known as the Linson Lumber Company, to which their rights were transferred, and this company

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

undertook to carry out the agreement under which the timber was acquired. McLaurin guaranteed that this timber would yield 17,000,000 feet of manufactured lumber, and he was to be paid therefor at the rate of $2 per thousand feet.

Before all the timber was removed, various disputes arose, which the parties agreed to submit to arbitration. The several matters in controversy related to the quantity of timber actually delivered under the contract, the quantity then remaining in the woods uncut, and the quantity alleged to have been wasted or lost by improper and negligent methods of operation. The latter proved to be the main subject of contention. In March, 1910, the arbitrators chosen made their award, one of them dissenting from certain conclusions of the majority, and in May following this award was filed with the clerk of court for Sumter county. Afterwards, W. B. McLauchlin, who had been appointed receiver of the Linson Lumber Company, brought suit as such receiver against McLaurin, in the United States Court in South Carolina, to recover damages for alleged breach of the timber contract. McLaurin set up the award of the arbitrators as a defense to this suit, and also commenced an action, in the United States Court in North Carolina, against McLauchlin and the other parties to whom he had sold the timber in question. Subsequently this suit was instituted to set aside the award; the amended bill of complaint being filed in September, 1912. An order was made restraining McLaurin from setting up or relying upon the award in the law courts, pending this suit in equity, and the actions mentioned were stayed until the hearing of the equity cause. The case was heard in open court by the District Judge for the District of South Carolina, and a decree made setting aside the entire award for the reason above stated.

[1] In the agreement to arbitrate it was provided that the differences therein set forth should be submitted to arbitration under section 2849 of the Civil Code of 1902 of South Carolina. But the agreement shows on its face that this statute was disregarded or not complied with in two important particulars, namely, by expressly waiving the bond which the statute requires each party to give, and by stipulating that the award should be final and binding without appeal, although the statute provides that either party shall have the right of appeal to the Circuit Court of the state. The effect of these departures from the scheme of arbitration established by the Civil Code was to eliminate the essential difference between that method of arbitration and the method of an ordinary common-law arbitration. The nature of the proceeding is not determined by what the parties call it but by the plan they actually adopt for the settlement of their disputes. Since the plan in this case not only differs materially from the plan of the South Carolina statute but conforms substantially to a common-law arbitration, it must be held to be of the latter class and dealt with accordingly. In our judgment, however, the case does not turn upon this point, because we apprehend that the grounds upon which the award in suit was set aside would be equally sufficient, if the facts warranted, to invalidate the award in an arbitration in full accordance with the statute in question.

[2] It is not open to doubt that a court of equity has power to set aside the award in a common-law arbitration, or in such an arbitration as is here considered, whatever its proper description, because of misconduct or mistake on the part of the arbitrators. The circumstances under which and the grounds upon which an award may be declared invalid are quite fully discussed in the opinion of the learned District Judge, and we find no occasion for disagreeing with the views expressed by him in that regard. For this reason, and because the rules thus laid down for the conduct of arbitrators seem to be accepted without dissent by appellant's counsel, we deem it unnecessary to further discuss the general principles of law involved in the controversy here presented.

Obviously, as appears to us, the controlling question in this case is a pure question of fact. The appellees assert that the arbitrators, or a majority of them, refused to receive evidence which they were prepared to submit relating to the amount of timber which had been lost by improvident and wasteful methods of cutting, and for which appellant claimed credit as timber standing on the land when he made the contract of sale. The appellant denies that there was any such refusal, and insists, on the contrary, that opportunity to offer proof was afforded and declined. The learned District Judge, who had the witnesses before him and heard them testify, decided this issue of fact in favor of appellees, and his reasons are set forth in an extended analysis of the contention and testimony which appears in his opinion. We are persuaded that this conclusion was not unwarranted. The record discloses substantial evidence, to say the least, in support of the finding, and there is plainly no such preponderance of opposing proof as would justify this court in holding that a contrary conclusion was required. For the purposes of this appeal, it must be accepted that the arbitrators refused to hear testimony which the appellees desired to introduce upon the principal matter in dispute.

[3] But appellant's counsel argue that the resulting decree is nevertheless erroneous, because no attempt was made to show that the rejected evidence, if received, would have influenced the arbitrators to a different decision, or had any tendency to affect their judgment, and therefore it does not appear that the appellees were in any wise prejudiced by the refusal. In our opinion this is quite beside the mark. Whether the arbitrators would have regarded the excluded proof as important and persuasive, or as wholly without probative value, is not now material. The award in suit is assailed, and has been set aside by the trial court, not because the action of the arbitrators was shown to be prejudicial, but because that action, however honest and well-intentioned, was in disregard of a primary obligation and operated to deprive the appellees of their fundamental right to produce evidence in support of their contention. In a case like this, where the matter in dispute is the proper subject of testimony, the refusal to hear witnesses raises a presumption of partiality at variance with the central idea of arbitration, namely, the submission of a controversy to impartial determination. In such a case, if the facts justify, the aggrieved party has an undoubted right to have the award declared invalid, and

a suit for that purpose may be maintained without proof that the rejected testimony was calculated to produce a different result. This appears to be the settled rule of law everywhere, so far as we are advised, not less in South Carolina than in other jurisdictions. Indeed, the principle is very clearly stated in a South Carolina case (Shinnie v. Coil, 1 McCord Eq. 478, 482), decided in 1826 and frequently cited with approval, in which a number of the prior English cases are reviewed and the whole subject discussed at length. The gist of the opinion is expressed in the following quotation:

"But there are nevertheless certain limits beyond which even arbitrators are not permitted to dispense with the rules of law. There are certain fundamental rules for the trial of causes, the disregard of which by any tribunal, however organized, will render their proceedings null and void. Among these are the right of a party to have notice of the time and place of trial; to have an opportunity to produce his testimony; to know and have an opportunity to rebut the testimony offered against him."

For reasons already stated, it must be held on this appeal that the fact of refusal to receive evidence has been established, and it follows, therefore, that the pending suit is maintainable without proof of actual prejudice because the law presumes that such refusal is a violation of appellee's rights for which the award may be annulled.

It is also contended by appellant that it was error to set aside the entire award, for the reason that the several matters submitted to arbitration are separable from each other and could be independently decided; that the testimony offered and rejected related to only one of the disputed questions, namely, the amount of wastage in cutting; that, even if the action of the arbitrators was improper as respects this particular item, there is no indication of bias or partiality on their part in dealing with the other issues, as to which no evidence was offered by appellees; and therefore the award should be sustained except as to the finding which may have been affected by the refusal to receive testimony. The opposing argument, among other things, asserts that awards have been held partly valid and partly invalid only in cases where the arbitrators exceeded their authority, as, for example, by deciding a question not embraced in the submission; that in such a case the authorized portion may be sustained and the unauthorized set aside; but that refusal to hear witnesses renders the entire proceeding void, even if separable matters are passed upon, because such refusal takes away the inherent right upon which arbitration is founded.

Whether this distinction, which finds apparent support in the decisions consulted, is based upon sound and controlling principle, or is rather in the nature of a coincidence, need not now be determined. However that may be, we are satisfied that the questions submitted in this case are so related and interdependent that the findings of the arbitrators cannot be separated, by setting aside the most important and sustaining the others, without at least the risk of injustice. The principal matter in controversy was the quantity of timber alleged to have been wasted, and the ruling which invalidates the finding upon that issue requires, in our judgment, the annulment of the entire award.

In thus deciding, no reflection is cast upon the integrity and good faith of the arbitrators. We assume that they are men of character

and standing who honestly believed that the report of the estimators and their own investigations enabled them to reach correct conclusions without the aid of other evidence. Holding this opinion, they declined to hear the testimony which appellees were prepared to offer; and this must be held to be a mistake which vitiates their award.

A careful examination of the record discloses no ground of reversal, and the decree appealed from is therefore affirmed.

PREST-O-LITE CO. v. DAVIS et al.

DAVIS et al. v. PRESTO-O-LITE CO.

(Circuit Court of Appeals, Sixth Circuit. July 25, 1914.)

Nos. 2583, 2584.

1. TRADE-MARKS AND TRADE-NAMES (§ 70*) — UNLAWFUL COMPETITION — GAS CONTAINERS—USE FOR COMPETING GAS.

Complainant manufactures and sells acetylene gas put up in metal tanks of peculiar construction, and also provides an exchange system by which an empty tank may be exchanged for a filled one at a small charge; its gas being trade-marked under the name "Prest-O-Lite," and its containers being marked "Prest-O-Lite gas tank." Defendants sold, for similar use, acetylene gas made by a competitor of complainant and put up in different containers; the competing manufacturer also having a similar exchange system. Defendants filled with the competing gas empty Prest-O-Lite tanks acquired by defendants, and in effect sold to consumers such refilled tanks, pasting a paper label thereon, from which the purchaser, by close attention, might discover that it was not complainant's gas. *Held*, that complainant's right to protection against unfair competition extended to the protection of its exchange system, and that defendant was therefore guilty of unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*

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.]

2. TRADE-MARKS AND TRADE-NAMES (§ 11*)—INFRINGEMENT—PATENTED ARTICLE.

Where the term "prest-o-lite" not only applied to the sale of acetylene gas in patented container tanks for lighting vehicles, but had also become known as designating complainant's exchange service system, by which empty tanks could be exchanged at different stations in nearly every ordinary sized city for a filled one at a small charge, the word indicated origin or manufacture, and hence, the expiration of the patent on the container did not give the public the right to use the name, under the rule that on the expiration of the patent the generic name or description under which the patented article has been sold during the term of the monopoly passes to the public.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 15; Dec. Dig. § 11.*]

Appeals from the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Suit in equity for unlawful competition by the Prest-O-Lite Company against Arthur C. Davis and another, doing business as Gluchow-

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

sky & Davis. From a decree for complainant for less than the relief demanded (209 Fed. 917), both parties appeal. Affirmed.

Keyes Winter, of New York, and Dudley V. Sutphin, of Cincinnati, Ohio, for Prest-O-Lite Co.

Wallace R. Lane, of Chicago, Ill., for Davis et al.

Before KNAPPEN, Circuit Judge, and COCHRAN and TUTTLE, District Judges.

PER CURIAM. The Prest-O-Lite Company, a manufacturer and distributor of acetylene gas for lighting automobiles and other vehicles, brought suit to restrain alleged unfair competition and infringement of trade-mark by defendants, who are dealers in automobile accessories. Complainant stores its gas in portable steel cylinders lined with asbestos, which absorbs a quantity of acetone, which in turn is saturated with acetylene gas introduced under pressure, the outflow for consumption being valve-controlled. The entire package, so filled by complainant with its gas (the gas being trade-marked under the name "Prest-O-Lite"), is furnished the consumer in the first instance. When the gas is consumed the tank is, under complainant's long-established system, accepted at any one of several thousand agencies or depots throughout the United States, in exchange for a package fully charged by complainant, and on payment of a small fraction of the original price of the filled package. Complainant's container is copper-plated and bears the words "Presto-O-Lite gas tank," together with its corporate name as manufacturer, etched in the metal surface of the cylinder. It also contains a notice licensing its sale and use only when filled with gas and acetone compressed by complainant. This restrictive feature was exploited by complainant, by its advertising matter and otherwise, at least during the life of the Claude & Hess patent (No. 664,383, December 25, 1900), under which the apparatus in question was manufactured. The patent was held by the Circuit Court of Appeals of the Seventh circuit to have expired June 30, 1910. Commercial Acetylene Co. v. Searchlight Gas Co., 203 Fed. 276, 121 C. C. A. 474.[1] Complainant's trade-mark was registered June 30, 1906. The gist of the charge against defendants is that they are recharging empty Prest-O-Lite containers with Searchlight gas, the product of a competitor of complainant, and in effect selling Prest-O-Lite tanks charged with Searchlight gas. The final decree below enjoined defendants, in substance, from refilling Presto-O-Lite tanks with any material, and from dealing in such tanks refilled by others than complainant, without in all cases removing or obliterating complainant's trade-mark, and from passing off such refilled tanks as Prest-O-Lite gas tanks, exchanges or refills. Both parties have appealed.

The grounds, broadly stated, on which defendants contend that complainant should be denied relief are: (a) That defendants have not been guilty of fraud or unfair trade; (b) that the attempt to limit the use to which complainant's gas tanks shall be put after their sale by

[1] But see Acme, etc., Co. v. Commercial, etc. Co. (C. C. A. 6) 192 Fed. 321, 326, 112 C. C. A. 573.

complainant is void, whether rested upon trade-mark rights or the system of exchanging filled for empty tanks, under the rule announced in John D. Park & Sons Co. v. Hartman, 153 Fed. 24, 40, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135 (C. C. A. 6), and Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502; and (c) that by the expiration of the patent the name, and trade-mark "Prest-O-Lite" have been dedicated to the public, under the doctrine of Singer v. June, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118.

[1, 2] The published opinion of Judge Hollister, who heard the case below (Prest-O-Lite Co. v. Davis [D. C.] 209 Fed. 917), so well and so fully considers the first two contentions stated (no reference, however, being made to the doctrine of the Singer Case) as to make discussion by us of the propositions there treated quite unnecessary. We fully agree with his conclusions that defendants have been guilty of unfair trade and that the doctrine of the Parks Cases cited is not opposed to the granting of the relief given. The validity of the attempted license restriction agreements under the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) or at common law is not involved here. The decision of this court in Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720, 726, 19 C. C. A. 164, is directly in point. Relief may safely be rested upon defendant's interference with complainant's rights under its long-established system of exchanges, which, as a practical proposition and for its own interests, and without contract therefor, it is bound to carry out. Assuming that complainant's trademark and trade-name have not, by the expiration of the patent, become public property, we agree with the district judge, and for the reasons given by him, that complainant's rights are not adequately protected by the affixing of the paper label in question upon packages refilled with Searchlight gas, stating that the refilled tank contains acetylene gas made by the Searchlight Gas Company and not Prest-O-Lite gas.

We think the Singer Case has no application. The rule there announced is that on the expiration of a patent the generic name or description under which the patented article has been made and sold during the term of the monopoly (as distinguished from a name merely indicative of origin of manufacture) passes to the public, and may be used by another, provided unmistakable notice is carried that the article is manufactured by the one actually making it, and not by the proprietors of the expired patent. For a discussion of this rule, see the opinion of Judge Denison, speaking for this court, in Merriam v. Saalfield, 198 Fed. 369, 374, 375, 117 C. C. A. 245.

The case here does not involve merely the right to sell tanks in the form made by complainant and bearing such words as "Prest-O-Lite tank" or even "Prest-O-Lite gas tank." The case goes farther. While the patent is upon a gas-storing apparatus which includes the valve-equipped, closed receptacle containing acetylene gas in solution, the gas is not protected by the patent, either as respects manner of manufacture or specific method of compression. Complainant's trade-mark is upon its gas in the portable tank, which gas it compresses in its peculiar way, differing from the Searchlight process. It has never sold

its tanks except as part of a complete gas package, ready charged for illuminating purposes, and in connection with its system of distributing acetylene gas. The trade-mark "Prest-O-Lite," used upon gas stored in complainant's containers, thus indicates "acetylene gas prepared and tanked as the complainant prepares and tanks it in these specific tanks."[2] It also carries with it the idea of complainant's exchange service. These effects are not weakened, but rather are strengthened, by the fact that the "tank" and "system" and "service," as well as specific features of the package, are known as "Prest-O-Lite." The word "Prest-O-Lite" when used upon the charged gas package thus indicates origin or manufacture; and so the case is not within the doctrine of the Singer Case.

The same result has been reached by the Circuit Court of Appeals of the Seventh Circuit in an opinion by Judge Baker, rendered since the decision of the instant case below. Searchlight Gas Co. v. Prest-O-Lite Co., 215 Fed. 692.

Complainant appeals because the decree does not forbid sales of Searchlight gas in Prest-O-Lite containers which had originally borne the trade-mark "Presto-O-Lite," unless the purchaser is given actual notice that the package is not a Prest-O-Lite, and is not exchangeable by the Prest-O-Lite Company when empty. But we think the prohibition against the use of the containers bearing complainant's mark sufficiently protects its interests.

The decree of the district court is affirmed, with costs of the respective appeals against the appellants therein.

LACY v. McCAFFERTY, County Treasurer, et al.

(Circuit Court of Appeals, Eighth Circuit. June 2, 1914.)

No. 3944.

1. TAXATION (§ 608*)—ASSESSMENT—RELIEF IN EQUITY.

The assessment of the property of national banks at its full value while other classes of property are assessed at only 60 per cent. of their fair cash value, though in violation of Rev. St. § 5219 (U. S. Comp. St. 1901, p. 3502); Const. Okl. art. 10, §§ 5, 8, and Comp. Laws Okl. 1909, § 7580, does not entitle a national bank to relief in equity unless it appears that the erroneous valuation was not made accidentally or inadvertently with respect to a single piece or kind of property, but systematically and intentionally with respect to one or more classes of property with the intention of imposing upon such class an undue burden of taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230–1241; Dec. Dig. § 608.*]

2. APPEAL AND ERROR (§ 1009*)—REVIEW—QUESTIONS OF FACT.

In a suit to restrain the collection of a tax, the trial judge's finding that the assessment of complainant's property at a greater percentage of its value than other property was not intentional but due to an error of

[2] Judge Ray's expression in Prest-O-Lite Co. v. Avery Light Co. (C. C.) 161 Fed. at page 650.

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

judgment, would not be disturbed unless clearly erroneous, in view of his superior knowledge of the local conditions prevailing in his district and of the character, standing, and credibility of resident witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. § 1009.*]

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suit by Don Lacy, Liquidating Agent of Oklahoma City National Bank, against Charles McCafferty, as County Treasurer of Oklahoma County, Okl., and others. From a decree dismissing the bill, complainant appeals. Affirmed.

W. F. Wilson, John Tomerlin, and E. E. Buckholts, all of Oklahoma City, Okl., for appellant.

D. K. Pope, of Oklahoma City, Okl., and George F. Zimmerman, of Guthrie, Okl., for appellees.

Before HOOK, ADAMS, and SMITH, Circuit Judges.

ADAMS, Circuit Judge. This was a suit brought by the Oklahoma City National Bank by Don Lacy, its liquidating agent, to enjoin the treasurer and sheriff of Oklahoma county from taking the necessary steps for collecting certain taxes assessed against the bank by the assessor and board of equalization of Oklahoma City located in that county. The bill charges that notwithstanding the constitutional requirement of the state of Oklahoma that the property should be assessed for the purposes of taxation at its fair cash value the assessor and board of equalization of that city intentionally and systematically undervalued, for the purposes of taxation for the year 1910, a large amount of taxable property within the city such as merchandise, real estate, horses, cattle, credits, moneys, automobiles, etc., assessing the same at not over 60 per cent. of their actual fair cash value while they valued and assessed the property of complainant and other national banks including their capital and surplus, at their full cash value; that the result of such action was to compel the complainant and other national banks to bear an unjust proportion of the burden of taxation for that year and to create an unjust and intentional discrimination against them in favor of other property; that the defendants, the county treasurer and sheriff, threaten to collect from the complainant the sum of $2,686.53 whereas if its property had been assessed as other property was the amount justly collectible from complainant would have been $1,611.92 only. This amount complainant alleges it is willing and ready to pay and it prays for an injunction restraining the defendants from enforcing the payment of any further sum. The answer of the defendants admits most of the allegations of the bill, but denies specifically that there was any intentional or systematic undervaluation of the large amount of taxable property in the city of Oklahoma City, as alleged by the complainant, and denies that it assessed the property of the complainant or other national bank at its full face value as so alleged. The replication being duly filed the cause was submitted to the court for final

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

decree upon the proofs adduced. The court dismissed the bill and complainant appeals.

[1] The Constitution of the state of Oklahoma, section 5, art. 10, ordains that taxes shall be uniform upon the same class of subjects. Section 8 of the same article ordains that all property which may be taxed ad valorem shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale. Section 7580 of Snyder's Compiled Laws of Oklahoma, 1909, provides that every bank located within this state—

"whether such bank has been organized under the banking laws of this state, or of any other territory or state or of the United States, shall be assessed and taxed on the value of their shares of stock therein in the county, town, district, village or city, where such bank or banking association is located, and not elsewhere, * * * subject however, to the restriction that taxation of such shares shall not be at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of this state." * * *

Section 5219 of the Revised Statutes of the United States provides among other things that:

"The Legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state." * * *

From these various provisions of applicatory law it is manifest that if complainant's property and other property of its kind was assessed for the purposes of taxation at a greater rate than the property of other corporations and individual citizens was assessed, it was in contravention of the constitutional and statutory law of the state and of the United States and of course was unlawful, but that fact in itself would not entitle complainant to resort to a court of equity to secure relief; it must further appear that the assessing officers made the erroneous valuation not accidentally or inadvertently with respect to a single piece or kind of property, but systematically and intentionally with respect to one or more classes of property, with the intention of imposing upon that class of property an undue burden of taxation. Cummings v. National Bank, 101 U. S. 153, 25 L. Ed. 903; Pittsburgh, etc., Railway Co. v. Backus, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; Coulter v. Louisville & Nashville R. R. Co., 196 U. S. 599, 25 Sup. Ct. 342, 49 L. Ed. 615; Raymond v. Chicago Traction Co., 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757; Taylor v. Louisville & N. R. Co., 31 C. C. A. 537, 88 Fed. 350.

The doctrine was concisely and comprehensively stated by this court in the case of Atchison, T. & S. F. Ry. Co. v. Sullivan, 97 C. C. A. 1, 6, 173 Fed. 456, 461, thus:

"A systematic and intentional under or over assessment of one or more classes of property in violation of the law, whereby one or more classes of property is to be made to bear an undue proportion of the burden of taxation, presents a good cause of action for relief from the payment of the unjust part of the proposed tax."

[2] In recognition of this established principle of law the pleadings in this case tendered the simple and controlling issue of fact, whether there was such a systematic and intentional undervaluation of the property specified. The court below heard the conflicting evidence produced by the parties and after a critical analysis of it stated its conclusion thus:

"As to the under assessment of a large portion of the property in Oklahoma City for the year 1910, the evidence adduced preponderates in favor of the plaintiff. Nevertheless, this court is not convinced from the proof that this was intentional on the part of the officers charged with the difficult and responsible duty of valuing the property, but is persuaded and will find that so far as the under assessments are here subject to complaint, they proceed in general from error of judgment. Besides, the evidence discloses no agreement or concert among the officers to depart from the requirements of the law, nor any system or rule of scaling values of property below fair cash worth."

By reason of his superior knowledge of the local conditions prevailing in his district and of the character, standing, and credibility of resident witnesses whose testimony he heard, the learned trial judge was peculiarly fitted to pass on a controverted issue of fact like that presented in this record, and we should hesitate to overrule his judgment except in the case where error most clearly appears. In the case of Blank v. Aronson, 109 C. C. A. 327, 330, 187 Fed. 241, 244, we stated the rule thus:

"It is the settled law of this court that where a chancellor has considered conflicting evidence and made his findings of fact and decree thereon they will be treated as presumptively correct, and will not be disturbed, unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence."

See, also, to the same effect, Thallman v. Thomas, 49 C. C. A. 317, 111 Fed. 277; Hussey v. Richardson-Roberts Dry Goods Co., 78 C. C. A. 370, 148 Fed. 598, 602, and cases cited.

Moreover, a wise public policy most obviously demands that the discharge of duty by administrative officers charged with the responsibility of providing necessary revenue for the support of government ought not to be interfered with on any doubtful showing of error on their part, but only when wrongful, illegal and injurious conduct is made clearly to appear.

Tested by the foregoing rules the decree of the District Court must be affirmed.

WOOD et al. v. SPRING GARDEN INS. CO. OF PHILADELPHIA, PA.

(Circuit Court of Appeals, Fourth Circuit. May 11, 1914.)

No. 1204.

1. INSURANCE (§ 81*)—AGENTS—INSURING OWN PROPERTY.

Where an agent of an insurance company insures his own property for his own benefit, it is his duty to notify the insurer of his ownership as an element of the risk.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 106; Dec. Dig. § 81.*]

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

2. INSURANCE (§ 668*)—INSURANCE AGENTS—INSURING OWN PROPERTY—NOTICE TO INSURER.

In an action on a fire policy issued by an agent on his own property, evidence *held* to require submission to the jury of the question whether the agent gave sufficient information to the insurer to charge it with notice that the agent was the owner of the property.

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

Rose, District Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Judge.

Action by T. Gilbert Wood, suing for himself and others, against the Spring Garden Insurance Company of Philadelphia, Pa. Judgment for defendant, and plaintiffs bring error. Reversed.

George E. Caskie, of Lynchburg, Va. (Caskie & Caskie, of Lynchburg, Va., on the brief), for plaintiffs in error.

George Bryan, of Richmond, Va., for defendant in error.

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

WOODS, Circuit Judge. [1] The first trial of this action on a fire insurance policy resulted in a judgment for the plaintiff, Wood; but the judgment was reversed in this court and the cause remanded for a new trial, the court holding that a verdict for the defendant should have been directed because the evidence showed that Wood was the agent of the defendant insurance company and issued a policy on his own property describing it as Haytokah Inn, without notice to the company of his ownership. On this point the court said:

"The position of an agent of an insurance company who issues a policy to himself is one that calls for the utmost frankness of dealing between himself and his company. He has a right to apply to his company to insure his property, but when he is dealing with himself he should be careful to see that there can be no question as to the fact that his principal is fully informed of the risk, and especially of that material element in the risk involved in the ownership of the property. The defendant in error as the plaintiff below sued upon a contract made with himself. To support his allegation he produced the policy made to the Haytokah Inn. In the opinion of this court he was not entitled to recover upon this policy unless he could show clearly that his principal was advised when as its agent he sought to make it accept the policy and undertake the risk that the words 'Haytokah Inn' referred to T. Gilbert Wood, and that he was in reality the beneficiary."

On the second trial the defendant set up the following as its sole defense:

"That the plaintiff was the agent of the defendant and issued the policy in suit to himself for his own benefit, and did not inform the defendant of the risk, including his ownership of the property."

After hearing the evidence on this issue, in the light of the former decision of this court, the District Judge directed a verdict for the defendant. There are a number of assignments of error, but the decision turns upon the correctness of the view of the District Judge that the evidence offered by the plaintiff to show that he did inform the de-

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

fendant company of his ownership of the property was no stronger than it was on the former trial, and that therefore the former judgment of this court required a verdict for the defendant.

[2] As the case is to go back for a new trial, detailed discussion of the evidence is not appropriate; but we cannot doubt that the evidence of the plaintiff on the second trial was substantially different and strong enough to require submission of the issue of notice to the company of the plaintiff's ownership. Wood was appointed agent of the defendant company at Burkeville, Va., on January 26, 1909, by E. A. Young, who signed the appointment as state agent for the company. On July 10, 1909, Wood wrote the first policy on the hotel owned by him called in the policy Haytokah Inn. The policy was issued to Haytokah Inn without other statement of ownership. Some time after this policy had expired, Wood issued in like terms the policy now in suit, numbered 5105 and dated December 25, 1909.

In each instance, Wood retained the policy in his possession, but sent to the stamping office in Richmond, representing the defendant and a number of other companies, a correct memorandum of the usual particulars of the policy, except that it stated the issuance of the policy to Haytokah Inn without indication of individual ownership. The stamping office, after passing on the rate and other more or less formal matters, stamped with its approval the memorandum sent by Wood and forwarded it to the home office in Philadelphia.

On both trials there was evidence sufficient to go to the jury that Young, who turned out to be the special agent of his company, received information from Wood and from others, first that Wood was about to build a hotel and afterwards that he was the owner of the hotel or had an interest in it; and that Young undertook to authorize the insurance, with this information before him. Even on this point the evidence was more definite on the second trial than on the first. But the main point is that on the second trial there was strong evidence not adduced at the first trial to the effect that Young as special agent for the defendant company had full authority not only to employ and dismiss local agents, but to represent the company generally, to authorize insurance, and to waive the usual conditions of the company's policies.

Examination of the record leads to the conclusion that there was evidence from which the jury might with good reason infer that Young was an agent empowered to consent that Wood should insure his own property in the company, and that notice to Young was notice to the company; and that as such agent Young sanctioned and solicited the insurance for the company after he had received sufficient information as to Wood's ownership. But the evidence was not so convincing on all of these points as to warrant the court in directing a verdict for the plaintiff.

The judgment must therefore be reversed, and the cause remanded for a new trial.

Reversed.

ROSE, District Judge, dissents.

BUTLER et al. v. JOHANNSEN.

(Circuit Court of Appeals, Fourth Circuit. June 10, 1914.)

No. 1237.

COLLISION (§ 95*)—STEAMER AND SCHOONER IN TOW—FAULT OF TUG.

The decree of a district court affirmed, which found on conflicting evidence that a tug which had made fast to a schooner in a narrow channel, for the purpose of moving her to a pier when it should be vacated by a steamer, was solely in fault for a collision between the steamer and schooner when the former moved away and was attempting to pass, on the ground that the tug unnecessarily started moving the schooner instead of waiting until the steamer had passed.

[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 District of Maryland, at Baltimore; John C. Rose, Judge.

Suit in admiralty for collision, by Gerhard Johannsen, master of the steamship Wegadesk, against the steam tug Curtis Bay, the Curtis Bay Towing Company claimant, and the schooner Edward B. Winslow, Henry W. Butler, master, claimant, with cross-libels. Decree against the tug Curtis Bay, and its claimant appeals. Affirmed.

For opinion below, see 206 Fed. 919.

Harry N. Abercrombie, of Baltimore, Md. (Jacob France, of Baltimore, Md., on the brief), for appellants.

John W. Griffin, of New York City (Haight, Sanford & Smith, of New York City, on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and DAYTON, District Judge.

WOODS, Circuit Judge. The schooner Edward B. Winslow, in tow of the tug Curtis Bay, and the steamship Wegadesk came into collision in the channel of Curtis Bay, an arm of the Patapsco river, in the afternoon of April 21, 1913. The libel on behalf of the Wegadesk and the cross-libels on behalf of the Curtis Bay and the Edward B. Winslow having been consolidated, the District Judge, after discussion of the evidence, in an extended opinion held the tug Curtis Bay to be solely at fault and responsible to the Wegadesk for damages to the amount of $4,382.73 and interest. The appeal involves no question of law, but draws in question the court's conclusions of fact on the conflicting evidence.

The Wegadesk, 365 feet long and 52 feet beam, had taken on 6,600 tons of coal at the coal pier of the Baltimore & Ohio Railroad. The Edward B. Winslow, 400 feet long and 50 feet beam, was lying off waiting to dock at the same pier as soon as the Wegadesk should leave. About 4 o'clock in the afternoon, the Curtis Bay went alongside the Winslow and made fast for the purpose of taking her to the pier. The

channel at the point of collision is about 400 feet wide, and afforded scant water space for the Wegadesk to get out and safely pass the Winslow. The Wegadesk having its bow to the shore at the pier, it was necessary for it to turn around before it could get through the channel into the open river. In this movement it was aided by the tug Dalzelline. Just after the tug had left and the steamer had straightened in her course, the collision occurred. The claim of the Winslow and the Curtis Bay is that they had stopped far enough away not to interfere with the maneuvers of the steamship, and had been practically still for about 20 minutes, when the steamer went directly into the Winslow, although that ship was plainly visible, and although the Curtis Bay sounded warning whistles. This claim is supported by the testimony of several witnesses, but it depends chiefly on the credence to be given to that of the master of the Curtis Bay, who was in charge of the tug and the schooner.

On the other hand, the witnesses on behalf of the Wegadesk testified that the Curtis Bay and the schooner, having been motionless and supposed by the master of the Wegadesk and the pilot in charge of her to be still so, without warning moved across the course of the steamer; that the schooner was between the tug and the steamer so that the tug which controlled could not be seen by the master or the pilot of the steamer; that they were watching carefully but did not discover the movement of the Winslow until it was too late to avoid the collision, although they immediately put their engines full speed astern.

Counsel agree that the decision depends entirely on the credibility of the witnesses, considered in the light of the surrounding conditions. Careful examination of the record and of the elaborate analysis of the evidence by counsel discloses some inconsistencies and improbabilities on both sides, but it leads to the conviction that the fault was that of the master of the Curtis Bay. He saw plainly that the Wegadesk was executing a difficult maneuver and needed full water space. He had been still, and he ought to have had in mind that, as the tug could not be seen from the Wegadesk, the master and pilot of the steamship in motion would not readily discover any movement of the Winslow. There was no need for immediate movement of the Winslow, and, in view of the scant space, due care required that she should remain motionless or move away from the steamer. The strong preponderance of the disinterested testimony is to the effect that, under these circumstances, the master of the tug did move the schooner and tug into the course of the steamship without warning. But, even if he had given warning, he would be in fault because there was no urgent need for him to be in haste to get to the pier and there was obvious peril in moving across the bow of the Wegadesk.

The explanation given by the master of the tug that the Wegadesk directed her course straight for the Winslow in full sight of her must be rejected because it is opposed to the preponderance of the testimony, and because it would have been purposeless folly on the part of the master. Such a course would have sent the ship into inevitable collision with the Winslow or on the beach beyond.

There are other details of evidence supporting the conclusion of the

District Judge, who had the special advantage of hearing and seeing the important witnesses for the appellant; but this is enough to show that it is not opposed to the preponderance of the evidence, and therefore must be adopted by this court.

Affirmed.

HOGG v. MAXWELL et al.

(Circuit Court of Appeals, Second Circuit. June 30, 1914.)

No. 254.

COURTS (§ 307*)—UNITED STATES COURTS—JURISDICTION—STIPULATIONS.

A stipulation at the opening of a trial that plaintiff was a "resident" of a state other than that of which defendants were citizens, was insufficient to show jurisdiction in a federal court in a case where the jurisdiction depended upon diverse citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 850–854; Dec. Dig. § 307.*

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dallagham, 27 C. C. A. 298.]

Coxe, Circuit Judge, dissenting.

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

W. G. Cooke, of New York City, for plaintiff in error.

H. W. Simpson, of New York City, for defendants in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. January 28, 1905, differences having arisen between the plaintiff and her late husband, an agreement under seal to live separately was entered into between them and certain trustees, whereby her husband agreed to pay the plaintiff or the trustee for her $5,200 a year in equal quarterly installments as her separate estate during his life and to make effectual provision in his will for continuing the same during her life or until her remarriage. January 31st he did make such a will and died June 5, 1911. February 4, 1913, the plaintiff began this action against the executors of the will to recover damages in the sum of $200,000, alleging that her husband, in consideration of her refraining from bringing an action for separation, promised that he would enter into an agreement with her which would secure her one-third of his income, and, relying on his representation that it was about $15,000 a year, she had entered into the agreement aforesaid, but that upon his death she for the first time learned that his income was, at the time the agreement was executed and down to the time of his death, between $70,000 and $100,000.

The complaint alleges that the plaintiff is a resident and citizen of the state of New Jersey.

The answer denied any knowledge or information sufficient to form a belief as to substantially all the allegations except that the agreement pleaded had been executed.

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

When the cause came in for trial, the defendant stipulated that Hogg's annual income at the time the agreement was executed was $60,000, and that the residence of the plaintiff was in the state of New Jersey. There was nothing to show the citizenship of the defendants. The plaintiff's counsel in opening the case said that her claim was for the difference between $5,200 and $20,000 during her husband's life and the cost of an annuity of $20,000 for her expectation of life, calculated on the mortality tables at the time of her husband's death.

The defendants' counsel moved to dismiss on the complaint and the opening upon the ground, among others, that the complaint did not state a cause of action and that the damages were incapable of legal ascertainment. Judge Martin granted the motion, principally upon the latter ground.

The case should have been dismissed for want of jurisdiction because the stipulation that the plaintiff was a resident of New Jersey was quite insufficient. Citizenship of the plaintiff in New Jersey and of the defendants in New York was necessary to give the court jurisdiction. Newcomb v. Burbank, 181 Fed. 334, 104 C. C. A. 164.

Judgment reversed.

COXE, Circuit Judge, dissents.

NOTASEME HOSIERY CO. v. STRAUS et al.

(Circuit Court of Appeals, Second Circuit. May 14, 1914.)

No. 285.

TRADE-MARKS AND TRADE-NAMES (§ 98*)—UNFAIR COMPETITION—ACCOUNTING FOR PROFITS.

A decree holding defendants liable for profits realized from unfair competition, by using a label so like complainant's as to be deceptive, affirmed on the ground that during the time for which profits were allowed defendants were chargeable with intentional fraud.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. § 98.*

Unfair competition in use of trade-mark or trade-name, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

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

Suit in equity by the Notaseme Hosiery Company against Isidor Straus and Nathan Straus, trading as R. H. Macy & Co. Decree for complainant, and defendants appeal. Affirmed

For opinion below, see 209 Fed 495.

E. E. Wise, of New York City, for appellants

E. H. Fairbanks, of Philadelphia, Pa., for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

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

WARD, Circuit Judge. The complainant, a corporation of the state of Pennsylvania, filed its bill against the defendants, citizens of the state of New York, residing in the Southern District thereof, for infringement of its trade-mark and for unfair competition. The District Judge dismissed the bill, and upon appeal this court held that the labels were so alike that it was obvious confusion of goods must result. We sustained the charge of unfair competition. 201 Fed. 99, 119 C. C. A. 134. Accordingly the decree was reversed, and the District Court directed to enter a decree in favor of the complainant, with the usual injunction and accounting against the defendants.

It appears that the complainant's and defendants' labels were both designed by the same person, and that the defendants, though they put their goods on the market in March, 1908, were wholly unaware of the complainant's label until December 1, 1909.

The master awarded to the complainant the profits made on sales of this infringing hosiery from July 30, 1908, to February 1, 1913, amounting to $15,411.29. Upon exceptions to his report Judge Lacombe struck out profits down to January 1, 1910, from which time he held the defendants guilty of a deliberate intention to enter into unfair competition, because they continued to use their label after they had been advised of the complainant's and had ample time to change it. This reduced the decree to $9,839.73. The defendants appeal, on the ground that profits in cases of unfair competition are recoverable only when there is intentional fraud. Assuming this to be so, we are, in view of our previous decision, compelled to find that there was fraudulent intent.

The decree is affirmed.

OTTUMWA BOX CAR LOADER CO. v. CHRISTY BOX CAR LOADER CO.

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

No. 4046.

(Syllabus by the Court.)

1. TRIAL (§ 83*)—OBJECTION TO EVIDENCE—SUFFICIENCY—WAIVER.

   The failure by the terms of the objection to give fair notice to opposing counsel of the reason for the objection to evidence, which the latter could easily have avoided while introducing his testimony, is a waiver of that objection.

   [Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 193–210; Dec. Dig. § 83.*]

2. APPEAL AND ERROR (§ 242*)—MATTERS REVIEWABLE—RULINGS ON OBJECTION.

   A ruling by the trial court upon objections to evidence in equity must be obtained or refused and exception taken, and these proceedings made of record, to warrant a consideration of the questions they suggest in an appellate court.

   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1417–1425; Dec. Dig. § 242.*]

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

3. PATENTS (§ 62*)—ANTICIPATION—TESTIMONY TO ESTABLISH—REQUISITES.
The testimony of a former employé of a patentee, more than a decade after the date of the patent, that he himself made the invention, and the testimony of others that about the time the device was patented he made statements to that effect to them, is insufficient to establish that fact in the face of testimony to the contrary of the patentee and other witnesses. Testimony to establish such an anticipation must be clear and conclusive.

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

4. PATENTS (§ 26*)—COMBINATION OF OLD ELEMENTS.
A new combination of old elements, whereby a new and useful result is produced or an old result is attained in a more facile, economical, and efficient way, may be as securely protected by a patent as a new machine or composition of matter.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*

Patentability of combinations of old elements as dependent on results attained, see note to National Tube Co. v. Aiken, 91 C. C. A. 123.]

5. PATENTS (§ 26*)—RIGHT TO PATENT—INDEPENDENT INVENTIONS.
Where the advance toward the thing sought is gradual, and several inventors independently form several combinations which accomplish the general result with varying degrees of operative success, each is entitled to his own combination as long as it differs from those of his competitors and does not include theirs.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27-30; Dec. Dig. § 26.*]

6. PATENTS (§ 245*)—INFRINGEMENT—DOCTRINE OF MECHANICAL EQUIVALENTS —APPLICATION.
The doctrine of mechanical equivalents is governed by the same rules and has the same application in a case in which the infringement of a patent for a combination is in question as in cases where the issues are over the infringement of patents for machines or compositions of matter.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 386; Dec. Dig. § 245.*]

7. PATENTS (§ 64*)—COMBINATIONS—ANTICIPATION.
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 accomplish substantially the same result by substantially the same means as does the patented combination.

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

8. PATENTS (§ 168*)—CLAIMS—ACQUIESCENCE IN REJECTION—ESTOPPEL.
While one who acquiesces in the rejection of his claim on references is estopped from maintaining that an amended claim covers the combinations and devices shown in those references, or that it has the breadth of the rejected claim, this is the limit of the estoppel.
He is not estopped from claiming and securing by an amended claim every improvement and combination he has invented that was not disclosed by the references on which his original claim was rejected.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 243½, 244; Dec. Dig. § 168.*]

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

9. PATENTS (§ 167*)—CONSTRUCTION—SPECIFICATION AND CLAIMS.

The specification of a patent which forms a part of the same application as its claims must be read and construed with the latter, not for the purpose of expanding, nor for the purpose of limiting or contracting the claims, but for the purpose of ascertaining their true meaning and the intention of the parties when they were made and allowed.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

10. PATENTS (§ 167*)—CONSTRUCTION—SPECIFICATION AND CLAIMS.

General language in a claim, which points to an element or device more fully described in the specification and drawings of which it is a part, is limited to such an element as is there described.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

11. PATENTS (§ 328*)—VALIDITY—INFRINGEMENT.

Claims 1 and 2 of letters patent No. 648,897, issued May 1, 1900, to Joseph M. Christy for a box car loader are valid and infringed.

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

Suit by the Christy Box Car Loader Company against the Ottumwa Box Car Loader Company. From decree for plaintiff, defendant appeals. Affirmed.

Wallace R. Lane, of Chicago, Ill., for appellant.

J. Ralph Orwig and Charles Hutchinson, both of Des Moines, Iowa (Orwig & Bair and Clark & Hutchinson, all of Des Moines, Iowa, on the brief), for appellee.

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

SANBORN, Circuit Judge. This is an appeal from a decree that Joseph M. Christy was the first and sole inventor of that combination of mechanical devices constituting a box car loader which was patented to him by letters patent No. 648,897, issued May 1, 1900, that this patent had been assigned to the plaintiff below, the Christy Box Car Loader Company, a corporation, that the defendant below, the Ottumwa Box Car Loader Company, a corporation, had infringed the rights secured by the first and second claims of this patent, and that it was thenceforth enjoined from so doing.

[1] The defendant first contends that the court below should have found that the patent had never been assigned to the plaintiff because the signatures to the two assignments, one from the patentee to Ellen M. Christy and the other from Ellen M. Christy to the plaintiff, were not proved by the subscribing witnesses thereto, but by the testimony of Joseph M. Christy. That objection, however, was not made when the testimony of Christy and the certified copies of the assignments were introduced in evidence, and it was thereby waived. The plaintiff presented the original assignments for the inspection of counsel for the defendant, proved that the signatures to them were genuine by the testimony of Christy, and introduced in evidence certified copies of the records of them in the Patent Office. The only objection was

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

made before the examiner who was taking the evidence, and it was that the original assignments and certified copies were not proved, were incompetent to effect the transfer of the patent, and a motion was made before the examiner to strike out all the testimony of Christy in relation thereto as incompetent. Conceding, but not admitting, the rule of evidence counsel invokes, to the effect that Christy was not a competent witness to prove the signatures to the assignments until the plaintiff established the fact that the subscribing witnesses to those assignments were dead or unavailable, the objection made was insufficient to invoke this rule, because it failed to suggest to opposing counsel or the court the technical objection upon which counsel rely. The failure to give fair notice to opposing counsel of the grounds of an objection to evidence, which the latter could easily have avoided while introducing his testimony, is a waiver of that objection, Guaranty Co. of North America v. Phenix Ins. Co., 124 Fed. 170, 175, 59 C. C. A. 376, 381, and the title to the patent was sufficiently proved by the testimony of Christy to the signatures, the presentation of the originals to opposing counsel, and the introduction of the certified copies from the Patent Office.

[2] Moreover, the objection which has been considered was never called to the attention of the court below, or ruled by it, and an appellate court cannot declare that the trial court erred in a ruling that it has never made upon a question never presented to it. Objections to evidence and motions noted by an examiner in the taking of testimony in equity must be ruled by the court, and exceptions must be taken to those rulings, and both rulings and exceptions must be made a part of the record before they become reviewable in the court above. Goodwin v. Fox, 129 U. S. 601, 630, 9 Sup. Ct. 367, 32 L. Ed. 805; Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co., 104 Fed. 243, 43 C. C. A. 511.

[3] It is contended that the court below should have found that John Moses, and not Christy, conceived and constructed the combination of mechanical devices which constituted the box car loader patented to Christy. When the first box car loaders were constructed on the principle of the combination described in the patent in suit, Christy was the president and manager of the Christy Coal Company, and was operating their mines, and Moses was one of his employés. Christy directed Moses to construct these loaders, and superintended his work. Moses was his master mechanic. After the loaders were completed Christy applied for and obtained a patent for the combination they embodied in his own name. His application was filed July 26, 1898, and his patent issued May 1, 1900. Moses never instituted any legal or equitable proceeding to question Christy's invention of these combinations, or his title to the patent, but in March, 1913, after this suit was brought, he testified on behalf of the defendant below that he was, and that Christy was not, the inventor thereof, and several witnesses came at the call of the defendant to testify that Moses claimed in conversations with them, about the time the loaders were constructed or shortly thereafter, either that he or he and Christy conceived the principle of and made the combination they illustrate. Moses also testified that

in 1902, in consummating the purchase of a house, he signed a written agreement to buy it and to surrender therefor a note indorsed by Christy and all claims he held in or against the patent. On the other hand, Christy and other witnesses came to say that he conceived the principle of the loader patented to him and directed its embodiment by Moses, his employé, in the machine. The testimony on this issue is therefore conflicting. The legal presumptions, that arising from the patent and that arising from the undisturbed title and use of the patented monopoly by Christy and his successors in interest for more than a decade, are in favor of the claim of the patentee. Christy was the man who was seeking and who needed a box car loader, and Moses was his employé, hired and paid to do as he directed. It is easy for one, employed to construct a machine upon a principle disclosed by his employer, to come to think and to say as he works out the mechanical details, and afterwards to believe and testify, that the invention itself was his. But testimony of this nature produced by an alleged infringer, to destroy a patent unchallenged for years, ought not to prevail unless it is clear and conclusive. Thomson-Houston Elec. Co. v. Winchester Ave. Ry. Co. (C. C.) 71 Fed. 192, 199; Eastern Dynamite Co. v. Keystone Powder Co. (C. C.) 164 Fed. 47, 56; United Shirt & Collar Co. v. Beattie, 149 Fed. 736, 79 C. C. A. 442, 447. All the testimony upon this issue has been read and weighed, but it fails to convince that Moses was the original inventor of the patented combination, much less to persuade that the court below fell into any error of law or made any such mistake in its consideration of the evidence as can overcome the strong presumption that its finding and decree upon this conflicting evidence was correct. Warren v. Burt, 58 Fed. 101, 106, 7 C. C. A. 105, 110; Gorham Mfg. Co. v. Emery-Bird-Thayer Dry Goods Co., 104 Fed. 243, 244, 43 C. C. A. 511, and cases there cited.

It is specified as error that the court below decided that the patent was valid, and that the defendant infringed it. Modern box cars are about 40 feet long. Coal must be loaded into the ends of these cars, and the art is to receive this coal from a chute inserted in one door of the car and load it into the extreme ends of the car with machinery, without shoveling or handling it by manual labor. The plaintiff and the defendant are and have been competitors in the business of making and selling box car loaders. For many years the plaintiff has made and sold the combination patented to Christy on May 1, 1900, upon his application of July 26, 1898. The defendant has made and sold a combination operated on the principle described in letters patent No. 632,202, issued to Phillips and Hunt, August 29, 1899, on an application filed December 22, 1898. About the year 1912, however, just before this suit was instituted, the defendant commenced to make and sell box car loaders made on the principle described, and embodying the combination disclosed in the patent to Christy, and it is the manufacturing and selling of these loaders that the court below has enjoined.

The principle or mode of operation of the Christy combination is to receive the coal as it descends from the chute on a moving endless

carrier about eight feet long, consisting of steel cross pieces placed so near together that no coal can fall through between them, and attached at their ends to the links of two endless chains which run over and are driven by sprocket wheels at the ends of the carrier, which are mounted on the side plates of a carrier frame capable of turning in a horizontal plane. The sprocket wheels, and hence the endless carrier, are driven by an engine or other suitable power, and are capable of throwing the coal as it strikes the platform to the extreme end of the largest box car, or to any less distance. By a reversal of the engine or power the carrier may be made to throw the coal to the opposite end of the car. The carrier is provided with upstanding partitions which catch the coal, prevent it from sliding on the carrier, and assist in throwing it to the end of the car. The combination devised by Christy to avail himself of this principle or mode of operation consisted of a main frame mounted on trucks on a permanent platform on the side of the car opposite the coal chute, so that the end of this main frame upon which the carrier was mounted on a frame capable of turning in a horizontal plane could be moved by an engine mounted upon the outer end of the main frame, or by a belt or other similar device, driven by suitable power into the car so that the carrier would stand under the coal chute when it had been inserted from the opposite side of the car, a carrier frame, so mounted on the main frame that it could be readily turned in a horizontal plane, an endless carrier made of crosspieces of steel, placed so close together as to prevent fine coal from falling between them, attached to the links of endless chains driven by sprocket wheels on shafts supported by the sides of the carrier frame, driven by the engine or other suitable power at such speed as to throw the coal when it fell on the endless carrier to the end of the largest box car, or to any less distance, as desired. The carrier frame and the carrier in Christy's combination are about eight feet long, are introduced into the car endwise, and then turned until they stand lengthwise of the car. The carrier is provided with upstanding crosspieces or partitions to prevent the coal from sliding along the carrier and to carry and throw it as desired, and it is capable of moving at great speed from 400 feet to 1,000 feet per minute, or at such less speed as may be desired.

The principle or mode of operation of the Ottumwa loader, made and sold by the defendant after patent No. 632,202, is to receive the coal from the chute into a curved trough about 12 or 14 feet long, consisting of a bottom and sides without end pieces, mounted on a pedestal capable of turning in a horizontal plane, and provided with a tight-fitting sliding partition or pusher, attached through a slot in the bottom of the trough to a chain which, by means of power from the engine or elsewhere, is dragged from one end of the trough to the other and back again, and in that way made to scrape the coal out of the trough. In operation the sliding partition is placed at one end of the trough, and the trough is then moved along under the chute until it is loaded by the coal falling upon it, and is extended from the middle of the car towards the end of the car as far as possible, or about 12 to 14 feet. The sliding partition is then dragged by

means of the chain beneath the trough along the trough, and made to push and scrape the coal out of the trough into the car, and when this is done the operation is reversed and coal is scraped out of the trough into the other end of the car. The Ottumwa combination used to operate this principle consisted of a main frame, mounted on wheels on shafts upon a permanent platform at the side of the car opposite the coal chute, on which the trough and its pusher were so mounted upon a pedestal or frame capable of turning in a horizontal plane, that they could be moved by an engine mounted on the other end of main frame, or by other suitable power, into the car so that the trough would stand beneath the coal chute on its pedestal or frame, upon which it could be turned to a position lengthwise of the car, and could be moved longitudinally, and a partition or pusher fitting the trough and a chain beneath the trough attached to the pusher actuated by the engine or other like power.

The advance in the art over the Ottumwa device marked by the combination of Christy is that in the use of the former the inertia of a stationary mass of coal in the trough and its friction against the bottom and sides thereof must be overcome by the use of great power, while this is avoided in the use of Christy's device by catching the coal in a small stream as it flows from the chute upon the rapidly moving carrier and throwing it immediately and continuously to its destination; that in the use of the former time is required to load and then to unload the trough, while in the use of the latter the coal may be placed at its destination in the car without any such loading or unloading; that even to load a car 14 feet from the middle of it a trough 14 feet long must be provided, because when a load of coal is pushed out of such a trough it cannot be thrown, but will fall near the end of the trough, while in the use of the latter a carrier 8 feet long proves sufficient to throw the coal to the end of the largest box car, and that on account of the narrowness of a box car and of its door a rigid trough more than 14 feet long cannot be introduced into the car, so that in a car 42 feet long there will be about 7 feet at each end that cannot be well loaded by the use of the Ottumwa combination, while in the use of Christy's combination the coal can be loaded at the extreme ends of the car, where, on account of the greater strength of the car over the trucks, the bulk of it should be placed. It was this advance in the art that caused the commissioner to grant the patent to Christy, caused the defendant to substitute in 1912 Christy's mode of operation and combination with its endless carrier for its own combination with its trough and pusher, and caused the court below to sustain the claim of Christy as an inventor and to issue the injunction against the use of his combination by the defendant.

The claims of the patent which were adjudged infringed are:

"1. A box car loader, comprising in combination a device capable of movement into or out of a box car, a frame on said device pivotally mounted to be capable of turning in a horizontal plane, an endless conveyer on the frame provided with suitable crosspieces to thereby form a platform for receiving coal and carrying it to either end of the frame, and means for driving said conveyer in either direction, so that coal may be thrown to any desirable distance within the car.

"2. A box car loader, comprising a device capable of movement into or out of a box car, a frame on said device pivotally mounted to swing in a horizontal plane, one or more endless chains on said frame, a platform on the chain or chains extending to the ends of the frame, and in position to receive coal from a chute introduced in the opposite side of a box car, and means for driving the platform in either direction, for the purposes stated."

[4] It is claimed that Christy's combination and these claims are anticipated by the prior state of the art. It is not claimed, and it is probably not true, that any of the mechanical elements of which Christy's combination is composed is new, and this, like most modern patents, is a patent for a new method of combining old mechanical devices. But a new combination of old elements, whereby a new and useful result is produced, or an old result is attained in a more facile, economical, and efficient way is as securely protected by a patent as a new machine or composition of matter. National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 707, 45 C. C. A. 544, 558.

[5] Where the advance towards the thing desired is gradual and several inventors form different combinations which accomplish the result sought with varying degrees of operative success, each is entitled to his own combination as long as it differs from those of his competitors and does not include theirs. Railway Co. v. Sayles, 97 U. S. 554, 556, 24 L. Ed. 1053; McCormick v. Talcott et al., 20 How. 402, 405, 15 L. Ed. 930; Stirrat v. Excelsior Mfg. Co., 61 Fed. 980, 981, 10 C. C. A. 216; Griswold v. Harker, 62 Fed. 389, 391, 10 C. C. A. 435; Adams Electric Ry. Co. v. Lindell Ry. Co., 77 Fed. 432, 440, 23 C. C. A. 223; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 712, 45 C. C. A. 544, 563.

[6] The doctrine of mechanical equivalents is governed by the same rules, and has the same application, in a case in which the anticipation or infringement of a patent for a combination is in question as in cases where the issues are over the infringement of patents for machines or compositions of matter. Belding Mfg. Co. v. Challenge Corn Planter Co., 152 U. S. 100, 14 Sup. Ct. 492, 38 L. Ed. 370; Seymour v. Osborne, 11 Wall. 516, 542, 548, 20 L. Ed. 33; Imhaeuser v. Buerk, 101 U. S. 647, 653, 25 L. Ed. 945; Griswold v. Harker, 62 Fed. 389, 10 C. C. A. 435; National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 711, 45 C. C. A. 544.

[7] 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 the same means. Imhaeuser v. Buerk, 101 U. S. 647, 660, 25 L. Ed. 945; Bates v. Coe, 98 U. S. 31, 48, 25 L. Ed. 68; Latta v. Shawk, 1 Bond, 259, Fed. Cas. No. 8116; Eickemeyer Machine Co. v. Pearce, 10 Blatchf. 403, Fed. Cas. No. 4,312; Mfg. Co. v. Steiger (C. C.) 17 Fed. 250, 252; National Cash Register Co. v. American Cash Register Co., 3 C. C. A. 559, 53 Fed. 367; Rhodes v. Lincoln Press Drill Co. (C. C.) 64 Fed. 218,

219; Packard v. Lacing Stud Co., 16 C. C. A. 639, 641, 70 Fed. 66, 68; J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 265, 93 C. C. A. 561. Bearing in mind these indisputable principles of the law, let us see whether or not Christy's mode of combining his old elements was shown anywhere in the prior art cited by counsel for the defendant. It was not in the endless carrier belt with upstanding projections operated by chains over sprocket wheels to carry grain from a warehouse into a car disclosed in patent No. 472,454 to Hastings, nor in the counterpart conveyers on a sliding carriage upon a stationary sideway under which the car to be loaded was to be placed for the purpose of loading it with coal, nor in the other machinery shown in patent No. 475,236, issued May 17, 1892, to Compton, and under the rule last stated these patents are immaterial to any issue in this case. The combinations they disclose lack these elements of Christy's combination, a main frame on the end of which the frame of the carrier and the carrier itself may be introduced through the door of the box car, and the carrier frame capable of turning in a horizontal plane.

The complicated device shown in patent No. 619,191 to Lamb, issued February 7, 1899, falls under the same rule. While it discloses a complex combination whereby an endless carrier may be introduced into a box car and may be there driven, it lacks these essential elements of Christy's combination, the short reversible carrier and the short frame upon which it is mounted, capable of turning in a horizontal plane within the car. In the operation of Lamb's device it is necessary, in order to load the car, to first load one end of the car, then withdraw it from the car, run it into the other end, and when that is loaded draw it out again and load the middle of the car. Neither all the elements of Christy's device, nor his method of combining his elements, nor his easy, economical, and efficient way to load a car are either found or suggested by the impractical and useless combination of Lamb.

Patents No. 344,595 to Ramsay, issued June 29, 1886, No. 512,575 to Bond, issued January 9, 1894, No. 525,181 to Beck, issued August 28, 1894, and others of like character, are not material as alleged anticipations, but they are curious and interesting illustrations of the gradual advance in the art. They disclose attempts to load the ends of box cars with coal by receiving it in the middle of the car on stationary platforms or in troughs, and then knocking it to the ends of the cars by reciprocating paddles, shovels, or knockers passing rapidly over and in close proximity to the face of the platform first in one direction and then in the other. Beck's patent for example shows a shovel projecting downward from a shaft which in operation is given a reciprocating motion which causes its lower end to pass 100 times in a minute close to the bottom of a stationary pan in which the coal is received from the chute. These devices have been superseded because they do not drive the coal uniformly where desired, because they break and scatter it, and because they drive some of it against the end and sides of the car with such force as to injure it, while other parts of it not fairly struck receive too slight a movement.

The next advance in the art after the knockers was the conception and construction of the scraping combinations, devices whereby the coal was received in troughs or on platforms in the middle of the car and unloaded therefrom by scraping it out of the troughs or off of the platforms by upstanding partitions dragged over them by chains actuated by engines or other suitable power. The combination used by the defendant before it appropriated Christy's principle and combination is a good illustration of each of these scrapers, and it has already been described. Examples of them are portrayed in the patent to Phillips and Hunt No. 570,880, issued November 3, 1896, where the coal is received in a trough, and when the trough has been loaded a single sliding partition is drawn by power actuating a chain beneath the trough which is fastened to a bar attached to the lower edge of the partition, which is adapted to move through a longitudinal slot in the bottom of the trough from one end of it to the other, thereby scraping the coal out of the end of the trough, in the patent to Phillips and Hunt No. 632,202, issued August 29, 1899, which with the exception of details of construction immaterial here discloses the same combination operated on the same principle, in the patent to Dierdorff No. 575,028, issued January 12, 1897, which describes a like combination of a trough to receive and hold the coal and a single upstanding partition, which the patentee calls a plunger, and which is dragged along the trough and made to unload it by scraping the coal out of one of its ends by means of parallel chains traveling longtitudinally in the trough and actuated by suitable power, and in the patent to Ingalls No. 488,564, issued December 27, 1892, upon which counsel for the defendant seem to lay much stress. But when the description of the combination of that patent is carefully examined it is found to be nothing but a stationary platform on which the coal is received, and from which it is unloaded by scraping it off with many upstanding partitions instead of one attached to endless chains drawn by suitable power. This patent shows an appreciation by the patentee of the difficulty of delivering the coal at the ends of the cars and a determined attempt to overcome it by expanding the receiving platforms to the extreme ends of the cars. Neither he nor any one could, by the use of the scraper principle or mode of operation, deliver the coal at the ends of the cars unless he could get a trough or platform longer than could be introduced in a single longitudinal section through the door of the car. Perceiving this, he conceived and described a combination of a platform to receive the coal and a scraper to unload it in three sections, two of which were to be folded up as they were introduced through the door of the car and after their introduction were to be extended from the third or middle section to the ends of the car respectively and then retracted at will. If Christy's principle or mode of operation by receiving the coal upon a tight rapidly moving carrier and never permitting it to reach a platform beneath it had ever suggested itself to his mind, his sections would have been worse than useless, and he never would have constructed them. What he did was to make a sheet metal flooring *R* for his platform, resting on crossbars supported on the side bars of the platform. In his specifica-

tion he calls this his sheet metal flooring, and in one of his claims he calls it a stationary plate attached to the platform, and it is this flooring that receives and sustains the coal as it drops from the chute. To remove the coal from the floor of this platform he provides two endless chains with crossbars operated by power in either direction. He calls these chains and crosspieces an "endless apron or conveyer," but the drawings disclose the fact that the spaces between the crossbars are wider than the crossbars themselves, so that they constitute in fact nothing but upstanding partitions, and their actual function is to push and scrape the coal along the floor of the platform, until it falls off one of its ends. The endless chains and crosspieces of Ingalls constitute a conveyer in the same sense that the common scraper drawn by a team of horses is a conveyer of the rocks and dirt it scrapes along the surface of the earth, but in no other sense. They do not receive and carry the weight and burden of the coal as does the carrier of Christy, and the facts that Ingalls placed his crosspieces so far apart that they could not constitute a carrier, that he provided the sheet metal flooring and the folding extensions, demonstrate the fact that his combination never suggested to his mind, inventor though he was, in fact it probably never suggested to the mind of any one, either the short rapidly moving throwing carrier of Christy or his mode of operation. There are many other patents in the record, but none that disclose combinations nearer that of Christy than those that have been reviewed. There is some testimony regarding box car loaders made and used by Phillips and Hunt in 1895 and 1896, but it has failed to convince that they ever conceived, made, or used a combination of devices capable of operating on the principle of Christy's patented combination prior to the date of his patent. Our minds are confirmed in this conclusion by the fact that Phillips and Hunt subsequently secured patents No. 570,880 and No. 632,202 on their inventions in which no intimation of Christy's mode of operation or of his combination is found, and their eagerness to appropriate them now makes it more than probable that if they had been aware of them then they would have embodied them in their applications and secured them by their patents. This completes the review of the prior state of the art as it is disclosed by the record in this case. The result is that we agree with the court below that there is no patent, publication, combination, or device disclosed therein which anticipated or described the principle or mode of operation, or the method of combination of the mechanical elements to practice it which are described in the specification and secured by the first two claims of the patent to Christy.

[8] But counsel say that Christy's claims were so limited and he was so estopped by the fact that after the rejection of one of his claims in the Patent Office upon Phillips and Hunt's patent, No. 570,-880, he abandoned it, and subsequently substituted for it by amendment claim 1 in suit, and by the fact that in an interference with one Willson in the Patent Office priority of invention was awarded to Willson, that the plaintiff may not maintain and enforce the claims of Christy's patent under consideration. It is true that a patentee who acquiesces in the rejection of his claim on references cited in the

Patent Office and accepts a patent on an amended claim is thereby estopped from maintaining that the latter claim covers the combinations shown in the references, and that it has the breadth of the claim that was rejected. But this is the limit of the estoppel. One who acquiesces in the rejection of his claim because it is said to be anticipated by other patents or references is not thereby estopped from claiming and securing by an amended claim every known and useful improvement that is not described by those references. National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 714, 45 C. C. A. 544; J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 268, 93 C. C. A. 561; O'Brien-Worthen Co. v. Stempel (C. C. A.) 209 Fed. 847, 851.

[9] The specification of a patent which forms a part of the same application as its claim must be read and construed with the latter, not for the purpose of expanding nor for the purpose of limiting or contracting the claims, but for the purpose of ascertaining their true meaning and the intention of the parties when they were made and allowed. Seymour v. Osborne, 11 Wall. 516, 547, 20 L. Ed. 33; O. H. Jewell Filter Co. v. Jackson, 140 Fed. 340, 344, 72 C. C. A. 304.

[10] And general language in a claim which points to an element or device more fully described in the specification is limited to such an element as is there described. Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 493, 23 L. Ed. 952; Mitchell v. Tilghman, 19 Wall. 287, 387, 22 L. Ed. 125; Expanded Metal Co. v. Board of Education of St. Louis, 111 Fed. 395, 397, 49 C. C. A. 406. Patent No. 570,880 to Phillips and Hunt did not, as we have seen, anticipate, describe, or claim the principle or combination of a short tight carrier with the other mechanical elements of Christy's combination, but was limited to the combination of a trough and a sliding scraping partition to unload it with other mechanical elements. In their specification and claims, however, Phillips and Hunt had called this trough and scraper a conveyer and Christy had made this claim: "A box car loading apparatus comprising in combination a device capable of movement into or out of a box car, a frame on the end of said device capable of turning in a horizontal plane, an endless conveyer on said frame and means for driving this conveyer in either direction so that coal may be discharged successfully from each end of the conveyer for the purposes stated," which was rejected by the examiner on this patent No. 570,880, undoubtedly because the word "conveyer" therein had too broad a significance, and thereupon Christy amended his claim so as to describe clearly his carrier as it is now described in claim 1 of the patents in these words:

"An endless conveyer on the frame provided with suitable crosspieces to thereby form a platform for receiving coal and carrying it to either end of the frame."

[11] As neither the mode of operation nor the combination of such a conveyer with the other elements of Christy's combination was disclosed or suggested by the specification or claims of patent No. 570,880, and the latter patent was limited to the combination of its other mechanical elements therein described with the trough and

scraper, neither Christy nor the plaintiff was estopped from or limited in the enforcement of the monopoly of his combination described in claims 1 and 2 of his patent.

Nor does the adjudication of the interference with Willson, who subsequently abandoned his application for a patent, present any better defense. He was seeking a patent on another scraper conveyer consisting, among other elements, of a trough for receiving the coal and two endless chains with downward extending partitions thereon, which he termed "flights" and of which he said in his specification:

> "The chains and trough are so related that the flights are carried along the bottom of the latter and scrape or push the coal from the center of the car toward one end or the other. * * * The conveyer acts by scraping, it being of skeleton character, with cross flights that push the coal along the bottom and sides of the stationary trough."

As Willson's claimed combination was limited by his specification and claims to the combination of other devices with this scraper mechanism, the only effect of the adjudication in his interference with Christy was to determine that he invented or discovered that scraper combination before Christy, and as the mode of operation and the combination of Christy are not the scraper mode of operation or the scraper combination of Willson, and are not anticipated thereby, that judgment in no way estops or limits the right of Christy or his successors in interest to maintain the monopoly of his combination and mode of operation adjudged and granted to him by the examiner of patents after this adjudication upon the interference had been made.

The defendant has not omitted to make another attack upon Christy's combination, which is generally made upon every patented combination, and that is that it is a mere aggregation of old elements and not a combination subject to patent. It is true that there is no invention in the mere assembling of old elements into an aggregation in which each element performs its own independent function only and in which no new principle or mode of operation or new result is produced. But Christy's combination of elements was new; it was not disclosed in the prior art; no one had ever made it before him. The independent functions of his various elements were modified and extended by his combination so that together they operated on a new principle and by a new mode and produced a new and better result. The ordinary function of the chief element of this new combination, the endless carrier which was to convey to its ends and there drop its burdens, was so qualified and extended by its combination with the other elements described that it readily caught and threw coal 14 feet beyond its ends. A new principle or mode of operation was invented in the art of loading box cars, and practiced by the use of Christy's combination, whereby the coal as it descended the chute into the car was caught on Christy's rapidly moving tight-fitting steel slat carrier, held, carried, and thrown by that carrier and the upstanding steel partitions thereon to the end of the car as fast as it came down the chute, and the new and useful result of loading the coal into the ends of the cars or at any less distance, as desired, uniformly and continuously as fast as it descended the chute, was at-

tained. Not only this, but the further object was accomplished by this combination of loading such cars at their ends in an easier, quicker, and more economical way than they had ever been loaded by any other method. No mere aggregation of the old elements of this combination could have achieved these results, and Christy's combination fell far within the limits of a patentable combination.

His combination has gone into extensive and successful commercial use, but in the commercial combination the carrier is slightly curved, so that its ends are higher than its middle so that in operation the coal may be thrown above the horizontal plane in which it leaves the carrier, while the carrier portrayed and described in Christy's patent has a flat top, and counsel for the defendant contend that there was no utility in the combination described in the patent of which the flat topped carrier was the main element. The argument is not persuasive. The record satisfies that the combination in the exact form described in the patent would throw the coal to the ends of the cars, was practical and useful, and that the utility and success of the commercial combination is attributable to Christy's discovery or invention of this mode of operation and combination, and not to the slight change in the form of the top of his carrier to which he was not limited by his specification or claims.

Finally counsel assail the validity of Christy's patent on the ground that there was no invention in the production of the principle and combination it discloses; that any mechanic skilled in the art could have conceived and produced them. But the record and the fact that Phillips and Hunt, officers of the defendant and inventors of the scraper devices patented to them in 1896 and 1899, men who have been engaged for more than 15 years in searching for the best device to load box cars, have lately mounted in the sides of their old trough in place of their scraper the steel crosspiece carrier of Christy with its upstanding partitions, and have thereby rendered the bottom of their trough useless, have convinced that Christy's patented combination is the most efficient and economical box car loader yet produced. Manufacturers, owners of mines, skilled mechanics, and inventors for more than a decade before Christy's invention felt the need of and sought to find such a loader. Ramsay in 1886, Bond and Beck in 1894, invented and patented knockers to bat the coal from stationary platforms in the middle of their cars to their ends, Ingalls in 1892, Dierdorff in 1897, Phillips and Hunt in 1896 and 1899, and many others, invented and patented scrapers to accomplish this desired end. Skilled mechanics studied and sought for the same purpose, but no one discovered the principle or invented the combination of Christy until he described it. It is strenuously contended that the patent to Ingalls of his scraper loader was so suggestive that any mechanic skilled in the art on an inspection thereof could have produced the combination of Christy. But the patent to Ingalls was issued in 1892, four years before Christy filed his application and four years before Phillips and Hunt obtained their first patent. Phillips and Hunt were studying and hunting for the best combination of old elements to load box cars. They were doubtless familar with the patent to In-

galls and with all the old elements of all these combinations. Yet they failed to find either the principle or the combination of Christy, and produced inferior combinations which they patented and used and for which they are now here fighting to substitute the combination of Christy. That combination and the mode of operation it uses were first invented and discovered by Christy, and in the light of these facts the commissioner of patents and the court below adjudged that his combination was the product, not of the skilled mechanic, but of the intuitive genius of the inventor. And the entire record in this court has led our minds to the same conclusion.

Was the defendant guilty of infringement? In view of the conclusions already reached and the rules of laws which have been cited, this question is no longer debatable. Before the defendant commenced to make and sell the infringing device it was making and selling, in competition with the plaintiff, a combination of the Phillips and Hunt trough for receiving the coal, a sliding partition to scrape it out of the trough with plain mechanical equivalents for the other elements of Christy's combination, to wit: (1) A device capable of movement into and out of a box car; (2) a frame on said device mounted to be capable of turning in a horizontal plane; and (3) means for driving their trough and scraper. Thereupon, just before the commencement of this suit, the defendant proceeded to make and sell a combination of Christy's endless carrier provided with Christy's steel crosspieces and upstanding partitions forming a platform for receiving the coal and carrying it to the end of the carrier with: (1) A device capable of movement into and out of a box car; (2) a frame on said device, mounted, to be capable of turning in a horizontal plane upon which this endless carrier was mounted; and (3) means for driving this endless carrier. In effect the defendant mounted Christy's endless carrier provided with its steel crosspieces set so close together that coal could not pass between them and uprights to hold the coal from sliding on the carrier, on the sides of its trough, dispensed with its sliding scraper therein, left the bottom of its trough without use or function, appropriated in its entirety the principle or mode of operation and the combination of Christy, and with them accomplished the same result which he attained. For the evidence has convinced that the box car loaders in which the defendant has embodied Christy's combination are capable of receiving the coal on the endless carriers and throwing it to the ends of the cars as do the plaintiff's.

The devices by which the various parts of the respective combinations of Christy and of the defendant are mounted and actuated differ in some particulars, but those differences present no defense to the charge of infringement because they are immaterial and the respective devices are mechanical equivalents of each other. And the conclusion is that the evidence in this case conclusively establishes the infringement found below.

This is not a case where a single inventor preceded all the rest and struck out something which underlay all the others. It is one of the great majority of cases involving patents in which progress in

the art has been made step by step, and many have discovered and patented methods and combinations to accomplish the desideratum. It is a just and equitable rule that where several inventors, as in this case, Ingalls, Phillips and Hunt and Christy, and many others, have formed and patented different combinations which accomplish the desired result with different degrees of operative success, each should be protected in his own combination so long as it differs from those of his competitors and does not include theirs. Christy's mode of operation and combination fall far within this rule, and they are more entitled to protection than those of the other inventors because they constitute the best and the most useful box car loader; and, while others may be permitted to make, use, and sell their patented combinations, they ought not to be allowed to appropriate that of Christy.

The result of the whole matter is that claims 1 and 2 of the patent to Christy are valid, they have been infringed by the defendant, and the decree below which enjoins the continuance of this infringement must be affirmed. It is so ordered.

ELECTRIC BOAT CO. v. LAKE TORPEDO BOAT CO. (five cases).

(District Court, D. New Jersey. July 7, 1914.)

Nos. 412, 426, 433, 450, 451.

1. PATENTS (§ 310*)—INFRINGEMENT—PLEADING—CLAIMS AVAILABLE—EQUITY RULES—CONSTRUCTION.

Equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi) provides that the answer must state any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set up any set-off or counterclaim against plaintiff which might be the subject-matter of an independent suit in equity against him, and such set-off or counterclaim shall have the same effect as a cross-suit so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims. *Held*, that the word, "cross-bill," was used as synonymous with "cross-suit" and cross-claim so that the limitation on what counterclaims may be set up is not that it must have arisen out of the transaction which is the basis of the original bill, but that the subject-matter is such as might be the subject of an independent suit in equity against the complainant, and hence, in a suit for infringement of a patent, defendant may set up in its answer a counterclaim for infringement by complainant of a different patent unrelated to the transaction and made the basis of complainant's bill.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507–540; Dec. Dig. § 310.*]

2. PATENTS (§ 290*)—INFRINGEMENT—PARTIES.

Since all persons must be made parties in equity who are interested in the controversy, and, as against seasonable objections, a recovery can be had establishing the validity and infringement of patents only in a suit wherein all necessary parties are before the court, a defendant in a suit for a patent infringement cannot set up as a counterclaim complainant's alleged infringement of other patents of which defendant was but a part owner, without joining the co-owner as a party, though defendant had a license from his co-owner.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 470–472; Dec. Dig. § 290.*]

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

3. EQUITY (§ 39*)—JURISDICTION—EXTENT.

Where equity has jurisdiction of the subject-matter, it will determine all incidental matters necessary to a final determination of the entire controversy.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104–114; Dec. Dig. § 39.*]

4. COURTS (§ 263*)—FEDERAL COURTS—JURISDICTION.

The jurisdiction of a federal court being a limited one, it cannot be extended by uniting a cause of action of which it has no jurisdiction with one within its jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 799, 800; Dec. Dig. § 263.*]

5. COURTS (§ 263*) — FEDERAL COURTS — JURISDICTION — EQUITY RULES — "TRANSACTION."

Equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi) provides that the answer may set up any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, plead any set-off or counterclaim which might be the subject of an independent suit in equity against plaintiff, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce judgment, etc. *Held*, that the word, "transaction," as so used embraced both the right and the breach of it, together with the various occurrences that make up each; and hence, in a suit between citizens of the same state, where complainant sued for infringement of certain patents, defendant was not entitled to set up as a counterclaim damages for unfair competition and alleged malicious prosecution, consisting of matters occurring before the facts on which complainant relied occurred, and independent thereof.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 799, 800; Dec. Dig. § 263.*

For other definitions, see Words and Phrases, vol. 8, pp. 7060–7062, 7818, 7819.]

In Equity. Suits by the Electric Boat Company against the Lake Torpedo Boat Company for infringement of specified patents, in which defendant filed certain counterclaims for complainant's infringement of certain other patents for unlawful competition and malicious prosecution. On complainant's motion to strike out the counterclaims. Granted in part.

Pennie, Davis & Goldsborough, of New York City, for plaintiff.
Gifford & Bull, of New York City, for defendant.

RELLSTAB, District Judge. The parties are citizens of the same state, engaged in a competitive business of manufacturing and selling submarine boats. The bill in each of the five cases alleges infringement of certain letters patent, relating to submarine boats. The answers to said bills, in addition to the usual defenses, set up as counterclaims alleged infringements of other letters patent, relating to submarine boats, malicious prosecution, and unfair competition, and are substantially alike. In connection with such counterclaims the defendant prays, inter alia, that the plaintiff be enjoined from infringing said letters patent; from unfairly competing with it in its business; for an accounting of the profits acquired by plaintiff; and the damages suffered by defendant from the acts set out therein.

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

The plaintiff moves to strike out the counterclaims and the prayers based thereon on the following grounds: First, that the subject-matters of such counterclaims are not within equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi); second, that, as to some of such patents, defendant is not the sole owner; third, that the subject-matter of the alleged malicious prosecution and unfair business dealings, if a cause of action, is one between citizens of the same state, and not one arising under the Constitution or laws of the United States; and, fourth, that such counterclaims are calculated to embarrass the trial of the action.

[1] As to the first ground: In Motion Picture Patents Co v. Eclair Film Co. (D. C.) 208 Fed. 416, 418, this court noted the difference in the judicial interpretation given to equity rule 30, but, as the conclusion there reached was based on other considerations, no opinion was expressed as to what counterclaims could be set up under such rule. The pertinent part of the rule is as follows:

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims."

The diverse interpretations referred to appear in the following cases: Terry Steam Turbine Co. v. B. F. Sturtevant Co. (D. C.) 204 Fed. 103; Adamson v. Shaler (D. C.) 208 Fed. 566; Klauder-Weldon Dyeing Machine Co. v. Giles (D. C.) 212 Fed. 452; Williams Patent Crusher Co. v. Kinsey Mfg. Co. (D. C.) 205 Fed. 375; Marconi Wireless Telegraph Co. v. National Electric Signaling Co. (D. C.) 206 Fed. 295; Salt's Textile Mfg. Co. v. Tingue Mfg. Co. (D. C.) 208 Fed. 156; and Vacuum Cleaner Co. v. American Rotary Valve Co. (D. C.) 208 Fed 419. These were all suits in which the plaintiff sought to enjoin alleged infringements of patents and to obtain an accounting, etc. In the first three cases the courts struck out counterclaims seeking to enjoin alleged infringements of other patents, etc. In the fourth case the court struck out a counterclaim alleging unfair competition in trade, consisting of misrepresentation by complainant of its patent rights and the scope thereof. In the other three cases the courts refused to strike out counterclaims setting up alleged infringement of patents, etc., and unfair business methods. The cases which denied the setting up of the counterclaims proceeded on the idea that only such matters as before the adoption of such rule could be set up by a cross-bill could be made the subject of a counterclaim.

In the Turbine Case, the first of the reported cases dealing with this subject, the learned judge said that the main purpose of the permissive part of the rule was, "to dispense with cross-bills by requiring everything previously done by cross-bill to be thereafter done by answer only." This, in my judgment, is so only as to the mandatory part of the rule, and, as to the permissive or optional part, the main purpose is to enable the defendant by answer to do precisely that which the plaintiff, by rule 26 (198 Fed. xxv, 115 C. C. A. xxv), may do in one bill, viz., "join * * * as many causes of action cognizable in equity as he may

have against the (plaintiff) defendant." This difference as to the main purpose of this part of the rule leads to radically different results. In the former view the term "cross-bill" (drawing to it its previously accepted meaning) is given a controlling effect upon what follows, whereas under the latter view the phrase "without cross-bill" is but a parenthetical one, subordinate in its effect. Dominated by this former view, the learned judge, in the Turbine Case, was led to conclude that no other counterclaims than those covered by the mandatory provision could be set up under the permissive provision of the rule. To so confine the right to counterclaim, in my judgment, is to unduly limit the meaning of the term "cross-bill" as used in such rule, disregard the manifest intent to distinguish between the kinds of counterclaims that must or may be set up in the answer, and to overlook entirely the plain purpose of the new rules to permit the parties to settle their differences in one suit, provided they can be conveniently disposed of together.

Under the old system of pleading, a cross-bill was necessary to obtain for the defendant affirmative relief touching the matter of the original bill. A cross-bill, however, was not permitted unless it was based on or grew out of the subject-matter of the original bill. It was treated as a mere auxiliary suit or as a dependency upon the original suit. Story's Eq. Pl. §§ 389, 399; Shipman's Eq. Pl. §§ 210, 211; Morgan Co. v. Texas Central Ry. Co., 137 U. S. 171, 200, 11 Sup. Ct. 61, 34 L. Ed. 625; Harrison v. Perea, 168 U. S. 311, 320, 18 Sup. Ct. 129, 42 L. Ed. 478; Stonemetz, etc., Co. v. Brown, etc., Co. (C. C.) 46 Fed. 851; New Departure Bell Co. v. Hardware Specialty Co. (C. C.) 62 Fed. 462; Weathersbee v. American, etc., Co. (C. C.) 77 Fed. 523; Springfield Milling Co. v. Barnard & Leas Mfg. Co., 81 Fed. 261, 26 C. C. A. 389; Hogg v. Hoag (C. C.) 107 Fed. 807; 16 Cyc. 331.

The "counterclaim arising out of the transaction which is the subject-matter of the suit," and which, under the rule, must be set up in the answer, covers broadly stated, all matters which heretofore could have been pleaded by cross-bill. Therefore to limit the option given to the defendant to "set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him" to such claims as must be set up is to make the option fruitless. Marconi Wireless Telegraph Co. v. National E. S. Co. (D. C.) supra, 206 Fed. at page 302.

The distinction made in the rule between a "counterclaim arising out of the transaction" forming the basis of the original suit and one "which might be the subject of an independent suit," brought by the defendant against the plaintiff, is the primary and influential distinction between what could be set up by a cross-bill and what could not. The provision that the claims arising out of such transaction must be set up in the answer is intended to put an end in one suit to all the controversies that arise out of such subject-matter, legal (see rule 23 [198 Fed. xxiv, 115 C. C. A. xxiv], also new) or equitable; and the provision that the independent equitable causes of action may be so set up is intended to permit the defendant to litigate in the same suit

all independent causes of action, of an equitable nature, to the same extent as the complainant might in the first instance under rule 26. In the presence of such manifest intent, to adhere to the technical meaning of the term "cross-bill" is to attribute to the framers of the rule a meaning in irreconcilable conflict with the context. Such term is perhaps unfortunate, both as to words and position, but it is clear from the context that it is to be understood as a synonym of "cross-suit" and "cross-claim." Therefore the limitation upon what counterclaim may be set up is not that it must have arisen out of the transaction which is the basis of the original bill, that character of counterclaim having been already completely covered by the preceding clause, but that the subject-matter thereof be such as "might be the subject of an independent suit in equity" against the plaintiff.

Rule 26 (also a new rule) authorizes the plaintiff to "join in one bill as many causes of action cognizable in equity as he may have against the defendant," and a proper construction of rule 30 gives the defendant the same option; thus both parties are, in the matter of joining causes of action, placed on an equal footing. In the case of the plaintiff so joining, the court, by express authority contained in the concluding sentence of rule 26, is given discretion to order separate trials if it appears that such "causes cannot be conveniently disposed of together." In case the joinder is the result of the defendant's action, the court has a like discretion. Rule 30 declares that such counterclaim "shall have the same effect as a cross-suit," and by analogy, if not by necessary implication, the defendant in such cross-suit is to be treated as a plaintiff, and the joinder of different causes of action by him in one suit is subject to the court's power of ordering separate trials if they "cannot be conveniently disposed of together."

In Adamson v. Shaler, supra, the learned judge, following closely the view of the court in the Turbine Case, supra, advanced another thought which seemed to him to support their conclusions that only such counterclaims could be pleaded as formerly might have been introduced by cross-bill. He said (208 Fed. at page 568):

"If it were intended by rules 26 and 30 to enlarge the scope of equitable procedure by permitting answers to incorporate causes of action not related nor germane to the subject of the bill, then rule 31 [198 Fed. xxvii, 115 C. C. A. xxvii], would naturally have the necessary provisions to enable a plaintiff to obtain such affirmative relief as, were the counterclaiming defendant proceeding by original bill, the complainant could obtain, formerly by cross-bill, now by counterclaim. For example, in the case already referred to, a citizen of Illinois suing a citizen of Wisconsin upon a cause of action for foreclosure, the latter might, under the broad construction claimed for rule 30, set up by counterclaim a cause of action for specific performance of a contract wholly unrelated to the subject-matter of the bill. Must the plaintiff, because of the limitations of rule 31 forego, for instance, his right to relief by way of reformation which he could formerly have asserted through cross-bill? Is there any way whereby a plaintiff through a 'reply' to such counterclaim can obtain affirmative relief? It would seem not; the effect of the rule is plainly to determine the point when and how an issue for trial upon the merits is created. Thus, 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."

But, if the defendant, as to his counterclaim setting up an independent cause of action, is treated as plaintiff in such cross-suit, a result necessarily contemplated by permitting cross-actions in the same suit, the plaintiff, now defendant, may reply by answer or counterclaim, or both, under rule 30. Rule 31 eliminates a reply upon the part of the plaintiff in the original suit unless the answer "asserts a set-off or counterclaim." Necessarily, the "reply" contemplated by rule 31 transcends the scope of the "replication" used when the defendant's pleading was limited to the controversy forming the basis of the plaintiff's complaint, and includes that which would be an answer and counterclaim under rule 30. Thus construed, the incongruity referred to by the learned judge in the concluding paragraph of the quoted excerpt does not exist.

In my judgment, rule 30, whether read alone or in the light of the other new rules, requires, subject to jurisdictional limitations to be presently considered, an interpretation permitting the defendant to set up against the plaintiff counterclaims unrelated to the transaction made the basis of the plaintiff's bill, provided they "might be the subject of an independent suit in equity against him." Under such interpretation, the first ground of the present motion is untenable and the counterclaims must stand, unless incompetent for other reasons.

[2] As to the second ground, that defendant is not the sole owner of some of the patents: This relates to the independent causes of action founded on three several letters patent. Of these the defendant is the sole owner of but one. As to the other two Lake patents, it answers:

"That this defendant and Simon Lake, not a party to this suit, are now the lawful owners of said patents and inventions and all rights thereunder, and have been continuously since prior to the infringement thereof by the plaintiff."

In its brief, defendant asks leave to amend its answer in this particular to allege that it has an exclusive license from Simon Lake "for all government work"; and it contends that:

"Since that [government work] is the only work complained of in the bill of complaint, and the only work complained of in these counterclaims, it will be seen that it is only the rights of the defendant (not the rights of Lake) which plaintiff, it is alleged, has invaded."

The matter of the amendment, however, does not change the status of the defendant to maintain a suit to enjoin an infringement of such Lake patents. The license conveys no title to such patents, and the defendant is still only a part owner. True, by such license it secured additional rights as against the other part owner, but neither such rights nor such part ownership enables it to alone maintain a suit upon such patent against the present plaintiff.

"The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation." Williams v. Bankhead, 86 U. S. (19 Wall.) 563, 571 (22 L. Ed. 184).

In the present case, notwithstanding such license, it being exclusive only as to a particular kind of work, the licensor has a vital interest in

maintaining the validity of the patents and the scope of the claims here sought to be put in issue. His contractual relations with his co-owner, whether determined by the patent or the license thereunder, in no wise authorize his co-owner and licensee to jeopardize his statutory monopoly. On the other hand, the alleged infringer has a right to be protected against unnecessary or multiplied suits. If one owner, not a party to the suit, cannot be bound by the result of the litigation instituted by his co-owner and licensee, neither should the alleged infringer be harrassed by such litigation. Being a joint owner, and having such license from the other part owner, defendant is entitled, as between it and the other owner, to the sole enjoyment of the profits and damages that may be secured in certain suits for infringement. But such benefit is only incidental to the main controversy, viz., validity of the patents, and the scope and infringements of their claims, and, as against objections seasonably interposed, can be recovered only in a suit wherein all the necessary parties are brought before the court. Walker on Patents (4th Ed.) § 399; Paper-Bag Cases, 105 U. S. 766, 26 L. Ed. 959; Pope Mfg. Co. v. Gormully, etc., Co., 144 U. S. 248, 12 Sup. Ct. 641, 36 L. Ed. 426; Van Orden v. Nashville (C. C.) 67 Fed. 331; Postal Tel. Cable Co. v. Netter (C. C.) 102 Fed. 691; Bowers Hydraulic Dredging Co. v. Vare (C. C.) 112 Fed. 63; Excelsior Wooden Pipe Co. v. City of Seattle, 117 Fed. 140, 55 C. C. A. 156; Milwaukee Carving Co. v. Brunswick-Balke-Collender Co., 126 Fed. 171, 61 C. C. A. 175; De Forest v. Collins Wireless Telephone Co. (C. C.) 174 Fed. 821; Snead v. Scheble, 175 Fed. 570, 99 C. C. A. 578.

As the right to counterclaim under the permissive provision of rule 30 depends upon the defendant's right to bring an original suit against the plaintiff, and as all the necessary parties to maintain such suits on the Lake patents are not before the court, the counterclaims, so far as the Lake patents are concerned, are not maintainable in this proceeding, and must be struck out.

As to the third ground, that if the alleged malicious prosecution and unfair business dealings, is a cause of action, it is one between citizens of the same state, and not one arising under the Constitution or laws of the United States: The alleged malicious prosecutions, as set up, are but steps in the charge of unfair competition; and as the federal court's jurisdiction over such causes of action depends upon diversity of citizenship (Ryder v. Holt, 128 U. S. 525, 9 Sup. Ct. 145, 32 L. Ed. 529; Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; Leschen & Sons v. Broderick & Bascom, 201 U. S. 166, 26 Sup. Ct. 425, 50 L. Ed. 710; Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 220 U. S. 446, 31 Sup. Ct. 456, 55 L. Ed. 536), nonexistent in this suit, the counterclaims based on such unfair methods cannot stand unless they arise "out of the transaction which is the subject-matter of the suit."

[3] A court of equity having jurisdiction of a subject will comprehend within its grasp and decide all incidental matters necessary to enable it to make a full and final determination of the whole controversy, and thus terminate litigation while it facilitates the remedies. McGowin v. Remington, 12 Pa. 56, 51 Am. Dec. 584; 1 Pomeroy's Eq.

Juris. (3d Ed.) § 241; Springfield Milling Co. v. Barnard & Leas Mfg. Co., 81 Fed. 261, 266, 26 C. C. A. 389.

[4] The federal court's jurisdiction being a limited one, however, it will not be extended by uniting a cause of action of which it has no jurisdiction with one of which it has. National Casket Co. v. New York & Brooklyn Casket Co. (C. C.) 185 Fed. 533.

[5] The unfair competition counterclaims, therefore, are cognizable in this suit only if they are incident to the controversy underlying the plaintiff's suit, or, in the words of the mandatory provision of rule 30, if they arise "out of the transaction which is the subject-matter of the suit." Regardless of what is new in rule 30, a court of equity has the power to investigate and determine all matters incidentally involved in the main controversy between the parties. However, while it has the power so to do, how much of this power is to be exercised depends largely upon the pleading of the defendant. If he is content with a dismissal of the bill, none of the incidental matters calling for affirmative relief would arise, and therefore they would remain undetermined. As to these, if the defendant is not estopped from making them the subject of an independent suit, such relief could be secured in another action. Rule 30, however, has put an end to such multiplication of suits, and the defendant is now required to raise such incidental issues in the same suit, under the pain of being barred thereafter from asking any affirmative relief based thereon. Thus the judicial invitation to settle all matters arising out of the transaction sued upon is now a requirement. This mandatory provision, however, is limited to "the transaction which is the subject-matter of the suit," so that whenever the defendant in a federal court conceives himself entitled to relief from the plaintiff, which relief is not obtainable under a strict defense, and which, in view of the limited jurisdiction of such court, he cannot interpose as an independent equitable cause of action in such court, the test whether such relief can be obtained in such suit by counterclaim in reality is, Can the defendant be barred from seeking relief thereon in another proceeding, if he fails to demand it in such action? If he would be so barred, the plaintiff can be compelled to meet it in his suit. The defendant, conceding that because of the lack of diversity of citizenship such counterclaims are cognizable in this suit only if they arise out of the transaction underlying the plaintiff's bill, contends that they do arise out of such transaction. "Transaction" is a word of comprehension. In litigation it usually embraces both the right and the breach thereof, and the various occurrences that make up each. Its scope, however, depends upon the company it keeps —the context.

In the rule under consideration, the transaction "is the subject-matter of the suit," and as the determination of what is the transaction in a given case may settle whether in such case the court has jurisdiction over such interposed cause of action, it is essential that no more be put into litigation under such mandatory provision of the rule than falls properly in the occurrences which make up such transaction. No rule of court is to be so read as to confer jurisdiction over causes not cognizable in the United States courts, and care must be taken that in the

endeavor to determine the controversy authorized by rule 30 no more is comprehended than could be litigated by the parties in the suit then pending in that particular court. Marconi Wireless, etc., v. Nat'l E. S. Co., supra.

As noted, the bills alleged infringement of certain patents. In such a suit, the defendant may interpose as a defense, not only any matter that would destroy the validity of the patents or the claims sued upon, but also that which estops the plaintiff from maintaining such suit. The defendant having the opportunity by strict answer to attack the plaintiff's right to or the scope of his alleged monopoly, a right, it is to be observed, in no way depending upon any transaction with the defendant, the transaction referred to in the rule, so far as patent litigation is concerned, would seem to be limited to the occurrences that relate only to the alleged infringements. If the conduct of the plaintiff, other than that relating to the infringement, impinges upon the legal rights of the alleged infringer, while it is liable to an independent action for such conduct, it is not compelled to respond to a counterclaim interposed to its suit for such infringement, for such a counterclaim does not grow or arise out of the transaction which is the subject-matter of that suit.

Having ascertained the meaning to be given to the word "transaction" in the mandatory part of rule 30, and the test to be applied in determining whether a counterclaim can be entertained under such provision, I turn to the allegations of the answer concerning such counterclaims. In substance, they charge that the present suits, begun in the latter part of 1913, as well as certain other suits begun in the years 1902 and 1903, alleging infringement of other patents, and which were discontinued in the early part of 1913, without having been prosecuted or intended to have been prosecuted to a final conclusion, were malicious prosecutions, and parts of a scheme to injure defendant by preventing it from obtaining contracts for submarine boats, and from performing contracts already obtained, and by preventing it from raising money to pay its obligations and obtain a proper working capital to carry on its business; that at the time such earlier suits were brought, and during their pendency, defendant was seeking to obtain contracts for the building and selling of boats to the United States government; that such suits were brought and kept pending for the purpose of preventing defendant from obtaining such contracts; that by reason thereof, and the therein falsely asserted infringements, "falsely urged to the officials of the United States," the defendant was prevented "from obtaining contracts or making sales"; that before the beginning of the earliest of such suits the plaintiff published, through the newspaper, its purpose to bring such suits, with the intent of prejudicing the public against the defendant, that its business might be injured; that it has since published numerous articles tending to injure defendant's business, and has made unwarranted charges of infringement by defendant to various agents of the United States government, defendant's only customer in this country, with the intent to prevent it from obtaining contracts from such government, and to injure its business; that plaintiff has unlawfully caused limitations to be inserted in

acts of Congress relating to the purchase of submarine boats, to prevent competition. Several acts of Congress, covering the period from 1893 to 1907, giving a history of congressional action with reference to the purchase of submarine boats, are set forth, coupled with a charge that through the influence of agents of the plaintiff Act June 29, 1906, c. 3590, 34 Stat. 583, which provided for open competition in the purchase of such boats, was amended (Act March 2, 1907, c. 2512, 34 Stat. 1204) so as to hamper competition in the interest of the plaintiff and to the injury of the defendant; that as a result of such unfair and unlawful methods plaintiff has contrived to deprive defendant of business with the United States government, and has unlawfully prevented the sale of defendant's boats to such government, to its great and irreparable damage. From this recital, it is apparent that the acts charged relate to the competition between these parties to secure contracts for the manufacture and sale of submarine boats, both being engaged in that line of business, and that while this may furnish a basis for the charge of unfair competition, yet such charge does not arise out of the particular transaction (alleged infringement) which is the subject-matter of the plaintiff's suit.

None of the plaintiff's patents cover a submarine boat in its entirety. Each relates to a special device designed to accomplish a particular function in a distinct operation or movement of a submarine vessel. The charge of infringement is not that the boat made and used by the defendant as a whole is an infringement, but that it embodies the inventions claimed in the respective patents. Assuming that such a cause of action, unfair competition, might find its origin in the transaction covered by such alleged infringement, it is evident that what the defendant has here alleged does not arise out of such transaction, but out of a series of acts embracing alleged infringements of other patents and covering many years of competition in the admittedly limited market for submarine boats.

The infringement suits pending between the parties prior to the institution of the present suits, as noted, were upon other patents. Each patent presents a separate legal right, and infringement of each patent separate and distinct transactions. Compared with the patents involved in the present suits, the transactions which were the subject-matter of the earlier suits were necessarily different. The business methods of the plaintiff which these counterclaims characterize as unfair, according to the allegations of the counterclaims, began prior to the institution of the earliest of such prior suits, and were carried forward during their pendency, and the alleged injuries sustained by the defendant were, according to such allegations, the result of such unfair methods. The very theory of the pleader in these counterclaims is that the present suits are but subsequent steps in an already existing plan to unfairly compete with the defendant. Being such, they cannot be considered as malicious. Aside from the limitation of this mandatory provision of rule 30, it is manifest from the asserted facts that the alleged unfair competition is not an incident of the cause of action alleged in the plaintiff's bill, and necessary to be decided to do complete justice between the parties as to that subject-matter, but that the al-

leged unfairness in such charge of infringement is an incident of the business methods of the plaintiff and which give rise to the charge of unfair competition. The unfair competition alleged, if established, will in no way diminish the right of the plaintiff to a decree in this suit, and will in no way entitle the defendant to any affirmative relief on any matter arising out of the transaction furnishing the basis of either his or the plaintiff's infringement suit. On the face of the defendant's pleading, the conclusion is irresistible that the unfair dealings here alleged cannot be said to arise out of any particular transaction, but out of many, and that, whatever redress the defendant may be entitled to, it can only obtain through a separate and independent suit brought for such purpose. In such a suit, full and complete redress for any wrongdoing established can be secured, while that would be impossible if such charge were cognizable only as a matter growing or arising out of the transaction forming the basis of the plaintiff's suit, as the defendant would be necessarily confined in his proof to such matters as arose out of such latter transaction.

The cases cited, and which furnish the main reliance of the defendant in support of such counterclaims, to wit, T. B. Woods Sons Co. v. Valley Iron Works (C. C.) 166 Fed. 770, and Onondaga Indian Wigwam Co. v. Ka-Noo-No Indian Mfg. Co. (C. C.) 182 Fed. 832, are not in point. In both these cases, the charges of unfair competition were joined in the bill alleging infringement, and were sustained on the ground that they were but different features or parts of the same transaction upon which the charge of infringement was based, and in fact but an aggravation of such infringement. In the case at bar, the charge of unfair competition made by the defendant is not connected with the alleged infringement of its patents, but arises out of a different transaction entirely, viz., the transaction which is the subject-matter of the plaintiff's charge of infringement.

The counterclaims based on unfair competition, for the reasons given, must be struck out.

As to the fourth ground, viz., that such counterclaims are calculated to embarrass the trial of the action: It is sufficient to say that as but one counterclaim or charge of infringement based on the Peacock patent has survived the motion to strike, such ground is without merit.

In addition to striking out the counterclaims based on the Lake patents and the charge of unfair competition, the prayers relating to such counterclaims must also be struck out.

NATIONAL METAL MOLDING CO. v. FLEXIBLE CONDUIT CO.

(District Court, W. D. New York. July 29, 1914.)

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—MECHANISM AND PROCESS FOR MAKING ARMORED CABLE.

The Gilson patents, No. 1,004,643, for a mechanism for making armored cable, and No. 1,004,644, for a process for armoring cable, were not anticipated, and are valid and entitled to a fair range of equivalents. Claims 1 and 3 of the apparatus patent, and claim 10 of the method patent, also *held* infringed.

In Equity. Suit by the National Metal Molding Company against the Flexible Conduit Company. On final hearing. Decree for complainant.

Marshall A. Christy, of Pittsburgh, Pa. (J. William Ellis, of Buffalo, N. Y., of counsel), for complainant.

Robert S. Allyn, of New York City, for defendant.

HAZEL, District Judge. This action is for infringement by the defendant of two patents granted to Henry R. Gilson, October 3, 1911, one for a mechanism for making armored cable and similar products, and the other for a process for armoring cable, and numbered 1,004,643 and 1,004,644, respectively. The method patent has three claims, which read as follows:

"1. The method of armoring cable, which consists in coiling about and continuously drawing down into binding engagement with the surface of the cable a spirally wound metallic armor, and thereby feeding the coils and cable continuously forward.

"2. The method of armoring cable, which consists in coiling about and continuously drawing down into binding engagement with the surface of the cable a spirally wound metallic armor, thereby feeding the coils and cable continuously forward, and then compressing and further setting the coils.

"3. The method of armoring cable, which consists in coiling upon a cable a spirally wound metallic armor, and then abruptly bending the armored cable and causing portions of adjacent coils to momentarily bind against each other, thereby neutralizing the torsional strain induced by the coiling."

The specification states that this process is also usable for making metal tubing, but with that we are not here concerned, as the asserted infringement is in the manufacture of flexible cable alone. There is in the method patent no limitation to a particular mechanism, but the apparatus described in patent No. 1,004,643 is therein referred to as suitable for the purpose. According to the specifications, the metallic strips of which the armor is made are substantially flat and flanged at their edges at an angle somewhat less than a right angle, and "one, two or any desired number" of strips may be used, depending upon the character of the armor to be produced. When, for example, four-strip armor is to be produced two strips are formed side by side with the flat portion against the cable, the flanges projecting outwardly in such a way that each bears upon the other, and upon these inner strips are applied two other strips with the flanges projecting inwardly, the outer strips forming bridges over the adjacent

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

inner flange thereby imparting flexibility to the coils. But when two strips (the commercially preferred number) are used the method of manufacture, according to the complainant's brief, is as follows:

"One strip is wound upon the cable with its concave face outward, and the other strip is wound upon the inner strip with its concave face turned inward and breaking joints with the successive convolutions of the inner strip, so that the inwardly turned edges of the outer strip bear upon the concave body portions of two adjacent coils of the inner strip. By this construction the inner and outer strips are held in proper relation one by the other, while at the same time, the coils will have a limited range of movement relatively to each other, and the armored cable as a whole is thus given the desired flexibility."

The strips are applied in the foregoing manner by the use of cooperating instrumentalities, consisting of a rotating coiling head with reels for separately carrying the outer and inner strips, and a hollow tapering mandrel through which runs the cable around which strips are wound. On the mandrel frame at the tip of the mandrel are placed opposite each other two guides which rotate with the mandrel directing the coiling of the strips and holding them in proper relation during the process of coiling and impart the desired flexibility to the coils. As the coiling proceeds, the coils travel towards the grooved stationary sizing rolls, which are adjacent to the tip of the mandrel, and by passing between them secure uniformity of diameter and stability.

The evidence shows that during the coiling operation there is a tension on the coils causing them to twist and kink, which tension is neutralized by the binding engagement specified in claims 1 and 2 of the process patent and claim 9 of the apparatus patent, and by the abrupt bend imparted to the cable by feeding it forward and downward to the compression rolls. In other words, as the cable in its rotation passes downward and partly around the grooving of the nearest sizing roll, a bending occurs, in consequence of which the cable is straightened out. To reduce the frictional resistance to the coiling, the patentee preferably rotated the mandrel in a direction opposite to the direction of the rotating head, and formed a groove on the mandrel to push the coils forward; but these features, included in the claims of the patent for apparatus, were not necessary to the manufacture of two-strip armor.

The steps of the process as specified in claim 1 consist of (1) coiling the strips about the cable, and (2) continuously drawing them down as they come in binding engagement with the cable traveling forward and away from the mandrel. Claim 2 includes an additional element, i. e., the compression of the coils by the adaptation of the sizing rolls; while claim 3 emphasizes the feature of abruptly bending the armored cable to neutralize the torsional strain. The defendant earnestly contends that the process patent is merely descriptive of the function of the machine, but I am not satisfied by the evidence that such is the fact.

Armored cable had never before been made by helically coiling metal strips and bringing them in binding engagement with the cable, although it was not a new product and had been produced in a variety of ways before the granting of the patents in litigation; but its pro-

duction was due to processes and mechanisms patentably different from those described in the Gilson patents in suit. In my opinion the claims in controversy are not merely descriptive of the use to which the machine may be put, but they set forth steps which are capable of accomplishing a new and useful result. Corning v. Burden, 15 How. 252, 14 L. Ed. 683; Cochrane v. Deener, 94 U. S. 780, 24 L. Ed. 139.

Claims 9, 10, and 11 of the apparatus patent, which are for a combination of elements by which armor is coiled and wound around cable and the whole then straightened out, are in issue; but it will suffice to set out claim 10:

"10. In a machine of the class described, the combination, with means for coiling upon a cable a spirally wound metallic armor, of means for abruptly bending the armored cable and causing portions of adjacent coils to momentarily bind against each other, and thereby to neutralize the torsional strain induced by the coiling."

This claim for a combination includes means for coiling the strip upon the cable and abruptly bending the armored cable to neutralize the torsional strain. In claims 9 and 11 are included sizing rolls—an element not thought contained in defendant's machine. It is no doubt true that the separate elements of the claims were old, yet these two elements had never before been combined in a machine for closely coiling metal strips around a cable to produce a flexible armor, and by their adaptation a new and useful result was attained.

In the Sperry patent, No. 47,343, is described a machine for covering wire with other wire; but the machine cannot be used for coiling and drawing down the covering wire as in complainant's machine. On the contrary, the wire in the Sperry patent is wound directly upon the surface of another portion of wire, and there is nothing shown therein to enable bringing the strips of metal down to overlap at their edges, or to enable feeding them continuously forward, or abruptly bending the adjacent coils to relieve the tension or strain.

The Greenfield patents, Nos. 630,502, 630,503, and 724,570, clearly show the limitations of the prior art in this field of usefulness at the date of the invention in suit. They relate to adaptations for insulating cables by winding armor thereon, and accomplish this by the use of a grooved die which has a spiral configuration on its inner side. In making the armor, the strips of metal are inserted in the die and passed through it, and thus molded and compressed to engage the cable. Such an operation is on an entirely different principle from that of the invention in suit.

In the Greenfield patent, No. 724,570, there are shown friction rollers; but these, I think, are incapable of performing the function of the compression or sizing rollers *35* of the Gilson patent. There is nothing in this Greenfield patent to anticipate complainant's patent, or to require such a limitation of the claims as will avoid infringement of claim 10 of the apparatus patent and claim 3 of the process patent.

There are also exhibits of patents for winding strips of metal helically on the surface of a mandrel to cover hose and for armoring

cable; but in none of them is found the combination of elements of claims 9, 10, and 11 of the Gilson apparatus patent, which contains mechanism for coiling the metal strips upon the cable in binding engagement, and for compressing it and bending it to neutralize torsional strains. It was quite important that the flanged metallic strips of the Gilson patents should be wound so that they would not incumber one another in their forward movement, but would travel along evenly and continuously as the edges of adjacent coils contacted with one another. How to achieve such a result was a problem which the prior art did not disclose or suggest, but which Gilson by the exercise of a fair degree of the inventive faculty solved. We must therefore accord to him a fair and reasonable construction of his claims, allowing a fair range of equivalents in passing upon the question of infringement.

Complainant's Exhibit No. 1, which concededly is descriptive of defendant's machine for armoring cable, shows the employment of a reel on the right of the machine bearing the cable to be armored, which is passed through a hollow shaft. The metal strips of which the armor is formed pass from reels down through guides to the mandrel, the inner strips being first wound around the mandrel. The coils are formed of a greater diameter than the cable and then drawn down to it. A shoulder *k* on the rotating head guides the strips or coils as they travel forward along the surface of the mandrel. It makes no difference that the shoulder *k* is somewhat different from the helical abutment of complainant's machine; it is enough that the coils are drawn down along the tapered mandrel to the end thereof, and that they then grip the cable. This result is achieved by the adaptation of the steps *d* described in claims 1 and 3 of the method patent in controversy.

I am left in doubt by the evidence as to whether the sizing rolls of complainant's patent are embodied in the machine used by the defendant company. The proofs are that originally smoothing rolls were used experimentally, but that their use was afterwards in good faith abandoned, and has not since been threatened. Such use, in my judgment, does not constitute infringement of claims 9 and 11 of the apparatus patent, or of claim 2 of the process patent. Defendant is, however, shown to have an idle drum or sheave in connection with its machine, around which the armored cable turns, and the bend thus given the cable no doubt is sufficiently abrupt to take out the torsional strain imparted to the cable in the coiling operation, and therefore defendant is thought to have appropriated the substance of claim 3 of the method patent and claim 10 of the apparatus patent, achieving the same result as complainant.

It follows, therefore, that although the various claims in issue of both the method and apparatus patents are valid, only claims 1 and 3 of the former and claim 10 of the latter are infringed by the defendant company, and a decree, with costs, may be entered accordingly.

UNDERFEED STOKER CO. OF AMERICA v. SANFORD RILEY STOKER CO., Ltd. et al.

(District Court, D. Massachusetts. July 2, 1914.)

No. 545.

PATENTS (§ 328*)—INFRINGEMENT—FURNACE.

The Daley patent, No. 644,664, for a furnace, *held* infringed, on motion for preliminary injunction, by a furnace which contained nonfunctional and immaterial modifications of the patented structure, designed merely to avoid the language of the claims of the patent.

In Equity. Suit by the Underfeed Stoker Company of America against the Sanford Riley Stoker Company, Limited, and others. On motion for preliminary injunction. Motion granted.

Fish, Richardson, Herrick & Neave, of Boston, Mass., for plaintiff.
Louis W. Southgate, of Worcester, Mass., for defendants.

BROWN, District Judge. This is a petition for a preliminary injunction against infringement of letters patent No. 644,664, March 6, 1900, to Fred A. Daley, for furnace.

The opinion of this court, handed down May 22, 1914, in Equity No. 459, 214 Fed. 799, a case brought by this complainant against R. Sanford Riley et al., sufficiently sets forth the nature of the Daley invention and previous litigation on the Daley patent.

The defendants' device in the present case is the Riley stoker previously found to infringe, with modifications which consist in adding to the Riley stoker thick brick walls, which completely fill the space under each retort and divide the space beneath the fire box, and in placing an air chamber outside and in front of the stoker. These changes were made in order that the defendants' stoker should be clear of the patent to Daley.

It is contended that the characteristic feature of the Daley patent, namely, "a large air chamber beneath the retort and fuel-bearing surfaces," is now eliminated, and that, therefore, there is no infringement.

In Westinghouse v. Boyden Power Brake Company, 170 U. S. 537, 568, 18 Sup. Ct. 707, 722 (42 L. Ed. 1136), the Supreme Court said:

"We have repeatedly held that a charge of infringement is sometimes made out, though the letter of the claims be avoided."

By bricking up the space underneath the retorts the defendants have made inapplicable the words "beneath the retort." The only function of these brick walls is to make these words inapplicable to the defendants' device. They perform no useful function, and so far as the operation of the stoker is concerned are merely a useless addition. The defendants' affidavits and arguments disclose no reason for the addition of these brick walls other than the desire to avoid the claims of the Daley patent. As the bottom of the Daley retort is filled with green fuel this part of the retort is cool, and there is no need to cool it by the incoming air. The Daley retort has slanting sides with a rounded bot-

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

tom, so that Daley's air chamber is beneath the sloping sides of the retort as well as beneath the bottom of the retort. Daley in his specification says:

"The in-rushing air comes directly in contact with the walls of the retort as well as with the fuel-supporting plates along the sides of the retort, so that these portions of the furnace are kept cool by the air, their life being thereby increased."

The defendants' retorts are substantially rectangular. There is no air chamber underneath the bottoms of the retorts, which are covered with green coal and are cool. At the sides of the retorts, however, there are air chambers wherein air under pressure is present to cool the walls of the retort as well as the fuel-supporting plates along the side. The defendants, therefore, use an air chamber to perform the same functions that are performed by Daley's air chamber.

The defendants' difference from Daley seems to be this: That while Daley's air chamber underlies, not only the portion of the walls of the retort, which needs cooling, but also the portion, which needs no cooling, the defendants' air chamber does not underly the part of the retort which needs no cooling, but does come in contact with the parts of the retort which need cooling. The fact that the defendants use an outside air chamber in connection with air chambers at each side of the retort does not avoid infringement. This is substantially the same question that arose concerning the Taylor patent in Underfeed Stoker Co. v. American Ship Windlass Co. (C. C.) 165 Fed. 65, 78.

Daley's inventive conception included the direction of his entire supply of air against the heated parts of the furnace, as was stated on page 79 of the above opinion. That he also directed his air supply against portions of the furnace which were not heated—that is, the bottoms of the retorts—is not a reason why his functional feature of directing his air supply against the heated parts of the furnace can be appropriated by so constructing defendants' device as to exclude the nonfunctional contact of the incoming air with the cool parts of the retort. The defendants' structure is functionally the same as that which was held to infringe the Daley patent.

In Mr. Riley's affidavit he states that in adopting the new construction he was guided by the prior patent to A. F. Brown, No. 570,978, November 10, 1896. It is not apparent, however, that any feature of the defendants' stoker was adopted from the Brown patent. This patent is used rather as an attempted justification by the prior art than as the guide followed in designing the construction of the defendants' modified stoker. The Brown patent was before the court in the previous litigation over the Taylor stoker, but was held not to anticipate the Daley patent. Brown shows the use of hollow tuyere blocks which extend down into the retort, but the limited space within these tuyere blocks does not correspond to Daley's large air chamber. The tuyere blocks are supplied from two horizontal air pipes, but the air in these horizontal pipes does not come in contact with the fuel-bearing surfaces nor with the sides of the retort. The air spaces in the hollow tuyere blocks and the air spaces in the horizontal conduits are connected by restricted openings, but this construction does not correspond

either to Daley's air chamber or to the defendants' air chamber. The air conduits more nearly resemble those of the Garden patent, No. 648,251.

I agree with the view of defendants' expert, Mr. Jackson, that Mr. Riley has not taken the Brown structure as the foundation for his modified structure, but that he has made a colorable modification of the Daley furnace, without departing substantially from its structure or mode of operation.

There is also raised by the affidavits a question as to whether in the Riley stoker the fuel-supporting surfaces act to maintain air under pressure below them. This is a renewal of a controversy which was determined in favor of the complainant in the former case, Equity No. 459, 214 Fed. 799.

There is substantially the same difference of opinion of the experts as to the significance of the tests, and I see no sufficient reason for modifying the conclusion as to this point reached in the former opinion. The modifications of the Riley structure, being nonfunctional and immaterial, must be regarded as designed merely to avoid the language of the claims of the Daley patent. To hold that a valid patent can thus be avoided would be to regard the question of infringement merely as a verbal matter, and to disregard the rule above quoted from Westinghouse v. Boyden, 170 U. S. 537, 568, 18 Sup. Ct. 707, 42 L. Ed. 1136.

The petition for a preliminary injunction is granted, and a draft decree may be presented accordingly.

THE OWEN J. McWILLIAMS.

(District Court, E. D. New York. May 25. 1914.)

COLLISION (§ 71*)—TOWS—MANEUVERING TO REACH PIER.

A tug, which had taken boats from the tow of another, *held* in fault for a collision for failing to allow the other tow sufficient room to maneuver in placing her tow at a pier.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.*]

In Admiralty. Suit by Olaf Dahl against the steam tug Owen J. McWilliams. Decree for libelant.

Hyland & Zabriskie, of New York City, for libelant.

Herbert Green, of New York City, for claimant.

CHATFIELD, District Judge (orally). The McWilliams tow, having taken boats out of the Pennsylvania tow, and swung them around on the outside near the mouth of the Newtown creek, would seem to be the burdened vessel.

I think that the libelant's injury, although it happened without any actual carelessness, and purely from the inability of the captain of the McWilliams tug to estimate just how much room he should allow to the other vessel, was caused by the maneuver of the Pennsylvania tug

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

in warping its boats around the dock so as to bring them in on the lower side, thus requiring more room against the flood tide than if it had been landing them on the upper side of the dock. If the responsibility for allowing room for this maneuver rested upon the McWilliams, then the resulting damage must be borne by them.

The libelant may have a decree.

BABBITT v. READ et al.

(District Court, S. D. New York. April 16, 1914.)

1. COURTS (§ 366*)—FEDERAL COURTS—STATE LAWS AS RULES OF DECISION.

Where the constitutional and statutory law of the state in which a corporation was incorporated respecting the liability of stockholders, at the time of such incorporation had been clearly and definitely construed and settled by the decisions of the highest court of the state, it will be followed by a federal court in determining the liability of stockholders of such corporation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954–957, 960–968; Dec. Dig. § 366.*]

2. CORPORATIONS (§ 232*)—LIABILITY OF STOCKHOLDERS—STOCK ISSUED FOR PROPERTY—MISSOURI STATUTE.

Under Const. Mo. art. 12, § 8, which provides that "no corporation shall issue stock or bonds except for money paid, labor done, or property actually received," and Rev. St. Mo. 1899, § 962 (Rev. St. 1909, § 2981), which contains the same provision, as construed by the Supreme Court of the state, where a corporation issues stock in payment for property, the property must be the fair equivalent in value of the par value of the stock issued therefor, otherwise the stockholder receiving it is liable to creditors who became such without knowledge of the fact, for the difference, whether he was guilty of actual fraud or acted in good faith; and as a creditor in dealing with the corporation had the right to rely on its having the full amount of its capital stock in money, or its equivalent value, in a suit to enforce such liability of a stockholder, the burden rests on the defendant to prove that plaintiff knew that it did not.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 686; Dec. Dig. § 232.*]

3. BANKRUPTCY (§§ 145, 282*) — LIABILITY OF STOCKHOLDERS — ASSETS — ENFORCEMENT BY TRUSTEE.

Such liability, being as for an unpaid stock subscription, is an asset of the corporation, and may be enforced by its trustee in bankruptcy for the benefit of its creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 205, 230–232, 234; Dec. Dig. §§ 145, 282.*]

4. CORPORATIONS (§ 240*)—RIGHTS OF BONDHOLDERS—ENFORCEMENT OF STATUTORY LIABILITY OF STOCKHOLDERS—"NO RECOURSE" CLAUSE.

Bonds issued by a corporation recited that they were secured by mortgage, and contained a clause, stating that they were subject to all the provisions of such mortgage. The mortgage contained a provision that "no recourse under any obligation of this mortgage or of any bond or coupon hereby secured shall be had against any * * * stockholder * * * either directly or through the company by the enforcement of any right or claim, statutory or otherwise; * * * it being expressly agreed and understood that this mortgage and the bonds secured hereby are solely corporate obligations." *Held*, that such provisions, having been inserted in good faith, and not as part of a scheme to defraud, were valid and

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

binding on purchasers of the bonds, and that bondholders could not enforce a statutory liability imposed on certain of the stockholders for the benefit of general creditors of the corporation because of their having received their stock in payment for property transferred to the corporation at an overvaluation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 688, 692, 693, 697-699; Dec. Dig. § 240.*]

5. CORPORATIONS (§ 244*) — LIABILITY OF STOCKHOLDERS — LIABILITY AS FOR UNPAID SUBSCRIPTIONS—BONA FIDE PURCHASERS.

Bona fide purchasers of stock of a corporation from the original subscribers or their transferees, without notice that it was illegally issued in payment for property bought at an overvaluation, are not subject to a statutory liability imposed on the original holders because of such fact, as for unpaid subscriptions; nor are they charged with notice by the fact that they received the stock as a bonus with a purchase of bonds of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 710; Dec. Dig. § 244.*]

In Equity. Suit by Byron F. Babbitt, trustee in bankruptcy of the Randolph-Macon Coal Company, against William A. Read and others. Decree for complainant as to part of his claim against certain defendants, and for the remaining defendants.

Hornblower, Miller & Potter, of New York City (Charles A. Boston, of New York City, and P. Taylor Bryan, of St. Louis, Mo., of counsel), for plaintiff.

Strong & Cadwalader and Rushmore, Bisbee & Stern, all of New York City (Charles E. Rushmore and George N. Hamlin, both of New York City, of counsel), for defendant Read.

William J. Patterson, of New York City, for defendant Van Brunt.

Carter, Ledyard & Milburn, of New York City, for defendants Metropolitan Life Ins. Co., Hegeman, and Hamilton Trust Co.

Harris, Corwin, Gunnison & Meyers, of New York City, for defendants Home Trust Co., Brown, and Furness.

Montgomery & Peabody, of New York City, for defendant Tegethoff.

MAYER, District Judge. On May 10, 1907, Mr. Babbitt was duly appointed trustee in bankruptcy of the Randolph-Macon Coal Company, a corporation organized under the laws of Missouri, for the purpose of acquiring and operating coal mines and selling coal. The claims originally proved in bankruptcy aggregated $2,376,041.43 of which $2,149,729.45 represented a deficiency judgment entered in a suit brought by the Central Trust Company of New York as trustee to foreclose a mortgage given to secure an issue of $3,000,000 of bonds. Pursuant to an order of authorization made by the referee in bankruptcy, the trustee brought this suit in April, 1909, against these defendants, who are some, but not all, of the stockholders of the bankrupt company, to recover, upon the theory of a stockholder's liability for unpaid subscriptions, an amount equal to the capital stock of the company, to wit, $5,000,000 "or so much thereof as may be necessary

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

for the full payment of all the debts proved and allowed in bankruptcy" against the bankrupt estate, together with cost of collection.

Briefly stated, the plaintiff contends that the Randolph-Macon Coal Company issued its capital stock of $5,000,000 and its bonds to the extent of $1,800,000 for the purchase of property which, it is alleged, did not exceed in value the sum of $1,620,000; that the original so-called subscribers to the entire issue of the stock of the company, who were also the incorporators, paid therefor by the sale and transfer to the company of the property in question, and that in so doing they were acting as the agents of the defendants Read, Gardiner (now executors of Gardiner), and Van Brunt, and that, in view of all of the facts and circumstances hereinafter outlined, these defendants are liable as for unpaid subscriptions. The bill further alleges (paragraph thirty-sixth) that the defendants Seaman, Clark, Metropolitan Life Insurance Co., Hegeman, Gardiner as trustee, and Read as trustee, acquired their shares of stock with full knowledge that the stock was not fully paid, and that Seaman, Clark, Metropolitan Life Insurance Company, and Hegeman are each severally liable for the full amount of shares of stock, severally held by each of them, or so much thereof as may be necessary for the full payment of debts, etc., and that these defendants are jointly and severally liable with Read, Gardiner, Van Brunt, and Kobusch, for the full amount of the par value of the shares of stock standing, respectively, in each of their names, or for so much thereof as may be necessary for the full payment of debts, etc. The trustee sets forth in the bill that he cannot state whether or not the defendants the Home Trust Company, the Hamilton Trust Company, and Tegethoff acquired the shares of stock severally standing in their respective names, with knowledge or notice that the same was not fully paid; but he avers that, if any of these three defendants acquired the stock with knowledge that the amount subscribed therefor was not fully paid, then that they are liable. Substantially the same allegation was made in regard to defendants James N. Brown and Harry P. Furness. George J. Kobusch was not made a party to the suit. James T. Gardiner died after the suit was commenced. After the suit had been at issue and considerable testimony had been taken (and subsequent to the decision in Mackay v. Randolph-Macon Coal Co., 178 Fed. 881, 102 C. C. A. 115, the trustee filed a supplemental bill, including as creditors entitled to representation in the suit certain holders of bonds of the company aggregating $353,000 at par, these being the only bondholders whose claims had been allowed in the bankruptcy proceeding. The theory of the supplemental bill is that the bonds of these holders (called for convenience the Mackay group) were not merged in the foreclosure judgment, but could be established as claims against such portion of the estate in bankruptcy as might be created by a judgment if obtained herein.

For clearness, therefore, it is desirable to consider: First. The questions of fact and law which arise on the issues suggested by the original bill; secondly: (a) Those which are presented because of the partial defense as to the "no recourse" clause in the mortgage set up by defendants Read, Gardiner, Seaman, Clark, Metropolitan Life

Insurance Company, Hegeman, and Hamilton Trust Company; and (b) those which are at issue because of the special position claimed to be held by the owners of the Mackay group bonds.

The Original Bill.

There is in Randolph and Macon counties in the eastern part of the state of Missouri a large field of bituminous coal. In 1904 this coal, although its existence and extent were well known, had been but little exploited, and there were few mines in operation in this field. The properties, whether consisting of rights or land (not now using the words technically), were held in different ownerships, and from the practical and commercial standpoint the mining had gone on in a comparatively small way. The defendant Van Brunt had been associated with railroad interests in St. Joseph, Mo., and elsewhere, and knew of the existence of this coal territory, and believed that it had great possibilities. He interested George J. Kobusch of St. Louis, Mo., who was then the president of the St. Louis Car Company, and together they acquired 23,000 acres (in round numbers), together with a mine thereon that was then in operation. They organized, under the laws of Missouri, a corporation which was called the Randolph County Coal Mining Company. Believing, however, that the situation warranted the creation and development of an even larger enterprise, Van Brunt and Kobusch, working through agents, procured, from time to time, options for the purchase of a more extensive area, including certain other existing mines. They were two years in acquiring the control, by option and otherwise, of these properties. They realized that such a project needed capital and the co-operation of men of financial ability and standing. Van Brunt was favorably known to the defendant Read, who was a member of the then banking house of Vermilye & Co., of New York City, and in December, 1904, Van Brunt called upon Read and succeeded in attracting Read's interest. Read, however, desired the opinion of some expert of repute. He knew that the old and well-known banking house of Spencer Trask & Co. had frequently been engaged in placing bonds of coal properties in the East, and he asked their aid in procuring the services of the right kind of an expert. Spencer Trask & Co. recommended Mr. James T. Gardiner, who undoubtedly was at that time one of the great coal experts of the country. Read had no previous personal acquaintance with Gardiner, and there is no reason to doubt that the subject-matter was presented to and undertaken by Read in perfect good faith and in the manner in which capable men seek to satisfy themselves as to the merits of a proposed business enterprise. Read requested Gardiner to make a careful examination of the property and its commercial possibilities and to report to him. Gardiner went to Missouri in the early part of January, 1905. He visited the property, inspected such mines as were open and in operation, and, in brief, procured such data and made such study of the situation as would enable him to arrive at a judgment upon which he was willing to rest, and which he was willing to submit to Read. He reported to Read and, in due course, stated his views in writing. Letters of January 11 and 14, 1905. Read consulted his

counsel, and he (Read) and Gardiner agreed with Van Brunt and Kobusch to take part in the proposed enterprise. The understanding between the parties was expressed in two agreements dated January 14, 1905, and known throughout the case as Exhibits 24 and 25, or the Promotion Agreements. These agreements are as follows:

"Exhibit 24.

"Agreement, made this fourteenth day of January, 1905, by and between W. T. Van Brunt, of the city of New York, and George J. Kobusch, of St. Louis, Missouri, parties of the first part, James T. Gardiner, of the city of New York, party of the second part, and William A. Read, of the city of New York, party of the third part, witnesseth: Whereas, the said Van Brunt and Kobusch have acquired the ownership or control of certain mineral lands and properties in the counties of Randolph, Macon and Howard, state of Missouri, and are desirous of securing the aid of the parties of the second and third part in the organization and development of said properties; now, therefore, it is agreed as follows:

"First.—That there shall be organized under the direction of the party of the third part a corporation under the name of 'Randolph-Macon Coal Company,' or some other appropriate designation, pursuant to the laws of the state of New Jersey, or some other state approved by the said party, having appropriate powers.

"Second.—The said Van Brunt and Kobusch agree to cause to be transferred to the said corporation the following properties, to wit: All the right, title and interest now belonging to Randolph-County Coal and Mining Company, a corporation of the state of Missouri, in and to about twenty-three thousand (23,000) acres of land in the counties of Howard and Randolph, in the state of Missouri, including portions of the surface and coal and other rights under the same, and all improvements thereon; certain coal rights in additional lands adjoining the said property of the Randolph County Coal and Mining Company; all the right, title and interest of the Wabash Coal Company in and to certain property amounting to about two thousand (2,000) acres, near the village of Huntsville, in the county of Randolph, state of Missouri; the options for the purchase of coal rights in about ten thousand acres (10,000) of unimproved land in the county of Randolph, north of Huntsville, at present held by W. E. Murlin; certain coal rights in unimproved lands lying north of the above-mentioned tract and estimated at about five thousand (5,000) acres, so far as the same can be secured by the said Van Brunt and Kobusch, lying in the counties of Randolph and Macon, state of Missouri; all the right, title and interest of a corporation known as Interstate Coal Mining Company in about eleven hundred (1,100) acres of land in the counties of Howard and Randolph, state of Missouri; all the right, title and interest of the corporation known as the Coal Creek Coal & Mercantile Company in and to about fourteen hundred (1,400) acres of land in the counties of Howard and Randolph, state of Missouri; all the right, title and interest of the corporation known as Bolen & Darnell Company in the counties of Randolph and Howard, state of Missouri; all the right, title and interest of the corporation known as Elliott Coal Company in the county of Randolph, state of Missouri, amounting to about fourteen hundred (1,400) acres; all the right, title and interest of the corporation known as Renick Coal Company, in the county of Randolph, state of Missouri; all the right, title and interest of the corporation known as Hollingsworth Coal Company, lying in the county of Randolph, state of Missouri; in consideration of the issue and delivery to the parties of the first part by said corporation of five million dollars ($5,000,000) par value of its capital stock, being the entire issue of the same; and one million eight hundred thousand dollars ($1,800,000) face value of its first mortgage five per cent., thirty-year gold bonds, out of a total authorized issue of three million dollars ($3,000,000) of said bonds, secured by a mortgage covering all of the above-mentioned properties and such other properties of the company thereafter acquired with the proceeds of the sale of any of

the remaining one million two hundred thousand dollars ($1,200,000) of bonds which shall be reserved for future issue for the purpose of the company, the said mortgage to provide for the creation of a sinking fund of two cents per ton on all coal mined from any of the mortgaged property, and the bonds to be redeemable out of said sinking fund at one hundred and five per cent. (105%) and accrued interest.

"The parties of the first part agree forthwith, upon the organization of said corporation and the transfer to it of the properties and rights aforesaid and the issue and delivery to them of the bonds and stock aforesaid, to transfer and deliver the entire amount of the said stock and bonds unto the party of the third part, to be held and disposed of by him under and pursuant to an agreement bearing even date herewith.

"This agreement is made upon the further understanding and agreement that the party of the second part shall become the president of the corporation so to be organized and shall agree to give his services to the development of the said property in that capacity.

"In witness whereof, the parties have hereunto set their hands and seals in the city of New York the day and year aforesaid."

"W. T. Van Brunt.
"George J. Kobusch.
"James T. Gardiner.
"William A. Read."

"Exhibit 25.

"Agreement, made this fourteenth day of January, 1905, by and between W. T. Van Brunt, of the city of New York, and George J. Kobusch, of St. Louis, Missouri, parties of the first part, James T. Gardiner, of the city of New York, party of the second part, and William A. Read, of the city of New York, party of the third part, witnesseth: Whereas, by an agreement of even date herewith, the said Van Brunt and Kobusch have agreed to cause to be transferred and delivered unto a corporation therein agreed to be formed under the name of 'Randolph-Macon Coal Company,' or some other appropriate name, in consideration of the issue to them of certain first mortgage bonds and certain stock, which bonds and stock, when so issued, are to be transferred and delivered unto the said William A. Read, and the parties hereto desire to make a provision for the disposition of said bonds and stock in the interest of the common enterprise in which they are engaged: Now, therefore, in consideration of the premises, it is hereby agreed as follows:

"The said William A. Read shall receive, hold and deliver the said stock and bonds as hereinafter provided; that is to say, six hundred thousand dollars ($600,000) face value of the said bonds shall be delivered to the said Van Brunt and Kobusch in payment of their actual cash outlays in the acquisition of the properties and options to be transferred to the company by them, as above provided, it being understood and agreed that the said Van Brunt and Kobusch have actually expended the sum of five hundred and twenty thousand dollars ($520,000) in the acquisition of said properties and options up to January 1st, 1905, and they agreeing to submit to said William A. Read vouchers for the expenditure of the additional sum of twenty thousand dollars ($20,000), failing in which there shall be reserved from the said amount of the bonds to be delivered to them enough bonds at ninety per cent. of their face value to make up the difference.

"The said William A. Read proposes to undertake to place one million two hundred thousand dollars ($1,200,000) face value of said bonds at ninety per cent. of their face value, and this agreement shall cease and determine unless on or before sixty days from date he shall, by agreement in writing, bind himself firmly to take and purchase said bonds at said price.

"The proceeds of the sale of the said one million two hundred thousand dollars ($1,200,000) of bonds are to be applied: (a) to the purchase of property embraced in the options agreed to be transferred to the company by Messrs. Van Brunt and Kobusch; (b) for improvements and developments of the property; and (c) for working capital for the company.

"The said William A. Read shall hold and distribute the stock so delivered to him as aforesaid as follows:

"1. He shall transfer and deliver one million dollars ($1,000,000) par value of said stock unto the said W. T. Van Brunt or his assigns, and one million dollars ($1,000,000) par value of said stock unto George J. Kobusch or his assigns, the same being in full payment to them for their services in procuring the said properties for the company.

"2. He shall transfer and retain, as his own individual property, one million eight hundred and fifty thousand dollars ($1,850,000) face value of said stock in consideration of his services rendered and to be rendered in connection with the organization and promotion of the company.

"3. He shall transfer and deliver unto W. T. Van Brunt one hundred and fifty thousand ($150,000) par value of said stock for delivery to certain employés of the company, it being agreed by said Van Brunt that any of said stock not so employed shall be returned by him to Mr. Read, to be dealt with as hereinafter provided.

"4. He shall transfer and deliver unto James T. Gardiner five hundred thousand dollars ($500,000) par value of said stock.

"5. He shall set aside and hold five hundred thousand dollars ($500,000) of said stock, and out of the same transfer and deliver unto James T. Gardiner, at the expiration of each period of one year from the date of his original election as president of the said company, one hundred thousand dollars ($100,000) par value of said stock, which stock, together with that of the par value of five hundred thousand dollars ($500,000) to be delivered to him forthwith, as above provided, shall be received by the said James T. Gardiner in full compensation for his services as president of said company; and if at any time before the expiration of the full period of five years the same James T. Gardiner shall die or shall voluntarily cease to be the president of the said company, then, except as hereinafter especially provided, all of his interest in and to any portion of the said remaining five hundred thousand dollars ($500,000) of stock so set apart then undelivered to him shall cease and determine; provided, however, that so long as any portion of said stock shall remain set apart and held for his benefit the said James T. Gardiner shall be entitled to receive all dividends declared and paid upon every portion thereof, and provided, further, that if at any time before the full delivery of the entire balance of said stock to said James T. Gardiner a majority of the company shall cease to be held by the said W. T. Van Brunt, George J. Kobusch, William A. Read and James T. Gardiner, or some of them, then and thereupon the said Gardiner shall be entitled to the delivery to him of all portion of the said five hundred thousand dollars ($500,000) reserved stock then remaining undelivered.

"In case of the death or resignation of the said Gardiner during the year, a proportional adjustment shall be made with him for the fraction of the year.

"Any portion of the said five hundred thousand dollars ($500,000) of stock so set apart for the benefit of the said James T. Gardiner, together with any portion of the said one hundred and fifty thousand dollars ($150,000) of stock to be delivered to the said W. T. Van Brunt for the purposes above set forth, not actually used for such purposes shall be divided equally between the said W. T. Van Brunt, George J. Kobusch and William A. Read.

"All of the details of incorporation, form of the mortgage and the organization of the board of directors shall be determined by Messrs. Kobusch, Gardiner and Read.

"It is further agreed that if said William A. Read shall agree to take and pay for the one million two hundred thousand dollars ($1,200,000) of bonds aforesaid, as above provided, he or any firm of bankers of which he shall be a member shall be appointed sole financial agents and bankers for the company.

"In witness whereof, the parties hereto have subscribed this agreement the day and year aforesaid.

W. T. Van Brunt.
"George J. Kobusch.
"James J. Gardiner.
"William A. Read."

At the time of the execution and delivery of Exhibits 24 and 25, the Randolph County Company had acquired, in round numbers, 23,000 acres, for which the price paid was not less than $292,737.15, and, according to Van Brunt, between $300,000 and $400,000. In order to acquire the remaining property, which would make up the total of 47,000 acres, it was necessary to raise and expend additional money. The purpose was to acquire all of these 47,000 acres, and it was in respect of this whole aggregate field that Gardiner made his reports.

Some criticism was suggested because of the short time employed by Gardiner in his examination of these coal properties, but it seems to me that Gardiner, because of his ability and knowledge, could very well arrive at a conclusion after an examination much shorter in time than that which would be occupied by men less expert. In his report of January 11, 1905, Gardiner considered elaborately various phases of what he called the Randolph-Macon coal field of Missouri. He discussed the commercial situation, outlined the physical description, and pointed out the expected control of the field by the exercise of the Van Brunt options, which would add to the existing Randolph County Company holdings, so that the aggregate holding of a new company would be the 47,000 acres. He deduced his estimate of earnings from the data thus set forth, and finally strongly advised the purchase of the property in the following language:

"Although the well-operated companies in this field are now making about 30c. a ton on their coal and about 10c. a ton for powder sales and stores, or 40c. total, and although I believe the present price can be maintained and the cost of mining reduced, I think it safest to estimate 30c. a ton as the profit from operating the 10 mines which are now working on the Van Brunt options and the additional shaft which is being sunk. With an estimated output of 1,250,000 tons the first year, the net earnings of the operating company should be $375,000. The second year with an output of 2,000,000 tons the net earnings should be $600,000.

"In view of the rapid increase of demand for coal and the absence of other sources of supply, I should look for a steady increase in the production from this field and a consequent increase in the earnings of the company.

"I strongly advise the purchase of this property on account of the favorable mining conditions, the low cost of mining as compared with competitive fields, the established reputation of the coal, the unusual steadiness of the price for this fuel, the absence of competitive fields which could lower present prices, the geographical position of the four great trunk railways, the almost complete control of the field, the ownership of 200,000,000 tons of coal, and the fact that the 10 open and producing mines will give the operating company a large tonnage at the beginning of its business and an ample surplus the first year of operation."

On January 14, 1905, he made a further report, in which he said:

"The Randolph-Macon Coal Company is a recent consolidation of the operating coal mines and undeveloped properties in the isolated coal basin in Randolph and Macon counties in Northern Central Missouri. * * * There are 10 operating shafts and 47,000 acres of coal land containing 200,000,000 tons of coal."

After pointing out the prospects, transportation conditions, coal supply and proposed economics, he said:

"I think the property of the Randolph-Macon Coal Co. worth from $3,000,000 to $4,000,000 as it stands and that it will rapidly increase in value from the developments of the next two years."

He concluded by an enthusiastic expression of expectation of the results to be attained, and stated that he had decided to take a personal interest in the company and accept its presidency. There is no question that the field was a valuable one, and that it was believed so to be by the defendants Gardiner, Read, and Van Brunt; and it was advantageous that the company should start with a man of the reputation which Gardiner had as a coal man.

The exact figures of $1,800,000 of bonds and $5,000,000 of stock at which the company was to be capitalized were not based on any accurate mathematical computation; but they were regarded by the promotors as a minimum well within the value of the property as estimated by Gardiner. It is urged that the valuations, under different dates, by Gardiner, were inconsistent; but, from the point of view of all concerned, as affecting the questions of good faith (Wickersham's testimony, vol. 4, pp. 1054, 1055–1061; Read's testimony, vol. 7, p. 2094), I find no inconsistency (see supplemental brief of defendants Read et al., page 40, subd. 2). That point of view was thus expressed by Read:

"I relied on Mr. Gardiner's estimates, which were that the property was a very valuable property, worth the full amount of the stock and bonds to be issued; that, as a *going concern, with capital behind it,* it had far greater value than it had as separate concerns in poor condition, in poor credit I should say possibly, antagonizing each other, competing for business. As a going concern, the coal in the ground had a fixed value which it was easily demonstrated was very large indeed, many times the amount of stock and bonds."

And an important element in the formation of Gardiner's judgment was that the property would be in the hands of a large and strong company having the knowledge and capital to develop its possibilities. Volume VII, pp. 2011 et seq. It is evident that these men thought that the property would earn its own way, and while, for various reasons, this result was not attained, I am satisfied that they honestly believed that the enterprise would stand the capitalization, and that they acted in that regard, in good faith.

The details and routine necessary to incorporate the company were conducted at St. Louis by attorneys of repute. Mr. William E. Fisse of the Missouri bar had been the personal counsel of Kobusch, and Messrs. Strong and Cadwalader were the attorneys for Read.

Mr. Fisse and Mr. Gale (an associate of Strong and Cadwalader) co-operated in preparing the Articles of Association of the coal company. These articles, bearing date January 23, 1905 (8 days after the date of the promotion contracts) were executed by Henry F. Vogel, one George A. H. Mills, and Mr. Fisse, all of the city of St. Louis. The articles set forth that the parties had associated themselves together for the purpose of organizing a corporation under the laws of the state of Missouri, and particularly under article 9, chapter 12, of the Revised Statutes of Missouri of 1899, and the various acts supplemental to and amendatory of the said article. The articles further set forth that the whole of the stock had been bona fide subscribed, and one-half thereof had been actually paid up in lawful money of the

United States, and was then in the custody of the persons named as the first board of directors.

Article fourth provided as follows:

"The names of the several shareholders of said corporation, and their residence, and the number of shares subscribed for by them respectively are as follows:

Vogel	$4,999,800 00
Mills	100 00
Fisse	100 00"

Vogel, Mills, and Fisse were named as the directors for the first year. Fisse testified that he had been requested to act in the matter of the incorporation of the company as local counsel by Mr. Gale, and that Vogel and Mills acted under his, Fisse's, directions. No one of these three had any pecuniary interest in the company. The first meeting of stockholders was held on January 24, 1905, and at this meeting a proposition in writing, dated January 24, 1905, was submitted from Vogel, addressed to the stockholders of the coal company. This proposition, briefly stated, was to sell and convey, or cause to be conveyed, to the company, in consideration of the payment and delivery of $5,000,000 par value of capital stock and $1,800,000 of first mortgage bonds, out of a total authorized issue of not more than $3,000,000, the property substantially the same as contained in the contract, Exhibit 24; that is to say, the 23,000 acres and the property to be acquired. This proposition was accepted, and then a resolution was passed, authorizing the use of $1,800,000 of bonds to pay Vogel part of the purchase price of the properties authorized to be acquired from him; the remainder of the issue, to wit, $1,200,000 to be reserved for future use by the company, as should thereafter be determined by the stockholders or the directors. Temporary certificates of stock were issued to Vogel, Mills, and Fisse to the extent of their subscriptions. Between January and August, certain certificates were surrendered and canceled and new certificates issued in lieu thereof until, on August 10, 1905, pursuant to a letter of instructions of William A. Read & Co., $1,850,000 of the stock theretofore issued was issued to the following: 900 shares to Metropolitan Life Insurance Co., 100 shares to John R. Hegeman, 200 shares to Hamilton Trust Co., 17,100 shares to William A. Read, 100 shares to Joseph H. Seaman, and 100 shares to John Hallett Clark. Shares of stock were issued to various persons pursuant to the direction of Van Brunt and, in brief, the stock was distributed in precise accordance with the promotion contracts.

The company was operated for about two years, during which time it failed to make money and encountered difficulties. At a meeting of the directors on February 4, 1907, the president, Mr. Gardiner, read a letter addressed to the stockholders and bondholders of the company, which, among other things, stated that the 1st of February had arrived with no money in the treasury to meet the interest on the bonds and to pay creditors. The board of directors authorized the president to have the letter printed and distributed among the stockholders, and adopted a resolution authorizing counsel of the company to enter an appearance of the company in any proceedings which might be brought

to foreclose the mortgage. On February 19, 1907, such proceedings were instituted by the Central Trust Company of New York, trustee under the mortgage, in the United States District Court for the Northern Division of the Eastern Judicial District of Missouri, and these proceedings resulted in a sale of the property by a special master of the court, the price received being $100,000. On March 26, 1907, the company was adjudicated a bankrupt. The allotment to Read of the $1,200,000 of bonds at 90 realized for the company $1,080,000. This money was largely used in the acquisition by the company of the property other than the Randolph county property. (The total paid for the Wabash, Bolan Darnell, Elliott, and properties other than the Randolph county, is figured by plaintiff to be $857,915,000, but the difference between that amount and the $1,080,000 is not important for purposes of decision of the issues herein.) This sum of $1,080,000 was the only money which came to the company in connection with its organization. The total holdings of the company were surface land, 1,035.24 acres, coal rights, 45,531.38 acres, leased rights, 1,246.75 acres.

From the record of which the foregoing is necessarily a meager outline, it is entirely clear that Read, Gardiner, Van Brunt, and Kobusch were in fact the subscribers to the capital stock of the corporation. The case was not one of a sale by Van Brunt and Kobusch, wherein Vogel, Mills, and Fisse were their agents for the transfer of the property, but Vogel, Mills, and Fisse plainly acted for all parties (merely as instruments in routine) to carry out the purpose and understanding expressed in the promotion contracts. Equity will brush away mere forms, and the result is the same as if Read, Gardiner, Van Brunt, and Kobusch had signed the articles of association with their own hands.

[1] Starting, then, with the proposition that Read, Gardiner, and Van Brunt, defendants here, were subscribers, the first inquiry is whether their obligations and duties are to be determined by the law of Missouri or by the law of the forum. It is insisted by the defendants that the decisions of the Missouri courts, in respect of the subject-matter, are contrary to long and well-established views announced by the federal courts and by other state jurisdictions, and that the responsibility, if any, of the defendants, depends upon the construction which this court will give to their acts irrespective of the authority of the Missouri courts, and that the rule which prevails in Missouri expresses the interpretation of the courts of that state, upon propositions of general commercial law quite irrespective of the Constitution or statutes of Missouri. The plaintiff, on the other hand, insists that the liability of the defendants is because of the requirements of the Constitution and statutes of Missouri. The main contentions may briefly be summarized as follows: Plaintiff urges that the issue of the capital stock was in pursuance of an actual fraud, in that the stock was issued for property knowingly grossly overvalued; that if, however, it be found that actual fraud was not practiced, then, nevertheless, the defendants are liable because, as matter of fact, the property conveyed for stock was far less in value than the amount of stock subscribed and delivered in payment. The defendants insist

that the transactions were undertaken and executed in good faith, that defendants are to be held liable only if actual fraud shall be found to have existed, and that, in any event, the property was fully worth the amount of stock subscribed and, indeed, of a value far in excess thereof. The defendants further contend that a suit may not be maintained by the trustee in bankruptcy, but only by a creditor who acted on the belief that the capital stock had been fully paid. There are other and minor contentions which may, to some extent, be later referred to.

[2] The Constitution of Missouri provides that:

"No corporation shall issue stock or bonds, except for money paid, labor done or property actually received." Constitution of Missouri, article 12, § 8.

"Dues from private corporations shall be secured by such means as may be prescribed by law, but in no case shall any stockholder be individually liable in any amount over or above the amount of stock owned by him or her." Constitution of Missouri, article 12, § 9.

Section 962 of the Revised Statutes of Missouri of 1899, which was in force at the time the Randolph-Macon Coal Company was organized, and which is still in force, is as follows:

"The stock or bonds of a corporation shall be issued only for money paid, labor done or money or property actually received."

After making provision for increases of stock, the section mentioned provides further:

"The shares of stock or bonds arising from such increase shall only be disposed of for money paid, labor done or money or property actually received. All fictitious issues or increase of stock or of bonds of any corporation shall be void."

The section quoted is the same section as that now known as section 2981 of the Revised Statutes of Missouri of 1909.

The section of the statutes of Missouri, under which this corporation was organized (article 9, chapter 12, Revised Statutes of Missouri of 1899, section 1319), provided as follows:

"Corporations may be created under this article for any of the following purposes:

"First.—To carry on any kind of mining, * * * business.

* * * * * * * * * *

"Eleventh.—For any other purposes intended for pecuniary profit or gain, not otherwise specially provided for, and not inconsistent with the * * * laws of this state. * * *"

This section is now known as section 3346, Revised Statutes of Missouri of 1909.

Section 1312, of the Revised Statutes of Missouri of 1899, provided:

"Any three or more persons who shall have associated themselves, by articles of agreement, in writing, as provided by law, for any of the purposes included under section 1319, may be incorporated under any name or title designating such business."

It is further provided in said section that the Articles of Association shall set out among other things:

"Third.—The amount of the capital stock of the corporation, the number of shares into which it is divided, and the par value thereof, that the same

has been bona fide subscribed, and one-half thereof actually paid up in lawful money of the United States, and is in the custody of the persons named as the first board of directors or managers.

"Fourth.—The names and places of residence of the several shareholders, and the number of shares subscribed by each * * * purposes for which the association or company is formed. * * *"

This section is now known as section 3339, Revised Statutes of Missouri of 1909.

Section 1313, Revised Statutes of Missouri of 1899, provided that such Articles of Association shall be signed and acknowledged by the parties thereto, which is substantially the same section as section 3340 of the Revised Statutes of Missouri of 1909, which provides that "such articles of association shall be signed and acknowledged by the parties thereto."

There can be no doubt as to the doctrine laid down by the Missouri courts. That is announced in Berry v. Rood, 168 Mo. 316, 67 S. W. 644, where the court was dealing with questions which arose in regard to a Missouri corporation. There had been some uncertainty caused by the decision in Woolfolk v. January, 131 Mo. 620, 33 S. W. 432. But in Van Cleve v. Berkey, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593, the Woolfolk Case was distinguished, and the prior case of Shickle v. Watts, 94 Mo. 410, 7 S. W. 274, was approved. In the Shickle and Van Cleve Cases, the Missouri courts were not dealing with Missouri corporations, and, on the close analysis suggested by the learned counsel for the defense, it might well be argued that the Missouri courts were applying their view of the law applicable to such cases, just as it is now insisted by the defendants that this court shall apply whatever the law may be in federal jurisdictions as a proposition of general commercial law as distinguished from the interpretation of a constitution or statute. But in the Van Cleve Case the Missouri court took pains to point out what it believed to be the law of Missouri in the following language:

"Upon a review of all the cases decided by the appellate courts of this state since the adoption of the Constitution of 1875, the ruling in all of which will be found to be in harmony, it is impossible to escape the conviction that in this state, whatever may be the case in some of the other states, the American trust doctrine, as suggested by Mr. Justice Harlan, has indeed been 'reinforced' by its Constitution and statutes, and that the proposition that the stock of a corporation must be paid for 'in meal or in malt,' in money or in money's value, is not a mere figure of speech, but really has the significance of its terms. It may be paid for in property, but in such case the property must be the fair equivalent in value to the par value of the stock issued therefor; that it is the duty of the stockholders to see that it possesses such value; that when a corporation is sent forth into the commercial world, accredited by them as possessed of a capital in money, or its equivalent, in property, equal to the par value of its capital stock, every person dealing with it, unless otherwise advised, has a right to extend credit to it on the faith of the fact that its capital stock has been so paid, and that the money or its equivalent in property will be forthcoming to respond to his legitimate demands. In short, that it is the duty of the stockholder, and not of the creditor, to see that it is so paid; hence the inquiry in a case between the creditor and a stockholder, when property has been paid in for the capital stock of a corporation, is not whether the stockholder believed or had reason to believe that the property was equal in value to the par value of the capital stock, but whether, in point of fact, it was such equivalent. This whole-

some and salutary doctrine, beneficial alike to the general public and to all corporations doing business with bona fide capital, so firmly applied in Shickle v. Watts, supra, and so well formulated in the foregoing quotation from the opinion of Gill, J., in the case of Shepard v. Drake, supra [61 Mo. App. 134], ought not to be in any way weakened or impaired by anything said in the opinion in the case of Woolfolk v. January, in criticism of a single expression in the opinion in Shickle v. Watts, and which criticism was obiter to the case then in hand."

Then came Berry v. Rood, 168 Mo. 316, 67 S. W. 644. There a receiver of a corporation appointed by the Missouri courts, brought an action at law to recover for unpaid subscriptions. The corporation was formed under the laws of Missouri with a nominal capital of $300,000 stated in its articles to have been all subscribed and fully paid in cash. None of the subscriptions were paid in cash, but the organizers were the owners of certain lands believed to contain valuable onyx deposits which, pursuant to the understanding among them from the beginning, they put into the concern at a valuation of $200,000 as in payment to that extent of their subscriptions, and one subscriber, being the owner of certain onyx works and machinery in Vermont, put that property in at a value of $90,000 as in payment of his subscription to that extent. The referee found that these deposits added little, if any, real value to the land, and, in brief, that the property turned in by the original incorporators was very greatly overvalued. The referee further found that there was no fraudulent intent or purpose in the transactions and in the incorporation of the company. The court held that where stockholders turn over property to a company and receive stock in payment therefor, such stockholders are respectively liable for the difference between the real value of the property turned over and the face value of the stock, and that judgment may be entered against the stockholders individually for so much of that difference as may be necessary to pay off the debts of the concern to such creditors as extended credit without knowledge of the fact that the corporation had accepted property in payment of stock, and for costs. The defendants say that this decision of Berry v. Rood is contrary to the principle announced in many cases that before a stockholder who takes stock for property may be held liable as for an unpaid subscription, it must be shown that the stockholder was guilty of a fraud, and if, in fact, the stockholder acted in good faith or was not guilty of fraud, then there may be no recovery in any event. Clark v. Bever, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88; Fogg v. Blair, 139 U. S. 118, 125, 11 Sup. Ct. 476, 35 L. Ed. 104; Coit v. Gold Amalgamating Co., 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420; Taylor v. Cummings, 127 Fed. 108, 62 C. C. A. 108; Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606, 43 L. R. A. (N. S.) 706; Hospes v. Northwestern Mfg., etc., Co., 48 Minn. 174, 196, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637.

With these substantially different views claimed by counsel to be illustrated in many cases, it is necessary, at the outset, to arrive at a conclusion as to the nature and character of the transactions complained of. I am entirely satisfied (as I have heretofore indicated) that there was no fraudulent purpose or conduct in connection with the or-

ganization of this company. On the contrary, I am convinced that the promoters entered into the enterprise in good faith and with the greatest measure of confidence in its success. Read employed the best expert he could find, and he was a stranger to him. He employed counsel of recognized standing and ability to advise him in regard to and to conduct the legal details. Gardiner believed in his own reports, and they were such as to lead any one to conclude that the property was of great value. The stock was not shoved on the market nor sold in such a manner as to bring a profit to Read from the stock itself. It is true that Read made the sum of $60,000 by taking the bonds at 90 and selling them to the Metropolitan Life Insurance Company at 95, but that was a banker's commission which everybody perfectly understood, and which was earned on the theory that it takes money to get money. The confidence of Gardiner in the proposition is demonstrated by the fact that he was willing to take his compensation for services over a period of five years, in a stock allotment for each year. Van Brunt had already given the best evidence of his belief in the value and future of the property by undertaking with Kobusch to collect the original Randolph county holdings of 23,000 acres and to get the options for the remainder which went to make up the 47,000 acres. Read, Gardiner, and Van Brunt later lent the company money in the hope of working out of the difficulties. Therefore this is not one of those cases where a number of men associate together for the purpose of putting on the market knowingly grossly overvalued stock, the proceeds of the sale of which they convert to their own uses. I think any one reading this record will be satisfied that all these men believed that they had a large proposition with splendid possibilities and that they believed so thoroughly in the future of the company that they were willing and were glad, in the main, to hold their stock until it reached a satisfactory market value.

Arriving at this conclusion, I must determine whether the law of Missouri is applicable, or whether the case is to be controlled by authorities having the meaning which defendants urge is to be found in Clark v. Bever, supra, and the like.

I have not failed to appreciate the earnestness of the argument of the counsel for defendants, when they emphatically insist that Berry v. Rood did not construe the Constitution and statutes of Missouri. If the rights of the parties are to be adjudicated according to the Constitution and statutes of Missouri, then the doctrines of Berry v. Rood must prevail. Bernheimer v. Converse, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163; Converse v. Hamilton, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1913D, 1292. It seems to me that I should not strain to find that the Missouri court meant something different from what it affirmatively stated. In Berry v. Rood, the proposition was squarely before the court, and, in view of the opinions in the Shickle, Woolfolk, and Van Cleve Cases, the time had come when the Missouri court was called upon to take a position which would be clear and free from doubt. In Berry v. Rood reference is made to the Shickle, Woolfolk, and Van Cleve Cases, and the court said:

"In Van Cleve v. Berkey, supra, the authorities are reviewed and the law clearly defined in an exhaustive opinion by Brace, J., in which all concurred,

including the writers of the opinions in the two other cases. We feel that nothing is needed now to add to what is said in that opinion to demonstrate that our Constitution and statute mean that when property is taken in payment of stock the stockholder is liable at the suit of a creditor to account for the difference, if any, in value between the price at which the property was turned in to the company and the face value of the stock, and this is so even though no actual fraud be shown."

The position of the court was stated as follows:

"II. The main proposition, however, upon which reliance is had to sustain the judgment of the circuit court, is that a stockholder who has turned into the corporation property in payment of his stock which has been accepted by the corporation as the equivalent of the face value of the stock, and who has been guilty of no actual fraud, cannot be called to account by creditors of the concern, or made to pay in satisfaction of debts the difference between the value of the property turned in and the face value of the stock. This proposition as contended for, under the facts of this case, also draws a distinction, in favor of the stockholder, between actual fraud and legal fraud and leaves him on the safe side of the line, although the property he turned in was in fact worth less than 5 per cent. of the face value of the stock, provided we find that his mind had been so excited by indications of prospective mineral wealth that he really believed that, when the unexplored caverns should be opened, mines of fabulous value would be disclosed.

"If that is the correct interpretation of the law of Missouri on this subject, then the manifest efforts of the framers of our Constitution and the makers of our statutes to authorize the establishment of only conservative and reasonably safe business corporations has been in vain. Our Constitution ordains that 'no corporation shall issue stock or bonds, except for money paid, labor done or property actually received.' Article 12, § 8. The money, the labor, and the property mentioned, are on a plane, and signify equivalents. If property worth 5 per cent. of the face value of the stock can be taken as full payment, then 5 per cent. in money is equally available, and the Constitution affords the people no protection against the wildest schemes. This clause in the Constitution puts a limit on the power of the Legislature, so that if that body should attempt, it could not authorize the organization of a corporation with power to issue stock without receiving its equivalent in money, labor, or property. But whilst the Legislature cannot go beyond that limit, it is not compelled to go to the limit, and may, if it should see fit, make the restrictions as to issuance of stock more strict. In section 962, Revised Statutes 1899, the General Assembly follows the language of the Constitution, using the negative form of expression that stock or bonds shall be issued only for money, labor, or property. That section is general as to all corporations and will apply to all unless by law a different requirement is made for corporations of a particular class. Manufacturing and business corporations are treated in the statutes as a class in themselves, with some provisions applicable to them not applicable to other kinds of corporations. Section 1312, Revised Statutes 1899, governing this class of corporations, requires the incorporators in their articles of association to certify that the shares of capital stock have all been bona fide subscribed and one-half thereof actually paid up in lawful money of the United States and in the actual custody at that time of the persons named as the board of directors. Even in the face of that unequivocal language this court has held, in this kind of corporations, that the stock may be paid in labor or property, and that has been too long a rule of business conduct to question it now. But we make this reference to the emphatic language of our Constitution and statutes at this time to emphasize the fact that our lawmakers, as far as they could, have endeavored to place Missouri on conservative and safe grounds in this respect. And that this is understood by the business community is shown by the well-known fact that many corporations designed to operate alone in this state are organized under the laws of other states which are supposed to be more liberal to the promoters and less careful of the rights of persons who

may come in their way in the course of business. If we adopt the rule of construction of our written law that the referee and the trial court have laid down, then there will be no necessity for men to shun Missouri as a forum in which to organize the wildest and most visionary schemes, for by such interpretation we break down all the safeguards that distinguish ours from any other laws. But that is not the proper interpretation of our law."

I have quoted thus extensively from Berry v. Rood, because I can hardly imagine language any stronger to indicate that the Missouri court, in dealing with rights and liabilities of stockholders, in relation to Missouri corporations, was construing the Constitution and statutes of its own state. If it be said that the Missouri court wrote into the Constitution and statutes something that was not there, the answer is that that is a question of interpretation for the Missouri courts. If it be said that the doctrine thus announced is contrary to that which prevails in other jurisdictions, the answer is that this court has no occasion to go behind the Missouri decision to inquire independently into the soundness of the doctrine, viewed either from the standpoint of law or public policy. Once this court is satisfied that the Missouri court was construing the Constitution and statutes of Missouri, then the law of Missouri, as thus announced by her own court, must be followed in this jurisdiction.

I think that the federal courts have not been as alert to disregard the views of the state courts in respect of a question of this character as the defendants contend. In Clark v. Bever, supra, Justice Harlan took pains to point out that all the cases in the Iowa court were determined after the stock in question was acquired, and all, with one exception, after the litigation was commenced. While rejecting the view slenderly sustained by a narrow majority in the case of Jackson v. Traer, 64 Iowa, 469, 20 N. W. 764, 52 Am. Rep. 449, he clearly indicated the caution which the federal courts will exercise in departing from the view of the state courts. A reading of Jackson v. Traer, supra, will demonstrate that the decision in that case was on harsh lines which the United States Supreme Court was reluctant to accept; but Justice Harlan restated the well-known principle that federal courts will lean "towards an agreement of views with the state courts if the question seems to them balanced with doubt."

In Fogg v. Blair, supra, Justice Harlan calls attention to the fact that the doctrine there restated is the same as that of the Supreme Court of Missouri. The limits of the Clark v. Bever and Fogg v. Blair Cases were pointed out in Camden v. Stuart, 144 U. S. 113, 114, 12 Sup. Ct. 585, 36 L. Ed. 363.

In Taylor v. Cummings, supra, the court is careful to conclude:

"We find no support in the decisions of the Illinois Supreme Court for the proposition on which reversal is sought."

In Kiskadden v. Steinle, 203 Fed. 375, 121 C. C. A. 559, the court follows the Ohio law.

In brief, a study of the decisions of the federal courts leads to the conclusion that it is very difficult, at times, to distinguish between those decisions which construe the Constitution or statutes of a state and those which interpret the so-called general law. This is peculiarly the fact in connection with questions that arise as to the obligations of a

stockholder to a corporation, and I think the underlying reason is that where persons become stockholders in a corporation, it may fairly be presumed, as matter of good sense and business experience, as well as a matter of law, that they have in mind the attitude of the courts of the state which has permitted the creation of the corporation. Whatever may be the difference of opinion as to the basic doctrine involved (and in this respect I express no opinion because unnecessary so to do), it is manifest that the Missouri court has worked out a simple, orderly, and uniform system in cases like this.

[3] What Berry v. Rood holds is that the liability for the difference between the amount subscribed and the actual value is contractual. Being such, it is an asset of the corporation applicable to the payment of debts, just as much as would be the balance due on a cash subscription. If Berry v. Rood is accepted as the law of this case, then must vanish most, if not all, of the distinctions which have been made between cash subscriptions on the one hand and the transfers of property for stock on the other.

Rescission is not necessary under the authority of Berry v. Rood, supra, nor would a court of equity require rescission where it is either a mere form or is impossible of accomplishment.

Further, it is perfectly clear that if the unpaid subscription under the principle of Berry v. Rood is an *asset* of the corporation, then the trustee in bankruptcy may collect the same. Babbitt v. Read (C. C.) 173 Fed. 712; Scoville v. Thayer, 105 U. S. 143, 26 L. Ed. 968; In re Remington Automobile & Motor Co. (D. C.) 153 Fed. 345.

It is urged, however, as one of the reasons why the trustee in bankruptcy cannot recover the unpaid subscriptions where stock has been received for property, that the creditor must show that he has acted in reliance upon the full payment of the capital stock. Defendants contend that there is a distinction between cases, on the one hand, where there is a cash subscription for stock with an agreement that the same may be satisfied by the payment of less or the giving of less value than par, or where stock is taken from the corporation as a bonus or gratuity, or there is a simulated cash subscription at par, and cases, on the other hand, where property has been purchased with an issue of stock. Speaking generally, such distinction is to be found in the books, although in some jurisdictions the question as to whether the creditor had knowledge of the method in which it was attempted to pay up the stock, is held to be immaterial (Eastern National Bank v. American Brick Co., 70 N. J. Eq. 722, 64 Atl. 1095), and in other jurisdictions there is authority for the proposition that the burden is on the stockholder, who relies upon such defense, to show the fact, if it exists, that the creditor had knowledge of the way the stock was paid. Northwestern Mut. Life Ins. Co. v. Cotton Exhange Real Estate Co. (C. C.) 46 Fed. 22–25; Gogebic Inv. Co. v. Iron Chief Mining Co., 78 Wis. 427–434, 47 N. W. 726, 23 Am. St. Rep. 417; Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 139 N. W. 606, 608, 43 L. R. A. (N. S.) 706.

In support of their position, the defendants refer to Berry v. Rood, where it is said:

"If a person, knowing that a corporation has accepted certain property in full payment of its stock, sees fit, with that knowledge, to lend money to the corporation, he has no more right to call the stockholder to further account for his debt"

—nor do I see any practical difficulty in that connection.

But it will be noted that the court does not hold that the burden rests upon a plaintiff. On the contrary, it would seem that this expression in Berry v. Rood is harmonious with the view expressed in Van Cleve v. Berkey, supra (quoted in the Berry Case), where the court said:

"When a corporation is sent forth into the commercial world accredited by them (i. e., stockholders) as possessed of a capital in money, or its equivalent, in property, equal to the par value of its capital stock, every person dealing with it, *unless otherwise advised*, has a right to extend credit to it on the faith of the fact that its capital stock has been so paid and that the money, or its equivalent in property, will be forthcoming to respond to its legitimate demands. In short, that it is the duty of the stockholder, and not of the creditor, to see that it is so paid. * * *"

It is plain that upon this question the Missouri courts adhere to the same principle as is applicable to unpaid cash subscriptions. That principle is well expressed (in the brief of the defendants Read et al.), as follows:

"The implied contract of the subscriber by the acceptance of the stock, is one to pay the par value thereof, if necessary, for the satisfaction of the claims of creditors, and the debt is an asset of the corporation, which may not be released by it. The trustee in bankruptcy in such cases may maintain a suit for their benefit on the insolvency of the corporation to recover the unpaid amount on the par value of the stock as an asset of the corporation, as a trust fund for the benefit of creditors. In such a case, it would not be necessary for the creditor to show that he relied upon the faith of the full payment of the authorized capital stock. He has the right to assume that all existing subscriptions, whether he knows of them or not, and irrespective of the amount of the authorized capital stock, will be administered for his benefit. The case is no different from one in which a judgment creditor seeks to set aside a conveyance by the corporation of other kinds of property in fraud of him. There it would not be necessary for him to show that he relied, in extending credit to the corporation, upon the faith of the existence of the particular property, which had been or was afterwards conveyed away. It would be sufficient for him to show that he is a creditor and that property of the debtor had been conveyed away for the purpose of defrauding him. It will be presumed that he relied upon the ownership of the property by the corporation. *That he assented to the transaction or had knowledge of it when he became a creditor, so that he could not have relied thereon, would be matter of defense.*"

The creditors in the case at bar are divided into two classes, to wit: (1) The general creditors; and (2) the deficiency judgment creditors represented by the deficiency judgment of the trustee under the mortgage, to wit, the Central Trust Company. Of the creditors represented in the deficiency judgment, there is the subdivision called the Mackay group. In view of the fact, alleged as a partial defense by the defendants, that a provision in the mortgage as to "no recourse" availed them as against the deficiency judgment, the trustee in bankruptcy procured leave to file, and did file, a supplemental bill, in which he set forth facts intended by him to show equitable grounds why this defense

should not prevail if otherwise a valid defense, and particularly why it should not prevail against the claims of the bondholders known as the Mackay group, who had purchased their bonds, as they asserted, under circumstances different from other bondholders.

At the time of filing the original bill, the claims of bondholders had been disallowed in bankruptcy by the referee on the ground that their claims were merged into the deficiency judgment entered in favor of the Central Trust Company as trustee under the mortgage, and that there could be no allowance of the bonds in view of the allowance of the deficiency judgment. This disallowance of the bonds as claims in bankruptcy was reversed by the United States Circuit Court of Appeals for the Eighth Circuit, in Mackay v. Randolph-Macon Coal Co., 178 Fed. 881, 102 C. C. A. 145. The original disallowance of bonds applied to 2,119 bonds. The appellants from the order of disallowance were the owners or persons interested in 353 of said disallowed bonds, and consequently the final judgment of allowance, pursuant to the appeal, related to only 353 out of the 2,119 bonds previously disallowed. The supplemental bill alleges that the holders of these 353 bonds are creditors of the Randolph-Macon Coal Company, that their rights and claims devolved upon the plaintiff as trustee in bankruptcy, and that the trustee is entitled to recover in respect of the claims of the several appellants to the extent in the aggregate of the bonds so allowed, to wit, $354,574.72, with interest. For reasons hereinafter outlined, I am of opinion that neither the Central Trust Company nor the Mackey group can prevail.

The total of claims under Exhibit A is $2,376,041.93, and, substracting the deficiency judgment of $2,149,729.45, the balance of $226,312.-48 represents the claims of the general creditors as distinguished from the claim of the trustee under the mortgage or the claims of the Mackay group. This amount, with reasonable counsel fee and costs, if any, will represent the outside sum for which the defendants Read, Gardiner estate, and Van Brunt are liable. It becomes necessary, therefore, to examine the testimony relating to the value of the property. Here, broadly stated, there are two absolutely different theories of value. Plaintiff's theory is that the property is worth no more than was paid for it. The theory of defendants is concisely stated as follows:

"This was an enterprise formed for the purpose of mining and selling coal to consumers, and not to purchase and sell coal lands as such. The tonnage of coal in the ground was the capital of the company, and its value depends upon the possibility so to utilize that capital that it will ultimately be distributable as capital, and, in addition, yield a profit thereon.

"It is not a matter of speculation upon which the opinion of an expert is based, * * * but is a matter determined by fixed and definite proof. In the district in question a charge of 5 cents, and ever a greater sum, per ton can be made against capital account, and, after charging all other items of cost, a minimum profit of 10 cents a ton and an average profit of 20 cents a ton can be and is earned. It is also established that there exists a market sufficient to absorb the coal as the same was to be mined in the contemplation of the company, and that the available tonnage is such that, at the minimum rate of 5 cents a ton, the coal can conservatively be said to have a capital value of over $13,000,000."

The "earning" basis to which Gardiner referred, say the defendants, is the correct basis, and the one on which they stand. In approaching the consideration of actual value, we must discard all questions of good faith; for the inquiry now is what, on the evidence, the property was worth. Plaintiff contends that the tonnage basis is illusory and impractical and that one of the serious difficulties encountered in connection with Gardiner's estimates of earnings, was lack of capital. The total issue of bonds, in addition to the $1,800,000, did not exceed $350,000 at par. The company expended $322,369.55 in improvements, and its entire working capital seems to have been $180,-000, loaned by its directors in cash and credit. I am not unmindful of the unexpected troubles of the company (due partly to the sickness of Mr. Gardiner) in the matter of bad management and strikes, nor have I failed to appreciate the changed market conditions, but any one may well ask whether the enterprise might not have stood on its feet if it had had sufficient capital to live through its troubles. This is a very practical question which men like Read, Gardiner, and Van Brunt consider when they undertake an enterprise. They were not figuring on a theoretical basis. Valuable units, they believed, increased in value if aggregated into "a going concern with capital behind it." As a going concern with capital behind it, interest would be paid and dividends earned on the stock. This, they supposed, the property would do of itself without (relatively speaking) much cash, but they were mistaken.

We are thus brought to a consideration of the theories of the defense, now presented as to value, but not developed prior to the incorporation of the company. Defendants contend that their experts have sustained calculations and not theories, but I cannot escape the conclusion that the testimony unfolds theoretical computations as distinguished from business market values. Testimony was adduced from which it appeared that there were two methods of mining, one known as the "room and pillar" and the other as the "long wall" system, the latter producing greater results. The tonnage basis of calculation is that which assumes the tonnage of coal in the ground irrespective, however, of the time that it would take to pay this coal on the surface ready for shipment and market requirements. There is much testimony on this subject, the net result of which is that the company owns coal in the ground of the aggregate value of many millions, which, through a long period of years (indeed centuries), can or will be mined. Under the royalty system the owner leases, as it is called, the right to mine coal upon the payment by the operator of a specific sum per ton for every ton mined. The minimum royalty which prevailed in this neighborhood was five cents a ton, and there were instances where the royalties exceeded that amount. It is contended by defendants, for instance, that upon a royalty basis, and with but 60 per cent. of the coal being mined, the property had a value of over $12,-000,000 and in any event that whatever might be adopted as the amount of the royalty from five cents up, and after an allowance of so many cents per ton for extinguishment of capital account, the value of the property was many millions in excess of $6,800,000. Again, to illustrate, upon a basis of 6,453 tons of coal to the acre extracted, less

10 per cent., by the "long wall" system, 5,807.70 tons per acre would be susceptible of being extracted, and, charging two cents a ton for extinguishment of capital account, on the basis of Mr. Doubleday (an expert for plaintiff), and adding a further charge of only six cents a ton as royalty, the defendants arrive at the figure of $21,830,090 for the 47,000 acres owned by the company.

There is more than one difficulty with the theories of the defendants. Value, of course, means market value. It surely cannot be an abstraction. There is force in the argument of the plaintiff that actuarial figures dispose of the theories of the defendants. From the standpoint of practical business dealing, a ton of coal mined a century hence certainly cannot be worth a ton of coal extracted from the mine to-day. A problem of this kind involves somewhat complex questions of interest, extinguishment account, and the like, and one would soon be lost in the labyrinth of pure theory. We are living in a time of practical business and commercial problems and engagements, and I cannot bring myself to believe that the theories of the defendants on the question of value are anything more than theories. Further, as is pointed out by counsel for plaintiff, neither the tonnage basis nor the royalty system was the settled customary method in this coal field. Some mines were operated under a royalty basis, but not many. The real question is, How much, under all the facts and circumstances, viewed from a practical business standpoint, were these properties worth? My own notion is that the real value was somewhere between the two extremes contended for by the parties hereto. It may very well be that there is substantial added value in collecting into a controllable whole a considerable number of units. Such a control gives a better opportunity for influence upon the market and for economies in various directions of management and administration. But the difficulty is that there is no proof in this regard as to what, if any, increase in value, as such, there was between the units considered separately and these units when aggregated into a field of 47,000 acres; and plaintiff is right when he insists that the *evidence* fails to show a basis upon which added combination value may be figured. Plaintiff's Reply Brief, December 12, 1913, p. 94. If defendants' views are not accepted, the value, according to plaintiff, would be $1,150,652.15—or say not to exceed $1,800,000.

As there is an action pending in the state courts, and as I am unable to foresee what further litigations may come on between the interested parties, I think that it is well that I should not find that this property was worth a definite figure in so many dollars and cents. But I must find upon this record that the property was worth, in any event, a value sufficiently less than $6,800,000 to require, if necessary, that there be furnished a sum large enough to pay the claims, as shown in Exhibit A, of all general creditors, with interest, and such reasonable counsel fee and costs as may be determined.

My conclusion, therefore, on this branch of the case is that the trustee is entitled to recover in this suit as against Read, Van Brunt, and the executors of Gardiner jointly and severally an amount sufficient to pay the claims, with interest, of such general creditors as may be en-

titled to be paid in accordance with the principles as to liability herein indicated, together with such counsel fee and costs as may be determined. In the situation presented in this record, the interlocutory decree may provide for the ascertainment of this amount by a master, or otherwise as may be determined upon the settlement of the decree. By this method multiplicity of suits is avoided, all interested parties will have appropriate opportunity to be heard in one proceeding, and such subsidiary proceedings may be had herein as may be proper and necessary.

The Supplemental Bill.

[4] As concerns the Central Trust Company deficiency judgment, various contentions are presented, but the sole question really is whether the so-called "no recourse" clause of the mortgage avails these defendants. Each of the bonds contain a statement that it was one of a series of 3,000 bonds "all of them equally and without preference, one over the other, secured by a certain mortgage." The bond further provides that:

"This bond is entitled to the benefit of the sinking fund * * * as provided in the said mortgage, and is entitled to all other benefits and is *subject* to all the provisions of the said mortgage as if the same were herein fully recited."

The twenty-second paragraph of the mortgage is as follows:

"Twenty-second: No recourse under any obligation of this mortgage or of any bond or coupon hereby secured shall be had against any incorporator, officer, stockholder or director of the company, either directly or through the company, by the enforcement of any right or claim, statutory or otherwise, or by any legal or equitable proceeding, it being expressly agreed and understood that this mortgage and the bonds secured hereby are solely corporate obligations which shall derive no support or aid by or through the personal liability of and that no personal liability whatever shall attach to or be incurred by the incorporators, stockholders, officers or directors of the company, or any of them, under or by reason of or founded, whether wholly or partly, directly or indirectly, upon any of the obligations of this mortgage or of any of the bonds or coupons hereby secured. But every and any such personal liability of every such incorporator, stockholder, officer or director is hereby expressly waived as a condition of and consideration for the execution of this mortgage and of such bonds and coupons."

Plaintiff contends that the provisions upon which the defendants rely for a waiver or discharge of any liability in respect of the bonds cannot avail the defendants because: (1) The said provisions do not relate to the liabilities asserted by plaintiff; (2) they do not apply to the claims based on the bonds; and (3) such provisions are against public policy and void. These contentions are not impressive. The bondholder was bound by the terms of the mortgage, and we well know that in the absence of representations to the contrary, the purchaser of bonds of this character looks to the security of the mortgage. He rarely has any concern with anything else. The twenty-second paragraph of the mortgage clearly referred to any right or claim, statutory or *otherwise,* and the explanatory clause, "it being expressly agreed and understood that this mortgage and the bonds secured hereby are solely corporate obligations, * * *" made additionally

plain (if such were necessary) the intent of this clause. Such a clause is one quite familiar in bond issues, and unless used as a part of a scheme to defraud, it is not only not against public policy, but I think is a fair and proper protection with which stockholders have the right to surround themselves. Cook on Corporations, § 216; Carnahan v. Campbell, 158 Ind. 226, 63 N. E. 384; Robinson v. Bidwell, 22 Cal. 379, 388; 10 Cyc. 665; Grady v. Graham, 64 Wash. 436, 116 Pac. 1098, 36 L. R. A. (N. S.) 177.

The books are full of instances where some liability, of which no one thought at the time, arises thereafter when unexpected disaster overtakes an enterprise. The "no recourse" clause is designed to protect against the unexpected and uncontemplated. The case at bar is a striking illustration of just the kind of situation to guard against which a clause of this character is erected, and erected so plainly as to give fair notice to any one buying the bonds. Here these defendants and their associates never supposed for a moment, at the time of the organization of the company, that they would be subjected to any suit for failure to pay up subscriptions. The bond issue was not overdone, competent lawyers had been employed, a competent expert had examined the property, and the day this mortgage was executed each interested party undoubtedly looked forward to a successful future for the property. To say now that the owners of these bonds, who did or could look at the property itself for their security, can brush aside the "no recourse" clause would be to capitalize an afterthought.

As to the Claims of the Mackay Group.

I think that an elaborate analysis would not be serviceable, because whoever may have occasion hereafter to consider this subject must examine all the testimony. The circumstances under which the Mackay group claim, through the trustee, to be in a stronger position for recovery than others arises out of the sale of the Van Brunt and Kobusch $600,000 of bonds. They claim that they were misled by the use of the word "lands," coupled with certain representations made to them by Van Brunt, Kobusch, and Gardiner. It is indeed seriously questionable whether the trustee in respect of these claims has any standing in this suit. His position is entirely different from that discussed under the original bill, because here the recovery is sought upon the theory that fraud has destroyed the protection of the "no recourse" clause. Cheney v. Dickinson, 172 Fed. 109, 111, 96 C. C. A. 314, 28 L. R. A. (N. S.) 359. But in view of the great mass of testimony taken upon this subject, and of the fact that these bondholders, acting through the trustee, have sought this forum, this branch of the case may as well be decided on the merits now as at any other time.

I think that on the facts in this case, the defendants Read, Gardiner, and Van Brunt did not intend to mislead the Mackay group by the use of the word "lands" as it occurs in the Gardiner letters and in the mortgages, nor was the Mackay group misled. The claim is that it was the intention of Read, Gardiner, and Van Brunt to have it appear that the corporation asserted ownership in the surface land, and that the bondholders were justified in relying upon this representation and interpretation.

In addition to what was said by Judge Hand in Slater Trust Co. v. Gardiner (C. C.) 183 Fed. 268, I may observe that the record in this case is fuller and even more convincing than that before him. There is abundant proof in the record that the words, "coal lands" and "lands," when used in connection with coal properties, are understood as referring solely to the seam of coal itself, and, as I understand the testimony adduced on behalf of plaintiff in this regard, the most that it amounts to is that these words do not necessarily refer only to coal rights as distinguished from the ownership of the surface.

It is very difficult for me to believe that experienced men or average investors in bonds of this character, who are supposed to possess at least some degree of care and intelligence, would, when purchasing bonds of this character, be thinking of the value of the surface as so much land or so many farms rather than the value of the property from the security standpoint as a property out of which coal was to come.

As to what may be called active representations, I see no warrant whatever for the claim in this suit as against Read. He did not endeavor to sell these bonds, and he did not make any representations in respect thereof.

As to Gardiner, it may be said, also, that he had no interest in these bonds, and there was little justification for this claim against him. Mr. Kendrick of the Mackay group is not at all clear as to whether Kobusch or Van Brunt made the statements as to the value of the property as farm lands upon which he, Kendrick, relied. Brought down to its last analysis, Kendrick's testimony must be construed as showing that he did not rely on the language of the letters and the mortgages alone, but on the language of these papers in conjunction with what he says Van Brunt told him about the valuable farm lands, and that it was the combination of these two things which caused him to believe that the company owned the surface of the land as well as the coal rights. Van Brunt denies positively that he made any such statement to Kendrick, and certainly as between Kendrick and Van Brunt, the former has not borne the burden which is cast upon him. But quite irrespective of this, it is as plain as anything can be that Kendrick fully understood the situation as to the stock, and believed that it did not represent any actual money paid in, but was, as he called it, "watered stock." Pages 1397, 1398.

Mackay & Co., who bought the bonds for the purpose of reselling them, unfortunately made certain representations that the bonds were secured by a mortgage upon farm lands. This unfortunate error was not based upon anything said by Read or Gardiner, nor indeed was it solely caused by what, it is claimed, Van Brunt said, but was apparently founded upon the report made to Mackay & Co. by one of their own agents, Mr. Woodward, a bond salesman who was in their own employ, and who had been directed to investigate the subject. Space will not permit extended extracts from the testimony, but I have no hesitation in saying that (while I do not adopt the descriptive comments), my conclusions as to the testimony are substantially the same as those set forth under point XI of the brief on behalf of Read et al.,

beginning at page 253 thereof, and that means that I find affirmatively on this branch for the defendants Read, Gardiner, and Van Brunt.

As to Defendants Other Than Read, Gardiner, and Van Brunt.

[5] Metropolitan Life Insurance Company holds 900 shares of the capital stock of the Randolph-Macon Coal Company, Hegeman holds 100 shares, and Hamilton Trust Company 200 shares. There is no proof in the record that either Hegeman, the Metropolitan Life Insurance Company, or the Hamilton Trust Company had knowledge or notice of the circumstances under which the stock was issued, or the consideration paid therefor. The Metropolitan Life Insurance Company was merely a purchaser from Read of $1,200,000 of the bonds and $120,000 of the stock of the Randolph-Macon Coal Company. Mr. Dutcher, the president of the Hamilton Trust Company, was a member of the finance committee of the Metropolitan Life Insurance Company, and on behalf of his company took $200,000 of the bonds and $20,000 of the stock purchased by the Metropolitan. The stock standing in the name of Hegeman was part of the remaining $100,000 of Metropolitan stock. The Metropolitan Life Insurance Company and the Hamilton Trust Company paid to Read $1,140,000 for the $1,200,000 of bonds and $120,000 par value of stock purchased by them. This was the only connection of either of these companies with the transaction.

The fact that payments on account of the purchase of the bonds and stock were made from time to time in accordance with Read's directions prior to the actual delivery of the securities has no significance. Payment on account for securities prior to actual delivery is a familiar business occurrence, and does not charge the purchaser with notice of anything except the fact that the securities are not yet ready for actual delivery.

Hegeman states with respect to his going on the board of the Randolph-Macon Coal Company that Read spoke to him about the matter, and that there was some discussion about it at the meeting of the finance committee. The first meeting of the board that he attended was on August 1, 1905. It was at the August meeting of the board that Hegeman as a stockholder of the company signed the instrument dated March 18th, purporting to ratify the corporate proceedings theretofore had. There is no evidence that he ever read or heard read the description of the properties of the Randolph-Macon Coal Company contained in the mortgage and supplemental mortgage, or that he participated in any manner whatsoever in any representations made to purchasers of Randolph-Macon Coal Company bonds. The Metropolitan Life Insurance Company, Hegeman, and Hamilton Trust Company were bona fide purchasers for value of the stock which stands in their names. On the evidence in this case, the fact that the stock may have been considered as a bonus did not charge these defendants with notice; but, even if they had examined the records then available, they would have been well justified in concluding that the stock subscription was full paid. Erskine v. Loewenstein, 82 Mo. 301; Dickerman v. Northern Trust Co., 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423.

As to the other defendants, there is so little to support the claim of plaintiff, that the subject needs no discussion.

Conclusion.

A decree will go against the defendants Read, executors of Gardiner and Van Brunt, jointly and severally, to pay to the trustee in bankruptcy such amount as may be necessary to pay in full, with interest, the claims of those general creditors who may be entitled thereto. Questions as to costs and counsel fee will be taken up on the settlement of the decree.

The decree will go against the plaintiff as here indicated, so far as the claims of the Central Trust Company as trustee, and the Mackay group are concerned; and the defendants, other than Read, Gardiner, and Van Brunt, may have a dismissal of the bill in all respects.

CENTRAL OF GEORGIA RY. v. GEORGIA R. R. COMMISSION.

(District Court, N. D. Georgia. June 25, 1914.)

1. CARRIERS (§ 10*)—REGULATION—RATES—NOTICE AND HEARING—DUE PROCESS OF LAW.

Notice and hearing are necessary to the validity of an action by the Georgia Railroad Commission, changing a freight classification of a railroad company doing business within the state, so as to reduce its freight rates, under authority conferred by Georgia Railroad Commission Law (Acts 1879, p. 125) as amended by Acts 1907, p. 72.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 12, 14–20; Dec. Dig. § 10.*]

2. CARRIERS (§ 10*)—REGULATION—RAILROAD COMMISSION—REDUCTION OF RATES—NOTICE AND HEARING.

Civ. Code 1910, Ga. §§ 2630, 2633, 2641, and 2653, being part of the Railroad Commission Law, providing the method of procedure before the Railroad Commission in rate regulation proceedings, and declaring that the same shall be that ordinarily used and recognized in courts of law, does not provide for notice and hearing to a railroad company before the entry of an order by the Commission, changing freight classification so as to reduce intrastate freight rates.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 12, 14–20; Dec. Dig. § 10.*]

3. CONSTITUTIONAL LAW (§ 318*)—DUE PROCESS OF LAW—NOTICE.

Where no statute or rule required the State Railroad Commission to give notice and hearing of a proceeding to change intrastate freight classification so as to reduce intrastate rates, the fact that the Commission did give notice to complainant railroad company by a letter addressed to one of its officers as matter of grace, did not constitute due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 949; Dec. Dig. § 318.*]

4. CONSTITUTIONAL LAW (§ 318*)—DUE PROCESS OF LAW—NOTICE—RAILROAD COMMISSION—HEARINGS.

Notice to a railroad company of proceedings before the State Railroad Commission to change intrastate classification so as to reduce rates

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

given in pursuance of a rule of the Commission as distinguished from a statutory requirement is sufficient to constitute due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 949; Dec. Dig. § 318.*]

In Equity. Suit by the Central of Georgia Railway against the Georgia Railroad Commission. On application to refuse or deny an application for an injunction pendente lite. Granted.

J. K. Hines, of Atlanta, Ga., for Georgia R. R. Commission.

McDaniel & Black, of Atlanta, Ga., for Southern Ry. Co.

Lawton & Cunningham, of Savannah, Ga., for Central of Ga. Ry.

Robert C. & Philip H. Alston, of Atlanta, Ga., for Atlantic Coast Line Ry. Co.

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

PER CURIAM. This suit was commenced in the Circuit Court of this district February 19, 1906. Its object was to obtain an injunction against the Georgia Railroad Commission, preventing the putting in force of a certain order of the Commission (No. 316) changing the classification of the complainant, and thus reducing its freight rates, on the grounds that the said order was issued without due process of law and if enforced would be confiscatory. The complainant prayed for an injunction pendente lite, a restraining order pending notice thereon, and for a perpetual injunction. The restraining order was reasonably issued pending a rule to show cause why an injunction pendente lite should not issue, and thereafter various demurrers and answers were filed, followed by an amendment to the bill January 21, 1907, and thereafter, on a hearing had on the question of the issuance of an injunction pendente lite, evidence was taken and the case was fully argued and submitted. Pending consideration the court was in doubt as to a question existing as to whether it cost the railroad considerably more to do intrastate business than it did to do interstate business or its general business. It was claimed by the railroad company that, while it cost about 70 cents to earn a dollar in its general business, in its local or intrastate business the cost was 85 cents to earn $1; and the determination of this necessarily affected the question of confiscation which, on the evidence before the court, was a close question, whereupon the court referred the matter to a master. The master took the case, and the railroad company, within a short time, put in certain evidence which tended to show the correctness of its contention, and probably, in the absence of rebutting testimony, did show its contention to be true. The Railroad Commission failed to put in any evidence, and the case remained in the hands of the master awaiting evidence for some time, and until the master was appointed a judge of the superior court of the state, which necessarily discontinued his work in the case. After discussion between the court and counsel as to the course to pursue, the master returned the papers, and the evidence which had

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

been taken, to the court, and from that time for a period of about five years the case practically went to the dead docket. From evidence offered on this present hearing, it appears that, owing to the then prevailing bad condition of railroad business in Georgia and the difficulty attendant upon proof in the case, the Railroad Commission and the complainant tacitly, if not actually, agreed to the indefinite postponement, if not actual discontinuance, of the case. No other explanation is suggested as to why, with the restraining order in force, the case was allowed to sleep for five years. Recently, on the 6th day of February, counsel for the Railroad Commission moved for a dissolution of the restraining order, and, that motion being set down for trial, the judge, finding that the real question involved was upon the issuance of an injunction pendente lite, concluded that Act June 18, 1910, c. 309, § 17, 36 Stat. 557, now section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [U. S. Comp. St. Supp. 1911, p. 236]), as amended by Act March 4, 1913, c. 160, 37 Stat. 1013, was controlling as to the personnel of the court to hear the same. He thereupon set the motion down for hearing and called to his assistance one of the Circuit Judges and another District Judge. On the hearing before the court thus constituted, on February 27, 1914, at New Orleans, counsel for both sides being present, on motion of counsel for the Commission, the pending motion was changed from an application to dissolve the restraining order, entered in the case of 1906, to a motion to refuse or deny the application for an injunction pendente lite, and thereupon, after argument, further hearing was continued.

On this present hearing, we have the evidence taken contradictorily before the master in 1907, strongly tending to show that the reduction required under order 316 would have been confiscatory at the time the bill was filed, and a mass of ex parte evidence, such as affidavits, reports of the complainant and of the Commission, from 1907 down to 1914, showing that the business of the complainant, and of other railroads in Georgia, for recent years has been largely increasing, and tending to show the effect order 316 would have if put in operation in this year, 1914.

A very important question in this case, raised by complainant, is that of "due process of law." Complainant claims that circular 316, issued by the Railroad Commission of Georgia, was made and promulgated by the Commission at a time when the act creating the Commission did not provide, and no rule adopted by the Commission provided, for notice or a hearing upon the question of a change in rates to be charged by the railroads for service rendered in the hauling of passengers or freight. The only notice which the railroad company had of the hearing was a letter addressed by the secretary of the Commission to the freight agent of the complainant company, stating that a motion by Commissioner J. Pope Brown to change a classification would be heard at a certain time. The hearing, at the certain time, it is stated, was had before the Commission on this matter. The grave question made by the complainant is that this notice was a mere matter of grace or favor, and not notice required by law or by the rules of the Commission.

[1] There was some doubt, apparently, for some time as to whether it was necessary for railroad companies in this state to have notice of the action of the Railroad Commission, concerning the rates which they might charge. A case decided by the Supreme Court of Georgia February 13, 1912, Wadley Southern Railway Co. v. State, 137 Ga. 497, 73 S. E. 741, determined this question.

The act of the Legislature of Georgia, creating and conferring powers upon the Railroad Commission of Georgia, of 1879 (Acts 1879, p. 125), was amended by an act of the Legislature of 1907 (Acts of 1907, p. 72). With reference to that act and to a provision contained therein there has been much discussion here. The Supreme Court of Georgia, in the opinion in the Wadley Southern Railway Company Case by Mr. Justice Evans, on this subject says this:

"It is said that the statutes giving validity to the orders of the Railroad Commission, which is the basis of this suit, do not provide for notice and hearing, nor do the rules of the Commission so provide, and therefore due process of law is not afforded. The Commission Act of 1907 enlarged the powers of the Railroad Commission so as to give it jurisdiction and power over practically all public service corporations. In defining the jurisdiction the sixth section of the act (Civil Code 1910, § 2663) declares that the Railroad Commission shall have and exercise all power and authority heretofore conferred on it by law and shall have general supervision over railroads and other public service corporations. In the exercise of its powers, it was provided that it may proceed on its own initiative or on the complaints of others, and may require all common carriers and other public-service companies under their supervision to establish and maintain such public service and facilities as may be reasonable and just, either by general rules or by special orders in particular cases, 'provided that nothing in this section shall be so construed as to repeal or abrogate any existing law or rule of the Commission as to notice or hearings to persons, railroads or other corporations interested in their rates, orders, rules or regulations issued by said Commission before the same are issued, nor to repeal the law of this state as to notice by publication of a change in rates.' The most casual reader of this section cannot fail to be impressed that the legislative purpose was to afford parties affected by any order in a particular case an opportunity to be heard in advance of its promulgation by the Commission. While the literal application of the proviso concerns the preservation of existing statutes, and orders of the Commission, with respect to notice and hearings, yet the implication is so pregnant of the legislative conception that such specific orders of the Commission must be made only after notice and hearing that it would be doing violence to the legislative plan of supervision by the Commission to construe the act so as to impute a contrary purpose and intent. It was contemplated that provision for notice should be made by statute or rule of the Commission. Special statutory provision was made as to notice of a hearing for joint rates to roads that are not under the management of the same company, and as to the requirement about the location of depots (Civil Code 1910, § 2631), but as to other matters the Legislature left it to the Commission to formulate rules respecting notice and hearing. Although the reference in the clause relating to notice was to the preservation of existing statutes and rules of the Commission, there is no negation that the Commission might not, from time to time, amend or enlarge its rules so as to give other or additional notice. There is nothing in the present record contradicting the existence of a rule of the Commission providing for notice at the time of the passage of the act of 1907, nor is there any contention that the Wadley Southern Railway Company did not in fact have notice of the hearing in the particular case. The defendant pleaded that the law did not provide for a hearing on the facts, and for that reason it violated the constitutional guaranties of due process of law, and the equal protection of the laws. The burden was on the railroad company to sustain its plea by submitting proof of

the absence of any rule of the Commission providing for notice and a hearing, Civil Code, § 2626. It wholly failed in this particular, and we are bound to assume that there was a rule of the Commission as contemplated in the statute. * * * It will be observed that the point raised in the plea is the nonexistence of any rule of the Commission, and not any deficiency of the rule. As the defendant failed to show the nonexistence of any rule of the Commission, or, if there was a rule, that it was faulty in any respect, the latter question cannot arise in this case."

It will be seen that the Supreme Court of Georgia held that it was bound to assume that there was a rule of the Commission as contemplated in the statute, and that the burden was on the railroad company to sustain its plea that it had been deprived of its constitutional guaranty of "due process of law," and consequently to show by proof the absence of any rule of the Commission providing for notice and hearing. The court then held that the railroad company had wholly failed in this particular. We think it must be fairly taken from this decision of the Supreme Court of the state that notice and a hearing are necessary to the validity of any such action of the Commission as was taken in the present case, where it is claimed that the rates to be charged by the railroad company were substantially changed and lessened. In this case the railroad company has assumed the burden of proving the fact and has shown that, neither in the law nor in the rules of the Commission, at the time the orders complained of here were passed, was there any provision requiring notice and hearing.

[2] The able counsel for the Commission has earnestly contended here that this requirement can be gathered from sections 2630, 2633, 2641, and 2653 of the Code of Georgia, being a part of the Railroad Commission Law, particularly section 2633, which provides the method of procedure before the Commission, the examination of witnesses, etc., shall be that ordinarily used and recognized in courts of law. We do not agree that there is anything in any of the sections referred to by counsel which confers such power or requires any such duty of the Commission. The Railroad Commission, in the answer filed by it in this case asserts that no such notice and hearing was necessary to justify the circular determined upon and promulgated by it. The language used in the answer is this:

"It is submitted that notice and a hearing according to judicial methods is not required by the Constitution or by the law of this state or of the United States. The Railroad Commission of Georgia lawfully exercises the police power of the state in the making and regulation of rates, and is vested with legislative and administrative powers adequate to the end in view. It is permitted to make its own investigations according to its own methods. It has been vested with the exclusive power to determine the reasonableness of rates, and the exercise of its discretion in this regard, within constitutional limitations, is not subject to judicial review."

It has been shown on the hearing in this case that soon after the decision by the Supreme Court of the state in the Wadley Southern Case the Commission, as the suggestion of its counsel, adopted an amendment to rule 12 of the Commission's "General Rules," providing for notice of hearing and an opportunity to be heard. This, we think, is strongly suggestive of the fact that the Commission itself recognized that no such rule had previously existed, and that, under

the decision in the case named, such a rule was necessary. The language of this amendment to rule 12 is as follows:

"Both in cases of complaints, and when the Commission initiates action, notice shall be given to the persons or corporations interested in, or affected thereby, ten days before the hearing, except in cases for the fixing of joint rates, when thirty days' notice shall be given and shall give to such persons or companies an opportunity to be heard."

[3] As has been stated, the railroad company did have notice by letter addressed to one of its officers, and the question arises, Was notice given to one of its officers, as a matter of favor or consideration on the part of the Commission, sufficient to satisfy the "due process of law" requirement?

The case of Stuart v. Palmer, 74 N. Y. 183, 30 Am. Rep. 289, is an interesting authority upon this question, and has been frequently cited. In the course of the opinion, by Earl, J., and in discussing the question of "due process of law," this is said:

"It is not enough that the owners may, by chance, have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but by what may, by its authority, be done. The Legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice."

The opinion contains a discussion of the authorities on "due process of law," which it is unnecessary to further consider; the part quoted being sufficient upon the question now under consideration. We think the decision in the Wadley Southern Railway Case fully recognizes this rule.

In the case of Security Trust Co. v. Lexington, 203 U. S. 323, 27 Sup. Ct. 87, 51 L. Ed. 204, it is said on the subject of due process of law:

"If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute" (citing Stuart v. Palmer, supra).

In Central of Ga. Ry. Co. v. Wright, 207 U. S. 127, 28 Sup. Ct. 47, 52 L. Ed. 134, 12 Ann. Cas. 463, the Supreme Court of the United States restated the rule laid down in Security Trust Co. v. Lexington in the following language:

"Before an assessment of taxes could be made upon omitted property, notice to the taxpayer, with an opportunity to be heard, was essential, and that somewhere during the process of the assessment the taxpayer must have an opportunity to be heard, and that this notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace."

In the first Minnesota rate case (Chicago, etc., Railway Co. v. Minnesota, 134 U. S. 418, 457, 10 Sup. Ct. 462, 466 [33 L. Ed. 970]), the Supreme Court says this:

"It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a Railroad Commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.

"Under section 8 of the statute, which the Supreme Court of Minnesota says is the only one which relates to the matter of the fixing by the Commission of general schedules of rates, and which section, it says, fully and exclusively provides for that subject, and is complete in itself, all that the Commission is required to do is, on the filing with it by a railroad company of copies of its schedules of charges, to 'find' that any part thereof is in any respect unequal or unreasonable, and then it is authorized and directed to compel the company to change the same and adopt such charge as the Commission 'shall declare to be equal and reasonable,' and, to that end, it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for, no summons or notice to the company before the Commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the Commission, in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the Commission, the company appeared before it by its agent, and the Commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was, or how the result was arrived at."

In Roller v. Holly, 176 U. S. 398, 409, 20 Sup. Ct. 414, 44 L. Ed. 520, in the opinion by Mr. Justice Brown, this expression is used:

"The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

We think it clear that there must have been something in the law, and certainly in the rules of the Commission, requiring notice and hearing to constitute due process of law. That there was nothing to this effect in the law or in the rules, at the time this circular was promulgated, we think has been established here.

[4] Counsel for complainant contend earnestly that the provision for notice and hearing must be in the law itself, and that a mere rule of the Commission requiring such notice is not sufficient. We think it unnecessary to pass further upon this question than to say that, in view of the fact that the Supreme Court of the state, in passing upon this matter in the Wadley Southern Railway Case, held that a rule of the Commission would meet the question of due process of law, we are disposed to follow that decision. Notwithstanding this the difficulty remains; for, as stated, the evidence in this case shows that at the time the circular in question was issued, there was no rule of the Commission providing for notice and hearing.

We think, on the whole, the equity of this case is with the complainant, and that it is entitled to an interlocutory order granting the injunction pending the hearing and the final disposition of the case. It has been satisfactorily shown that the rates promulgated by the Railroad Commission in this circular No. 316 were unreasonable and probably confiscatory, in a fair legal sense, at the time the circular was issued.

Ever since the Railroad Commission provided by rule for notice and hearing on questions before it involving rate reductions or adjustments,

it has been within its province to have taken up the question involved in this suit, and to have "mended its hold" so as to have eliminated all question of due process of law; and in recent years, in view of the admitted revival of business and increased earnings in intrastate traffic on the complainant's road and other railroads in Georgia, it would seem that affairs would have been speeded to the advantage of all concerned if the parties had agreed to a rehearing as to the readjustment of rates on the complainant's railroad.

Of course we do not intend by anything that has been said, nor by the injunction herein issued, to interfere in the slightest with the right of the Railroad Commission to take up now or hereafter the question involved in this circular issued in this case and re-examine the matter in the light of existing conditions and make such order about rates as it may deem proper.

In re CALDWELL MACHINERY CO.

(District Court, W. D. Washington, N. D. July 31, 1914.)

No. 5188.

1. BANKRUPTCY (§ 140*)—AGENCY CONTRACT—CONSIGNMENT OF GOODS—"CONDITIONAL SALE"—"CONSIGN."

Where claimants appointed the bankrupt claimants' agent for the sale of certain steam pumps, the contract providing that claimant should consign pumps to the bankrupt for sale in its territory, and that all pumps shipped to the bankrupt should be held strictly on consignment, subject to monthly reports of the consigned goods, and further provided for the return of goods to the consignor at the expiration of the contract period, the term "consign" meant that the title to the property should not pass to the bankrupt, and hence property so consigned, remaining in the bankrupt's possession, on the intervention of bankruptcy was returnable to the claimant; the contract not being within Rem. & Bal. Code Wash. § 3670, providing for the filing of contracts of conditional sale (citing Words and Phrases, vol. 2, pp. 1408–1410; vol. 2, p. 1449; vol. 8, p. 7612).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

2. BANKRUPTCY (§ 139*)—SALES ON OPEN ACCOUNT—VESTING OF TITLE—RECLAIMING GOODS.

Where certain goods were sold by the claimant to the bankrupt on open account, the title vested in the bankrupt at once, and the relation of debtor and creditor created, so that on bankruptcy intervening the seller could not rescind the sale and recover the goods.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193, 198, 199, 210–219; Dec. Dig. § 139.*]

3. BANKRUPTCY (§ 279*)—SALE OF GOODS—LEASE CONTRACT—SURRENDER BY BANKRUPT'S TRUSTEE—PROCEEDS.

Claimant furnished the bankrupt certain gasoline engines under a lease contract providing that the engines were to be leased to the bankrupt for an indefinite period, subject to claimant's order, with an option to the bankrupt to purchase during the period at a specified price, the merchandise to remain the property of the claimant until the option was actually exercised by the bankrupt's paying the price in full. After bankruptcy the claimant sold four engines to D., but instead of delivering from its own stock, directed the bankrupt's trustee to deliver the engines shipped

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

to the bankrupt to D., which through inadvertence or mistake he did. *Held*, that the trustee had no authority to deliver such property without proper authorization from the court and for a fair consideration, and hence D. was liable for the return of the engines to the trustee or for their value.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 419–424; Dec. Dig. § 279.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Caldwell Machinery Company. Application to review orders denying petitions of the Gardner Governor Company, Le Blond Machine Tool Company, and the Regal Gasoline & Engine Company, for reclamation of property in the hands of the trustee in bankruptcy. Confirmed except as to petition of the Gardner Governor Company and as to certain lathes consigned to the bankrupt by the Le Blond Machine Company.

Nelson R. Anderson and J. B. Power, both of Seattle, Wash., for Gardner Governor Co.

McClure & McClure, of Seattle, Wash., for Le Blond Mach. Tool Co.

Brightman, Halverstadt & Tennant, of Seattle, Wash., for Regal Gasoline & Engine Co. and Clarence G. Dunlap.

Corwin S. Shank and H. C. Belt, both of Seattle, Wash., for trustee.

NETERER, District Judge. On December 15, 1913, the Caldwell Machinery Company, a Washington corporation, was adjudged bankrupt. Subsequently petitioners endeavored to reclaim certain personal property in the possession of the trustee, which, it is alleged, had been consigned to bankrupts for sale under agency contracts, and that the title to the property remained in the consignors. The matter is before this court upon petitions of several of the consignors for a review of the respective orders denying to them the right of reclamation. Each petition will be taken separately.

Gardner Governor Company.

[1] The record shows that on February 5, 1912, a written agreement was entered into between the Gardner Governor Company and the bankrupt, styled, "Agency Contract for Gardner Steam Pumps." Omitting the formal parts, this agreement provides:

"* * * Has this day appointed the party of the second part agent for the sale of Gardner Duplex Steam Pumps, for Western half of Washington, and agrees to refer inquiries received from the said territory to said party of the second part; and in consideration of such agency, which is hereby accepted, the party of the second part agrees as follows:

"First: To sell no other duplex pumps of the same type or class.

"Second: To diligently solicit trade in the said territory.

"Third: To receive and hold strictly on consignment all pumps so shipped by party of the first part and to make monthly reports of all such consigned merchandise on hand unsold.

"Fourth: To pay the freight on such consignments.

"Fifth: To store, protect and keep in good order such pumps without charge.

"Sixth: To pay all taxes of every kind assessed or levied on goods held on consignment; to keep such property insured in responsible companies for the Gardner Governor Company, so as to protect the said Gardner Governor Company against fire loss.

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

"Seventh: To bear all expenses incident to recovery of any and all goods held on consignment that may be attached, detained or taken possession of by any process of law, on account of any claim held by others against party of the second part.

"Eighth: To report monthly such sales of pumps as may be made from said consigned stock, and to remit for such sales within thirty days from date of said report."

"Tenth: To make settlement for the pumps in one of the three following ways, provided at the end of the term party of the second part does not care to renew the agreement: (A) To purchase said pumps in accordance with clause nine. (B) Return all pumps to party of the first part at Quincy, Illinois, freight prepaid. (C) If the party of the second part does not wish to take advantage of any of the above plans of settlement, it is agreed that said party will provide storage for such Gardner Pumps on hand until they can be ordered away by party of the first part, provided, however, that the party of the first part will make some disposition of them within three months from the expiration of this contract.

"Eleventh: The term of this agreement shall be one year from date and to continue thereafter from year to year unless either party desiring to discontinue will notify the other of its termination in writing at least thirty days before any terminal date."

The contract was made upon a general blank form, in which the ninth paragraph was crossed out, which reads:

"To purchase all Gardner Steam Pumps remaining on hand unsold on Oct. 31st of each year at current prices, making payment for such purchase four months after date of bill with privilege of deducting 2% within 30 days."

No testimony was reported, but the matter was submitted to this court upon the certificate of the referee, which states that:

"It was made to appear that though the goods in question were upon consignment as between the claimant and the bankrupt, it was contemplated by and between the parties that the bankrupt should have the right to sell any or all of the goods as its own property and take pay therefor in its own name, remitting to the claimant the price agreed upon to be paid by the bankrupt for the respective articles."

It further appears from the certificate that the goods, so far as the public was concerned, were treated by the bankrupt as its own, and when sales were made of the same, pay or security was taken in the name of the bankrupt. There is no evidence in the record to show that the written contract of agency was ever changed, modified in any way, or the goods shipped under any other arrangement than that set forth in the agency contract. It is fundamental that in the interpretation of a written contract, if the language used is well understood and the contract is free from ambiguity, oral testimony cannot be admitted to vary its terms, nor can the conduct of one of the parties with relation to the contract be considered by the court with a view of the interpretation or modification. The intent of the parties must be determined by the language employed if this can be done.

In L. C. Smith & Bro. Typewriter Co. v. Alleman, 199 Fed. 1, on page 4, 117 C. C. A. 577, on page 580, the court said:

"It is a cardinal rule in the interpretation of contracts that, if the words or terms thereof are equivocal, the subsequent acts of the parties thereunder are admitted to show how the parties understood their contract. * * * 1 Beach on Contracts, 721, p. 875. However, where the contract is free from ambiguity, and its meaning is clear in the eye of the law, such mode of con-

struction is inadmissible. The practical construction of a contract adopted by the parties thereto will not control or override language that is so plain as to admit of no controversy as to its meaning. *In such cases the intent of the parties must be determined by the language employed, rather than by their acts.* 1 Beach on Contracts, 722, 877."

The language employed in the contract in the instant case is definite, explicit, and free from ambiguity.

The trustee claims the property by reason of the provisions of section 3670, Rem. & Bal. Code of Washington, which is as follows:

"All conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to the purchasers, incumbrancers and subsequent creditors in good faith, unless within ten days after taking possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides."

The agency contract was not recorded pursuant to the provisions of this section. It, therefore, becomes necessary to determine whether the "agency contract" is a contract contemplated by this section of the Washington statute, or is a simple bailment. To ascertain the relations of the parties, the contract must be construed as an entirety, and, in the light of all of its provisions taken together, the intent of the parties must be determined. A reading of the contract clearly defines the intent of the parties to be to enter into a "contract of agency," that the goods shipped to the bankrupt should be on consignment, and that title to the unsold goods remain in the consignor. The bankrupt contracted to sell the consignor's pumps exclusively; to diligently solicit trade in the territory assigned; to receive and hold strictly *on consignment* all pumps so shipped, and to make monthly reports of the consigned goods on hand unsold; and further provided for the return of the goods to the consignor at the expiration of the contract period, and that the bankrupt should insure the goods for the benefit of the consignor and pay all taxes, etc.

"The term 'consign,' as used in a commercial sense, carries a decided implication that the property consigned is not the property of the consignee. The invoice carries no implication of ownership; it being well understood that an invoice usually accompanies goods that are consigned to a factor for sale, as well as in case of purchase. Rolker v. Great Western Ins. Co., 4 Abb. Dec. (N. Y.) 76, 83." 2 Words and Phrases, page 1449.

"A consignment of goods for sale is ordinarily a bailment. The word 'consignment' does not imply a sale. *The very term imports an agency, and that the title is in the consignor.* Harris v. Coe, 71 Conn. 157, 41 Atl. 552, 554; Sturm v. Boker, 150 U. S. 312, 326 [14 Sup. Ct. 99, 37 L. Ed. 1093]; Rolker v. Ins. Co., 42 N. Y. 23." Words and Phrases, vol. 2, p. 1409.

To distinguish between a bailment and a conditional sale contract is sometimes difficult:

"A conditional sale implies the delivery to the purchaser of the subject matter, the title passing only upon the performance of a condition precedent, or becoming reinvested in the seller upon failure to perform a condition subsequent. It is not infrequently a matter of difficulty to accurately distinguish between a conditional sale and a bailment of property. * * * It is an indelible incident to a bailment that the bailor may require the restora-

tion of the thing bailed. * * * If the identical thing, either in its original or in an altered form, is to be returned, it is a bailment. * * * In a contract of sale there is this distinguishing test, common to an absolute and to a conditional sale; that there must be an agreement, expressed or implied, to pay the purchase price." Union Stockyards, etc., v. Western Land & Cattle Co., 59 Fed. 49, 7 C. C. A. 660.

No element of a conditional sale is embodied in the contract in issue. There is no agreement to buy; there is no agreement to pay any price. There are none of the elements of bargain and sale.

The attorneys for the trustee contend that subdivision A of paragraph 10 of the contract, "To purchase said pumps in accordance with clause nine," makes paragraph 9, which is eliminated from the contract, a part of the contract, although stricken, and that that extends an option to purchase, and would give the contract the force of an option to purchase, and bring it within the provisions of the Washington statute. Such contention cannot receive indorsement. The elimination of the option to purchase clause gives double expression of the intent of the parties to eliminate every phase of a conditional sale character, and the provision of paragraph 10 with reference to paragraph 9 is simply inoperative. The intent of the parties being clearly expressed upon the face of the contract, the inquiry of the court ends there.

In Union Stockyards Co. v. Western Land & Cattle Co., supra, the following language appears:

"The cause must therefore be determined by the construction to be placed upon the contracts under which possession of the cattle was delivered to Hall. In the solution of that question, we must search for the intention of the parties, as it may be gathered from a reading of the entire instrument, and not from any separate provision of it—the real design of the parties as disclosed by the whole contract."

In Metropolitan National Bank v. Benedict Co., 74 Fed. 182, 20 C. C. A. 377, the court had under consideration a written contract entered into between the Stern Company and the Benedict Company, which was an agreement relating to the consignment of ready made clothing at net prices as per memoranda, and provided for insurance of the consignment, and that no part of the consignment should remain unsold nor unpaid for by February 1, 1895. The consignee subsequently assigned all of its goods to the Metropolitan Bank, including the goods consigned, and the bank claimed that the transaction between the companies constituted a sale, and claimed title to the goods. The court said:

"The contract between the Benedict Company and the Stern Company * * * was not a sale, but a contract of factorage. The stipulations of the contract are not appropriate to a contract of sale. If it was a sale * * * what concern was it of the Benedict Company when they were sold? When one merchant sells goods to another" he "never requires the buyer to enter into a covenant that he will sell the goods within a specified period. Such a requirement is inconsistent with the dominion over property which absolute ownership confers. * * *"

The Supreme Court of the United States, in Sturm v. Boker, 150 U. S. 312, at page 326, 14 Sup. Ct. 99, at page 103 (37 L. Ed. 1093), in considering a contract between Boker and Sturm, in which Boker was to ship sundry arms on consignment and Sturm was to ship the goods

to Mexico, and if, after sale, there was a profit above the stipulated price, to divide it equally with Boker, Boker to stand the loss in case the goods were not disposed of, and Sturm to return all goods undisposed of to Boker, without charge, and Sturm was to insure the goods for Boker's benefit, and instead had the policy made out in his own name "for account of whom it might concern," said:

"It is too clear for discussion or the citation of authorities that the contract was not a *sale* of the goods by the defendants to Sturm. The terms and conditions under which the goods were delivered to him import only a consignment. The words 'consign' and 'consigned' employed in the letters were used in their commercial sense, which meant that the property was committed or intrusted to Sturm for care or sale, and did not by any express or fair implication mean the sale by the one or purchase by the other."

And on page 329 of 150 U. S., on page 104 of 14 Sup. Ct., 37 L. Ed. 1093:

"The true distinction is pointed out by Wells, J., in Hunt v. Wyman, 199 Mass. 198, 200 [85 N. E. 446], as follows: 'An option to purchase if he like is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return."

In Re Galt, 120 Fed. 64, at page 67, 56 C. C. A. 470, at page 473, the court, in determining whether a contract for the consignment of wagons was a bailment or conditional sale, 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, etc., v. Western Land, etc., Co., 59 Fed. 49 [7 C. C. A. 660]. 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 of 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?"

In John Deere Plow Co. v. McDavid, 137 Fed. 802, at page 811, 70 C. C. A. 422, at page 431, the court, in determining as to whether a contract was one of agency or of conditional sale, said:

"The contract in this case must be read in its entirety, and its construction is not to be gathered from any separate provision of it. It is upon the whole contract that we must search for the intention of the parties, and a careful scrutiny of the agreement before us, in the light of legal principles, compels us to the conviction that it must be held to be a contract of agency, and that the title to the goods in the hands of the implement company at the time of the adjudication in bankruptcy did not pass to the trustee."

This expression was used by the District Court of Missouri in consideration of a contract made with relation to section 3412, Rev. Stat. 1899, of Missouri, which is as follows:

"In all cases where any personal property shall be sold to any person, to be paid for in whole or in part in installments, or shall be leased, rented,

hired, or delivered to another on condition that the same shall belong to the person purchasing, leasing, renting, hiring or receiving the same whenever the amount paid shall be a certain sum, or the value of such property, the title * * * to remain in the vendor, lessor, renter, hirer or deliverer of the same, until such sum, or the value of such property, or any part thereof, shall have been paid, such condition, in regard to the title so remaining until such payment, shall be void as to all subsequent purchasers in good faith, and creditors, unless such condition shall be evidenced by writing, executed, acknowledged and recorded as provided in cases of mortgages of personal property."

In Re Columbus Buggy Co., 143 Fed. 861, 74 C. C. A. 613, the court in determining whether a contract was a bailment or a conditional sale, said:

"A contract between a furnisher of goods and the receiver that the latter may sell them at such prices as he chooses; that he will account and pay for the goods sold at agreed prices; that he will bear the expense of insurance, freight, storage, and handling; and that he will hold the unsold merchandise subject to the order of the furnisher—discloses a bailment for sale and does not evidence a conditional sale."

Walter A. Wood Mowing & Reaping Mach. Co. v. Vanstory, 171 Fed. 375, 96 C. C. A. 331, and In re Reynolds (D. C.) 203 Fed. 162, are to the same effect.

In Berry Bros. v. Snowdon (C. C. A.) 209 Fed. 336, Circuit Judge Ross of this district, in reversing the District Judge upon the construction of a contract with very similar provisions to the contract in the instant case, said:

"It will be seen from the foregoing statement that the proper disposition of the appeal depends upon the true character of the agreement between Berry Bros. and Graves & La Belle. The court below held that it constituted as to the creditors, if not an absolute sale, a conditional one, and that it was void as against the creditors because not recorded pursuant to a statute of the state of Washington requiring recordation of such sales. But we are unable to so regard the contract between the parties. We think it was not a sale of any kind. In more than one place in the agreement it is * * * stated that the goods were to be consigned for sale, which is an altogether different thing."

The trustee contends that Eisenberg v. Nichols, 22 Wash. 70, 60 Pac. 124, 79 Am. St. Rep. 917, is decisive of the issue in this case, and the decision there, being an expression of the Supreme Court of Washington upon the construction of a state statute, should obtain here. This action was based upon the custom which is alleged to exist among jewelers where a jeweler procures from a jobbing or wholesale house lines of goods on selection or memoranda, and the court said:

"And that these two words 'selection' and 'memorandum' have a distinct trade significance, and their meaning as understood in the trade, and, it is alleged, in this case, was understood by Nichols, is that goods can be ordered from which selection can be made, and that all can be kept, or a portion, or none, and, if any are selected and kept by the jeweler, he has either to agree upon the terms of the sale, or pay cash for the property kept; that the title of the goods thus sent remains in the sender until paid for, or until it is agreed what credit will be given, which credit is evidenced by bills showing the terms. The goods in question were obtained under this memorandum contract, and were marked 'memorandum' or 'memoranda,' which it is alleged and shown mean the same thing."

The court further said:

"The testimony in this case shows that the transaction falls within the words and spirit of the statute. It was a contract containing, in the language of the statute, 'a conditional right to purchase where the property is placed in the possession of the vendee'; and the evidence in this case not only showed that Nichols had a right to purchase this stock, but that he also had a right to sell the same."

The instant case is clearly distinguishable from Eisenberg v. Nichols, supra. In that case the goods were sent to the jeweler on selection or memorandum, with the privilege of selecting what he wanted and paying for them afterwards. It was not in any sense an agency contract or a shipment on consignment. I am of opinion that the bankrupt held the goods as bailee and not as purchaser or lessor under conditional sale contract, and that the order of the referee denying reclamation was erroneous and should be reversed.

Le Blond Machine Tool Company.

[2] The record and the certificate of the referee with relation to this claim shows that the goods were consigned without any written contract, and an examination of the correspondence leads to the inevitable conclusion that the 18x12, 12x8, and 14x8 lathes were sold and delivered to bankrupt on open account, the title at once vesting in the bankrupt, the relation of debtor and creditor at once obtaining, and that no basis for title in consignor exists, and it appears that the 14x6 and 20x12 lathes were sent to the bankrupt *on consignment* and come within the rule announced.

Regal Gasoline & Engine Company.

[3] In this claim the material part of the lease or contract is comprehended in the following clause:

"To be leased to Caldwell Machinery Co. for an indefinite period and subject to the order of Regal Gasoline Engine Co. with an option to purchase during the period at the above-mentioned price. Said merchandise to remain the property of the Regal Gasoline Co. until such option be actually exercised by paying in full for same."

It is contended by the petitioner that Rumpf v. Barto, 10 Wash. 382, 38 Pac. 1129, is decisive of the issue here, and that the holding of the referee should be reversed. On examination, it becomes apparent that that case is readily distinguishable from the instant case. In the Rumpf-Barto Case it is expressly stated that:

"Sale only takes effect from date of their [consignors'] approval of your selection"

—option being placed with the consignor as to whether the property should be delivered; whereas in the instant case the option is placed with the consignee, clearly bringing it within the provisions of the statute.

The trustee has filed a petition asking the return of certain property delivered to one Clarence J. Dunlap, agent of the Regal Gasoline & Engine Company, to which Dunlap has filed an answer. It appears that Dunlap purchased from the Regal Gasoline Company four en-

gines, but instead of delivering the engines from their stock, the Regal Company directed the trustee of the bankrupt to deliver four engines, shipped to bankrupt by them, to Dunlap. Upon request, the trustee, through inadvertence or mistake, turned over the four engines to Dunlap, and has filed this petition praying their return. It is contended by attorneys for the Regal Gasoline & Engine Company, who also appear for C. J. Dunlap, that Dunlap took these engines in good faith, paying full value therefor, and that the trustee should be estopped from claiming the property. It is sufficient to say that the trustee is an officer of the court of bankruptcy; that he gets his authority to act by virtue of the provisions of the bankruptcy act; that parties dealing with the trustee must be charged with knowledge of the duties and responsibilities devolving upon him and the source of his authority. Dunlap must know that he paid no consideration for the engines to the trustee; that the trustee, being an officer of the court, could not deliver any property belonging to the bankrupt estate without proper authority based upon fair consideration, and any payment made by Dunlap to others than the trustee was made at his hazard and risk. All of the parties are before the court, and Dunlap should be required to deliver to the trustee in bankruptcy the property belonging to the estate, and should be relegated to his arrangement with the Regal Gasoline & Engine Company to fulfill its contract for the sale of four gasoline engines.

The report of the referee is confirmed except as to the petition of the Gardner Governor Company, and the 20x12 and 14x6 lathes consigned to the bankrupt by the Le Blond Machine & Tool Company.

An order may be presented.

UNITED STATES v. PUGET SOUND TRACTION, LIGHT & POWER CO. et al.

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

No. 28.

PUBLIC LANDS (§ 120*)—SUITS TO ANNUL PATENTS—LIMITATION—AVOIDANCE FOR FRAUD—PLEADING.

Act March 3, 1891, c. 561, 26 Stat. 1099 (U. S. Comp. St. 1901, p. 1521) § 8, which provides that suits by the United States to annul patents to public lands thereafter issued shall only be brought within six years after the date of the issuance of such patents is a self-imposed statute of limitation, to avoid which, on the ground of fraud, the government must allege specific facts showing that its failure to discover the cause of action within the statutory period was due to concealment by the adverse party or that the fraud is of a self-concealing nature, and the failure to discover it was not due to negligence or want of diligence on the part of the government.

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

In Equity. Suit by the United States against the Puget Sound Traction, Light & Power Company and others. On motion to make bill more definite and certain. Motion granted.

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

Clay Allen, U. S. Dist. Atty., and Winter S. Martin, Asst. U. S. Atty., both of Seattle, Wash.

Clinton W. Howard, of Bellingham, Wash., and James B. Howe, of Seattle, Wash., for defendants.

NETERER, District Judge. This action was commenced by the United States on February 9, 1914, seeking the cancellation of a patent to public lands issued to the defendant Cornwall on June 30, 1904. The bill alleges that the land in question is located on the north fork of the Nooksack river and upon Wells creek at its confluence with the river, and comprises 66.35 acres in Whatcom county, Wash., and within the boundaries of the Washington National Forest; and that the land is of great value as a water power site. It is alleged that the defendant Cornwall and three other persons therein named pretended to make mineral discoveries upon the land, and thereafter filed fraudulent notices of mineral locations, knowing that the land was nonmineral in character and not subject to entry under the laws of the United States; that the defendant Cornwall in 1902 procured conveyances from the other parties of the land embraced in their mining locations; and that it was at all times his intention to procure the group of mining claims for the purpose of utilizing the water power resources of Nooksack river and the power sites adjacent thereto. The bill alleges that, in the application made by the said defendant on April 7, 1903, the false representation was made that labor had been performed and improvements made of the value of $10,142.67 on the claims for mineral development, and represented that gold and silver had been found in paying quantities, and that the land was more valuable for its minerals than for any other purpose, all of which representations were false and known to be false by the said defendant; but that the plaintiff believed the representations, and, relying upon them, issued its patent on June 30, 1904. On September 12, 1905, the defendant Cornwall conveyed the group of claims to defendant Bellingham Bay Improvement Company; and on the 22d day of September, 1905, the Bellingham Bay Improvement Company conveyed said claims to J. P. Stearns, who conveyed the same to the defendant Whatcom County Railway & Light Company on December 4, 1905; and the last-named defendant conveyed the lands to the defendant Puget Sound Traction, Light & Power Company on September 3, 1912. It is alleged that all of the said conveyances were made and received with full knowledge of the fraudulent representation by which title had been obtained from the government. The bill further states that the defendants began the erection of a power plant upon the said lands in 1905; and that, upon the completion thereof, power wires and power conduits were constructed to the city of Bellingham, for the purpose of utilizing the electrical power generated at the power plant in Bellingham and adjoining towns. The defendant Puget Sound Traction, Light & Power Company, it is alleged, is the present owner of and in possession of the said power plant, and is engaged in the utilization of the electrical power for commercial purposes generated thereby. The bill further alleges:

"By reason of the continuous character of the fraudulent acts complained of and of the continuous character of the concealment, the plaintiff has at all times herein down to the month of June, 1910, remained in ignorance of the true character of the real property described herein."

Section 8 of the Act of March 3, 1891, provides:

"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."

The defendants have moved the court to strike or to require the plaintiff to make more definite and certain various portions of the bill. The necessity of considering or disposing of the objections to the specific portions of the bill may perhaps be obviated by considering the following general motion:

"These defendants move for a further order requiring the plaintiff to make its claim more definite and certain and to file a better and further statement of its claim setting forth the facts instead of conclusions of law, showing why its claim against these defendants is not barred by the statute of limitations."

May the government avoid the bar of the statute of limitations by a mere allegation of failure to discover the fraud upon which the action is based within the statutory period? If so, the motion should be denied. If, on the other hand, the government must show that the failure to discover was due to a concealment of the cause of action by the other party, or at least that the fraud is of self-concealing nature, and the government in failing to discover it was not negligent or lacking in diligence, the motion should be granted.

The statute here in question was held by District Judge Lewis in United States v. Exploration Co. (C. C.) 190 Fed. 405, to be an absolute bar to an action by the government after the expiration of the statutory period. This holding was reversed by the Circuit Court of Appeals of the Eighth Circuit (203 Fed. 387, 121 C. C. A. 491), which held that the statute was subject to the equitable rule that where the failure to discover the fraud was due to concealment by the other party, or was not chargeable to the neglect or lack of diligence of the other party, the statute would not commence to run until the discovery of the fraud. A similar holding in a similar case was made by the Circuit Court of Appeals of the Ninth Circuit in the case of Linn & Lane Timber Co. v. United States, 196 Fed. 593, 116 C. C. A. 267; Id., 203 Fed. 394, 121 C. C. A. 498. In both of these cases the patents were sought to be annulled on the ground that the entries were made for the benefit of others, and the concealment charged was the withholding from record of deeds transferring the land. The fact that deeds are withheld from record is a "badge of fraud" and is sufficient to prevent the statute from running even as against private individuals. 20 Cyc. 446; McAlpine v. Hedges (C. C.) 21 Fed. 689.

The most favorable statement of the rule for those seeking to avoid the bar of the statute is that in Bailey v. Glover, 21 Wall. 342, 347 (22 L. Ed. 636):

"In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that, where the ig-

norance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief, provided suit is brought within proper time after the discovery of the fraud. We also think that, in suits in equity, the decided weight of authority is in favor of the proposition that, where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

But the party seeking to avoid the bar of the statute may not do so by general allegations of ignorance on his part, or fraud on the part of his adversary. The rule of pleading is thus laid down in Wood v. Carpenter, 101 U. S. 135, 141 (25 L. Ed. 807):

"In this class of cases the plaintiff is held to stringent rules of pleading and evidence, 'and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentations were discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made.' Stearns v. Page, 7 How. 819, 829 [12 L. Ed. 928]. * * * A general allegation of ignorance at one time and knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, and how it was made, and why it was not made sooner." Hardt v. Heidweyer, 152 U. S. 547, 14 Sup. Ct. 671, 38 L. Ed. 548; Godden v. Kimmell, 99 U. S. 201, 25 L. Ed. 431; Lansdale v. Smith, 106 U. S. 391, 1 Sup. Ct. 350, 27 L. Ed. 219; Hammond v. Hopkins, 143 U. S. 224, 12 Sup. Ct. 418, 36 L. Ed. 134.

If the government be held to this rule when it seeks to avoid the bar of a self-imposed statute of limitations, then the allegations of the bill in this case are patently insufficient. There is no allegation in the complaint of specific acts of concealment by which the government was prevented, after the consummation of the fraud, from discovering the same; nor are any facts alleged from which the court would be justified in concluding that the government was not negligent or was not lacking in diligence in failing to make the discovery within the statutory period.

The allegation that the defendants commenced in 1905 "secretly and covertly" to construct a power plant is too vague and indefinite. The terms employed to show concealment are relative terms; and it is impossible to determine with what degree of secretiveness and covertness the work was done. What may appear to the pleader to be secret and covert may not be regarded as such by the court. In order to determine whether the work was done "secretly and covertly," the court should be acquainted with the facts upon which the pleader bases his conclusion that it was done in such a manner. Especially is this so when the act charged is not such as in its nature to suggest performance in a secret and covert manner. It is necessary that facts be stated rather than conclusions, not only so that the court may determine the sufficiency of the pleading, but also that the adverse party may know with what he is charged and how to answer it. The assertion that the work was "secretly and covertly" done, being purely a conclusion and no facts being stated to sustain it, must be disregarded. Straus v. Foxworth, 231 U. S. 162, 168, 34 Sup. Ct. 42, 58 L. Ed. 168.

The general allegation in the bill to the effect that because of the

"continuous character" of the acts complained of, and the "continuous character" of the concealment, the plaintiff remained in ignorance of the true character of the property until June, 1910, does not bring the plaintiff within the rule above stated. In its final analysis it is merely an allegation of ignorance at one time and knowledge at another. The fraudulent acts alleged in the complaint culminated in the issuance of the patent. The government's right of action at that moment arose. It is a concealment of this cause of action that is the material point to the inquiry here. Subsequent transfers made and received with the knowledge that the land was nonmineral in character and that patent thereto had been fraudulently obtained would not tend to conceal from the government the fact that the representations upon which the land had been obtained were false. Such allegations are material only to show that the various parties were not purchasers in good faith. Neither such transfers nor the acts of the defendants in using the land for other than mineral purposes subsequent to the issuance of patent have any tendency to conceal the cause of action, and the mere allegation the acts are of a continuous character does ont satisfy the rule of cause and effect, by which their sufficiency must be determined.

"No * * * light is thrown in which tends to show the relation of cause and effect, or, in other words, that the protracted concealment which is admitted necessarily followed from the facts and circumstances which are said to have produced it." Wood v. Carpenter, 21 Wall. 135, 139, 25 L. Ed. 807.

In paragraph 10 of the complaint, which the defendants have specifically moved to make more definite and certain, the following allegation is made:

"The defendants, P. B. Cornwall, Bellingham Bay Improvement Company, J. P. Stearns, and Whatcom County Railway & Light Company, and their officers and agents, falsely represented that certain bona fide mining improvements had been made on said real property. In truth and fact all the assessment and annual work, together with all the development work on said claims, including that on constructing or excavating tunnels, was not for the bona fide purpose of mining or developing the said claims, but for the covert and secret purpose of preparing the said lands for subsequent use as a water power site and thereafter constructing the said water plant as herein alleged."

It is manifest that the court cannot determine from this allegation when the representations alleged were made, by whom or to whom they were made, or the method or means employed in making them. Nor are the representations set forth with that degree of definiteness and certainty which should characterize a pleading charging fraud. It appears from the bill that the parties were successive owners of the property. Representations made by defendant Cornwall, it might be inferred, would be prior to patent, since he held the land during that period. Such representations would be merged in the fraud which culminated in the issuance of the patent, and upon which the government's right to annul the patent would rest. Subsequent representations might amount to active concealment of this cause of action. It therefore becomes important to inquire just what representations were made prior and which were made subsequent to the issuance of the patent. The allegation contains no answer to this inquiry.

Such other general allegations as "that each of the said fraudulent acts and representations was and is a continuous and fraudulent act, and so intended by the above-named defendants and each of them," can neither supply the omission of specific acts nor make the acts which are alleged fraudulent or continuous acts of concealment, when they are not such in fact.

It is manifest, therefore, that, unless mere failure to discover the fraud will permit the government to avoid the bar of the statute of limitations, the bill must be made more definite and certain. The argument in favor of according plaintiff such a right is based upon the rule that laches is not imputable to the government, and that it is not bound by the negligence of its servants. The most emphatic statements of this rule have been made in cases where there was no self-imposed statute of limitations resting upon the sovereign. In United States v. Nashville, Chattanooga & St. Louis Ry. Co., 118 U. S. 124, 6 Sup. Ct. 1008, 30 L. Ed. 81, Judge Gray thus stated it:

> "It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound."

The statute here in question was enacted for the very purpose of binding the government. By its very terms it compels the government to suffer by the negligence of its agents or officials. If a patent is obtained fraudulently, and knowledge of the fraud is possessed by the government officials within the statutory period, and yet they negligently fail to bring an action to set it aside until after the period has expired, can we say that such negligence is not imputable to the government? To do so would be to deny the existence or binding force of the statute and to accomplish the repeal of a congressional enactment by the process of judicial construction. The statute is absolute in its terms. It says that actions to annul patents shall only be brought within six years of the date of their issuance. The equitable rule of concealed fraud, qualifying the absolute terms of the statute, was ingrafted upon it by judicial construction. It was, however, the rule as developed, defined, and expounded by courts of equitable jurisdiction, which was thus imported into the statute, and not an emasculated and mutilated remnant of that rule; a comprehensive legal principle, not a legal paradox. Equity recognizes no such doctrine as that the statute of limitations will be tolled by mere ignorance unaccompanied by a showing of due diligence or concealment of fraud. How, then, can it be read into the statute as a rule of equity?

Counsel for the government cite many authorities to the effect that where the fraud is of a self-concealing nature, and the injured party remains in ignorance without any fault or want of diligence on his part, the statute does not begin to run until discovery, though there may be no special efforts on the part of the other party to conceal it. This is the rule as quoted from Bailey v. Glover, supra. The very statement of that rule compels the conclusion that, if an injured party

is wanting in diligence, the statute begins to run against him from the commission of the fraud, and not from the date of discovery, even though the fraud may be of a self-concealing nature. Lant v. Manley, 75 Fed. 627, 21 C. C. A. 457.

Plaintiff cites the case of United States v. Minor, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110, and contends that, under the holding in that case, the government had the right to rely upon the representations of the claimants as to the character of the land, and was under no necessity of making an independent investigation. In the Minor Case the particular point in controversy was the establishment of the original fraud in obtaining patent. Of course the government, in issuing the patent, had the right to rely upon the representations made by those seeking to obtain it. I apprehend that, in all cases where one party seeks relief on the ground of fraudulent representations on the part of another, he must show that he had a right to rely on the representation. 20 Cyc. 32, 33. The Minor Case would therefore be directly in point as establishing an essential element of the original fraud in obtaining the patent; that is, it would show that the government had a right to rely upon the fraudulent representations alleged to have been made in obtaining the patent. Does it relieve the government from the duty of showing that its failure to discover the fraud was not due to lack of diligence? The mere fact that a party has a right to rely upon a representation, and is therefore released from the necessity of making an independent investigation, does not release him from the necessity of showing that his failure to discover that he had been defrauded within the statutory period was not due to lack of diligence on his part. As to what would constitute due diligence on his part would depend upon the facts and circumstances of the case. A certain set of facts might call for affirmative action. Again a disclosure of all of the surrounding facts and circumstances in the light of which his conduct must be judged might be such that no affirmative action on his part would be demanded. In order to determine whether a party has exercised due diligence, it must first be known what was done by him and what were the facts and circumstances which called for action on his part or justified him in remaining inactive. It cannot be determined as an abstract matter that a certain course of inaction would constitute due diligence, merely because the party was under no necessity of acting at some prior period of time and under the state of facts then existing.

Neither do I think that it can be said that, because the government was under no duty to investigate these claims prior to the issuance of patent, it may be said as any absolute proposition that it would not thereafter under any circumstances be held to such a duty in order to show that it was not lacking in diligence in failing to discover a fraud which had already been perpetrated. I cannot think that the right of the government to rely upon representations by which a fraud was perpetrated upon it exists even after the fraud has been consummated to such an extent that the government is relieved of the necessity of showing due diligence where it has failed to discover the fraud. If such a holding should be adopted, the statute of limitations would be

practically nullified. Rare, indeed, would be the cases in which the statute could be applied. Those would be where a discovery was made, and the officers failed to do their duty in neglecting to bring an action within six years. It cannot be presumed that Congress had in mind only such cases as these. The policy of this statute, as of all statutes of limitations, was to prevent the bringing of actions when the evidence upon which they were based was impaired by time, and, for the sake of repose, to prevent the disturbance of claims to which time, at least, had given some sanctity. The statute would therefore accomplish very little of its object if it was held to apply only to cases where a discovery was made and no action was brought until six years thereafter. These would be only those cases where a breach of duty was committed by officials in failing to prosecute such actions, and it must be presumed that such cases would be few. The great bulk of cases for which this law was enacted would remain untouched. A new statute of limitations enacted by the court would be substituted for that enacted by Congress. The date would be changed from that of the issuance of the patent to that of discovery of the fraud, not in order to accomplish the presumed intent of the Legislature that an established rule of equity was incorporated therein, but regardless of such intent because no such rule as that contended for has ever been established either in the courts of law or equity.

I am therefore of the opinion that, when the government is seeking to avoid the bar of a self-imposed statute of limitations, it must allege facts showing that its failure to discover the cause of action within the satutory period was due to concealment by the adverse party, or that the fraud is of a self-concealing nature, and the failure to discover it was not due to negligence or want of diligence on the part of the government.

The bill will be amended as indicated in this opinion.

MOEBIUS et al. v. LOUIS DEJONGE & CO.

LOUIS DEJONGE & CO. v. MOEBIUS et al.

(District Court, S. D. New York. May 7, 1914.)

Nos. 9—277, 9—361.

1. TRADE-MARKS AND TRADE-NAMES (§ 93*)—UNFAIR COMPETITION—EVIDENCE.
A manufacturer and seller, who is charged with unfair competition, is not chargeable with an occasional remark of an unidentified occasional salesman of his product, based on misrepresentations by the salesman, so as to confuse the product of the manufacturer with a product of the complaining manufacturer.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104–106; Dec. Dig. § 93.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 93*)—UNFAIR COMPETITION—EVIDENCE.
The court in a suit by a manufacturer to restrain a rival manufacturer from unfair competition must, if possible, determine from the appearance of the articles themselves whether the purchasing public may be de-

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

ceived, unless a course of conduct is proved which shows the employment of methods and means indicating unfair competition, and in doubtful cases actual instances of confusion by the purchasing public may assist in arriving at a correct decision.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104–106; Dec. Dig. § 93.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 70*) — UNFAIR COMPETITION — EVIDENCE.

Where the original manufacturer of a fly catcher, known to the trade as the "Pyramid," showed that a hanger ribbon of red, white, and blue was a distinctive item of the article, and that its label was divided into three vertical spaces, in one of which was the name of the article, and in another printed directions, and in another the name of the manufacturer, and that a subsequent manufacturer of a fly catcher, known to the trade as the "Spiralette," also used at times a hanger ribbon of red, white, and blue, and advertised that it was "First in the Fight," and that its label was also divided into three vertical spaces, omitting the name of the manufacturer, the original manufacturer was entitled to an injunction to compel the subsequent manufacturer to adopt a hanger of a single color and cease the use of the words "First in the Fight" or anything similar thereto, and put on its label its name or some legend indicating that the article does not come from the original manufacturer.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 69*)—UNFAIR COMPETITION—MOTIVE.

Motive is not an essential element of unfair competition, though often valuable in determining the existence of unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 80; Dec. Dig. § 69.*]

In Equity. Suits by Emil Moebius, doing business as E. Obin, and others against Louis Dejonge & Co., and by Louis Dejonge & Co. against Emil Moebius and others. Decree for complainant in second suit.

Prindle & Wright, of New York City (Edwin J. Prindle and Arthur Wright, both of New York City, of counsel), for complainants in suit No. 1 and for defendants in suit No. 2.

Kenyon & Kenyon, of New York City (Robert N. Kenyon and James S. Lehmaier, both of New York City, of counsel), for defendant in suit No. 1 and for complainant in suit No. 2.

MAYER, District Judge. The suit of Moebius et al. against Louis Dejonge & Co. is for an injunction restraining the defendant in that suit from sending out letters to or otherwise notifying the trade that complainants therein are guilty of unfair competition in selling their flycatchers in their present form, dressing, and appearance. In that litigation a motion for an injunction was made to restrain Louis Dejonge & Co. from sending out letters pendente lite. This motion was denied by Judge Lacombe on August 7, 1912, with the proviso that Dejonge & Co. would bring suit against Moebius and his associates, to test the question of unfair trading, on or before October 7, 1912. Prior to that date the second suit, wherein Louis Dejonge & Co. is complainant, was brought against Moebius et al.

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

For convenience, the suit of Moebius et al. against Louis Dejonge & Co. will be called suit No. 1, while that of Dejonge & Co. against Moebius et al. will be called suit No. 2.

Suit No. 2 will be first discussed and will be deemed to include the testimony of Bruno Weimar, Edward Weimar, Mathiesen, Dreyfuss, and Amberg. In suit No. 2 complainant charges defendants with unfair trading by reason of the sale of flycatchers which are made in imitation of the flycatchers of the complainant, so close as to constitute unfair competition. The bill prays for an injunction and an accounting in the usual form.

Complainant is a New York corporation which manufactures and imports paper goods and novelties and has acquired a high reputation for the quality of its goods generally.

About the beginning of 1909, complainant began the business of selling flycatchers; its president being convinced of the commercial possibilities of a flycatcher known as the "Pyramid," which was then manufactured by Max Dametz, of Zeitz, Germany, but which had not been sold prior to that time in this country. The flycatcher material of the "Pyramid" is conical in shape, formed by a spirally wound tape. This tape has a preparation on it which is said to attract flies and, in practical use, is hung at some convenient place. This cone-shaped material is inclosed in a small cylindrical box and encircled with a detachable plate at the bottom. Louis Dejonge & Co., of course, desired to make the appearance of this article distinctive. The cylindrical box or inclosure was two inches long and an inch in diameter. It had two caps, one on each end; the flange of the cap extending over the side of the tube for about a quarter of an inch. The hanger projected through the middle of the upper cap and was parti-colored; these colors being arranged in bands or stripes running lengthwise of the hanger. When the business was started in 1909, different combinations of color were used, including yellow, blue, and green. The plate, which was corrugated, was adapted to be slipped over the lower cap of the flycatcher, was round in shape, and was about 3⅝ inches in diameter. The tube, caps, and plate were brown in color; the upper surface of the plate having a design on it representing a woven fabric or basket weave. At that time the articles were put up in boxes of 100, and the boxes were made of a brown pasteboard, with a sort of basket weave pattern on its surface. In 1910 the goods were packed in boxes or cartons of 50 each. In 1911 a label of a light green color was adopted, and the parti-colored ribbon or hanger was limited in color to red, white, and blue. In the same year a new form of box was adopted (Dejonge Exhibit No. 12). The plain box with the so-called basket weave pattern was discarded for a box with the words "Pyramid Fly Catcher" prominently displayed on the outside and inside, and with other words upon it; the colors of the box being mainly yellow, green, and red, and the box having a rather striking appearance, one of its features being a representation of the cone as drawn out inclosed in its base, with flies clustering about and sticking to the cone and sticking to the base.

In 1912 the only change of importance was the addition to the fly-

catcher label of the representation of a pyramid and two palms under the word "Pyramid." (Flycatchers contained in Dejonge Exhibit No. 13).

While, therefore, the cylindrical shape and the name "Pyramid" were the same in 1912 as in 1909, the appearance of the box was entirely different from and after 1911, and in 1912 the label on the flycatcher had an added distinctive feature in the form of the pyramid with a palm on each side thereof.

About March, 1912, the defendants began to place on the market their flycatcher which they called "Spiralette." This also contained a flycatcher material which, when elongated, would be of cone shape and was inclosed in a cylindrical box or cover with two caps, and also was designed to be fitted into a base. While the measurement of the cylinder and the base were slightly different from those of the Pyramid, it may be said that for ocular purposes they were substantially the same.

The color used on the "Spiralette" label was blue, on the two caps red, and the base was red with white spots, while the base of the Pyramid was brown or tan. For the hanger, defendants used various colors, but many of its hangers were red, white, and blue.

Both labels are divided into three vertical spaces by vertical lines, in one of which is the name of the article, and in another of which are printed directions. In the Pyramid the third space contains the words "Agents, Louis Dejonge & Company, 69-73 Duane Street, New York City," while in the "Spiralette" are the words "Mark registered."

Defendants sent out with the box of their flycatchers a red poster bearing at the top, in conspicuous large red letters, the words "First in the Fight," and with the design which would seem at a casual glance to be of the same general character as the elongated cone on the box of the Pyramid.

In 1912 defendants sold their flycatchers in boxes of 100. These boxes were of brown paper and had a design somewhat like the basket weave of the Pyramid in 1909.

In 1913 defendants placed the words "Patented in the U. S. A." on some of their flycatchers, although there is no doubt that defendants' flycatcher was and is not made in accordance with the patent to which these words purport to refer. These words should not have been used, but their use is of no importance in arriving at a conclusion herein. After the litigation between the parties had started, defendants ceased, for a time, using the "First in the Fight" poster, but, as I understand, insist that they had the right to use this poster and would have the right to do so now.

Flycatchers of the kind here in controversy were not known to the American market prior to the introduction of the Pyramid. It is claimed that the testimony of the Weimars, Mathiesen, Dreyfuss, and Amberg shows that some were on sale in this country as early as 1904, but, viewing that testimony in the light most favorable to defendants, the appearance of these flycatchers in this country was of a passing and accidental character and is of no consequence in this case. Nothing that the Weimars did made the article known, and, in

analogy, the incident was not even as informing as an abandoned experiment in the case of a patent.

[1] Complainant has introduced testimony as to misrepresentations of salesmen of defendants and confusion and mistakes by purchasers of these two articles. The salesmen are not identified, and, where only sporadic incidents are ascertained, a merchant is not chargeable with an occasional remark of an unidentified occasional salesman.

[2] Little aid is furnished by the testimony of witnesses as to confusion when that testimony is taken by deposition. In open court the judge can form his opinion of the point of view and mental attitude of the person who gives testimony of this character. There is no reason to doubt that the illustrations given by the witnesses in the case at bar are truthfully stated, and, of course, in doubtful cases actual instances of confusion may be helpful in arriving at a correct decision; but, generally speaking, the court must, if possible, diagnose the subjective symptoms of the purchasing public from the appearance of the articles themselves, unless a course of conduct is proved which shows the employment of methods and means indicating unfair competition.

[3] I am satisfied from the evidence in this case that the particolored hanger plays a very important part. When these cylindrical shaped flycatchers are ready for sale by the retailer, the box is open, and the parti-colored hanger is the first item of the article which strikes the eye. It is very natural that a person buying a small article of this kind, who might not carry the name of the article in his memory, would remember, nevertheless, that the flycatcher which he wanted had a hanger ribbon of red, white, and blue. It is quite likely also that so much of the public as had been educated by the advertising and selling campaign of Louis Dejonge & Co., who believed that this was the first flycatcher of this kind in this country, would be misled by the red poster "First in the Fight," and more especially because the Spiralette did not contain the name of the manufacturer or sales agent. If the purchaser did not think that he was buying precisely the same flycatcher, he might very well think that he was buying a flycatcher placed on the market by the same concern.

There is a good deal of controversy as to the meaning of the phrase "First in the Fight" on the red poster advertisement. I should say that to some people it would mean that the article was the first to have been placed on the market, while to others it might mean the foremost or best article. Evidently for the purpose of showing that there was no intent to be unfair, defendants have insisted that the testimony warrants the conclusion that "First in the Fight" was a fair translation from its German poster of the phrase "Auf in den Kampf," but that German phrase (defendants' translator to the contrary notwithstanding) does not mean "First in the Fight." It is a battle cry and means "on to the battle." [1]

In any event, I am of opinion that, in view of the phrase and of the design, there would be enough people who would mistake the poster as referring to the Dejonge flycatcher, so as to result in confusion.

[1] While the translator's testimony is in suit No. 1, it may just as well be discussed here.

With the exceptions noted, I am unable to see in what other particulars defendants may be successfully charged with unfair trade. The Pyramid box of 1909 was not distinctive and could not be appropriated by complainant, and, indeed, was abandoned by complainant, while, on the other hand, defendants' present box, inside and outside, is entirely different from complainant's present box. In arriving at this, to me, obvious conclusion, I have not paid any attention to the history of the mushroom which is said to be the model for defendants' design, and, as a layman in the art of flycatching, I should not have known that the mushroom was the genesis of defendants' characteristic figures and colors. The test is to ascertain the effect upon the ordinary everyday person who would buy this sort of an article.

I think that the complainant is not entitled to the exclusive use of the cylindrical form, because obviously that is a proper and natural form in which to inclose the cone-shaped flycatcher material. The division into three spaces on the cylinder is a negligible matter, and no one would ever think of it except as a point of controversy in a lawsuit.

I see no confusion between the names "Pyramid" and "Spiralette," except after very close and deliberate analysis. "Spiralette" was a natural arbitrary name in view of the spiral shape of the material, and nowhere in the record is there anything to indicate that this name was deliberately selected in order to simulate in sound or appearance the name "Pyramid."

[4] There is a good deal which one might guess about, but cases must be decided on evidence, and I am unable to find any evidence which satisfies me or allows me to draw a fair inference that defendants have intended to copy complainant's article for purposes of unfair competition. But motive, while often a valuable index to, is not an essential element of, unfair competition. Louis Dejonge & Co. were first in the field, and they are entitled to the protection of a court of equity against any invasion which constitutes unfair trade. I am of opinion that their rights have been invaded in regard to the red, white, and blue hanger and the "First in the Fight" poster. Further, I see no reason why, in fairness, the defendants cannot put on their article the name of the manufacturer or the sales agent or, in any event, something to indicate that "Spiralette" does not come from the house of Louis Dejonge & Co. The point is that, assuming the form and size of the cylindrical shape and the base to be available to any one, care must be taken in a small article of this kind to avoid creating the impression on the public that the competing article comes from the same source as the original article; and it has often been said that it is extremely easy for a fair merchant to make such changes as fair trading requires. Besides, I see nothing in the testimony of Moebius which presents a good business reason for not putting on the name of the source of manufacture or sale.

I think this controversy is within very narrow limits, and if defendants are well intentioned, as they earnestly assert they are, then the difference can be ended: (a) By defendants adopting a hanger of a single color; (b) by ceasing the use of the "First in the Fight" poster or any-

thing similar thereto; and (c) by either putting on their label the name of the manufacturer or agent or some legend indicating that the article does not come from complainant. If these requirements are complied with, they may retain the name "Spiralette" and the appearance and dressing in other respects in which their flycatcher has been marketed.

There will be a decree in suit No. 2, with costs in accordance with this opinion.

Ex parte GRAYSON.

(District Court, W. D. Washington, N. D. July 17, 1914.)

No. 2780.

ALIENS (§ 53*)—NATURALIZATION—"PERSONS LAWFULLY NATURALIZED"—DEPORTATION.

Rev. St. § 1994 (U. S. Comp. St. 1901, p. 1268), provides that any woman who is now or may hereafter be married to a citizen of the United States, and who "might herself be lawfully naturalized," shall be deemed a citizen. *Held*, that the clause, "who might herself be lawfully naturalized," refers to the race, class, or nation of persons who are excluded from citizenship, and not to personal qualifications or character of the individual whose class or race is not excluded; and hence where, pending proceedings to deport an alien native of France as an alien prostitute, she was married to a citizen of the United States, she thereby became a citizen, and was not subject to deportation by the Department of Labor until her citizenship was revoked by due process of law.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 53.*]

Petition for a writ of habeas corpus by Marie Robina Grayson. Writ granted.

Noah Shakespeare and Louis A. Merrick, both of Everett, Wash., for petitioner.

George P. Fishburne, Asst. U. S. Atty., of Tacoma, Wash., for the United States.

NETERER, District Judge. On January 23, 1914, the acting Secretary of Labor ordered the petitioner, who was born at Tridon, Bretagne, France, and who landed at the port of New York in 1903, to be deported for being in the United States in violation of the act of Congress approved February 20, 1907 (34 Stat. 898, c. 1134 [U. S. Comp. St. Supp. 1911, p. 499]), and amendments thereto, in that the petitioner "is a prostitute and has been found practicing prostitution subsequent to her entry into the United States." The petitioner thereupon applied to this court for a writ of habeas corpus, on the grounds: (a) That the petitioner is now, and at all times since the 1st day of April, 1912, has been, a citizen of the United States, she having on that date been united in lawful wedlock to William Grayson, a native-born citizen of the United States, and that the department is without jurisdiction to order her deportation; and (b) that she "was denied a fair and impartial hearing."

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

It was admitted upon the hearing that William Grayson is a native-born citizen of the United States, and that on the 1st day of April, 1912, he was united in lawful wedlock with the petitioner, in the city of Portland, Or. It is alleged in the answer of the Commissioner of Immigration:

That "a warrant was issued for the petitioner, and she was arrested on the 14th of March, 1912, on a charge of having been found practicing prostitution; that testimony was taken in the case on March 27, 1912, and she was on the same day released on bond; that she was married April 1, 1912, to the best knowledge, opinion, and belief of the respondent, to prevent being deported; that at the time of her marriage to the said William Grayson she was a prostitute and was practicing prostitution; that she was still out on bond when she was married, and was not released until the 9th day of April, 1912; that she has never been formally admitted to the United States, and never has been naturalized; and that she should be deported as ordered by the Secretary of Labor, after a due hearing."

The testimony taken before the Commissioner of Immigration shows that the petitioner was accorded a fair and impartial hearing, and further shows that the petitioner has been practicing prostitution for nine years last past, except during the time she lived with her husband and for one month prior to her marriage, in various cities, from Nome, Alaska, to San Francisco, and as far east as Salt Lake, and that she met William Grayson, her husband, in a sporting house in Portland, Or. She lived with him "nearly seven months" after marriage, and upon her husband leaving her, she says, "I went back rustling again." There is no evidence, either before this court or in the record, that the petitioner was a prostitute on entering the United States, or that she came for the purpose of practicing prostitution.

The petitioner contends that since the dawn of civilization the domicile and citizenship of the wife became merged in that of the husband, and that such status was recognized by the common law of England prior to George III, and became part of the fundamental law of the United States, and a definite and fixed status by congressional enactment under section 1994, Revised Statutes of the United States (U. S. Comp. St., 1901, p. 1268), which provides that:

"Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

By this provision, the very act of marriage, it is contended, confers citizenship as fully to all intents and purposes as could be done by decree of naturalization.

The respondent asserts that the language, "who might herself be lawfully naturalized," excludes the petitioner from acquiring the franchise of citizenship, because section 2 of the act of 1907, as amended by Act March 26, 1910, c. 128, § 1, 36 Stat. 263 (U. S. Comp. St. Supp. 1911, p. 500), excludes "prostitutes, or women or girls coming into the United States for the purpose of prostitution or for any other immoral purpose"; and section 3 provides that "any alien who shall be found * * * practicing prostitution after such alien shall have entered the United States * * * shall be deported * * *"; and the petitioner, being a prostitute, could not be lawfully naturalized.

That the husband of the petitioner is and was a citizen of the United States, and that the petitioner was lawfully married to him, is conceded. That such marriage was recognized by the Department of Labor immediately after her marriage, following her former arrest, by releasing her from such arrest on a similar charge, appears in the record. It has been held by the Circuit Court in this Circuit (Leonard v. Grant, 5 Fed. 11) that the clause, "might herself be lawfully naturalized," applies to the race or class or nationality of persons who are excluded from citizenship in the United States, and not to the personal qualification of the individual whose class or race is not excluded, and does not apply to the character of the individual. The Circuit Court of Appeals in this Circuit, in Hopkins v. Fachant (appealed from this district) 130 Fed. 839, 843, 65 C. C. A. 1, 5, says:

"The rule is well settled that her marriage to a naturalized citizen of the United States entitled her to be discharged. The status of the wife follows that of her husband. Rev. Stat. § 1994 (U. S. Comp. St. 1901, p. 1268); Leonard v. Grant (C. C.) 5 Fed. 11; Kelly v. Owen, 7 Wall. 496 [19 L. Ed. 283]; United States v. Keller (C. C.) 13 Fed. 82; Ware v. Wisner (C. C.) 50 Fed. 310; Broadis v. Broadis (C. C.) 86 Fed. 951."

By the provisions of section 1994, supra, citizenship acquired is not a qualified or contingent one, but, until revoked by a court of competent jurisdiction, is as enduring and unqualified as if she had been actually naturalized upon her own formal application. Leonard v. Grant, supra; United States v. Keller (C. C.) 13 Fed. 82. Citizenship is a valuable right, and the most distinguished and honorable franchise which can be conferred by the government of the United States, and, when acquired, cannot be taken away without due process of law. Under the Constitution of Washington and the Constitutions of some of the other states, the right to own real estate depends upon citizenship. If, perchance, the petitioner acquired real estate by purchase in the state of Washington, after marriage and discharge from the former arrest because of her citizenship, such real estate, on deportation because she is not a citizen of the United States, would become the subject of forfeiture by the state of Washington, and she therefore deprived of property acquired in reliance upon section 1994, supra, and the former holding of the Department.

If the marriage of the petitioner was conceived in fraud, as contended by the respondent, and executed for the purpose of evading the immigration laws of the United States and preventing her deportation, such fact, from the history of this case disclosed in the record, should be established in a court of competent jurisdiction, in an action commenced for the purpose, where she would be accorded the right of compulsory process for the attendance of witnesses, and her right to remain be determined consistent with principles that inhere in due process of law. There is a distinction in the due process of law in depriving one of a citizenship once acquired and a procedure in determining the right of an alien to enter or remain in the United States. The Supreme Court of the United States, in Low Wah Suey v. Backus, 225 U. S. 469, 475, 476, 32 Sup. Ct. 734, 738 (56 L. Ed. 1165), says:

"It was the manifest purpose of Congress in passing this law to prevent the introduction and keeping in the United States of women of the prohibited

class. The object of the act was to exclude alien prostitutes, or, if they entered and were found violating the statute within the period prescribed, to return them to the country whence they came."

The petitioner in that case belonged to a class or race which was excluded, but by reason of marriage could remain in the United States so long as she did not practice the prohibited acts, and the issue here was not before the court, and the court did not pass on the issue as here presented. In the instant case, the petitioner does not belong to an excluded race, but it is claimed is excluded because of immoral character. That is a question of fact, which evidently was passed upon by the department under the former arrest, when she was discharged, and if she was a citizen then, and by reason thereof qualified to remain, she is a citizen now, for no decree of revocation of citizenship appears.

It would not be contended that a naturalized alien, admitted to citizenship by fraud practiced upon the court, could be deported until he had been given his "day" in court, and his acts condemned and citizenship revoked. Is the petitioner entitled to the same right? Is the hearing before the Department of Labor such a hearing? Is there a distinction between the right of an alien charged with the violation of the immigration laws in entering or remaining in this country, and the right of a foreign-born individual who has attained unto the standard of citizenship? The Department of Labor, by the act of Congress, is given exclusive jurisdiction over the alien until he has passed to the status of a citizen (Ex parte Moola Singh et al. [D. C.] 207 Fed. 780; White v. Greggory [C. C. A.] 213 Fed. 768); but does this jurisdiction obtain after the status of citizenship is attained, or does jurisdiction to determine any issue with relation to citizenship after it is attained, repose in the courts?

It is not necessary to answer all of the above questions. From the record in this case I am of opinion that the department was without jurisdiction to order the petitioner deported, until such citizenship is revoked and she relegated to the status of an alien. If the respondent appeals within 20 days after filing this decision, the petitioner shall give recognizance with sufficient surety in the sum of $2,000, conditioned to appear and answer the judgment of the appellate court, in accordance with Supreme Court rule 34 (198 Fed. xxviii, 115 C. C. A. xxviii).

An order may be presented.

SWIFT v. McFARLAND et al.

(District Court, N. D. Georgia. July 3, 1914.)

No. 1.

JUDGMENT (§ 828*)—RES JUDICATA—QUESTIONS DETERMINED.

Where a suit in the state court was based on the construction of a contract by which complainant claimed the right to an undivided half of certain property purchased for a city waterworks system, and judgment was rendered in favor of defendant, such judgment was res judicata of an issue as to whether complainant's right under the contract was

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

to an undivided half of the property itself, or only to an interest in the profits to be derived therefrom, involved in a subsequent suit in the federal court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1510-1515; Dec. Dig. § 828.*]

In Equity. Suit by Charles J. Swift against William C. McFarland and another. Dismissed.

Charles J. Swift, of Columbus, Ga., in pro. per.
L. C. Slade and A. W. Cozart, both of Columbus, Ga., for defendants.

NEWMAN, District Judge. A brief memorandum opinion in this case was filed by the court on the 30th of April, 1914. Afterwards, and at the regular term at Columbus, the court was satisfied from statements made by Mr. Swift that there had been a misunderstanding as to the manner in which the case was submitted, and evidence was heard as to what had transpired in the Harris superior court; the question being upon the plea of res judicata filed by the defendants. The record in the Harris superior court is all in evidence, and I have it before me now. This record being in evidence, argument was heard in Columbus and briefs have subsequently been submitted by both parties.

It appears from the record that Mr. Charles J. Swift had some negotiations with Mr. Wm. C. McFarland in 1902, with reference to the purchase of certain property, known as the Blue Springs property, for the purpose of furnishing the city of Columbus with water. There was difficulty in Columbus, at the time, about the water supply being furnished by the Columbus Water Supply Company, then being operated by the receiver of the court. Mr. Swift, according to the record here, was authorized by Mr. McFarland to enter into negotiations for obtaining the Blue Springs property for the purpose named. The real issue in the case seems to be what the arrangement was between Swift and McFarland as to the rights that Swift was to have in the property if obtained. As I understand it, Swift claims that he was to have a half interest in the property for his services in connection with the purchase of the property and its attempted utilization as a source of water supply for the city of Columbus. The bill filed here is a long one, and sets out in great detail the purchase of the property and the subsequent addition to the source of supply of the Barnes Creek property. Swift asserts in his bill that the Blue Springs supply was found to be insufficient, but the addition of what is called the Barnes Creek property to it made what, after careful survey, is thought to be, taking the two together, sufficient to supply the city of Columbus with abundant water.

Mr. Swift, according to his bill, unquestionably worked very hard at the matter of having the Blue Springs property, with the addition named, adopted as the source of supply for new waterworks to be established at Columbus, and asserts his right to a half interest in this property. His prayer is: First, for an injunction restraining Nevius and McFarland from interfering with complainant's possession of the

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

one-half of the Blue Springs or Barnes Creek places, or from any attempt to oust him from the same; second, that the court grant a temporary injunction, etc.; third, that the agreement in New York be decreed and declared a binding contract and obligation, and that complainant has fully executed the same on his part, and that McFarland and Nevius be estopped by their conduct from disputing the validity of the same, that it be decreed equally binding, according to McFarland's version of the same, in that he and complainant were finally to share the net profits as he aforesaid claims, but that it is not correct that complainant's interests was dependent on his sale to the city at any time, or at all, and that said last claim is made and was made early for the sole purpose of expelling and excluding complainant from any interest whatsoever, and to enable the defendant to defraud complainant and to appropriate all of complainant's time, services, and information, and that an accounting be had of all the rents, issues, profits of said property, and of all services rendered by complainant and moneys paid by said McFarland, and that it be decreed and adjudged that, even taking McFarland's version of the agreement and the acts of complainant in pursuance thereof, and of the services that complainant rendered and was to render as an equivalent of the capital to be advanced by McFarland, a common interest of both in the property be established, and that said Nevius is no bona fide purchaser, and that the deeds to both of said properties be decreed a trust for complainant for one-half interest in the same; fourth, that said agreement and those that were unified with it as to the Barnes Creek property be specifically enforced, and that the said McFarland and Nevius be decreed, compelled, and required to specifically perform his and their part of said agreement, and all obligations thereto incident and therewith connected; and, fifth, a prayer for general relief.

The present question, as stated, is that of res judicata and to determine whether the suit in the Harris county superior court was a full and final determination of the issue between the parties. I understand that question, from the record and from argument of counsel, to be whether or not Mr. Swift was to have an undivided half interest in the property purchased absolutely in consideration of doing what he did and what he was to do in promoting the enterprise of having the property named selected as the source of water supply for the city of Columbus. Mr. Swift claims that he now owns a half interest in the Blue Springs property and the Barnes Creek property, whereas McFarland and Nevius, to whom McFarland has transferred the property, claim that he has no interest whatever.

It appears that Swift took possession of the Blue Springs property, and in 1910 Nevius brought suit against him in the superior court of Harris county, laying demises in Wm. C. McFarland and others. The suit was brought in common-law form, and, as stated, demises were laid both in Nevius and McFarland and others. The defendant Charles J. Swift filed an equitable plea to that suit, in which he set up substantially the same facts that are set up in the bill in this case. The Supreme Court of Georgia, to which that case later went, as will be hereinafter referred to, speaking of this plea, says this (138 Ga. 229, 75 S. E. 8):

"The essence of the equitable defense, as to the Blue Springs place, is that the defendant and McFarland entered into an agreement to buy the property together. McFarland was to put up the money for expenses and for the purchase price, if the land was obtained. Swift, the defendant, gave certain valuable information which he had acquired as to the location, water supply, etc., and was to negotiate for the purchase, and perform certain other services. He fully complied with his agreement, and thus in effect paid his part of the purchase price. For convenience in exploiting the property in connection with a plan to furnish water to the city of Columbus, in which a certain engineering company was to take a part the deed was taken in the name of McFarland, by agreement between him and the defendant, and for the benefit of both. The defendant took possession of the property, and has managed it in accordance with the agreement between him and McFarland on that subject."

Demurrer was interposed to this plea, and was sustained, and the case, as stated, went to the Supreme Court of Georgia. The Supreme Court reversed the ruling of the lower court, and sent the case back to the Harris county superior court for trial. On the trial of the case the jury found for the defendant the land in question.

It is claimed, and may be conceded to be true, that the suit in Harris county superior court was for the Blue Springs property only, and that the verdict as rendered covered only that property. The rights of the parties in this controversy depend upon what the agreement was between Swift and McFarland, that is, as to whether Swift, in consideration of his services in this matter, was to become the owner of a one-half undivided interest in the property, or whether he was to have a half interest in the profits to be obtained by the sale of the property to the city of Columbus for waterworks purposes. Swift contends for the former view of the matter, and McFarland and Nevius for the latter. Was this issue settled and determined against Swift in the Harris county case? This is the question now before the court.

There can be no doubt that the two properties, the Blue Springs property and the Barnes Creek property, were united and, as expressed by complainant in his bill, became one project. The whole record, the bill in this court and the proceeding in the state court, shows this to be true. In complainant's bill, on page 32 he says this:

"The said McFarland consented to the option and deed afterwards in escrow for the Barnes Creek property and for it to become one project with the said Blue Springs property, and with said McFarland's understanding it became subject to all the terms and conditions and agreements original between the said McFarland and your orator as to the said Blue Springs property."

And on pages 36, 37 of the complainant's bill he says this:

"The said Barnes Creek, by and with the consent of the said McFarland, was unified with the said Blue Springs, and they became one project."

So there can be no doubt that the rights of the parties as to the two properties, under the pleadings here, were the same. That is to say, if complainant has a half interest in the Blue Springs property, he has it in the Barnes Creek property also, and under the same contract and by the same agreement. This question was fully tried out and determined in the Harris superior court. Mr. McFarland and Mr. Swift both were witnesses in that case and gave their versions of the matter, and the jury found in favor of McFarland and Nevius.

The law on the subject of res judicata in a case like this is so clear that it hardly needs citation, but in Tioga Railroad v. Blossburg and Corning Railroad, 20 Wall. 137, 22 L. Ed. 331, the following is the first headnote.

"Where, in a judicial proceeding, the matter passed upon is the right under the language of a certain contract to take receipts on a railroad, the judgment concludes the question of the meaning of the contract on a suit for subsequent tolls received under the same contract."

In Lumber Company v. Buchtel, 101 U. S. 638, 25 L. Ed. 1072, in the opinion by Mr. Justice Field, the court says this:

"The extent and effect of a former recovery between the same parties upon the same question raised in a new action have been so often considered and determined by this court that it would be a waste of time to go over the argument and repeat our views on the subject. Our latest expression of opinion, made after deliberate consideration, is found in the case of Cromwell v. County of Sac, 94 U. S. 351. To the reasons there adduced we have nothing to add. And we are of opinion that the second defense is also concluded by the former adjudication. The finding of the referee, upon which the judgment was rendered—and this finding, like the verdict of a jury, constitutes an essential part of the record of the case—shows that no representations as to the quantity of timber on the land sold were made to the defendant by the plaintiff, or in his hearing, to induce the execution of the contract of guaranty. This finding, having gone into the judgment, is conclusive as to the facts found in all subsequent controversies between the parties on the contract. Every defense requiring the negation of this fact is met and overthrown by that adjudication."

In Southern Pacific Railroad v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, one of the headnotes is as follows:

"A right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

A great many authorities could be cited to the same effect. There is no question in my mind whatever that the questions existing between the parties in this case were fully determined in the case in the Harris county superior court, and for this reason the plea of res judicata to that effect, filed as a part of the answer in this case, must be sustained and the complainant's bill dismissed. A decree may be taken to this effect.

MACY et al. v. BROWNE et al.

(District Court, S. D. New York. July 13, 1914.)

1. FOOD (§ 5*)—IMPORTATION—TEA—STATUTES—"QUALITY"—"PURITY."

Act March 2, 1897, c. 358, 29 Stat. 604 (U. S. Comp. St. 1901, p. 3194), to prevent the importation of impure tea, section 7, requires that the purity, quality, and fitness for consumption of tea shall be tested according to the usages of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, chemical analysis.

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

Held, that the word "quality" referred to the grade or fineness of the leaf, depending principally on whether it was, when plucked, tender and young, or more mature, and also whether the plant producing the leaf was of the best kind, and that the term "purity" referred to the presence of foreign substances, without reference to whether it made the tea foul, since any adulterant, however cleanly or innocuous, would per se detract from purity.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.* For other definitions, see Words and Phrases, vol. 7, p. 5879.]

2. INJUNCTION (§ 11*)—GOVERNMENT OFFICERS—NECESSITY FOR RELIEF.

An injunction will not be granted restraining the federal tea board from denying admission to an importation of complainant's tea, because it showed presence of Prussian blue when subjected to the Read color test, in advance of a determination of the board not to admit it.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 9-11; Dec. Dig. § 11.*]

3. FOOD (§ 5*)—IMPORTATION OF TEA—CUSTOMS REGULATIONS.

Act March 2, 1897, c. 358, 29 Stat. 604 (U. S. Comp. St. 1901, p. 3194), provides for the inspection of tea importations, and requires that the purity and quality shall be tested according to the customs of the tea trade, including the testing of an infusion in boiling water, and, if necessary, chemical analysis. Thereafter the Secretary of the Treasury required examiners in the tea board to use the "Read method" to examine for artificial coloring, or facing matter, and provided that if the tea should prove inferior to standard in quality, quality of infused leaf, or artificial coloring or facing, it should be rejected, notwithstanding it be superior to the standard in some of the qualifications. *Held*, that such regulations did not deprive the tea board of all discretion to admit tea possessing coloring matter in harmless quantities, otherwise of superior quality, and which did not constitute an inferiority in purity or quality; the Secretary of the Treasury being without authority to compel the tea board to decide any question lawfully coming before it in any particular way.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*]

4. FOOD (§ 5*)—IMPORTATION OF TEA—DISCRETION OF TEA BOARD—CONTROL BY COURTS.

Whether tea offered for importation complied with the standard samples selected for determination of purity and quality, and whether a failure to comply with the standard in the matter of color or coloring matter alone should be considered an inferiority in purity or quality and justify exclusion, is a matter for the determination of the tea board in the exercise of its discretion, and is not a matter which the courts can control.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*]

In Equity. Suit by George H. Macy and others against George S. Browne and others. Bill dismissed.

Joseph H. Choate, Jr., of New York City, for complainants.
William L. Wemple, Asst. Atty. Gen., of New York City, for defendants.

HOUGH, District Judge. Complainants lately proferred for entry into the United States at the port of San Francisco certain tea, which the collector of that port rejected, as inferior in purity to the established standards, because of the presence in the imported tea of certain coloring matter. In so doing the collector acted in assumed

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

compliance with the "act to prevent the importation of impure and unwholesome tea," approved March 2, 1897, and of the regulations established by the Secretary of the Treasury pursuant to power conferred upon him by said statute. Thereupon complainants (pursuant to section 6 of the act) protested against the collector's decision,[1] and caused "the matter in dispute to be referred to a board of three United States General Appraisers." The three defendants herein are the General Appraisers (commonly called the "Tea Board") to whom complainants took what is practically an appeal from the collector's decision. The object of this suit is to obtain the directions of this court as to how the tea board shall decide the matter submitted to it pursuant to the statute, and on the motion of the complainants themselves. It would hardly be admitted by the draftsman of the bill that what I have just said fairly summarizes the purpose of suit, yet I think the justice of the comment will appear from analysis of proven facts and some study of the statute.

The act of 1897 provides for the annual establishment of standard samples of tea, to be kept in stock, at convenient ports of entry, and all teas "of inferior purity, quality, and fitness for consumption to such standards" shall not be brought into the United States. The ascertainment of fitness or unfitness is intrusted in the first instance to an examiner, and from his decision either the government or importer may "refer the matter in dispute" to the tea board. This board must consist of General Appraisers, whose general duties, tenure of office, and presumed qualifications are too well known to need further comment, but that the appraisers, when constituting the tea board, are vested with discretionary powers of at least a quasi judicial nature seems so plain as to require no more than statement.

[1] Admittedly, however, any test, inspection, or examination of tea, whether by a single examiner or the board, must be conducted in the manner prescribed by statute. Such prescription is found in section 7, which requires that the—

"purity, quality and fitness for consumption (of tea under investigation) shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and if necessary, chemical analysis."

The language quoted gains much in clearness, when something is learned of the growth, varieties, preparation, and marketing of the tea leaf.

"Quality," as used in this act, evidently refers to the grade or fineness of the leaf, depending principally on whether the leaf was, when plucked, tender and young or more mature, and also whether the plant producing the leaf was of the best kind or growing under favorable conditions.

"Purity" with equal clearness refers to the presence or absence of foreign substances, especially those which would be regarded as foul or dirty; but any adulterant, however cleanly or innocuous per se, would detract from purity.

[1] The act requires the original test of tea to be made by an "examiner," but the action of the examiner I regard as an act of the collector.

"Fitness for consumption" is a phrase which in my opinion adds little, if anything, to the powers conferred, or limitations imposed by the statute; nor has the evidence shown any way in which tea can be unfit for consumption without also being woefully lacking in quality and purity.

The purity of tea has long been debased by "facing" or "coloring," or perhaps both simultaneously. Facing is often (if not usually) intended to increase weight, by the admixture of such materials as talc, etc. Coloring has long been thought desirable for "green" teas, of which the color of some (if not most) grades is obtained or improved by mixing Prussian blue, ultramarine, or indigo with the tea while it is being dried. One grain of Prussian blue will color seven pounds of tea; and this substance (which is the "lead" or writing part of a "blue pencil") seems the commonest pigment in use.

In some (at least) parts of China, the preparation of tea is carried on by small farmers, the leaves are dried in mud huts, in primitive ovens, and altogether under conditions necessarily resulting in the deposit of dust and "plain dirt" in the tea leaves. Teas having been colored for generations in these same huts, it is quite possible that forgotten particles of coloring matter may get into tea which it was not intended to color, i. e., change the appearance to the eye. In other words an uncolored tea may contain some coloring matter.

The customs authorities of this country have long tried to exclude colored teas; and the Secretary of the Treasury, having power under the statute to enforce "the provisions of this act by appropriate regulations," has required examiners and the tea board to use what is known as the "Read Method" to "examine for artificial coloring or facing matter." Reg. 22. It is further provided that—

"should a tea prove * * * inferior to the standard in any one of the requisites, viz.: Quality, quality of infused leaf, or artificial coloring or facing, *it shall be rejected* notwithstanding that it be superior to the standard in some of the qualifications." Reg. 23.

The Read method consists in calcining, under pressure of a spatula and on a piece of clean white paper, a small portion of the tea under investigation. If there be coloring matter (of the kinds above enumerated) in the tea, though in the smallest quantities, there will appear even to the naked eye, and certainly through a microscope of no great power, blue specks or streaks, on the paper, but ocular investigation will not show whether the blue color is that of ultramarine, indigo, or Prussian blue. The regulation then provides that the specked or streaked paper be sent to a chemist for identification of the pigment. As soon as such identification is made the tea must be rejected. If black paper instead of white be used, foreign materials other than blue colors will be detected. The identification of pigment by a chemist (it may be noted) cannot change the result; it makes no difference whether the speck turns out to be one blue dye or another, the tea must be rejected solely because it has coloring matter in it; kind is immaterial, and the quantity practically means any quantity, for the Read test is thorough, how thorough will hereafter appear.

When complainants offered their tea for entry, the standard samples

used by the government contained no coloring matter whatever, but (as shown by the evidence) did contain a far greater amount of other foreign substances than did complainants'. It is also proven that the tea refused entry is worth in the open market nearly four times as much per pound as is the standard sample by which its acceptance or rejection was gauged. I regard it as proven beyond doubt that the sole cause for rejecting the tea in question is that it showed coloring matter under the Read test—and a subsequent analysis, qualitative and quantitative, has revealed the presence of Prussian blue in proportions ranging (in the specimens examined) from 9 to 19 parts of blue in a million of other and unobjected to elements. There is an agreement of counsel that Prussian blue cannot be proved to produce any deleterious results; it is found mentioned in the United States Pharmacopœia as a drug sometimes used for common purposes, and in the quantities existing in this tea it might be arsenic without producing injury.

The foregoing findings of fact are not made because either court or counsel think this jurisdiction invoked to pass upon the sense or folly of rejecting tea such as that above described; these findings seem a necessary preliminary to justifying the original assertion that this action is brought to obtain directions for the tea board as to how to decide complainants' appeal.

Complainants' contention is this: (1) The act of 1897 limits the right of importing tea only in certain specified particulars; (2) the presence of coloring matter is not per se one of the specified grounds for rejection; (3) the only lawful reason for rejection is inferiority to the standard sample in purity, quality, and fitness for consumption, and such microscopic portions of Prussian blue as here shown do not constitute impurity, nor show unfitness in any way; (4) such inferiority, however, can only be ascertained in the specified statutory method, viz., by tests "according to the usages and customs of the tea trade, including the testing of an infusion * * * in boiling water, and, if necessary, chemical analysis"; (5) the Read test was unknown to the tea trade in 1897, being admittedly of more recent invention, and it is not a chemical analysis.

Asserting these premises, the bill prays that the tea board be compelled by mandatory injunction: (a) Not to use the Read test; and (b) not to base its decision on the "mere presence of material adapted for use as coloring, irrespective of whether said matter is harmful." Plainly if the tea board were shown everything proven in this court, and then restrained from considering the Read test, it would be aware that there was coloring matter in harmless quantities in the tea, and if it were then directed to disregard that fact, there would be nothing left except evidence that the complainants' tea was better and cleaner and more valuable than the standard, and must be admitted. If this in effect is not asking this court to sit as a tea board, I fail to understand the bill. Of course the request is to sit in more than one case, for the decree prayed for would be a guide for all subsequent cases of color in tea.

The form in which an action is brought is oftentimes still determinative of its fate. This suit is for injunctive relief, and there are, I am

sure, several reasons why that form of relief cannot and should not be granted.

[2] If it is ever right to coerce or guide the decision of any tribunal, an opportunity must surely first be given for the defendant organization to do something—it must have a chance to do right before it is assumed to be about to go wrong. This action asserts error before it is committed, and for this reason alone I should refuse injunction.

[3] This argument complainants seek to avoid by pointing out that regulations 22 and 23 deprive the tea board of all power to pass upon the "purity" and "quality" of tea if the Read test shows color, for when that occurs "it shall be rejected." If this be the intent of the regulations, they are in my opinion futile, for the powers of the tea board are derived from the statute itself—it is quite independent of the Secretary, and bound to hold (if such is the opinion of its members) that the presence of coloring matter in harmless quantities does not constitute an inferiority in purity or quality. The Secretary can no more compel the tea board to decide any question lawfully coming before it in any particular way than he can so act toward any other lawfully constituted tribunal.

[4] The real question presented to the original examiner, to the tea board, and sought to be laid before this court, is whether the standard samples of tea are to be interpreted (so to speak) narrowly or broadly. The samples are chosen by a board of experts (section 2), who are not employés of the Treasury for any other purpose. They have chosen a standard sample which is neither colored nor contains color, so that the real question is whether failure to comply with the standard in the matter of color or coloring matter alone is to be considered an inferiority in purity or quality. This is emphatically a matter of opinion, of discretion.

The conclusion that the matter in dispute is one of discretion leads me to dispose of this case by a reference to the recent decision of the Supreme Court in State of Louisiana v. McAdoo, 234 U. S. 627, 34 Sup. Ct. 938, 58 L. Ed. 1506 (June 22, 1914). As the matter is there put, the courts "will refuse to substitute their judgment or discretion for that of the official intrusted by law with its execution." It is enough if the act to be enforced by mandamus or forbidden by injunction be not ministerial; this question of tea is plainly not that. I have refrained from considering whether the Board of General Appraisers is not entitled to the further protection accorded to a judicial body.

The cases cited in the decision just mentioned render any further citation unnecessary. To sum the matter up, a court of equity may lawfully be asked to compel a public official to do an act plainly required of him by law, but that official can never be judicially told how to think. If he be empowered ministerially only, what he thinks is immaterial; if the law tells him to think and act on his opinion, any judicial advice is in its turn immaterial and indeed impertinent.

As the bill must be dismissed for lack of equity, it is not necessary to consider the inquiry whether the Read test is a chemical analysis. It may, however, be pointed out that an unquestioned chemical analysis of complainant's tea, both qualitative and quantitative, has been made,

and the result put in evidence. What is important is the truth, not the way of getting at it. The effect of that proven truth is for the tea board, not this court.

Bill dismissed.

In re DIALOGUE.

(District Court, D. New Jersey. May, 1914.)

1. BANKRUPTCY (§ 114*)—RECEIVERS—POSSESSION—UNLAWFUL SEIZURE—CONTEMPT.

Where a bankrupt having in his possession certain boats for repairs when bankruptcy intervened, his receiver completed the repairs and notified the owner that he might take the boats on paying the balance due for the repairs, and the owner's servant at his direction removed the boats by force from the bankrupt's dock without paying the amount due, and with knowledge that the claim was unpaid, against the protests of the receiver's employés, both the owner and his servant were guilty of contempt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 164-166; Dec. Dig. § 114.*]

2. RECEIVERS (§ 74*)—POSSESSION OF PROPERTY—INTERFERENCE—CONTEMPT.

Where a court has appointed a receiver, his possession of property in his official capacity is the possession of the court, and a disturbance thereof without leave of court constitutes a contempt.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 132-135; Dec. Dig. § 74.*]

3. RECEIVERS (§ 74*)—POSSESSION OF PROPERTY—REMOVAL—CONTEMPT.

Where the receiver of a firm completed the repairs on boats which the firm had contracted to make, and offered to deliver them to the owner on payment of the amount due therefor, but the owner, without payment or attempting to get possession by application to the court, took the boats by force from the receiver's servants, the court was not bound to merely enforce the return of the boats, but was warranted in treating it as a criminal contempt punishable by fine to vindicate the court's authority.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 132-135; Dec. Dig. § 74.*]

In Bankruptcy. In the matter of bankruptcy proceedings of John H. Dialogue. Proceeding by the receiver to adjudge Charles L. Walker and Ira T. Walker guilty of contempt. Application granted.

Wilson & Carr, of Camden, N. J., for application.

Lewis, Adler & Laws, of Philadelphia, Pa., for respondents.

HAIGHT, District Judge. This is an application to adjudge Charles L. Walker and Ira T. Walker guilty of contempt of court. The facts are briefly, as follows:

[1] On November 11, 1913, a petition in bankruptcy was filed in this court against John H. Dialogue, trading as "John H. Dialogue & Son," and on the same day Henry F. Stockwell was appointed receiver. He at once qualified and took possession of the plant and assets of the alleged bankrupt. At that time two boats, which belonged to Charles L. Walker, were at that plant. They had been delivered to the alleged

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

bankrupt prior to the filing of the petition in bankruptcy for the purpose of making some repairs thereon. The repairs had not at that time been completed, although considerable work had been done. The receiver was permitted to continue the business for a short period, during which time he also did some work on one of the boats. Charles L. Walker seems to have been very anxious to take the boats away, and when the receiver advised him that the plant had been shut down, because the court had refused to permit him to operate the business further, they entered into negotiations looking to the delivery of the boats to Walker and the payment to the receiver of the bill for the work done on them. It was finally arranged that the receiver should place on board one of the boats all of the machinery which had been taken from it during the course of making the repairs, and that he should be paid for doing so. There is some dispute as to exactly what the parties agreed upon as to the payment of the balance of the bill. It appears very clearly, however, that on November 21st the receiver wrote a letter to Charles L. Walker, embodying his understanding of the agreement, which was that he was to be paid the sum of $1,000 on account at once, and the balance of the bill, including the cost of placing the machinery aboard the boat, as soon as the receiver was ready to make delivery, and that the balance due was to be checked up by the bookkeeper at the plant and an itemized statement submitted, which was to "govern the cost of the work." Walker subsequently paid the $1,000.

The receiver submitted this proposition to the court for approval, and the same was approved by an order made on November 24th. On the following day the receiver notified Charles L. Walker that he was ready to make delivery of the boats; that the bills had been made up; that he would like to have a check for the balance at once, and that as soon as he received the same Walker could have the boats. It was then arranged that Walker should come to the plant at 2 o'clock on that afternoon and adjust the matter. Shortly after this conversation, and during the noon hour, another tug belonging to Charles L. Walker, and in charge of the respondent Ira T. Walker came to the dock of the alleged bankrupt at which the boats were moored, and forcibly seized and took them away, against the protests of the employés of the receiver, who were present. In order to do this the hawsers, which held the boat to the dock of the Dialogue plant, were cut by direction of the respondent Ira T. Walker.

The testimony leaves no doubt that the seizing of these boats and taking them from the receiver's possession was done intentionally and willfully. Although Charles L. Walker assumed full responsibility for what Ira T. Walker did, the conclusion is inevitable that the latter also acted with deliberation and with full knowledge that the boats were in the possession of a receiver of this court. The boats came lawfully into the possession of the receiver, and no attempt was made by the respondents to procure possession of them by application to this court or by any other legal proceedings. In fact it does not appear there was ever any dispute regarding the right of the receiver to

hold them. Under these circumstances I have no hesitancy in determining that both respondents are guilty of contempt of this court.

[2] It is entirely well settled that when a court has appointed a receiver, his possession is the possession of the court, and cannot be disturbed without leave of the court, and that if any person, without leave, intentionally interferes with such possession, he commits a contempt of court and is liable to punishment therefor. In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; In re Swan, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. Ed. 1207; Royal Trust Co. et al. v. Washburn B. & I. R. R. Co., 139 Fed. 865, 71 C. C. A. 579 (C. C. A., 7th Cir.). It is urged that the respondents should be required to return the two tugs to the custody of the receiver. Under the circumstances I cannot perceive that any useful purpose will be served by such a course.

[3] Shortly after the boats were taken from the receiver's possession he caused a libel to be filed in the United States District Court for the Eastern District of Pennsylvania, against them, for the moneys claimed to be due for repairs, etc. That proceeding is now pending. The rights of the respective parties will be fully determined and protected in that suit. Although I do not doubt authority of this court to require that the boats should be returned to the custody of the receiver (In re Swan, 150 U. S. 637, 14 Sup. Ct. 225, 37 L. Ed. 1207), it does not seem that either the ends of justice or vindication of the dignity of this court require such a course to be pursued in this case. I think that this should be treated solely as a criminal contempt to vindicate the authority of the court. Bessette v. Conkey Co., 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997.

In view of the high-handed means which were followed in taking these boats from the custody of the receiver and the evident premeditation of the whole plan, I feel constrained to inflict a severe punishment.

Both respondents will therefore be adjudged guilty of contempt of court, and as punishment the respondent Charles L. Walker will be required to pay a fine of $300 and the costs of this proceeding, including the special master's fees, and the respondent Ira T. Walker will be required to pay a fine of $50, and both will be committed to the custody of the marshal until the respective fines are paid. The order should provide for the payment by the clerk to the special master of the latter's fees.

McCALMAN v. ILLINOIS CENT. R. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1914.)

No. 2452.

1. TRIAL (§ 178*)—VERDICT—MOTION TO DIRECT.
On motion to direct a verdict, it is the duty of the trial judge to take that view of the evidence most favorable to the party against whom the direction is requested.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403; Dec. Dig. § 178.*]

2. MASTER AND SERVANT (§ 150*)—INJURIES TO SERVANT—PERILS—WARNING.
Where an occupation is hazardous, it is the master's duty to inform his servants of all perils to which they will be exposed, which are or should reasonably be known to him, except such as are obvious to the servants or through the exercise of ordinary care on their part may be foreseen and in either event injury therefrom be reasonably avoided.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297, 299-302, 305-307; Dec. Dig. § 150.*]

3. MASTER AND SERVANT (§ 150*)—INJURIES TO SERVANT—DANGERS—DUTY TO WARN.
The duty of a master to warn his servants of perils to which they will be exposed extends to any change made by him which introduces into their service a new element of danger.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297, 299-302, 305-307; Dec. Dig. § 150.*]

4. MASTER AND SERVANT (§ 151*)—INJURIES TO SERVANT—DUTY TO WARN—DELEGATION.
A master's duty to warn of perils to which servants will be exposed is primary and nondelegable.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 298; Dec. Dig. § 151.*]

5. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—DANGERS—DUTY TO WARN—QUESTION FOR JURY.
In an action for injuries to a railroad guard, during a strike, in a collision with deputy marshals sent to a crossing where the guards were located in response to a telephone message that there was trouble at that point, through the marshals mistaking the guards for strikers, whether the railroad company was negligent in failing to warn the marshals of the presence of the guards, and the guards of the approach of the marshals, *held* for the jury.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.*]

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

Action by Charles E. McCalman against the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company. Judgment for defendants, and plaintiff brings error. Reversed and remanded.

Caruthers Ewing, of Memphis, Tenn., for plaintiff in error.

A. W. Biggs, of Memphis, Tenn., for defendants in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and SESSIONS, District Judge.

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

WARRINGTON, Circuit Judge. McCalman brought an action against the two railroad companies to recover damages for personal injuries suffered by him while in their employ and through their alleged joint negligence. A motion to direct a verdict in favor of the defendants was granted at the close of plaintiff's evidence, and the plaintiff brings error. The negligence alleged occurred under these circumstances: September 27, 1911, these two railroad companies filed a bill in the court below against the Brotherhood of Railway Clerks, Local Lodge No. 40, its officers in their individual capacities, and a large number of other persons who, it was averred, while in the employ of complainants, had left their posts of duty and entered upon a strike which greatly interfered with, if it did not stop, complainants' business at Memphis, and especially in its freight yards in and near that city. A restraining order was prayed for and granted, enjoining defendants from entering upon the complainants' premises and from committing various other acts. The strike was still in progress in and about some portions of the railroad property on the night of December 7, 1911, when McCalman was injured. A force of deputy marshals was maintained and used in carrying out the order of injunction, wherever disturbance arose in or around the railroad premises. Besides the deputy marshals, the railroad companies themselves employed and maintained a force of guards, among whom was McCalman, in what are known as the Nonconnah railroad yards, which are some four miles south of Memphis; and it was at an entrance to these yards, known as the Horn Lake road crossing, that McCalman received his injuries.

The negligent acts and omissions charged and relied on are that the railroad defendants brought into collision at the Horn Lake road crossing a number of deputy marshals and railway guards, including McCalman, without giving either body of men notice of the approach or presence of the other, under conditions and at a time when each set of men would naturally regard the other as hostile to the interests they were alike intending and under duty to protect. The declaration was met by pleas of not guilty and contributory negligence.

The deputy marshals were stationed in Memphis and the railroad guards in and about the Nonconnah yards. The Horn Lake road crossing was at the intersection of that road and the defendants' lead track near an entrance at the east end of the Nonconnah yards. Locomotives or switch engines, whether drawing cars or not, moving between Memphis and these yards, were required to pass this crossing, and also to stop or not according as the switch there maintained was closed or open; and this switch was quite as likely to be closed against the approaching engines as not. During the earlier part of the night in question a considerable amount of gunfiring was going on at the Nonconnah yards. Mr. Knight, who was in charge of the railroad guards, had himself fired some shots to frighten away a number of men he supposed were strikers, though he subsequently thought they were tramps. At a later hour of that evening, Knight and McCalman went to the yardmaster's office, which was within Nonconnah and 500 yards distant from the Horn Lake road crossing; and while there, Knight

and Leslie, the yardmaster, engaged in conversation as to the prospect of trouble during the night. Leslie feared an attack by strikers, complained that some of the guards had been cut off, and said that he was going to telephone to see if more guards could not be furnished. Knight declared that he with his guards could take care of the situation. Before any message was sent, Leslie arranged to have a switch engine take Knight and McCalman, with another guard, to the Horn Lake road crossing; Knight stating that he expected some men to pass there and that he intended to arrest them. Upon arriving at the crossing, it was found that some guards were already there. Knight remained for something like two hours, and then with two of the men went away. However, before leaving, Knight told the guards remaining, including McCalman, to stay there until midnight. Evidence was offered tending to show that at about 10 o'clock a telephonic message was received at the special agent department of the Illinois Central from the south yards in Memphis, stating "there was trouble in Nonconnah," and requesting the department "to send some men"; also, that Leslie telephoned from the Nonconnah yards to the south yards that "there was trouble down there and he wanted a guard—wanted him to send a deputy marshal." It resulted, though it is not clearly shown how it came about, that several deputy marshals were started from Memphis, on a switch engine, for the Nonconnah yards; the switch engine was equipped with a headlight and running board at each end; the crew, having one or two lanterns, rode on the running board at the end leading toward the yards, and the deputy marshals on the running board at the opposite end. Two structures were maintained by the railroad companies adjacent to the tracks leading to the Horn Lake road crossing—one was called "East Scales," and was within about 500 yards of that crossing; the other was called "Shanty A," and was within about 75 feet of the crossing; there was a telephone at each of these places. At the time the switch engine was approaching Horn Lake road crossing, a guard, a weighmaster, and a clerk were at East Scales, and a car inspector was at Shanty A. Just after the switch engine had passed East Scales, the weighmaster telephoned to this car inspector to "watch the rear end of the engine." As the engine was coming to a stop at Horn Lake road crossing, the car inspector called out from Shanty A to the guards: "Look out for that engine; there is some men on it without lights." This was not a customary occurrence. When the engine stopped, a deputy marshal left the footboard and ran toward the guards, saying in a "rough and threatening" manner, "What in the h—ll are you s—s of b—s doing here?" and at once began firing at the guards. This resulted in an exchange of some 25 or 30 shots between the deputy marshals and the guards. It is enough to say of the casualties that McCalman, who was not armed, was shot in such a place and manner as to be permanently and most seriously injured.

Now, while the evidence tends to show, as before pointed out, that Leslie had telephoned to Memphis that there was trouble at the Nonconnah yards, yet the evidence fails in express terms to show that the deputy marshals had been informed that a force of railroad

guards was stationed at the Horn Lake road crossing; though it affirmatively appears that these guards had not been notified that the marshals were coming. The district judge ruled that if it was the duty of the defendant companies to advise the marshals of the presence of the guards at this crossing, "the presumption would be that they were so advised, on the ground that they are presumed to have done their duty"; and that the failure to notify the guards of the message to the marshals was immaterial because the guards did nothing to bring on the conflict. Thus the questions arise: Were the conditions such as to place the defendants under any duty to McCalman so to notify the marshals, and, if so, was the record open to a presumption that defendants discharged the duty?

It must be conceded that plaintiff was engaged in a hazardous employment during the conditions usually attending such a strike as the one then prevailing at the Nonconnah yards; and yet it is now plain enough that a new and distinct peril was added to that employment, though whether this was due to any breach of duty on the part of defendants is the problem. No question is raised as to the authority of the corporate agencies, whose acts resulted in bringing these two sets of men to the place of injury. After the yardmaster had furnished the engine to carry the official (in charge of the guards) and two of the guards to the crossing, as stated, and, with the knowledge that guards were usually kept there, he knowingly caused the deputy marshals to come to the same place; true, the request was that they report at his office in the yards, but he knew that they would have to pass over the crossing and very probably stop there. Although the yardmaster accompanied his call for assistance from Memphis by a statement that "there was trouble in Nonconnah," he did not describe the nature of the trouble or limit it to any particular place either within or about the yards; and it must constantly be remembered that strike conditions then existed at these yards. Three engines had been torn up, and for quite a while "a state somewhat of riot and insurrection" had prevailed there.[1] What, then, would have been the natural impulse of the ordinarily prudent man, when arranging to bring these two bodies of armed men together—deputy marshals and railroad guards—at the crossing and at night? Would it have been to notify the marshals of the presence of guards at the crossing and the guards of the coming of the marshals? The means of telephoning and the yardmaster's knowledge were complete. It is not too much to say that fair-minded men might honestly draw different conclusions in solving the question, whether these conditions were likely to create in each of these bodies of men a belief that its purpose was hostile to that of the other and so to add a new danger to the service of the guards. Tex. & Pac. Ry. Co. v. Harvey, 228 U. S. 319, 321, 33 Sup. Ct. 518, 57 L. Ed. 779. The duty of the com-

[1] Besides, the following statement appears in the brief of defendants' counsel: "It is conceded that there had been trouble in the Nonconnah yards; trains had been cut into, men had been intimidated in their work by shooting through the yards, and the night before, the office had been shot up by trespassers."

pany respecting notice is dependent upon a true answer to this question of fact; and, in case of affirmative answer, liability for failure to perform the duty is further dependent upon whether the omission was the proximate cause of the injury. It is vain for counsel to insist, as a matter of law merely, either that ordinary care and prudence would not have suggested the timely use of the knowledge and the means at hand to avert such beliefs, or that such use would not have avoided the mistake and its unfortunate consequences. Nor can it be laid down as matter of law that the weighmaster's telephoned message to the car inspector and the latter's call to the guards to look out for the men on the engine constituted an intervening cause of the conflict and one not to have been foreseen; for in such a situation of tense excitement it cannot be said that occurrences of this kind are not likely to happen, and thus to be anticipated.

[1, 2] It is true that this is an unusual case, and yet we do not see why it is not open to the application of familiar principles of law. In the first place, we have so often held as to render it unnecessary to repeat that upon a motion to direct a verdict it is the duty of the trial judge to "take that view of the evidence most favorable to the party against whom the direction is requested."[2] In the next place, it is a general rule as respects any hazardous occupation that the master shall inform his servants of all perils to which they will be exposed, which are or should reasonably be known to him, except such as are obvious to the servants or through the exercise of ordinary care on their part may be foreseen and in either event injury therefrom reasonably avoided. Mather v. Rillston, 156 U. S. 391, 399, 15 Sup. Ct. 464, 39 L. Ed. 464; Cincinnati, N. O. & T. P. Ry. Co. v. Gray, 101 Fed. 623, 627, 41 C. C. A. 535, 50 L. R. A. 47 (C. C. A. 6th Cir.); Mercantile Trust Co. v. Pittsburgh & W. R. Co., 115 Fed. 475, 480, 53 C. C. A. 207 (C. C. A. 3d Cir.); Chicago, M. & St. P. Ry. v. Riley, 145 Fed. 137, 142, 143, 76 C. C. A. 107, 7 Ann. Cas. 327 (C. C. A. 7th Cir.); American Mfg. Co. v. Zulskowski, 185 Fed. 42, 44, 107 C. C. A. 146 (C. C. A. 2d Cir.); Felton v. Girardy, 104 Fed. 127, 131, 44 C. C. A. 188 (C. C. A. 6th Cir.); Baxter v. Roberts, 44 Cal. 187, 192, 13 Am. Rep. 160; Borkowski v. American Radiator Co., 165 Mich. 266, 272, 130 N. W. 640; McGowan v. La Plata Mining & Smelting Co. (C. C.) 9 Fed. 861; 1 Shear. & Red. on Neg. (6th Ed.) § 203; 3 Labatt's Mas. & Ser. § 1146.

[3] This duty of the master so to inform his servants extends to any change made by him which introduces into their service a new element of danger. Cincinnati, N. O. & T. P. Ry. Co. v. Gray, supra, 101 Fed. at pages 627, 630, 41 C. C. A. 535, 50 L. R. A. 47; Sirois v. Henry, 73 N. H. 148, 151, 59 Atl. 936; Coll v. Westinghouse E. & Mfg. Co., 230 Pa. 86, 88, 79 Atl. 163; Ryan v. Chelsea Paper Mfg. Co., 69 Conn. 454, 459, 37 Atl. 1062; Knox v. American Rolling Mill, 236 Ill. 437, 443, 86 N. E. 90, 127 Am. St. Rep. 291; 3 Labatt's Mas. & Ser., § 1146, at p. 3043.

[2] It is but fair to the district judge to note that he recognized this rule, citing Williams v. Choctaw, O. & G. R. Co., 149 Fed. 104, 105, 79 C. C. A. 146 (C. C. A. 6th Cir.).

[4] And the duty so imposed upon the master is of a primary character and is therefore nondelegable. Mercantile Trust Co. v. Pittsburgh & W. Ry. Co., supra, 115 Fed. at page 481, 53 C. C. A. 207; Shear. & Red. on Neg. (6th Ed.) §§ 204, 205, 206. And see Sirois v. Henry, supra, 73 N. H. at page 151, 59 Atl. 936, and Bryson v. Gallo, 180 Fed. 70, 76, 103 C. C. A. 424 (C. C. A. 6th Cir.).

[5] Now, in applying these principles to the instant case, it is to be recalled that we are considering the question whether the defendants were, in view of the existing conditions, under any duty not only to notify McCalman of the message for and the coming of the deputy marshals, but also the marshals of the presence of the railroad guards at the Horn Lake road crossing. Apart from any duty to the marshals arising from the invitation to come to the yards, which we need not consider, the defendants bore a contractual relation to McCalman and so owed him the duty not to enhance the peril of his service without notice. Plainly it would not have been sufficient merely to notify him of the coming of the deputies, though even this, as we have seen, was not done. The chief danger rationally to be apprehended lurked in the telephone message, "There was trouble at Nonconnah"; and the deputies approached the crossing with that belief. The nature of the danger, if under all the circumstances it was one reasonably to be anticipated, did not lessen defendants' duty to McCalman; for knowledge of these new conditions would have enabled him to decide whether to remain at the crossing or discontinue his service. In Baxter v. Roberts, supra, the former was employed by the latter to work upon his premises, and while removing a fence was fired upon from a neighboring lot and injured. When the employment was made, Roberts had reason to believe that interference with the fence would be forcibly resisted. After stating the "general principle which forbids the employer to expose the employé to unusual risk in the course of his employment and to conceal from him the fact of such danger," the court said (44 Cal. 193, 13 Am. Rep. 160):

"The nature or character of the agency or means through which the danger of injury to the employé is to be apprehended can make no difference in the rule, for the employé is entitled in all cases to such information upon the subject as the employer may possess, and this with a view to enable him to determine for himself if at the proffered compensation he be willing to assume the risk and incur the hazard of the business. * * *"

That decision, among others, was followed by the Court of Appeals of Colorado in Holshouser v. Denver Gas & Electric Co., 18 Colo. App. 431, 435, 72 Pac. 289, 291. There the company had been in trouble with strikers prior to plaintiff's employment, but it failed to notify him either of the strike or of certain threats of violence which the strikers had made concerning other persons who might take their positions; and the court rejected a distinction urged between that case and Baxter v. Roberts to the effect that in the latter case the employer was invading premises of another, while in the Holshouser Case the employer was conducting business upon its own premises, holding that:

"The degree of danger to be apprehended from exasperated men is not safely measurable by the cause of the exasperation."

In Lipscomb v. Railway & Express Co., 95 Tex. 5, 20, 64 S. W. 923, 926 (55 L. R. A. 869,[1] 93 Am. St. Rep. 804), a building at one of the stations of the railroad company had been entered several times at night and goods stolen; and on the night in question the station agent placed two armed men in the building to catch the burglars. Lipscomb, a freight engineman, with his fireman, found it necessary, through disrepair of their engine, to leave it and the train and go to this station to report the condition and get orders. Finding the doors locked, they made a noise which awakened the guards, one of whom, mistaking Lipscomb for a burglar, fired at him and inflicted wounds from which he died. The action was for damages for negligent death. In the course of the opinion it was said:

> "A distinct ground upon which it is claimed that the railroad company would be liable is that it owed to its servants the duty of giving to the guards such information and instruction as would protect the other servants against danger in going to the station, and also of giving to such other servants warning of the presence of such danger. This is a theory that should have been submitted to the jury, but the facts were not such as authorized the court to declare a liability as matter of law. Whether or not such instructions and warning were called for was a question for the jury and depended upon the further questions whether or not the presence of other employés and danger to them at the depot ought reasonably to have been foreseen by the company, and whether or not the omission of such precautions constituted negligence of which the shooting of Lipscomb was the proximate result."

We conclude, upon the whole, that the instant case should have been submitted to the jury under appropriate instructions, and, consequently, that it was error to grant the motion to direct. Any presumption that the defendants notified the deputy marshals of the presence of the guards at the road crossing was overcome by the clear tendency of the evidence. The telephonic message sent and received for the marshals fails to show any allusion to the railroad guards. The language of the deputy who opened the firing at the crossing was totally inconsistent with the idea that the marshals thought the men found there were railroad guards; and, moreover, it cannot be assumed that deputy marshals would have opened a murderous fire upon men they understood were there to aid them in suppressing trouble at the yards.

The question of variance need not be passed upon. If the objection had been urged below, no doubt the court would have allowed any amendment necessary to a correspondence between the allegations and proofs; and, besides, it does not appear that defendants were misled in this respect. Standard Oil Co. v. Brown, 218 U. S. 78, 84, 30 Sup. Ct. 669, 54 L. Ed. 939.

The judgment is reversed, with costs, and the cause remanded.

WATSON et al. v. HUNTINGTON et al.

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

No. 171.

1. EQUITY (§ 148*)—PLEADING—MULTIFARIOUSNESS.

A bill by stockholders of a corporation to recover damages from the defendant on the ground of his fraudulent acts as an officer of the corporation by which, as alleged, certain of the complainants were induced to purchase their stock, and others, who had previously purchased, were otherwise injured, is bad for multifariousness; the right to relief of the two groups being based on a different state of facts.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. § 148.*]

2. EQUITY (§ 46*)—JURISDICTION—ADEQUATE REMEDY AT LAW.

A stockholder cannot maintain a suit in equity to recover the amount he paid for his stock on the ground that he was induced to purchase the same by the fraud of defendant in making false representations in respect to the condition and business of the corporation; his remedy at law being full and complete.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 151, 152, 157, 159-163; Dec. Dig. § 46.*]

3. EQUITY (§ 51*)—JURISDICTION—MULTIPLICITY OF SUITS.

A mere community of interest between plaintiffs in matters of law and fact does not make it admissible for all such plaintiffs, each of whom has a separate cause of action at law against the defendant for a tort, to join in a suit in equity in order to avoid a multiplicity of actions, especially where the defendant makes no objection to such possible separate actions.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 167-171; Dec. Dig. § 51.*]

4. EQUITY (§ 383*)—FEDERAL COURTS—CHANGE OF FORM OF ACTION.

Where a bill in equity, filed in a federal court by numerous complainants, states a separate cause of action at law in favor of each complainant against the defendant, but no ground of jurisdiction in equity, the suit should not be dismissed, but each complainant should be permitted to file a separate complaint.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 787; Dec. Dig. § 383.*]

Rogers, Circuit Judge, dissenting.

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

Suit in equity by Wentworth Watson and others against Henry E. Huntington and others. Decree dismissing the bill, and complainants appeal. Reversed.

Plaintiffs, 38 in number, sued to have certain votes, cast by defendant Huntington under a voting trust agreement, canceled so far as plaintiffs are concerned, and to have a conversion of the holdings of stock in the National Steel & Wire Company into the securities of the National Consolidated Wire & Cable Company set aside, so that plaintiffs, respectively, may be restored to their rights as owners of stock in the National Steel & Wire Company for the purposes of this suit, and that defendant Huntington may be decreed to account and pay over to plaintiffs, respectively, the entire amounts which they invested in their respective holdings of stock in the National Steel & Wire Company, and for other equitable relief.

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

The following facts are alleged in the bill:

Plaintiffs own shares in the National Steel & Wire Company, and all except one own securities of the National Consolidated Wire & Cable Company. Some bought prior to 1904; others in 1904, 1905, and 1906. The National Steel & Wire Company, called the holding corporation, was organized about February 4, 1902; its only source of income being from the operations of certain subsidiary companies. A balance sheet of the books of the holding company for the period from July 1, 1903, to March 31, 1904, showed a surplus in favor of the company, whereas in truth this apparent surplus was fictitious and the liabilities were in fact largely in excess of the assets of the corporation, as the directors knew. Details of the bill show suppression of the fact of hypothecations, pledges, and of certain guaranties of obligations which were outstanding and unpaid, losses in business, and insolvency in April, 1904. Notwithstanding this condition of insolvency, on or before April 1, 1904, and from and after January 13, 1903, the directors had caused dividends to be paid on the preferred stock of the holding corporation. About April, 1904, Huntington and Webster entered into a plan and agreement to promote the sale of stock of the holding corporation in order to carry on the business and to provide funds to pay themselves an agreed price for their interest in a subsidiary corporation, the Safety Insulated Wire & Cable Company. The scheme was that balance sheets and reports should be issued showing that the holding corporation was the absolute owner of the shares of stock of the subsidiary companies and that dividends should be continued, notwithstanding the condition of insolvency. In aid of the plan, about May 17, 1904, Huntington was appointed by the directors of the holding company a managing director, and on May 19, 1904, a voting trust to continue for three years from September 1, 1904, was authorized by the board of directors of the holding company. The trustees under this voting trust were defendants Huntington, Mills, and Monroe. Under the voting trust the trustees agreed to inform the stockholders of the condition of the corporation, of its business and its progress. Plaintiffs, relying upon the representations contained in the voting trust agreement and upon the well-known financial reputation and business experience of the trustees, surrendered their respective certificates of stock and all their rights represented by the stock, including the right to vote for three years from September 1, 1904.

But the defendant Huntington failed to inform the stockholders of the true condition of affairs and as managing director participated in the declaration of dividends, although the corporation was insolvent, and thereby falsely represented that the corporation was not insolvent, and took part generally in the doings under the plan agreed upon with Webster.

The voting trust is charged to have been contrived by Huntington and Webster to aid them in preventing the plaintiffs, stockholders in the holding corporation, from learning the true condition of their company and to enable Huntington, as a voting trustee, to approve on behalf of plaintiffs of his and Webster's doings by voting stock in favor of resolutions validating what had been done. Huntington and Webster dominated and controlled the board of directors of the holding company and subsequent to April 30, 1904, controlled a large majority of the stock of the Safety Insulated Wire & Cable Company, a subsidiary company, for which they paid $15 a share but which they sold to the holding company at $70 a share, and in that way Huntington and Webster claimed to be creditors of the holding company in a large sum, so that the holding company became indebted to Huntington and Webster in large sums, as evidenced by notes of the holding company secretly secured by stock of the subsidiary company as collateral, in violation of the charter and by-laws of the holding company

Thereafter, in execution of the scheme charged, Huntington and others, constituting the executive committee of the holding company, issued false reports for distribution in promoting stock sales, and in 1904. 1905, and 1906 fraudulently represented to plaintiffs that the corporation was earning dividends and was a great success, and did other things which induced some of the plaintiffs to make further investments and to turn over their rights under the voting trust agreement heretofore referred-to.

Plaintiffs say that Huntington and Webster, knowing that the holding company could not continue to carry on its business, about February, 1906, organized the National Consolidated Wire & Cable Company for the purpose, among others, of taking over the securities of the holding company and issuing its own securities in exchange therefor. This new corporation was organized with dummy officers and directors and has transacted no business except on January 15, 1906, when the dummy board authorized an issue of $8,000,000 of bonds secured by preferred stock of the holding company. Huntington and Webster, keeping up the purpose of having plaintiffs remain ignorant of the real facts, issued reports of the holding company and of the National Consolidated Wire & Cable Company for the year ending June 30, 1906, fraudulently representing that the business of the holding company was more than satisfactory and that it owned certain subsidiary campanies. Thereafter receivers were appointed for certain of the subsidiary companies and for the holding corporation. Plaintiffs say that they were deluded by the course of misrepresentation and deceit on the part of Huntington down to the time when receivers were appointed.

The bill was dismissed for lack of equity and because of multifariousness. Plaintiffs appeal.

Isaac W. Dyer, of Portland, Me., Bristol & White, of New Haven, Conn., Frederick H. Siggin, and Carl W. Smith, for appellants.

Leventritt, Cook & Nathan, of New York City (Walter C. Noyes and Alfred A. Cook, both of New York City, of counsel), for appellee Huntington.

Before COXE, ROGERS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). At the outset it is to be noted that one of the plaintiffs, Herbert Francis Smith, alleges that he bought shares in the National Steel & Wire Company in 1905, and that he is "still" the owner of the same number of shares that he bought in the holding corporation. It is true that in a subsequent paragraph of the complaint there is an allegation that "all" of the plaintiffs were induced to surrender their certificates of stock and right of voting the same in the holding company to the voting trustees and to convert their holdings into the securities of the National Consolidated Wire & Cable Company. Nevertheless, under the special averment as to Smith, he should be judged as a stockholder in the original holding company and not asking to be restored to the position of stockholder in the holding corporation.

[1] The suit is not brought by plaintiffs in behalf of themselves and all other stockholders in the holding company who may desire to become parties plaintiff thereto; nor are plaintiffs suing in behalf of the corporation, which is not even a party to the bill. The real object of the suit is to recover the amounts which plaintiffs respectively invested in their respective holdings in the holding company, and in order to get their money they ask the court to remove such impediments as plaintiffs think will be necessary to have removed before they can recover.

The conspiracy charged was a continuing one initiated by arrangement with agents in England whereby stock sales were to be promoted in order to raise money to carry on the business of the holding company and to provide money for paying the defendant Huntington and one Webster an agreed-price for their interest in a certain one of the

subsidiary corporations, and continued always with the purpose of stock selling even until the plaintiffs had converted their stock into securities of the National Consolidated Wire & Cable Company. Reduced to a few words, this was the scheme charged: The conspirators persuaded certain of the plaintiffs as investors to come into the holding company, and when they had been drawn in they deceived them, as well as others who had already bought stock, as to the affairs of their corporation and misled them to such an extent as to induce them to surrender the control of their stock to the conspirators who, by the exercise of such control, carried on the scheme and were enabled to manipulate the concerns of the holding corporation and further deceive plaintiffs to their damage, even in some instances inducing them to invest more money, so that finally they were left with stock in a corporation much impoverished by wrongs of the conspirators.

Now from such a position plaintiffs wish to be relieved by some decree which will compel defendant Huntington to pay back to them the amounts paid by them respectively for their stock. They want to get out whole. It appearing, however, that some of the plaintiffs bought their stock prior to the 1st of April, 1904, which was before the origin of the conspiracy charged, clearly such persons, in the first instance at least, were not drawn in by the acts of any combination as charged. As to them the conspirators' wrongs consisted in having persuaded them to enter into the voting trust and thereafter in having deceived them concerning corporate affairs and in having acted as charged under the voting trust. Such persons could not herein recover the amounts paid for their stock upon the ground of false representations made before they bought shares. The relief they ask is plainly based upon a different state of facts from that relied on by those who came in because of fraudulent representations. May the two groups nevertheless unite in one bill claiming relief in equity because all went into the voting trust agreement and were victimized by the acts done by defendant Huntington, and this irrespective of the time when they obtained their shares? In other words, may the bill be sustained in equity as stating grounds for a return of the money paid? We think not, and for these reasons:

[2] The object of the complaint being a recovery of damages specifically named to be the respective sums put in by plaintiffs respectively, an accounting is wholly unnecessary. Nor is it at all necessary that the votes of the trustees under the voting trust should be set aside, or that any conversion of the stock of the holding company be canceled, for if defendant Huntington was guilty of the frauds charged by plaintiffs in fraudulently misrepresenting things after plaintiffs became stockholders, and they relied upon the false representations, each of the plaintiffs can recover damages upon the ground of fraud and his remedy at law is full and adequate. U. S. v. Bitter Root Development Co., 200 U. S. 451, 26 Sup. Ct. 318, 50 L. Ed. 550; Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451. Upon a trial at law for fraud defendant Huntington could not successfully defend upon the ground that the voting trust and his acts thereunder relieved him, or that any plaintiff's rights were affected by the con-

version of his shares into securities of the consolidated company. The mere charges of fraud will not give equity jurisdiction; nor will averments of conspiracy and violation of trust authorize a court of equity to take jurisdiction when the gist of the action is one arising in tort for which a defendant is liable in damages where the damages can be just as readily ascertained at law as in equity. The familiar rule is well stated in Hipp v. Babin, 19 How. 271, 15 L. Ed. 633:

"Wherever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975; Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804; Walker v. Railway Co., 165 U. S. 593, 17 Sup. Ct. 421, 41 L. Ed. 837; American Publishing Co. v. Fisher, 166 U. S. 464, 17 Sup. Ct. 618, 41 L. Ed. 1079.

The latest expression of the Supreme Court is to be found in Curriden v. Middleton et al., 232 U. S. 633, 34 Sup. Ct. 458, 58 L. Ed. 765, decided March 16, 1914.

[3] Having shown that an action at law will give to any one of the plaintiffs all the relief that he is entitled to, each plaintiff may for himself begin an action; and, as the defendant Huntington does not ask the court to retain jurisdiction in order to save him from many suits, upon what principle can plaintiffs invoke equity? Not that if plaintiffs sued at law separate actions would have to be instituted, for there is in the action no class, and no representatives of a class are affected.

It is said that, inasmuch as there are 38 plaintiffs and practically the same evidence would have to be produced 38 times with the same questions of law to be determined, the remedy at law would not be as practical and efficient as this single suit. Along this line argument is made that plaintiffs should be properly joined in equity to avoid a multiplicity of suits, and authorities are cited sustaining the rule that Pomeroy lays down in his text (section 245, Pomeroy's Equity Jurisprudence) to the effect that where a number of persons have separate and individual claims and rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter may be settled in a single suit brought by all these persons uniting as plaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone, equity will take jurisdiction. But an examination of the authorities convinces us that a mere community of interest in matters of law and fact does not make it admissible to bring all plaintiffs into one suit in equity in order to avoid a multiplicity of actions.

In Tribette v. Railroad Co., 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, the court said that it never could be established on authority "that a defendant sued for damages by a dozen different plaintiffs, who have no community of interest or tie or connection between them, except that each suffered by the same act, may bring them all before a court of chancery in one suit, and deny them

their right to prosecute their actions separately at law, as begun by them." And the court said further, if Pomeroy's test be maintained, in a hundred actions for damages arising out of the wreck of a railroad train in some of which executors or administrators, or parents and children, might sue for the death of a passenger, and in others claim might be made for divers injuries, all of such numerous plaintiffs having a community of interest in the questions of fact and law, claiming because of the same occurrence, depending on the very same evidence, and seeking the same kind of relief, could be brought before a court of equity in one suit to avoid a multiplicity of suits.

The Mississippi case was commented on in Southern Steel Co. v. Hopkins, 157 Ala. 175, 47 South. 274, 20 L. R. A. (N. S.) 848, 131 Am. St. Rep. 20, 16 Ann. Cas. 690. In the Alabama case the facts were that 110 persons lost their lives in an explosion in a mine owned by the Southern Steel Company; 110 separate suits were filed by their representatives to recover damages for alleged negligence by the owner of the mine. The corporation, alleging that it had a perfect defense applicable alike to all the suits, filed a bill to enjoin the actions at law until such defense could be determined. Thus the question of jurisdiction was raised, and the court held that, independent of special grounds for proceeding in equity, jurisdiction would be assumed to prevent a multiplicity of suits by settling in a single case a right or transaction which at law involved the trial of numerous cases, entailing loss of time and perhaps ruin in costs. The principle upon which the court sustained the right for equitable interference to avoid a multiplicity of suits was that, where numerous parties are jointly and severally claiming against one, and the same title or right of defense will be called in question and will be determinative of the issues for or against all, equity will interpose to avoid a multiplicity of suits and there need be no aid by way of independent equity. The court adverted to the case of Tribette v. Railroad Co. as being directly opposed to the views being expressed. But the Supreme Court of Alabama afterwards in the same case on a second appeal (Southern Steel Co. v. Hopkins, 174 Ala. 465, 57 South. 11, 40 L. R. A. [N. S.] 464) reversed the decision just referred to after stating the question involved in the following manner:

"Has a court of equity jurisdiction to enjoin numerous tort actions, brought by different plaintiffs against the same defendant, when there is merely a community of interest in the questions of law and of fact involved, and no common title, no community of interest or of right, in the subject-matter?"

The court discussed the text of Pomeroy and noticed that the Tribette Case has been followed by Bliss on Code Pleading, § 76, Beach on Injunctions, § 543, and High on Injunctions, § 65a, calling attention also to the fact that in the last edition of Pomeroy two new sections are added (section 251½ and section 251¾), wherein the author is regarded as modifying the views be had expressed in the original text upon which the plaintiffs in the present case rely. The court well states that the distinction between a community of interest in the subject-matter which will support the jurisdiction of chancery to prevent a multiplicity of suits and the common interest in questions of law and

of fact which will not support it is illustrated in the Tribette Case and is said to be a right enjoyed in common with all the parties and in such manner that the invasion of the right of one is an invasion of the right of all, such as a right of common fishery.

In the Turner Case, 135 Ala. 73, 33 South. 132, the court says that:

"It would seem to be an elementary and fundamental proposition that a party who seeks to come into equity must himself have an equity, * * * or he cannot maintain a bill. * * * The wholly fortuitous, accidental, and collateral fact that numerous other persons have like, but entirely independent, * * * legal rights, estates, or defenses cannot upon any conceivable principle invest him with any right, legal or equitable, and that his rights whatever they may be, are precisely the same as if no other person had similar rights."

The mere fact that a defendant has committed a tort by which he injured one or a hundred parties cannot give him an equity to prevent each and every one of the parties so injured from maintaining an action against him to recover damages. If there had been a combination or conspiracy between such numerous parties to vex and harass the complainant by numerous suits, then he would have an equity to enjoin their prosecution, but the mere fact that his tort has injured a hundred persons and that it will save him and the court time and lessen the expense of the litigation does not give him any equity to come into a court of chancery to enjoin or prevent a multiplicity of suits. We do not find anything in Hale v. Allinon, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380, in conflict with this statement of the rule.

It was said by Mr. Justice Peckham in Equitable Life Assurance Society v. Brown, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. Ed. 682, that it does not rest with complainant to urge as a foundation for his suit that a defendant may thereby be saved a multiplicity of suits by other parties when the defendant raises no objection to such possible suits and urges no such ground for jurisdiction in equity of the complainants' suit. Boise Artesian Water Co. v. Boise City, 213 U. S. 276, 29 Sup. Ct. 426, 53 L. Ed. 796; Vandalia Coal Co. v. Lawson, 43 Ind. App. 226, 87 N. E. 47; Cumberland Telephone Co. v. Williamson, 101 Miss. 1, 57 South. 559; Illinois Central v. Baker, 155 Ky. 512, 159 S. W. 1169. It follows that the holding of the District Court that the plaintiffs showed no ground for equitable relief must be affirmed.

[4] It being our conclusion, however, that there is a legal cause of action stated in the complaint, plaintiffs should not be turned out of court, but each should be permitted to alter the complaint by adopting such parts thereof as he may be able to utilize as a basis for his complaint at law. The essentials of the present pleading may be adopted under the suggestion just made. Such a practice does not depart from the text or spirit of equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv). Cherokee Nation v. Kansas Ry. Co., 135 U. S. 641, 651, 10 Sup. Ct. 965, 34 L. Ed. 295; Schurmeier v. Connecticut Mutual Life Insurance Co., 171 Fed. 1, 96 C. C. A. 107; Dancel v. Goodyear Shoe Machinery Co., 144 Fed. 679, 75 C. C. A. 481; U. S. Bank v. Lyon County, 48 Fed. 632.

The order dismissing the bill is reversed, and the cause is remanded, with directions to transfer the case to the law docket and to permit the filing of an altered complaint by each of the plaintiffs.

ROGERS, Circuit Judge (dissenting). I find myself unable to concur in the opinion of the court rendered in this case.

The theory on which the suit is brought is that these 38 plaintiffs are entitled to come into equity in order to avoid a multiplicity of suits and assert their rights against respondent to recover damages for fraudulently inducing them to invest in certain stocks or stocks and bonds to their injury. It is charged in the bill, and upon demurrer must be assumed as true, that the respondent entered into a conspiracy to defraud and did defraud the plaintiffs in the manner stated in the bill. The bill is long and complicated, covering 55 printed pages. But in its ultimate analysis it asserts simply a right in each of these plaintiffs to recover damages in a single suit in equity to avoid a multiplicity of suits at law. The majority of the court think that the plaintiffs have no standing in a court of equity and that the bill cannot be maintained.

There are certain conclusions which the court has reached in which I fully agree. These are: (1) That no accounting is necessary. (2) That it is not necessary that the votes of the trustees under the voting trust should be set aside. (3) That it is unnecessary to cancel any conversion of the stock of the holding company. (4) That each of the plaintiffs has an action at law for damages upon the ground of fraud. (5) That the court of equity does not exercise its jurisdiction simply on the ground of fraud. (6) That the real object of the bill is the recovery of damages.

The mistake, which in my judgment the court has made, grows out of the following propositions, upon which, as I understand it, its opinion rests: (1) That the plaintiff Smith is an improper party to the suit. (2) That the plaintiffs compose two distinct groups or classes, and that these two groups cannot unite in one bill. (3) That there is a full, complete, and adequate remedy at. law, and therefore equity cannot assume jurisdiction. (4) That a mere community of interest in matters of law and fact does not make it admissible to bring all the plaintiffs into one suit in equity in order to avoid a multiplicity of actions.

Now we come to inquire whether Herbert Francis Smith is an improper party to the suit.

The conspiracy was entered into about April, 1904, and was a continuous conspiracy. Smith bought the stock of the holding company subsequent to the conspiracy and during its continuance, buying in 1905 and "still" holding at the time the bill was filed "the same number of shares." As the bill alleges that all the plaintiffs were induced to make investments in the stock by the frauduent conduct of the respondent, which of course includes Smith, it is impossible for me to understand why he is not as proper a party to the suit as any of the others. "The real object of the suit" being, in the language of the opinion, "to recover the amounts which the plaintiffs respectively invested in their respective holdings," I fail to see why Smith's right to join with the others in seeking to recover the amount he was fraudulently induced to invest should be apparently questioned because he

"still holds" the "same number of shares" he originally purchased. The fact that he "still" holds is without significance, so far as his right is concerned, to final relief under the bill. The fact that Smith never converted any of his shares in the holding company into the stock of the consolidated cannot affect his right to join in the bill. The fraud in inducing the investment in the stock of the holding company is the gravamen of the complaint. The right to recover is not dependent upon whether there was or was not a subsequent conversion of the whole or any part of the stock of the holding company into the holdings of the consolidated. The right to maintain the suit rests, not upon the doctrine of cancellation, but upon the necessity of avoiding a multiplicity of suits. It is a matter of indifference whether Smith converted or did not convert his original holdings. As in the case of those who did convert no cancellation is necessary, the relief to be afforded to Smith and the relief of the others who did convert is exactly the same, and the injury done him is the result of the same conspiracy that injured the others, and is established by the same evidence. He is therefore a proper party to the suit.

We inquire next whether there is any justification for the classification of these plaintiffs into two groups, who have no right to unite in one bill to avoid a multiplicity of suits. The classification separates the plaintiffs who bought stock prior to the conspiracy and those who bought thereafter. This distinction might be important if those who bought the stock before the conspiracy had not purchased additional stock after the conspiracy. But each of the plaintiffs in this suit did purchase stock after the conspiracy was formed, and each was induced to do so by the fraudulent practices of the respondent in carrying out the conspiracy. That fact appears to me decisive of their right to unite in this bill. It makes the separation into two groups purely artificial and without justification in any principle of law or of equity. The only relief the equity court under this bill needs to give is damages, and there is no reason which prevents the court from awarding damages as to stock purchased after the conspiracy; the parties being remediless as to stock purchased before the conspiracy. The fact that some of the stock purchased after the conspiracy was entered into was bought in 1904 and some in 1905 and 1906 is of no significance, so far as the right to maintain the suit is concerned.

It is to be noted on the subject of parties that "it is not necessary that each of the parties should be interested in all of the questions." See Dixie Fire Insurance Co. v. American Confectionery Co., 124 Tenn., 247, 292, 136 S. W. 915, 34 L. R. A. (N. S.) 897, and the authorities there cited.

In Curran v. Campion, 85 Fed. 67, 70, 29 C. C. A. 26 (1898), a case in the Eighth Circuit, Judge Sanborn said:

"No bill is multifarious which presents a common point of litigation, the decision of which will affect the whole subject-matter, and will settle the rights of all the parties to the suit, and that it is not indispensable that all the parties should have an interest in all the matters contained in the suit but it is sufficient if each party has an interest in some material matters involved in the suit, and they are connected with the others."

In 16 Cyc. 251, in referring to the rule that a bill is objectionable as being multifarious if it unites distinct matters, it is said:

"This rule must, however, be confined to bills presenting several distinct objects, for it is not necessary that each defendant's interest should extend to all the matters of a bill with a single general object; it is sufficient if each defendant is interested in some matter involved which is connected with the others."

The cases cited support the rule. Truss v. Miller, 116 Ala. 494, 22 South. 863; Booth v. Stamper, 10 Ga. 109; Worthy v. Johnson, 8 Ga. 236, 52 Am. Dec. 399; Lenz v. Prescott, 144 Mass. 505, 11 N. E. 923; Curran v. Campion, 85 Fed. 67, 29 C. C. A. 26; Kelley v. Boettcher, 85 Fed. 55, 29 C. C. A. 14.

I pass to the consideration of the question whether equity should decline to assume jurisdiction because each plaintiff has his remedy at law for the damages to which he is entitled. The mere fact that each has his remedy at law is not sufficient to shut him out of equity unless the remedy at law is adequate. According to the Supreme Court of the United States, "it is not enough that there is a remedy at law" unless it is "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." Boyce v. Grundy, 3 Pet. 210, 215, 7 L. Ed. 655 (1830). In Cruickshank v. Bidwell, 176 U. S. 73, 81, 20 Sup. Ct. 280, 44 L. Ed. 377, Mr. Chief Justice Fuller said:

"Inadequacy of remedy at law exists where the case made demands preventive relief, as, for instance, the prevention of multiplicity of suits."

In 11 Am. & Eng. Encyc. of Law, 200, the adequacy of the legal remedy is considered, and it is said:

"The construction given to this phrase by the courts requires that the remedy at law must be as practical and efficient as the remedy afforded by chancery in order to exclude the latter from jurisdiction. * * * The fact that by proceeding in equity a multiplicity of suits might be avoided is deemed sufficient to make it more practical and efficient than the legal remedy, though in other respects the latter might offer all the advantages of the former."

And in 16 Cyc. 41, it is said:

"The existence of a remedy at law does not deprive equity of jurisdiction unless such remedy be adequate."

By this is meant that it must be clear, complete, and "as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." And on page 42 of the same volume it is said:

"The greater promptness of the remedy in equity is often given as a reason for sustaining its jurisdiction. This does not mean promptness in administration, depending on the state of the calendar. nor does it mean that the progress of a suit in equity is inherently more speedy, for, on the contrary, such progress has been generally and notoriously slow. It relates rather to directness of remedy and the avoidance of circuity of action and multiplicity of suits."

I think it is plain, under the authorities, that the remedy at law, under the circumstances of the case, is not adequate. It is made inadequate by the necessity of avoiding 38 distinct and separate actions at

law, all growing out of the single conspiracy into which the respondent entered as against each of these plaintiffs.

This brings me to consider whether a mere community of interest, such as exists in this case, is sufficient to justify these plaintiffs in joining in this suit.

The leading authority in this country upon equity jurisprudence has been for many years the great work of Mr. Pomeroy's. In that work this subject has been very fully considered, and the conclusion arrived at is not in accord with that which the majority of the court announce in the case at bar.

The first edition of Pomeroy's work appeared in 1881, and in it he announced in section 257 that a community of interest in the subject-matter of the suit was sufficient to justify many plaintiffs uniting in a suit against a single defendant in order to avoid a multiplicity of suits, although each was entitled to legal redress in the common-law court. He illustrated his doctrine by the cases which hold that a number of individual proprietors of separate and distinct parcels of land, who have all been interfered with and injured in the same general manner with respect to their particular lands by a private nuisance, so that they all have a similar claim for legal redress against the author of the nuisance, may unite in a single suit. There exists in such cases no privity between the parties, no common interest or bond which bears the slightest resemblance to privity, and the parties are injured in unequal amounts, and yet there exists a sufficient community of interest in the subject-matter of the suit to enable the court to exercise its jurisdiction on behalf of the united plaintiffs. The second edition of his work appeared in 1892, and it contains the identical statement on this subject which appeared in the first edition. The third edition was published in 1905, 13 years after the Tribette Case, upon which the majority opinion lays so much stress, was decided. In that edition, which is the last which has appeared, the doctrine is stated as follows:

"Under the greatest diversity of circumstances and the greatest variety of claims arising from unauthorized public acts, private tortious acts, invasion of property rights, violation of contract obligations, and notwithstanding the positive denials by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised, either on behalf of a numerous body of separate claimants against a single party or on behalf of a single party against such a numerous body, although there is no 'common title' nor 'community of right' or of 'interest in the subject-matter' among those individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body. In a majority of the decided cases, this community of interest in the questions at issue and in the kind of relief sought has originated from the fact that the separate claims of all the individuals composing the body arose by means of the same unauthorized, unlawful, or illegal act or proceeding. Even this external feature of unity, however, has not always existed and is not deemed essential. Courts of the highest standing and ability have repeatedly interfered and exercise this jurisdiction, where the individual claims were not only legally separate, but were separate in time and each arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claimants in the question at issue and in the remedy."

In 16 Cyc. 247, the law is stated as follows:

"The fact that different matters and demands arose out of the same transaction or series of transactions may render it convenient to dispose of them together, and therefore a bill uniting them all will be proper. The particular requisites to a joinder on this ground are stated variously. A frequent statement is that different causes arising out of the same transaction may be joined when all the defendants are interested in the same claim of right and the relief sought is of the same general character. Again it is said that causes may be joined if they arise out of the same transaction or series of transactions forming one course of dealing and all tending to one end and if one connected story can be told of the whole. Where such common origin leads to a commingling of controversies, their joinder in a suit to which all concerned are parties becomes necessary. Perhaps no more definite test can be safely proposed than that of convenience in adjudicating the whole matter arising from its common origin. The most familiar application of the rule is doubtless in the case of bills embracing different injuries and demanding varied relief, all growing out of a single fraudulent scheme; such bills being sustained whether directed against one defendant or against several participating in the fraud."

The majority opinion, in declining to accept the doctrine as stated by the authorities above mentioned, refers to the fact that in Beach on Injunctions, in High on Injunctions, and in Bliss on Code Pleading a different principle is announced.

In Beach on Injunctions (Ed. of 1895) § 543, the matter is disposed of in a brief paragraph in which the principle adopted in the majority opinion is announced and supported by the citation of the case of Tribette v. Illinois Central R. Co, decided three years before in the Supreme Court of Mississippi. The only other case the author cites is a Massachusetts one (Cadigan v. Brown, 120 Mass. 493, 495). An examination of that case shows that there is not a word in it which supports or lends countenance in the remotest degree to the doctrine which the majority opinion adopts. On the contrary, the case was one in which the several plaintiffs holding their rights under distinct titles and to separate lots abutting on a passage way were allowed because of their community of interest to maintain their bill in equity to restrain a private nuisance. The court said:

"The plaintiffs, though they hold their rights under separate titles, have a common interest in the subject of the bill. They are affected in the same way by the acts of the defendants, and seek the same remedy against them. There is no danger of confusion in the trial or of injustice to the defendants from the joinder of the plaintiffs; but the rights of all parties can be adjusted in one decree, and a multiplicity of suits is prevented. We are therefore of opinion that this ground of demurrer cannot be sustained."

High on Injunctions, § 65a, states that:

"It is to be observed that, in order to justify relief by injunction for the prevention of a multiplicity of suits, there must be some common subject-matter of controversy or some common right or interest therein, and that without this a mere community of interest in the questions of law and fact to be determined constitutes no basis for equitable relief."

Mr. High, like Mr. Beach, does not review the authorities or examine into the subject at length. The only cases which he cites are Tribette v. I. C. R. Co., 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am.

St. Rep. 660; Ducktown Sulphur, C. & I. Co. v. Fain, 109 Tenn. 56, 70 S. W. 813; and Turner v. City of Mobile, 135 Ala. 73, 33 South. 132.

Bliss on Code Pleading, § 76, to which reference has been made, contains no discussion or allusion to the jurisdiction of the courts of equity or to the right of parties to unite in one suit in equity in order to avoid a multiplicity of suits. He is discussing the right of parties to unite in a suit under the Code, and he states that all who would unite must be interested in the subject of the action and in the relief He goes on to define what is meant by the phrase "subject of the action," which is used in the different parts of the Code, and states that in general it is the matter or thing concerning which the action is brought. And he illustrates his meaning by saying that, if two or more owners of mills propelled by water are injured by an obstruction above that interferes with the downflow of the water, they cannot unite in an action for damages under the Code, as they are without a common interest.

The case of Tribette v. Illinois Central R. Co., 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642 (1892), seems to be the chief authority in support of the principle upon which the majority opinion is based. In that case a number of different owners of property destroyed by fire from sparks emitted by an engine of the company sued separately to recover damages for their respective losses occasioned by the fire, alleged to have resulted from the defendant's negligence. Thereupon a bill in equity was filed by the railroad company to enjoin the prosecution of the suits upon the ground that they all grew out of the same occurrence and depended for their solution upon the same questions of law and fact, and to prevent a multiplicity of suits and the vexation and harassment consequent thereon. The bill was dismissed; the court writing an elaborate opinion in which authorities were examined and the conclusion reached that a mere community of interest "in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of a numerous body," is not sufficient to justify the interposition of chancery to settle in one suit the several controversies. The court admitted that its conclusion was contrary to the doctrine set forth in Pomeroy's work, but it declared with a good deal of emphasis that it was satisfied that that distinguished writer was wrong and was not supported by the authorities which he cited. In taking this position the court was compelled to overrule an earlier case which it had decided, that of Pollock v. Okolona Savings Institution, 61 Miss. 296, decided in 1883. But it is important to observe that the Tribette Case not only failed, as we have seen, to cause Pomeroy to withdraw his alleged erroneous doctrine but that it has itself been absolutely repudiated and overthrown by the court which decided it, and that not once but a number of times. In 1902 in Illinois Central Railroad Co. v. Garrison, 81 Miss. 257, 32 South. 996, 95 Am St. Rep. 409 the court began by "distinguishing" the case, and in 1903, in Crawford v. Railroad Co., 83 Miss. 708, 36 South. 82, 102 Am. St. Rep. 476, it was flatly over-

ruled, and the doctrine of the earlier Pollock Case was reasserted. The Chief Justice writing the opinion said:

"We think the doctrine announced by Pomeroy is sound and clearly established by the best-considered modern cases."

In 1904 the question came again before the same court in Tisdale v. Insurance Cos., 84 Miss. 709, 36 South. 568, and the doctrine of Pomeroy was accepted. In 1907 the matter was again before the court in Whitlock v. Yazoo, etc., R. Co., 91 Miss. 779, 784, 45 South. 861, with a like result. Once more in 1909 it came up again in Ship Island Railroad Co. v. Barnes, 94 Miss. 484, 48 South. 823, also with a like result; the court saying:

"This court has in many cases recently most carefully re-examined this whole subject, and has re-established the doctrine announced in Pollock v. Okolona Savings & Trust Co., and overruled the case of Tribette v. I. C. Railroad Co."

The Mississippi court in Cumberland Telephone & Telegraph Co. v. Williamson, 101 Miss. 1, 57 South. 559 (1910), again reversed itself, overruling the cases which overruled the Tribette Case and reestablishing the doctrine of the latter case. Each time the personnel of the court changes the position of the court on this question seems to change with it.

The Tribette Case, soon after it was decided, was followed by the Supreme Court of Alabama in Turner v. City of Mobile, 135 Ala. 73, 33 South. 132 (1902), a case also relied upon in the majority opinion in the case at bar. But in the subsequent case of Southern Steel Co. v. Hopkins, 157 Ala. 175, 190, 47 South. 274, 20 L. R. A. (N. S.) 848, 131 Am. St. Rep. 20, 16 Ann. Cas. 690 (1908), the Tribette Case is repudiated in the Alabama court in like manner as we have seen it was in the Mississippi court. The Alabama court said:

"The case, however, of Tribette v. Railroad Co., 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642, is directly opposed to our views. That case we consider as overruled by the subsequent one in the same court of Hightower & Crawford v. Railroad Co., 83 Miss. 708, 36 South. 83, 102 Am. St. Rep. 476, in which the court expressly approves the view repudiated in the Tribette Case. It is said in the Hightower Cases, 'We think the doctrine announced by Pomeroy is sound and clearly established by the best-considered modern cases.' After this repudiation of the Tribette Case, by the Supreme Court of Mississippi, we will not follow the reasoning of the opinion in that case to point out its deflection from, and opposition, in our opinion, to, the ancient as well as modern view of the extent of the jurisdiction of courts of equity in reference to multiplicity of suits. That jurisdiction is too well established and too beneficent, when wisely exercised, to be any longer called in question. It would be a strange casus in juridical evolution to meet the needs of society if there was no remedy against a party being vexatiously prosecuted at the same time by over 7,000 separate invalid claims held by insolvent plaintiffs, as in the Sheffield Waterworks Case, L. R. 2 Chan. 8, when each case is founded on the same facts, and when it is alleged and admitted, by the objection to the jurisdiction, that there is a defense common to all the claims. It is to avoid the monstrosity of such a result that the court of chancery extends its plenary jurisdiction to stay the proceedings at law until the question of liability can be determined in one suit, and therefore we hold that the bill in the case was well filed."

In a recent case the Supreme Court of Alabama again reversed itself, overruled Southern Steel Co. v. Hopkins, and announced its adhesion to the doctrine of Turner v. Mobile. "We therefore conclude," the court says, "to adhere to the former doctrine," although "it is not to be doubted that there are many high authorities to the contrary." And the court goes on to concede that "the text announced by Mr. Pomeroy," in what it calls his "inestimable work," "has been followed in a great number of adjudicated cases, and probably in the majority of the cases in which the exact proposition involved has been passed upon." Roanoke Guano Co. v. Saunders, 173 Ala. 347, 56 South. 198, 35 L. R. A. (N. S.) 491 (1911). But the opinion in the Roanoke Case is to my mind neither convincing nor persuasive. The vacillation of the court on this subject impairs to some extent the weight which might otherwise be accorded to its judgment.

In 1902 the Supreme Court of Tennessee followed the Tribette Case in Ducktown Sulphur, Copper & Iron Co. v. Fain, 109 Tenn. 56, 70 S. W. 813. In the latter case a copper company had been sued by numerous persons for a tort committed by killing trees and vegetation with copper smoke. It was held that mere community of interest in the questions of law and fact was not a ground for the interposition of chancery to settle in one suit the several controversies. But in 1910 the same court had the subject again under consideration with a result suggestive of that which we have seen was reached in Mississippi and in Alabama. In Dixie Fire Insurance Co. v. American Confectionery Co., 124 Tenn. 247, 136 S. W. 915, 34 L. R. A. (N. S.) 897, a bill in equity was held not demurrable but good in order to avoid a multiplicity of suits upon the following facts: Five insurance companies separately issued policies on a manufacturing plant; one company insured only the machinery, another insured the machinery and stock, another one issued a policy on the machinery and a separate policy on the stock, another issued a policy upon the building, machinery, and office fixtures: The policies were different as to their dates, their amounts, the property insured, and the name of the insurer, but were otherwise identical. The questions of defense were common to all the parties. The defenses were: Misrepresentations in procuring the policies; the keeping of explosives by the insured, in violation of the policies; and certain other alleged violations of the conditions of the policies which need not be mentioned. The court sustained the right of equity to assume jurisdiction in order to prevent a multiplicity of suits. According to the language of the court its right to assume jurisdiction was "not based on the postulate that the court of law is without jurisdiction, but simply on the ground that a multiplicity of suits would be thereby prevented, and that in such prevention both the public and private interest would be subserved."

The length of this opinion precludes examination of these several cases in detail. It is remarkable that we should find such a series of decisions of affirmations and reversals as these cases present. There seems to be a great confusion of thought upon the subject and a failure to accurately distinguish the cases to which Pomeroy's rule is applicable from the cases to which it is not applicable. There are

cases of negligence to which Pomeroy's rule has no application. See Pomeroy, Equity Jurisprudence (3d Ed.) § 251½. But there are certain cases of negligence to which the rule is clearly applicable. As has been pointed out in 25 Harvard Law Review, p. 559 (1912):

"If the complainant presents to the equity court an issue of contributory negligence or of damages, with each defendant, so that no simplification would result from a single trial Pomeroy's rule does not apply, but where a single issue is presented by the complainant's alleging absence of negligence on his part, jurisdiction should be taken. But courts failing to appreciate this distinction have neglected Pomeroy's rule altogether. It is to be regretted that the Alabama court, in overruling a former decision based on Pomeroy's rule, nevertheless repudiates the rule."

I have referred to the negligence cases, not because Pomeroy's rule is confined to that class of cases, for clearly it is not. But to point out that the rule is not applicable to all negligence cases and that the failure to recognize that fact has led to a confusion of ideas and to the rejection of the rule itself by some courts which have failed to recognize its proper limitations.

The Supreme Court of the United States has never denied that a community of interest in the questions of law and fact involved will suffice to support a bill filed to avoid a multiplicity of suits. Indeed, in Hale v. Allinson, 188 U. S. 65, 78, 23 Sup. Ct. 244, 252, 47 L. Ed. 380 (1903), the court, speaking through Mr. Justice Peckham, said:

"We are not disposed to deny that jurisdiction on the ground of preventing a multiplicity of suits may be exercised in many cases in behalf of a single complainant against a number of defendants, although there is no common title nor community of right or interest in the subject-matter among such defendants, but where there is a community of interest among them in the questions of law and fact involved in the general controversy."

And in Bitterman v. Louisville & Nashville Railroad Co., 207 U. S. 205, 226, 52 L. Ed. 171, 12 Ann. Cas. 693 (1907), in sustaining a bill claimed to be multifarious because of misjoinder of parties and causes of action, the same court said:

"The acts complained of as to each defendant were of like character, their operation and effect upon the rights of the complainant were identical, the relief sought against each defendant was the same, and the defenses which might be interposed were common to each defendant and involved like legal questions."

In 1890, in a case in the Circuit Court of the United States, Mr. Justice Harlan, in Osborne v. Wisconsin Central R. Co., 43 Fed. 824, declared that a community of interest in the questions of law and fact was sufficient to give jurisdiction to a court of equity in order to avoid a multiplicity of suits. And see Illinois Central R. Co. v. Caffrey (C. C.) 128 Fed. 770 (1904), where it is said that "a common interest in the questions to be litigated" is sufficient ground for coming into equity to avoid a multiplicity of suits.

I rest my dissent in this case, without going further into the authorities upon the doctrine announced in Pomeroy and which has not been successfully challenged, and in my opinion cannot be, that a community of interest in the questions of law and fact involved is sufficient to support a bill filed to avoid a multiplicity of suits. The cases which

support this view are sound in principle and accord with the weight of authority.

But there remain other phases of the subject to which brief reference should be made.

In Equitable Life Assurance Society v. Brown, 213 U. S. 25, 51, 29 Sup. Ct. 404, 53 L. Ed. 682, Mr. Justice Peckham said:

"Complainant also claims jurisdiction in equity on the ground that such an action will prevent a multiplicity of suits. But this is not a case for the application of the doctrine. * * * It does not rest with complainant to urge as a foundation for his suit that the defendant may thereby be saved a multiplicity of suits by other parties when the defendant raises no objection to such possible suits and urges no such ground for jurisdiction in equity of the complainant's suit."

The reference to this decision in the majority opinion in the case at bar seems to indicate that it is understood as laying down the proposition that the right to come into equity to avoid a multiplicity of suits is simply a privilege which equity accords to a party against whom a multiplicity of suits may be brought. I do not so understand the Supreme Court; neither do I understand that any such principle is established in equity jurisprudence. In the case in the Supreme Court there was a single plaintiff suing a single defendant to assert a claim for which he had an adequate remedy in a common-law court, which he could assert in a single action. It may be conceded that there is no precedent in the books which would allow a single plaintiff to file a bill in equity to avoid a multiplicity of suits under such circumstances. The law is clearly well established that under such circumstances the bill cannot be filed. In the case in the Supreme Court the defendant was not asking the court to protect him against a multiplicity of suits, and the plaintiff was not asking to be himself protected against a multiplicity of suits, as he could in a single action at law dispose of the whole controversy. Nevertheless he was undertaking to invoke the doctrine in behalf of numerous parties who had not joined in the suit and therefore were not in court claiming the privilege for themselves. If they had joined him in the suit, and if the matter could not have been disposed of in a single action at law, then it would have been an entirely different matter. In the case at bar it does not follow that, because the defendant Huntington is not asking to be protected from separate suits being instituted against him by these plaintiffs, they have no right to unite in one action their legal demands against him. On the contrary, the rights of the plaintiffs are wholly independent of the defendant Huntington's wishes. In 16 Cyc. 64, the rule is stated:

"The jurisdiction is exercised, however, either to protect the right of one asserted against many, or the rights of many against one. In spite of some authority to that effect that it is only the person who would otherwise be subjected to a multiplicity of suits who can maintain the bill, the rule is that either party may invoke the jurisdiction."

And in Pomeroy, § 269, of the Third Edition, it is also said:

"That the overwhelming weight of authority effectually disposes of the rule laid down by some judges as a test, that equity will never exercise its jurisdiction to prevent a multiplicity of suits, unless the plaintiff or each of the plaintiffs is himself the person who would necessarily, and contrary to his own will, be exposed to numerous actions or vexatious litigation. * * *

This position is opposed to the whole course of decision, * * * from the earliest period down to the present time."

The case of Curriden v. Middleton, decided in the Supreme Court of the United States on March 16, 1914, is not in conflict with the conclusion at which I have arrived. That was a bill in equity filed against three defendants to compel them to make restitution to the complainant by paying him the amounts of money which he had paid out in reliance upon the fraudulent representations of Middleton, who was alleged to have entered into a conspiracy with the other two to defraud him. The complainant did not come into equity to avoid a multiplicity of suits. His claim was one which could be disposed of in a single action at law, and he could at his option join all the alleged conspirators as defendants in the one action at law. There was no possible basis for the maintenance of the suit upon such a state of facts and the Supreme Court dismissed the bill. The plaintiffs in the case at bar come into equity to avoid a multiplicity of suits. They cannot unite in a single action at law, but would have to bring 38 separate actions. The two cases are absolutely unlike. In the Curriden Case there was no multiplicity of suits to be avoided.

Courts of equity, of course, have no jurisdiction to give damages when damages constitute the sole ground for the bill. Bispham's Equity (8th Ed.) p. 52. But the equity court has jurisdiction to give damages where the recovery of damages is not the sole purpose of the bill, the suit being founded upon some equitable principle such as the avoidance of a multiplicity of suits. Story's Equity Jurisprudence, § 796.

It may be said that for equity to assume jurisdiction is to deprive the defendant of his common-law right to a trial by jury. The answer, however, is that he has no such right except in cases where the remedy at law is adequate. For reasons stated, the remedy at law in this case is not adequate, and therefore his right to a jury trial does not exist. Oelrichs v. Spain, 15 Wall. 211, 228, 21 L. Ed. 43 (1872).

The prevention of a multiplicity of suits was said by Chancellor Kent in Brinkerhoff v. Brown, 6 Johns. Ch. (N. Y.) 151 (1822), to be "a very favorite object" with a court of chancery. Moreover, the wrongs complained of in the case at bar originated in fraud, and such wrongs from the earliest times down to the present have appealed with peculiar force to the conscience of chancellors. This court should overrule the demurrer to the bill and retain jurisdiction of the suit, if it can do so according to the established rules of equity jurisprudence. I find nothing in the rules of equity which requires this court to dismiss the bill. It has been filed to avoid a multiplicity of suits. There is a community of interest in the questions of law and fact which are involved which justifies the court in retaining jurisdiction of the suit. All the plaintiffs have been defrauded by the acts of the respondent in inducing them to buy the stock of a certain corporation. The fraudulent conspiracy has affected each of them in the same way and can be shown by the same evidence. The relief to be afforded to each is the same.

I therefore think the action of the court below in dismissing the bill should be reversed.

CHICKERING et al. v. CHICKERING & SONS et al.

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

No. 2012.

1. TRADE-MARKS AND TRADE-NAMES (§ 73*)—INFRINGEMENT—USE OF FAMILY NAME.

What ever confusion to the public and injury to complainants results from a lawful use by defendants of their own name in open, fair, and legitimate competition must be suffered; defendants only being responsible for the abuse of their right and for any unlawful use of the name and acts of unfair competition.

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

2. TRADE-MARKS AND TRADE-NAMES (§ 73*)—TECHNICAL TRADE-MARK—SURNAME.

A surname is not the subject-matter of a valid technical trade-mark, since it cannot be a clear distinguishing mark on goods, but by appropriation and actual exclusive use it may, in the course of time, come to denote the product of a particular person, factory, or business, and acquire a secondary signification which, when established, may be the subject-matter of an exclusive right.

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

Right to use one's own name as trade-mark or trade-name, see note 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.]

3. TRADE-MARKS AND TRADE-NAMES (§ 73*)—FAMILY NAME—CHICKERING.

The word "Chickering," while a family name having been associated with pianos manufactured and sold by Jonas Chickering and his successors since 1823, thereby acquired a secondary signification which might be the subject-matter of a valid trade-mark so as to entitle his successors in the business to protect the same against its use by others of the same name in such a manner as to indicate that there were two kinds of "Chickering" pianos of which theirs was one.

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

4. TRADE-MARKS AND TRADE-NAMES (§ 97*)—PROPER NAME—INFRINGEMENT—INJUNCTION.

Ordinarily, when a proper name has acquired a secondary signification which is entitled to protection as a trade-name, the relative rights of the parties may be adjusted by compelling those who may use the name in its primary sense to accompany such use by a clear and positive statement negativing any connection between them and those having the exclusive right in such secondary signification of the name.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. § 97.*]

5. TRADE-MARKS AND TRADE-NAMES (§ 97*)—PROPER NAME—INFRINGEMENT—INJUNCTION.

Where complainants were entitled to the exclusive use of the word "Chickering" as applied to pianos in the secondary signification of such name as a trade-name and defendants were entitled to use the name in the same business because it was their own proper name, and it was impossible for defendants, as a commercial proposition, to add to the name

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

on the fall board of pianos a statement negativing any connection between defendants and those entitled to use the name as a trade-name, the court properly required defendants to adopt a new name for all their pianos, and add to the name so adopted a statement that the pianos were "made by" defendants.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. § 97.*]

6. TRADE-MARKS AND TRADE-NAMES (§ 97*)—USE OF FAMILY NAME—INJUNCTION—SCOPE.

Where complainants had acquired the sole right to the use of the word "Chickering" in its secondary signification as a trade-name in the piano business, and were the successors in business of the original Chickering, while defendants, whose names were Chickering, were but grandsons of a brother of the original Chickering who started the piano business, neither of defendants' ancestors, nor any of the common ancestors of both parties, having had anything to do with the business, defendants were properly enjoined against advertising that they were the only Chickerings manufacturing pianos, or that the defendants' were the only pianos made by a Chickering.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. § 97.*]

7. TRADE-MARKS AND TRADE-NAMES (§ 85*)—PROTECTION—RIGHT TO EQUITABLE RELIEF.

Complainants' predecessors, who were solely entitled to the use of the name "Chickering" as a trade-name for pianos, though located in Massachusetts, incorporated in 1886 under the laws of New York because under the New York laws they could retain the firm name "Chickering & Sons" without words indicating incorporation. After the death of the last descendant of the original Chickering, a special charter was obtained in 1901 from the Massachusetts Legislature, not obtainable under the general corporation act, creating the Massachusetts corporation under the name "Chickering & Sons," but, notwithstanding such incorporation, complainants continued to use the expression "Messrs." Chickering & Sons, both before and after the sale of the business to the American Piano Company in 1908. *Held*, that none of such acts were so material to the public as to deprive complainants of their right to relief in equity against defendants' alleged infringement of the name.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 94; Dec. Dig. § 85.*]

8. TRADE-MARKS AND TRADE-NAMES (§ 85*)—INFRINGEMENT—RIGHT TO RELIEF.

Where the name "Chickering" as applied to pianos had acquired a signification apart from the origin of the goods indicating quality, and complainant American Piano Company succeeded to the exclusive right to the use of such name as a trade-name, its continuing to use the name "Chickering & Sons" on the fall board and name plate of pianos manufactured and sold by it after it had acquired the business of the Chickering corporation was not such a fraud on the public as would deprive it of the right to protect the name against infringement.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 94; Dec. Dig. § 85.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Christian C. Kohlsaat, Judge.

Suit by Chickering & Sons and another against Clifford C. Chickering and others. From a decree awarding a perpetual injunction and

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

an accounting of the profits in a suit for unlawful competition, defendants appeal. Modified and affirmed.

See, also, 198 Fed. 958.

Wm. D. McKenzie, of Chicago, Ill., for appellants.

Charles S. Holt, of Chicago, Ill., for appellees.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

MACK, Circuit Judge. This court, on January 6, 1903, affirmed the action of the Circuit Court in granting, on July 22, 1902, a temporary injunction to protect the complainant Chickering & Sons, a Massachusetts corporation, against the wrongful use of the name "Chickering," in and about the manufacture and sale of pianos by defendants Clifford C. and Fred W. Chickering, doing business in Chicago under the firm name of Chickering Brothers. The facts in the case, the relative rights of the parties, and the terms of the injunction are fully stated in the opinion then rendered by Judge Jenkins. Chickering v. Chickering & Sons, 120 Fed. 69, 56 C. C. A. 475. The legal principles there enunciated are confirmed by later decisions both of this and of the Supreme Court.

Thereafter, from time to time, depositions of witnesses were taken. In May, 1911, by supplemental bill, the American Piano Company, a corporation organized to acquire the business of several piano companies, and which, in July, 1908, had succeeded to the entire business of Chickering & Sons, except only the claim and cause of action involved in this suit, was made a co-complainant, and Wallace W. Chickering, who had joined his brothers as a member of the firm of Chickering Brothers in 1907, a codefendant. The supplemental bill set out numerous acts charged to be in violation both of complainants' rights and of the injunctional order of 1902. Thereupon, on January 2, 1912, the court extended the original preliminary injunction so as to bind Wallace W. Chickering and to protect the co-complainant, and in certain respects made it more specific. The case is now again before this court on appeal from the decree, entered after full hearing on April 15, 1913, in the District Court by Judge Kohlsaat, granting a perpetual injunction and referring the cause to a master in chancery for an account of profits.

This decree found that the name "Chickering," as applied to pianos, had long before the beginning of these proceedings come to designate the pianos manufactured by the complainants and their predecessors; that they had thereby acquired the exclusive right to manufacture and sell pianos by the designation of "Chickering pianos"; that the complainant Chickering & Sons is the owner of all rights in that behalf prior to July 12, 1908, and the complainant American Piano Company is such owner, by assignment and succession, since said date; that the defendants had wrongfully marked the pianos manufactured by them "Chickering Bros," in lettering similar to that used by the complainants, until the entry of the preliminary injunction; that since that date and pursuant to the injunction, the style of lettering had been changed, the use of a Maltese cross, found to be an imitation

of one awarded to and used by complainants, had been discontinued in their advertising and stationery and the words "Made by Chickering Brothers, Chicago," had been substituted for "Chickering Brothers" on the fall board of the piano, until the order of January 2, 1912, had found these changes not to be a sufficient compliance with the original injunction, and had required other changes. The court further found that the defendants had advertised their pianos, and knowingly allowed them to be advertised by dealers under the name of "Chickering Brothers Pianos" without marks or words to distinguish them from complainants'; that they had issued advertising matter containing references to their relationship to the Jonas Chickering family and to the former employment of Clifford and Fred in the Boston factory; that these statements were calculated to produce confusion of defendants' pianos with complainants'; that immediately after the death of the last male descendant of Jonas Chickering, defendants had marked their pianos, "The only piano made by a Chickering," and after the preliminary injunction of 1902 had forbidden this statement, they had substituted the statement, "The only Chickerings manufacturing pianos"; that defendants' acts have resulted in some actual purchases of defendants' pianos by persons misled into supposing them to be the genuine Chickering pianos, and in extensive confusion and uncertainty in the minds of the public as to the identity and relations between the Chickering piano and defendants' piano.

Thereupon the court perpetually enjoined defendants substantially as follows:

First. From using the word "Chickering" as the name or part of the name of a piano.

Second. From placing said word "Chickering" alone or in combination as aforesaid, on any piano not manufactured by the complainants; provided, however, that this order shall not prevent defendants from marking pianos of their manufacture with some other and different name which shall be the same for all pianos made by defendants, and adding thereto the words, "Made by Chickering Brothers, Chicago," which words "Chickering Brothers, Chicago," shall be of the same size and style; and such letters, relatively to the letters composing the name of the piano as aforesaid, shall not be larger or more conspicuous than the letters composing the words "Chickering Brothers, Chicago," as shown on the fac simile next below attached.

The Acoustigrande
MADE BY
Chickering Brothers
Chicago.

Third, fourth, and fifth. From using or authorizing the use of the word "Chickering," verbally or in writing, to the piano trade or piano purchasing public in reference to a piano other than complainants', without immediately accompanying it with a statement or distinct indication that the piano so referred to is not the original Chickering piano.

Sixth. From representing that there are two kinds of Chickering pianos, of which defendants' is one.

Seventh. (a) From representing that the defendants are members of or related to the Chickering family by whom the business of complainants was founded and carried on, or "the only Chickerings manufacturing pianos," or that the defendants' pianos are "the only pianos made by a Chickering," or any words of similar tenor or effect.

(b) From representing, without stating or otherwise distinctly indicating that defendants' pianos are not the original Chickering pianos: (1) That they were trained wholly or in part in the Chickering factory of complainants; or (2) that they have inherited or acquired, or have in any manner become possessed of, any portion or degree of the genius, skill, or ability of the founder of complainants' business and his descendants.

Eighth. From all acts calculated to create in the mind of any person of ordinary intelligence the belief or impression that the pianos manufactured by the defendants are Chickering pianos, or to create in the mind of such person confusion, doubt, or uncertainty as to whether defendants' pianos are or are not Chickering pianos.

Ninth. From in any wise attempting to make use of the good will and reputation of the Chickering piano, in putting out, selling, or offering for sale any piano not made by the complainants.

The basis of the appeal is: First, that defendants have not been guilty of unfair trade; second, that complainants did not come into court with clean hands.

[1] First. We deem it unnecessary to review the mass of evidence bearing on defendants' wrongful acts; in our judgment, it fully sustains the findings of fact. While it is urged on behalf of defendants that the specific instances of confusion resulting either from defendants' personal wrongdoing or that of dealers are few in number, extending over a long period of years, it is not controverted that both before and after this suit was begun, defendants' acts were such as to injure complainants in the enjoyment of their rights, and that unless restrained they would continue. Defendants' main reliance, in the matter of infringement, is on the contention that such confusion is only the natural result of the exercise by them of their undoubted legal right to the use of their own name. Whatever confusion to the public and injury to the complainants result from a lawful use by defendants of their own name in open, fair, and legitimate competition must be suffered; defendants, however, are responsible for the abuse of their right, for the unlawful use even of their own name, for any acts of unfair competition.

[2] A surname is not the subject-matter of a technical trade-mark. This is due to the fact that it cannot be a clearly distinguishing mark

on goods, inasmuch as any one bearing the name has a right to use it in connection with property of his manufacture. It may, however, by appropriation and actual exclusive use, in course of time come to denote, in the minds of the public, the product of some particular person or factory or business, and thus acquire a secondary signification. Such a secondary signification, when established, is the subject-matter of exclusive right; as Judge Baker said in Hanover Star Milling Co. v. Allen & Wheeler Co., 208 Fed. 513, 125 C. C. A. 515:

"If a dealer marks his shaving soap by the family name of 'Williams,' or his ale by the name of the village of 'Stone,' or his starch by the name of the hamlet of 'Glenfield,' his application of the name does not create its only meaning; but, if his trade creates a new meaning for the name, then he is entitled to just as full protection in the use of that meaning as if that were the only one. Others may use the common word in its common meaning, but they cannot use it in the particular meaning created by the complainant."

[3] In this case the proof is undisputed that in the course of the years before this suit was begun, Chickering pianos had come to mean the product of the business founded in 1823 by Jonas Chickering. Therefore, even though the defendants cannot properly be restrained from asserting, both in advertisement and on their product, that their piano is made by them, Chickering Brothers, they should be enjoined from asserting either that it is the "Chickering piano," or that there are two kinds of Chickering pianos of which theirs is one, because, to paraphrase the language of this court in Walter Baker & Co., Ltd., v. Slack, 130 Fed. 514, 65 C. C. A. 138 (a case cited with approval in Herring-Hall-Marvin Safe Co. v. Hall's Safe Co., 208 U. S. 554, 28 Sup. Ct. 350, 52 L. Ed. 616):

"In the market there were no two Chickering pianos, there was but one, and that was the product of Chickering & Sons."

In re Crosfield & Sons Application, 1910, 1 Ch. 130, Fletcher Moulton, L. J., said:

"It often occurs in trade that by continued use words get recognized as denoting the goods of a particular firm. These words may of themselves be unsuitable to be chosen as trade-marks, but they have, in fact, become so. Apart from the Trade-Mark Acts there would be nothing to prevent such words (as Yorkshire Relish or Worcester Sauce) becoming trade-marks in the eye of the law, and it was an obvious defect in the earlier legislation that it failed to give the benefits of registration to such marks when they had become duly established."

In Registrar of Trade-Marks v. W. & G. Du Cros, Ltd., 83 L. J. Ch. 1 (House of Lords 1913) Lord Parker said:

"Independent of any trade-mark legislation, whenever a person uses upon or in connection with his goods some mark which has become generally known to the trade or the public as his mark, and thus operates to distinguish his goods from the goods of other persons, he is entitled in equity to an injunction against the user of the same or any colorable imitation of the same which is in any manner calculated to deceive the trade or the public. Equity has never imposed any limitation on the kind of word entitled to this protection, but in every case it has to be proved that the mark has by user become in fact distinctive of the plaintiff's goods."

Under the present English trade-mark legislation, even a surname under exceptional circumstances, and subject to certain rights of oth-

ers having the same name, may be registered as a technical trade-mark. In re Teofani & Co.'s Trade-Mark, 82 L. J. Ch. 145; affirmed 82 L. J. Ch. 490 (1913).

The refusal of the English courts to enjoin E. G. Stanley Brinsmead from using his full name on the fall board of pianos at the suit to the old established house of John Brinsmead & Sons, Ltd., 29 Times Law Rep. 237, affirmed 29 Times Law Rep. 706 (1913), was due to the express finding that defendant had not been guilty of wrongdoing; that the form in which he placed his name on the fall board was conspicuously different from plaintiffs. While dealers had committed frauds in passing off defendant's for plaintiff's pianos, they had done this by telling deliberate falsehoods; defendant had not suggested or invited these wrongs by any act, and therefore was not responsible for them. The court said, however:

"If 'Brinsmead' had been in large characters, and 'E. G. S.' in characters which might be overlooked, that would have been a dishonest use of his own name. Another dishonest use would be if he had so printed it as to imitate the writing and manner in which the plaintiffs had put their name on their pianos."

In other words, because that defendant, unlike the Chickering Brothers, had done nothing at all to produce confusion or deception, except to use his own name in a very distinctive way, there was no occasion for the intervention of a court of equity to enjoin him from passing off his goods as those of another, and therefore, no need of determining just how such wrongful acts would be prevented with due regard to the rights of both parties.

In Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972, the court found that the defendant had not itself done anything to produce confusion, except to use the name "Remington" on its machines and in its literature. The decree enjoining the use of "Remington," even as part of the name Remington-Sholes, "denies," as the court says, "the right to use the personal name rather than aims to correct an abuse of that right. * * * The use of two distinct surnames (Remington-Sholes) clearly differentiated the machines of defendant from those of complainant. * * * And, in our view, defendant's name and trade-mark were not intended or likely to deceive, and there was nothing of substance shown in defendant's conduct in their use constituting unfair competition, or calling for the imposition of restrictions lest actionable injury might result, as may confessedly be done in a proper case."

The legal principles anounced in each of these cases, when applied to the totally different facts in the present case, far from sustaining defendants' contentions, as urged in their behalf, distinctly support the decree of the District Court. See, too, Royal Baking Powder Co. v. Royal, 122 Fed. 337, 58 C. C. A. 499; Williams Soap Co. v. J. B. Williams Soap Co, 193 Fed. 384, 113 C. C. A. 310; Donnell v. Safe Co., 208 U. S. 267, 28 Sup. Ct. 288, 52 L. Ed. 481; Elgin National Watch Co. v. Illinois Watch Co., 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365; Merriam v Saalfield, 198 Fed. 369, 117 C. C. A. 245; Baglin v. Cusenier Co., 221 U. S. 580, 31 Sup. Ct. 669, 55 L. Ed. 863;

Herring-Hall-Marvin Safe Co. v. Hall's Safe Co., 208 U. S. 554, 28 Sup. Ct. 350, 52 L. Ed. 616.

As to defendants' responsibility for the wrongful acts of dealers, the rule is well stated in Wolf Bros. & Co. v. Hamilton Brown Shoe Co., 206 Fed. 611, 617, 124 C. C. A. 409, 415:

"The appellee conceives that it has discharged its duty and obligation to the appellant, and to the public, if it has used means which would excuse it from the charge of having deceived its own customers. It says: 'We are not concerned with what the retailer does; we are concerned with how the Hamilton-Brown Shoe Company sells the shoes.'

"Such is not the law. If a manufacturer or wholesale dealer willfully puts up goods in such a way that the ultimate purchaser will be deceived into buying the goods of another, it is no defense that he does not deceive and has no intention of deceiving the retailer, to whom he himself sells the goods. The question is whether the defendants have or have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchaser."

See Moxie Co. v. Daoust, 206 Fed. 434, 124 C. C. A. 316.

The problem, therefore, is how best to conserve complainants' exclusive right to the "Chickering piano," defendants' right to state that their pianos are made by Chickering Brothers, and the public's right to protection from confusion and deception.

[4, 5] Ordinarily when a proper name has come to acquire a secondary signification, the relative rights of the parties are adjusted by compelling those lawfully entitled to use the name in its primary sense to accompany such use by some clear and positive statement negativing any connection between them and those having the exclusive right in the secondary signification of the name. Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. And so, in this case, the rights of the complainants could have been fully protected and deception of the public prevented by compelling the defendants to place, not hiddenly on the back or inside of the piano as they had done, but conspicuously on the fall board, in addition to the words "Chickering Brothers," some statement indicating that the piano was not the original Chickering. This plan would not, however, protect defendants because, as they urge, it would be utterly impossible for them, as a commercial proposition, to sell their product if any such statement were conspicuously displayed on the fall board, inasmuch as a piano is designed as well for ornament as for use. Here, as in the Prest-O-Lite Case, 215 Fed. 692, 131 C. C. A. 626 (see opinion of this court handed down to-day), some other and more practical method had therefore to be devised. Compelling the defendants to adopt one name for all of their pianos, to make the lettering of the words "Chickering Brothers" on the fall board relatively small as compared to this name, and to indicate that Chickering Brothers means the makers and not the piano itself, by using the phrase "Made by," accomplishes the result.

The requirement, to which defendants strenuously object that all of their product shall bear one name, was essential for the reason that, as the piano business has developed, some one name, ordinarily a surname, is used by every manufacturer to distinguish his product; the piano becomes known to the public by that name. If defendants were

permitted to use the word "Chickering" or "Chickering Brothers" on the fall board, unaccompanied by any other name and without the usually required express disclaimer of connection with complainants, their piano would inevitably be known as the "Chickering," and the confusion with complainants' piano would be, as it has been, unavoidable. The evidence in this case clearly shows that adding "Made By" and substituting "Brothers" for "& Sons" and "Chicago" for "Boston" are insufficient to prevent this. If, however, defendants were permitted to use more than one name, the several names would inevitably come to indicate to the public, not the name of Chickering Brothers piano, but the names of the several kinds or styles or grades of the Chickering piano. These several styles would certainly be called "Chickering's A, B, or C" piano. The District Court, in our judgment, has adopted, not only a perfectly reasonable, but perhaps the only available method of protecting both parties in the full enjoyment of their respective rights and at the same time preventing confusion and deception of the public.

[6] So, too, the absolute prohibition against the statement that defendants "are the only Chickerings manufacturing pianos," or that the defendants' "are the only pianos made by a Chickering," or that the defendants are members of or related to the Chickering family, by whom the business of complainants was founded, was, in our judgment, essential to the protection of the complainants' right. The defendants were very distant relatives of Jonas Chickering, grandsons of his brother; neither any of the defendants' ancestors nor any of the common ancestors of both parties had had anything to do with the piano business. All of the statements were but half truths; their only purpose was to give rise to the false inference that defendants, and not complainants, were, in fact, making the original Chickering piano, in succession to Jonas and his sons. "To convey that notion would be a fraud." Herring-Hall-Marvin Safe Co. v. Hall's Safe Co., supra.

[7] Second. Have complainants by their acts or omissions forfeited the right to protection in a court of equity? The alleged grounds of forfeiture are: First, incorporating in 1886 under the laws of New York, instead of Massachusetts, because the former alone permitted the retention of the firm name "Chickering & Sons" without words indicating incorporation, second, securing in 1901, after the death of the last descendant of Jonas Chickering, a special charter from the Massachusetts Legislature, not obtainable under the general incorporation act, creating the Massachusetts corporation "Chickering & Sons"; third, using the expression "Messrs. Chickering & Sons" in catalogues issued after 1901, both before and after the sale in 1908 to the American Piano Company; fourth, representing Chickering & Sons as the makers after the sale in 1908; fifth, concealment by the American Piano Company of its connection with the pianos sold.

Clearly, the members of the firm of Chickering & Sons were guilty of no wrong to the public generally or to any individual in following the common practice of incorporating under the firm name where this is legally permissible, or in exercising their rights as citizens of Massachusetts in obtaining a special charter, thereby preserving to a do-

mestic instead of to a foreign corporation the old established name. Whether a firm or corporation named Chickering & Sons made these pianos is really immaterial to the general public. In any event, there was no misrepresentation.

While "Messrs." would probably indicate a copartnership, yet it is not an uncommon and, technically, not an incorrect term as applied to a corporation, for, while a corporation is a legal entity, it is, for some purposes, only the aggregation of the stockholders. Moreover, as Mr. Justice Holmes said in Jacobs v. Beecham, 221 U. S. 263, 31 Sup. Ct. 555, 55 L. Ed. 729:

"These matters are small survivals from a time when they were literally true, and are far too insignificant when taken with the total character of the plaintiff's advertising to leave him a defenseless prey to the world."

So far, therefore, as the complainant Chickering & Sons is concerned, it has forfeited none of its rights to the injunction or accounting, either under the original or under the supplemental bill.

[8] The American Piano Company, it is claimed, is in a different position. Although a full announcement of its purchase of and succession to the Chickering, Knabe, and other piano concerns was made in advertisements in the daily and financial press and through circulars at the time of the transactions, it is urged that these were merely financial advertisements, intended for prospective stock buyers and piano dealers, not for the general, piano-purchasing public. To the answer that in newspaper advertisements of piano sales and in circulars sent to music schools the true situation was fully disclosed, defendants reply that in some magazine advertisements and catalogues "Chickering & Sons" were named as the makers or the sole makers, and that, in addition to the trade-name "Chickering" on the fall board, complainants retained the name "Chickering & Sons" on the name plate attached inside of the piano without in any way indicating the change of ownership.

The primary function of a trade-mark or trade-name is to indicate the origin of the goods to which it is attached; the manufacturer or dealer, not the grade or quality. A good article bearing such a mark gets a reputation for quality; in the minds of the public, certain goods come not only to be recognized as A.'s goods, but also to be distinguished from other makes by their excellence; then the trade mark or name becomes "both a sign of the quality of the article and an assurance to the public that it is the genuine product of his manufacture."

In course of time, however, a trade mark and name, because of the nature of the article to which it is attached, may acquire an additional or different significance; instead of pointing to the original manufacturer or his firm or corporation, the technical legal owner of the trade right, or to the factory in which the goods have always been made, it may come to indicate the business itself by whomsoever owned and managed and wheresoever located.

It the personality of the original maker remains the predominant characteristic of the trade mark or name, any suppression of a change in the business, any statement falsely indicating that he is still the manufacturer of the goods, would necessarily be a fraud on the public, and

would therefore in such a case cause a court of equity to refuse its aid to the guilty party. Manhattan Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706.

If, however, "the association of the name with the article indicates the place, or process or quality of manufacture" (Bauer v. Benedictine, 129 Fed. 74, 56 C. C. A. 480), if the trade-name has come to identify that combination of original skill and continuity in the process and quality of manufacture which create the good will of and give a stamp of individuality to the business itself, a court of equity will not fail to protect an assignee who affixes the trade mark or name to the product of the business, "although he gives no notice of the assignment or change of manufacturers." Layton Co. v. Church & Dwight Co., 182 Fed. 24, 104 C. C. A. 464.

In the early history of the Chickering business the name undoubtedly pointed to Jonas Chickering as the owner and maker of the pianos. In course of time, however, a Chickering piano has come to mean a product of the business founded by him. The proof is clear that, while the construction of the instrument, even of its most important element, the scale, has from time to time been improved, its general relative and absolute quality of excellence has been maintained. Despite successive changes in ownership and form, the Chickering business has retained its identity; the sons of Jonas became his associates and then his successors; others became associated with them, and together they created the New York and the Massachusetts corporations and held the stock therein; these associates were the founders of and are stockholders, as well as the principal officers and directors, of the American Piano Company; the Chickering factory is where it has been for over 50 years; the old manufacturing force, with employés in continuous service for periods in some instances exceeding 30 years, has held fast to its old traditions and processes despite changes in personnel and in methods; in a word, the Chickering & Sons division of the American Piano Company is the very business that was founded over 90 years ago by Jonas Chickering, and the "Chickering" is its piano.

The failure to state the fact of succession in each and every advertisement and letter until after the answer to the supplemental bill was filed, when, by resolution of the directors of the American Piano Company, this practice was prescribed, and the continuance of the name "Chickering & Sons" on the inside name plate in the piano, were, in our judgment, not designed or used by complainants to deceive the public and did not, in fact, tend toward any deception. We conclude, therefore, that defendants have no cause for complaining of the decree.

There is an apparent inconsistency, however, between the parts which we have marked (a) and (b 2) in the seventh paragraph of the decree. As defendants, for the reasons heretofore stated, are properly prohibited from referring to their kinship with the Jonas Chickering family, they should also be enjoined, not conditionally but absolutely, from making any statement that they or either of them have inherited or acquired or in any manner become possessed of any por-

tion or degree of the genius, skill, or ability of the founder of complainants' business or his descendants. Genius, skill, and ability are not transmissible to collateral relations.

Inasmuch, however, as the training received in complainants' factory may have stimulated or developed any native genius, skill, or ability which defendants possessed, it is not improper for them to refer to this, subject to the limitations imposed by the seventh, eighth, and ninth paragraphs of the decree.

To make the decree consistent, paragraph 7 should be recast so as to read as follows:

"Seventh. From making, using, publishing, circulating or authorizing any statement, oral, written or printed, in substance or purport that the defendants or either of them are members of or related to or have inherited or acquired from or in any manner become possessed of any portion or degree of the genius, skill, or ability of the founder of complainants' business or of his descendants, or that the defendants are 'the only Chickerings manufacturing pianos,' or that the defendants' pianos are 'the only pianos made by a Chickering,' or any words of similar tenor or effect. It is further ordered that the defendants or either of them shall not make, use, publish, circulate, or authorize any statement that they or either of them were trained wholly or in part in the Chickering factory of complainants, without stating or otherwise distinctly indicating that defendants' pianos are not the original Chickering pianos."

Free and fair competition with complainants, as with all other piano manufacturers, is open to defendants; theirs is the duty, however, to exercise care not to approach so near the boundaries of their rights as to fall into the open ditch of illegitimate trade. Reliance upon the intrinsic merits of an instrument that shall stand in the piano world as distinctively as a Steinway or a Weber, and an insistent struggle to profit, not from the confusing use of the name "Chickering," but from the reputation and name of their own product, must hereafter be the defendants' aim, if they would save themselves from impending dangers.

The decree as recast will be affirmed.

PIONEER MINING CO. v. TYBERG et al.

(Circuit Court of Appeals, Ninth Circuit. May 26, 1914.)

No. 2338.

1. TRUSTS (§ 95*)—CONSTRUCTIVE TRUSTS—PROPERTY ACQUIRED BY PROCEEDS OF LARCENY.

Where a thief has converted the stolen property into money or other property, a court of equity will impress a trust in invitum upon such money or property in favor of the beneficial owner so long as it has not passed into the hands of a bona fide holder for value without notice; fiduciary relations between the parties not being essential to the jurisdiction in such case.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 145–147; Dec. Dig. § 95.*]

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

2. TRUSTS (§ 95*)—CONSTRUCTIVE TRUSTS—PROCEEDS OF STOLEN PROPERTY.

Defendant was employed by plaintiff as foreman of a gang of men working plaintiff's gold mine and had the care and custody of its sluice boxes containing gold dust, nuggets, and amalgam. These contents he stole and converted into money and a bank draft which were found on his person when he was arrested for the larceny and passed into the custody of the court in which he was tried and convicted. *Held*, that defendant bore a trust relation to plaintiff with respect to the property in his charge and that plaintiff could maintain a suit in equity to enjoin payment of its proceeds to him and to declare and enforce a constructive trust thereon.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 145-147; Dec. Dig. § 95.*]

Appeal from the District Court of the United States for the Second Division of the District of Alaska; Cornelius D. Murnane, Judge.

Suit in equity by the Pioneer Mining Company against Johan Tyberg, alias Edwin Johanson, and John Sundback, as Clerk of the District Court for the Second Division of the District of Alaska. Judgment for defendants, and plaintiff appeals. Reversed.

O. D. Cochran and G. J. Lomen, both of Nome, Alaska, Metson, Drew & MacKenzie and E. H. Ryan, all of San Francisco, Cal., for appellant.

O. L. Willett and Frank Oleson, both of Seattle, Wash., George B. Grigsby, of Nome, Alaska, and Berkeley B. Blake, of San Francisco, Cal., for appellees.

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

ROSS, Circuit Judge. This is an appeal from the judgment of the court below dismissing the suit brought therein by the appellant for the establishment and enforcement of a constructive trust in respect to certain money in the hands of the clerk of the court, and for an injunction pendente lite as well as final, and from a final order denying an injunction and discharging the temporary restraining order that had been issued. The court, however, did enter an order directing that the property in controversy remain in the hands of the clerk of the court until its further order, upon the execution on the part of the plaintiff of a supersedeas bond in an amount fixed by the court.

The judgment was entered upon the refusal of the plaintiff in the suit to further amend its complaint after the sustaining of a general demurrer thereto filed by the defendant Tyberg, the appellee here.

The amended complaint, after setting out the corporate capacity of the plaintiff and the official position of the defendant Sundback, alleged in substance that the defendant Tyberg, alias Edwin Johanson, was, during the month of July, 1910, in the employ of the plaintiff company as foreman of the night shift in mining certain specified property of the plaintiff company, situated in the Cape Nome mining district, Alaska, upon which property were certain sluice boxes, with gold dust, nuggets, and amalgam therein, all of which was the property of the plaintiff company; that, as such foreman and employé of the plaintiff,

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

Tyberg had the care and custody of the said sluice boxes, gold dust, nuggets, and amalgam; and that it was then and there his duty to protect and safeguard the same, and not to remove from the sluice boxes or permit to be removed therefrom the said gold dust, nuggets, or amalgam, notwithstanding which he did, on or about the day mentioned, wrongfully and unlawfully, and without the leave or consent of the plaintiff company, take and carry away from the said sluice boxes the said gold dust, nuggets, and amalgam, to the value of more than $15,000, and concealed the same from the plaintiff, and converted the same to his own use; that thereafter, and in the month of September, 1910, the said Tyberg, after having retorted the amalgam, proceeded to the city of Seattle, in the state of Washington, and there sold to the United States assay officer in that city the said gold dust, nuggets, and amalgam so retorted, receiving therefor a certificate representing its value in the sum of $14,345.02; that thereafter and in the same month the said Tyberg presented the said certificate to the Union Savings & Trust Company for payment and received in payment thereof $5,345.02 in cash and a draft drawn by the said Union Savings & Trust Company on the First National Bank of Portland, Or., in the sum of $9,000, payable to his said alias, Edwin Johanson, or order; that thereafter, and in the same month of September, the said Tyberg was arrested by a deputy United States marshal in the city of Seattle, charged with the larceny of the said gold dust, nuggets, and amalgam, and that the said $5,345.02 in money, and the said draft, the proceeds of the gold dust, nuggets, and amalgam, were found by the marshal in the possession of the defendant Tyberg, and were by the marshal seized as the proceeds of the said stolen property and as such proceeds were transmitted and delivered to the defendant Sundback as clerk of the said court; that thereafter the said clerk caused the said draft so received by him to be cashed, and received in payment thereof the sum of $9,000, its face value, and has ever since had in his possession, as such clerk, the said proceeds, in the aggregate sum of $14,345.02, "and has held the same for and on account of the case of the United States against said Johan Tyberg now adjudicated in said court, and should now hold the same on account of this action"; that the said defendant Tyberg is insolvent and is not now an inhabitant of the district of Alaska, and that the defendant Sundback neither has nor claims any interest in the said proceeds, except as a mere depositary thereof for the use and benefit of the true owner, and holds the same subject to the orders and directions of the said court, and not otherwise; that the defendant Tyberg has by motion requested the said court to return to him the money so in the hands of the said clerk, and unless restrained from so doing he will demand and claim the said proceeds from the said clerk; that by reason of the premises there is due and owing from the said defendant Tyberg to the plaintiff the said sum of $14,345.02, for which he should be made to account, and that a constructive trust has attached thereto in favor of the plaintiff, and that a lien thereon to the extent stated should be declared in favor of the plaintiff, and a decree in its favor therefor entered. The prayer is for such decree, injunctive and general relief, and for costs.

It is contended on behalf of the appellee that the appeal should have been taken to the Supreme Court by virtue of those provisions of the "Compiled Laws of the Territory of Alaska" which provide as follows:

"Sec. 1336. Appeals and writs of error may be taken and prosecuted from final judgments and decrees of the District Court for the District of Alaska or for any division thereof, direct to the Supreme Court of the United States, in the following cases: * * * In all cases which involve the construction or application of the Constitution of the United States. * * *

"Sec. 1337. In all cases other than those in which a writ of error or appeal will lie direct to the Supreme Court of the United States as provided in section thirteen hundred and thirty-six, * * * writs of error and appeals shall lie from the District Court for Alaska or from any division thereof, to the Circuit Court of Appeals for the Ninth Circuit: * * *"

It is sufficient to say concerning that contention that the proper disposition of the case in no way involves the construction or application of any provision of the Constitution of the United States.

[1] It is further insisted on the part of the appellee that the defendant Tyberg sustained no trust relation to the plaintiff company, and for that reason that the case was not within the jurisdiction of a court of equity.

In the case of Ætna Indemnity Company of Hartford, Conn., v. Malone, 89 Neb. 260, 131 N. W. 200, it was held that, in a suit to declare and enforce a constructive trust with respect to stolen property, fiduciary relations between the parties are not essential to the jurisdiction of a court of equity, but that such a court may enjoin a police officer from transferring money taken by him from burglars who procured it by robbing a bank, and may restore it to the owner thereof; the court saying, among other things:

"The first proposition argued by defendants relates to the nature of the case. Is it a suit in equity or an action at law? It was heard below without a jury, over the objection of defendants, and this is urged as error. The main purpose of the litigation, as shown by the petition, was to trace the stolen fund through the burglars into the hands of the police officers and restore it to the owner. It is alleged that the burglars are insolvent. The recovery of a judgment against them was consequently a secondary matter. They had in their possession only a portion of the amount stolen, when searched, and as to that plaintiff was seeking redress by enjoining the policemen from transferring it to others and by establishing a constructive trust. In the petition there was no attempt to describe the particular denominations of money taken from the bank or found in the hands of the burglars or the police officers. There had been opportunity to change the currency into different items. Defendants were no less accountable because their possession grew out of a felony. Confidential relations are not essential to the jurisdiction of a court of equity to declare and enforce a trust with respect to stolen property. It may be traced through the thief into a different form of property and restored to the beneficial owner. In contriving means to cheat an owner out of his property a thief should not be permitted to outstrip the courts in discovering a remedy to restore it when found. Nebraska Nat. Bank v. Johnson, 51 Neb. 546, 71 N. W. 294; Newton v. Porter, 5 Lans. (N. Y.) 416."

In the case of Newton v. Porter et al., 69 N. Y. 133, 25 Am. Rep. 152, the Court of Appeals of that state held that the owner of negotiable securities stolen and afterwards sold by the thief may follow and claim the proceeds in the hands of the felonious taker, or of his assignee with notice; and that the right continues and attaches to any securities or property in which the proceeds are invested, so long as they can be

traced and identified and the rights of a bona fide purchaser do not intervene. The court, after referring to the well-settled equitable doctrine that when a person standing in a fiduciary relation misapplies or converts a trust fund into another species of property the beneficiary will be entitled to the property thus acquired, said:

"It is insisted by the counsel for the defendants that the doctrine which subjects property acquired by the fraudulent misuse of trust moneys by a trustee to the influence of the trust, and converts it into trust property and the wrongdoer into a trustee at the election of the beneficiary, has no application to a case where money or property acquired by felony has been converted into other property. There is, it is said, in such cases, no trust relation between the owner of the stolen property and the thief, and the law will not imply one for the purpose of subjecting the avails of the stolen property to the claim of the owner. It would seem to be an anomaly in the law, if the owner who has been deprived of his property by a larceny should be less favorably situated in a court of equity, in respect to his remedy to recover it, or the property into which it had been converted, than one who, by an abuse of trust, has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided. The law in such a case will raise a trust in invitum out of the transaction, for the very purpose of subjecting the substituted property to the purposes of indemnity and recompense. 'One of the most common cases,' remarks Judge Story, 'in which a court of equity acts upon the ground of implied trusts in invitum, is when a party receives money which he cannot conscientiously withhold from another party.' Sto. Eq. Juris. § 1255. And he states it to be a general principle that 'whenever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the original owner, or the cestui que trust.' Section 1258. See, also, Hill on Trustees, p. 222. We are of opinion that the absence of the conventional relation of trustee and cestui que trust between the plaintiff and the Warners is no obstacle to giving the plaintiff the benefit of the notes and mortgage, or the proceeds in part of the stolen bonds. See Bank of America v. Pollock, 4 Edw. Ch. (N. Y.) 215."

In the case of Lightfoot v. Davis, 198 N. Y. 261, 91 N. E. 582, 29 L. R. A. (N. S.) 119, 139 Am. St. Rep. 817, 19 Ann. Cas. 747, the same court held that the owner of bonds which were stolen could maintain an action in equity commenced upon the discovery of the identity of the thief against his estate for the amount of the bonds and interest thereon from the time of the theft, saying, among other things, that:

"The method by which equity proceeds in all these cases is to turn the wrongdoer into a trustee."

In 3 Pomeroy's Equity Jurisprudence, § 1051, it is said:

"A constructive trust arises whenever another's property has been wrongfully appropriated and converted into a different form. If one person having money or any kind of property belonging to another in his hands wrongfully uses it for the purchase of lands, taking the title in his own name; or if a trustee or other fiduciary person wrongfully converts the trust fund into a different species of property, taking to himself the title; or if an agent or bailee wrongfully disposes of his principal's securities, and with the proceeds purchases other securities in his own name—in these and all similar cases equity impresses a constructive trust upon the new form or species of property, not only while it is in the hands of the original wrongdoer, but as long as it can be followed and identified in whosesoever hands it may come, except into those of a bona fide purchaser for value and without notice, and the court will enforce the constructive trust for the benefit of the beneficial owner or original cestui que trust who has thus been defrauded. * * * Whenever one person has wrongfully taken the property of another, and converted it

into a new form, or transferred it, the trust arises and follows the property or its proceeds."

And further, in section 1053, it is said:

"In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed ex maleficio or ex delicto, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer."

[2] Under the averments of the amended bill in the present case, however, we think Tyberg did sustain a trust relation to the plaintiff company. To his care and custody the company committed its sluice boxes containing its gold dust, nuggets, and amalgam, all of which Tyberg as foreman of the night shift undertook to safeguard and protect. Instead of observing and executing that trust, he became himself the thief of the trust property. There is no magic in the mere name of a thing or act; but we find in the Century Dictionary this definition of the word "trustee":

"A person to whom property or funds have been committed in the belief and trust that he will hold and apply the same for the benefit of those who are entitled, according to an expressed intention, either by the parties themselves, or by the deed, will, settlement, or arrangement of another; also, by extension, a person held accountable as if he were expressly a trustee in law."

The foreman of a gang of men is certainly properly accountable for that which was committed to his care and custody, and which the duty he undertook required him to safeguard and protect. The facts averred distinctly show not only that the trust property could be followed, but that it actually was followed and its proceeds found, in cash and in a draft, on the person of the foreman, and that it subsequently passed into the custody of the law, where the draft also was converted into money and where the whole of the proceeds of the trust property still remain. Surely there ought to be no rule of equity why, if the facts be as alleged and as are to be here taken as true, a court of equity should not restore such proceeds to the rightful owner.

In the case of Nebraska National Bank v. Johnson et al., 51 Neb. 546, 71 N. W. 294, the defendant to the bill, which was brought by the Nebraska National Bank, had been employed by the bank as a janitor, "his duties being, for a fixed compensation, to sweep the bank's offices, to arrange and care for the furniture therein, and, while in the discharge of his said duties to watch over, safeguard, and preserve, to the extent of his ability, all property of the bank, including moneys, notes, and papers." While so employed, he appropriated certain of the bank's money and invested it in certain real estate upon which the bank sought

by its bill to impose a constructive trust, which suit the Supreme Court of Nebraska sustained. After disposing of a question in respect to the quantum of proof required in such a case, the court proceeded and held as follows:

"The other questions discussed are: (1) Whether the relation of the parties towards each other was a fiduciary one, in the sense in which that term is understood and employed by courts of equity; (2) whether assuming, as claimed, that the evidence fails to establish any such relation of trust and confidence, will equity interfere for the purpose of declaring, in favor of the injured party, a trust with respect to property purchased by a thief, with the fruits of his larceny? The propositions implied from the foregoing inquiries, although separately treated by counsel for defendants, are in fact so nearly akin that they may with propriety be discussed together. It has been held that no trust results in favor of the owner with respect to the proceeds of property stolen by a mere servant, and that the master is in such case restricted in his remedy to an action for damage, and to a prosecution of the thief in a court of criminal jurisdiction. A review of the cases tending to support that view will not be attempted in this connection. It is sufficient that the doctrine therein asserted is, in our judgment, indefensible on authority, and opposed to the enlightened policy of modern equity jurisprudence. The doctrine of constructive trusts, as developed by courts of equity, was intended primarily as a remedy for fraud in cases where the established rules had proved wholly inadequate; and larceny, under the circumstances here disclosed, is none the less a fraud upon the owner of the property stolen because committed by a servant, instead of one who is, in the technical sense of the term, a trustee. Speaking on that subject, it is said in a recent valuable work that: 'The subject of constructive trusts is intimately connected with that of frauds. Indeed, the basis of all such trusts is fraud, either actual or presumed. Rightly understood, a constructive trust is only a mode by which courts of equity work out equity, and prevent or circumvent fraud and overreaching. There are therefore two well-defined classes of constructive trusts, corresponding with the two classes of fraud, viz.: (1) Those which are raised in cases of actual fraud; and (2) those raised in cases of presumed or constructive fraud. Those of the first class are commonly called "trusts ex maleficio."' 1 Beach, Mod. Eq. Jur. § 226. And in Fetter, Eq. (1895) 187, the rule is thus formulated: 'When on the grounds of justice and good conscience, without reference to the intention of the parties, equity considers the holder of the legal estate to be not entitled to enjoy the equitable or beneficial interest, it treats him as a trustee.' See, also, 3 Pom. Eq. Jur. § 1053."

In the case of Borchert v. Borchert, 132 Wis. 593, 113 N. W. 35, the Supreme Court of Wisconsin, speaking upon the subject of constructive trusts, said:

"An action lies to establish a constructive trust and to recover the subject thereof where the property wrongfully obtained in specie, or in its converted form, still remains in the possession of the wrongdoer. Three: In case of a constructive trust an action lies in equity for its establishment and for an accounting even though the property wrongfully obtained is personal and in specie or in some new form into which it can be definitely traced, is within the reach of a plain remedy at law where it is necessary in order to obtain complete justice for equity jurisdiction to deal with the situation. 3 Pom. Eq. Jur. 1053. This court quite recently held that the better rule is that the cestui que trust may always sue in equity for an accounting. Harrigan v. Gilchrist, 121 Wis. 252, 99 N. W. 909. He may certainly do so where there are special circumstances which in the judgment of the court render equity jurisdiction competent to afford a more efficient remedy than can be obtained at law."

Nor do we think that the fact that the amended bill shows that the appellee Tyberg was charged with the larceny of the appellant com-

pany's property, and that that criminal charge was "adjudicated" in the court below, in any way affects the right of the company to pursue its civil remedy.

The case of Williams v. Dickenson, 28 Fla. 90, 9 South. 847, was a civil action brought to recover damages for the alleged burning of a certain building and fixtures through the alleged criminal act of the defendant to the action, and in which civil action the defendant, among other things, pleaded in abatement of it:

"That the cause of action set forth in plaintiff's declaration is a tort which amounts to a felony, and the defendant has been indicted therefor in the circuit court of Jackson county, and said indictment is still pending and no trial has been had thereof; wherefore defendant prays that said suit be abated."

The trial court having sustained the plaintiff's demurrer to the plea, the ruling came before the Supreme Court of Florida, where that court said:

"This plea seeks to invoke the doctrine held in the English courts—that where a private individual has been damaged in person or property by the tortious act of another, which act amounts to a felony, the matter should be disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offense, before the injured individual can seek civil redress for the private wrong inflicted upon him; the redress of the private wrong being postponed until after the public justice is satisfied. Two reasons for this rule are assigned in England: First. The party injured is relied upon to take the place of public prosecutor. In some cases he has even been required to employ counsel to prosecute on behalf of the crown, and his interest in the accomplishment of public justice is kept alive by postponing the redress of his private grievance. And second, in cases of felony, there was a forfeiture to the crown of the felon's property, and the private individual was not allowed to acquire priority over the crown in satisfaction of his demands upon the property of the felon. But in this country this doctrine of the suspension of the civil remedy in cases of felony has been repudiated by the great weight of the American authorities. Under the system of laws prevailing in the United States the reasons for this rule are entirely absent. Here we have a public officer whose duty it is to prosecute all offenders against the state without reliance upon the injured individual; and here we have no forfeiture of the felon's goods. The civil and the criminal prosecution may therefore go on pari passu, or the one may precede or succeed the other; or, if the criminal prosecution is never commenced at all, the failure to seek public justice is no bar to the private remedy. Neither is an acquittal or conviction upon the criminal charge any bar to the civil action. Cooley, Torts, 86 et seq; Pettingill v. Rideout, 6 N. H. 454 [25 Am. Dec. 473]; Blassingame v. Glaves, 6 B. Mon. [Ky.] 38; Railroad Corp. v. Dana, 1 Gray [Mass.] 83; Howk v. Minnick, 19 Ohio St. 462 [2 Am. Rep. 413]; Newell v. Cowan, 30 Miss. 492. The court below properly sustained the demurrer to the defendant's plea in abatement."

We are further of the opinion that the law did not afford the appellant a full, plain, and adequate remedy. It is expressly conceded in the brief of counsel for the appellee Tyberg that the proceeds of the stolen property, being in the custody of the court, were not subject to legal process; they there saying:

"The authorities are unanimous that property in custodia legis is not subject to legal process."

We think there is nothing in the case of United States v Bitter Root Co., 200 U. S. 451, 26 Sup. Ct. 318, 50 L Ed. 550, relied on by the appellee Tyberg, in conflict with what we here hold. There there was

no trust relation between the government and the Bitter Root Company concerning any of the timber wrongfully cut or disposed of, nor, as was expressly stated by the Supreme Court in that case, was there any pretense "that any specific piece of property was in fact either the same timber or the proceeds of the timber wrongfully cut and disposed of by the defendants, or any of them." But in the case just cited, as well as in that of Angle v. Chicago, St. Paul, etc., Ry. Co., 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55, the court referred with approval to the familiar doctrine that a party who acquires title to property wrongfully may be adjudged a trustee ex maleficio in respect to that property.

Such, in our opinion, is clearly the position of the appellee Tyberg under the allegations of fact contained in the amended complaint. And as the proceeds of the stolen property here involved were accurately and clearly traced and found in the possession of the thief, and passed from his possession into the custody of the law, we regard it as clear that it is not only within the power, but that it is the duty of a court of equity, should the facts prove to be as alleged, to award the owner of the stolen property the proceeds thereof.

In view of what has been said, it becomes unnecessary to further discuss matters embraced by the motions interposed on the part of the appellee.

The judgment and order dissolving the restraining order are reversed, and the cause remanded to the court below, with instructions to reinstate the restraining order and for further proceedings in accordance with this opinion.

BOTSFORD v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. May 15, 1914.)

No. 2446.

1. POST OFFICE (§ 48*)—OFFENSES AGAINST POSTAL LAWS—MAILING NON-MAILABLE MATTER.

Pen. Code, §§ 211, 212 (Act March 4, 1909, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, pp. 1651, 1652]), the former of which declares non-mailable every obscene, lewd, or lascivious picture, paper, or other publication of an indecent character and the latter "all matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which," any similar or libelous language or matter may be written or printed, are together designed to exclude from the mails all matter of such character, whether concealed from view by a non-offending cover or wrapper or displayed on a cover or wrapper. Such being the purpose of the statute, section 212 cannot be limited to include only an outside cover or wrapper inclosing mailable matter, but if the cover carries the objectionable matter, it is nonmailable whatever may be its contents, and separate counts in an indictment, charging with respect to the same package a violation of both sections, are not repugnant.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. § 48.*

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

2. CRIMINAL LAW (§ 1186*)—APPEAL AND ERROR—REVIEW—INDICTMENT CONTAINING SEVERAL COUNTS.

A general conviction and judgment cannot be reversed on error, where one of the counts or sets of counts in the indictment is good and warrants the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.*]

3. POST OFFICE (§ 50*)—CRIMINAL PROSECUTION FOR MAILING NONMAILABLE MATTER—QUESTIONS FOR JURY.

In a criminal prosecution for violation of Pen. Code, § 211 (Act March 4, 1909, c. 321, 35 Stat. 1129 [U. S. Comp. St. Supp. 1911, p. 1651]), the question whether the matter contained in a newspaper mailed by defendant was obscene, lewd, lascivious, or indecedent *held* properly submitted to the jury by instructions which were free from prejudicial error.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87-89; Dec. Dig. § 50.*]

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; John E. Sater, Judge.

Criminal prosecution by the United States against Allen Botsford. From a judgment of conviction, defendant brings error. Affirmed.

M. J. Heintz and Theodore Horstman, both of Cincinnati, Ohio, for plaintiff in error.

S. T. McPherson and E. P. Moulinier, both of Cincinnati, Ohio, for the United States.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. [1] Defendant below prosecutes error to a conviction and judgment rendered under an indictment, comprising 22

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

counts, charging him with violations of sections 211 and 212 of the United States Penal Code through wrongful use of the mails. The charges in substance were that he caused to be deposited in the Cincinnati post office, for mailing and delivery, certain nonmailable matter, to wit, 11 copies of a paper called "The Owl," dated Cincinnati, Ohio, July 27, 1912, each of which bore on its first page the name and address of the person to whom it was to be delivered. The publication, as respects each copy of the paper, was described in character and intent in two separate counts. A portion of the publication appeared on the first page, and the rest on the second page (i. e., inside) of the paper. The even-numbered counts relate to the whole publication, and the odd-numbered counts only to the part imposed on the first page; the former alleging offenses under section 211, and the latter under section 212. Concededly none of the copies of The Owl so mailed was inclosed within an envelope or wrapper. It is insisted by counsel for the prosecution that the first and last pages of the paper (comprising eight pages) constituted an "outside cover" within the meaning of section 212, and that the portion appearing on the first page was violative of that section. Counsel for defendant contest this, and urge that section 212 does not apply to an outside cover, or even to an envelope or wrapper, no matter what is displayed upon it, unless it incloses mailable matter; and, since the whole publication—that is, the part so appearing on the inside of the paper, as well as that on the outside—was alleged in the even-numbered counts to be nonmailable under section 211, one of two results followed: Either no offense was committed under the odd-numbered counts, or the odd and even series of counts were repugnant. Upon the claim of repugnancy the defendant moved, both before and after the evidence was introduced, that the government be required to elect upon which set of counts it would rely, the even-numbered or the odd-numbered. The motion so repeated was denied; and it is earnestly contended that this was error.

It is important now to have in mind the language of sections 211 and 212, and the relevant portions are quoted in the margin.[1] Counsel's theory of repugnancy is in effect that the publication was made to perform double service, which was self-contradictory; because, conceding for the sake of argument that the first and last pages constituted an "outside cover," the portion of the publication carried on the inside of the paper could not be both nonmailable under section 211 and

[1] Sec. 211: "Every obscene, lewd, or lascivious * * * picture, paper * * * or other publication of an indecent character * * * is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. * * *"

Sec. 212: "All matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal card upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another, may be written or printed or otherwise impressed or apparent, are hereby declared nonmailable matter, and shall not be conveyed in the mails nor delivered from any post office nor by any letter carrier, and shall be withdrawn from the mails under such regulations as the Postmaster General shall prescribe. * * *"

mailable under section 212. This is based upon counsel's view, as stated, that whatever may be displayed upon an outside cover it is not prohibited by section 212, unless the inside matter is "otherwise mailable by law." But if this view cannot be sustained, the claim of repugnancy cannot. Concededly sections 211 and 212 were intended to define distinct offenses. Broadly considered, and apart from mere definition of what is designed to be excluded from the mails, the first relates to forbidden matter which may or may not be concealed from view by any sort of nonoffending inclosure, and the second to forbidden matter displayed on an "envelope or outside cover or wrapper * * * or any postal card"; stated in another way, the one class of offenses may be said to be of a general nature and the other specific, as respects the mails, and the most obvious legislative purpose to be deduced from the language employed is that the two classes shall be treated as alike independent of each other and consistent. This will be more readily seen, we think, in the brief history of the legislation, appearing below.[2] From 1872 to 1888 the mailable character of envelopes was tested by what they displayed and not by what they contained. The reasons for this are apparent. It was not necessary to open and examine letters in order to ascertain whether the envelopes were mailable or not. Forbidden contents of a plain and sealed envelope were not easily detected; but this was not so as to evils arising from exposure of matter upon envelopes and other inclosures used in the mails. So in June, 1888, further legislation against this latter abuse was passed, embracing the "outside cover or wrapper" as well as the envelope, and defining as nonmailable and denouncing with penalties objectionable matter exposed thereon. This was done by separate act, commencing with the words "All matter otherwise mailable by law." We are disposed to believe that these words were used merely as a precautionary

[2] The first enactment upon this subject was passed in 1865 (13 Stat. 507, § 16), but envelopes or the like were not mentioned. In 1872, exposure of certain matter upon envelopes, but without regard to the mailable character of their contents, and also upon postal cards, was for the first time prohibited (17 Stat. 302, § 148): "That no obscene book, pamphlet, picture, print, or other publication of a vulgar or indecent character, or any letter upon the envelope of which, or postal card upon which scurrilous epithets may have been written or printed, or disloyal devices printed or engraved, shall be carried in the mail. * * *"

Section 148 was amended March 3, 1873 (17 Stat. 599); and on June 22, 1874, the section seems to have been carried into the revision as section 3893 (Rev. Stat. [2d Ed.] p. 758 [U. S. Comp. St. 1901, p. 2658]); but no change was at either of these dates made in respect to envelopes or postal cards. The next legislation of present importance was passed June 18, 1888, when the words "otherwise mailable by law" and "outside cover or wrapper" first appeared (25 Stat. 188): "And all matter otherwise mailable by law upon the envelope or outside cover or wrapper of which, or postal card, upon which indecent, lewd, lascivious, obscene, libelous, scurrilous, or threatening delineations, epithets, terms, or language, or reflecting injuriously upon the character or conduct of another, may be written or printed, are hereby declared to be nonmailable matter. * * *"

This act was amended September 26, 1888, and changed to the same form practically as that of section 212 of the present Penal Code (Id., p. 496), and section 3893 was at the same time amended so as to exclude its previous language concerning envelopes and postal cards (Id.); the section has since been enlarged, but in no respects material to the present case. See section 211, Penal Code.

measure against an interpretation that the inclusion of mailable, instead of nonmailable, matter within a forbidden envelope or the like, would escape the law. There was no more reason for Congress to concern itself about the contents of envelopes or outside covers or wrappers after this change in legislation than there was before.. Provision had been made by section 3893 against nonmailable matter concealed within an envelope, and this was in effect continued in the section after the exclusion therefrom of envelopes, and, indeed, is still maintained in section 211; it was therefore unnecessary to repeat the provision when seeking to remedy another and distinct evil by prohibiting the display of objectionable matter upon the "envelope or outside cover or wrapper," but since this display could be made regardless of the mailable character of the contents, it might well have been deemed necessary to denounce such display, even though the contents were mailable. If the words employed had been, "though otherwise mailable," the intent to make the display an offense, whether the contents were mailable or not, would have been indisputable; but it is not necessary to add the word "though"—mere emphasis of the word "otherwise" will fairly disclose the same intent, and, indeed, in the light of the history of this legislation, any ordinary and attentive reading of the words "otherwise mailable" leads to the same end. This derives support from the obvious intent disclosed by the use of the term "postal card," with which the words "envelope or outside cover or wrapper" are associated. Every law must be given a sensible construction (United States v. Kirby, 74 U. S. [7 Wall.] 482, 486, 19 L. Ed. 278); and it is unreasonable to suppose that inclosed matter, whether harmless or offensive, would be regarded as mailable in a forbidden envelope, outside cover or wrapper. Further, if the words "otherwise mailable" are to be narrowly interpreted, the object of section 212, except as to postal cards, could be wholly defeated simply by placing nonmailable matter within an envelope, outside cover or wrapper of the most objectionable character; and so the evils evidently sought to be remedied by the section might, at least so far as it is concerned, be practiced with impunity. It is not conceivable that this could have been the intention of Congress, for such an interpretation would at once reduce the law to absurdity and frustrate it; and this was never the office of interpretation. True, we are considering a criminal act, and the rule of strict construction applies; but as the present Mr. Chief Justice White said in United States v. Corbett, 215 U. S. 233, 242, 30 Sup. Ct. 81, 84 (54 L. Ed. 173):

"The rule of strict construction does not require that the narrowest technical meaning be given to the words employed in a criminal statute in disregard of their context and in frustration of the obvious legislative intent."

In Pickett v. United States, 216 U. S. 456, 461, 30 Sup. Ct. 265, 267 (54 L. Ed. 566), Mr. Justice Lurton expressed the rule in this language:

"The reason of the law, as indicated by its general terms, should prevail over its letter, when the plain purpose of the act will be defeated by strict adherence to its verbiage."

In Glickstein v. United States, 222 U. S. 139, 32 Sup. Ct. 71, 56 L. Ed. 128, it was held that the immunity given by subdivision 9 of section 7 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 548 [U.

S. Comp. St. 1901, p. 3424]) was not applicable to a prosecution for perjury committed by the bankrupt when examined under it. That provision requires the bankrupt to submit to examination concerning his business, the cause of his bankruptcy, the character of his property and its whereabouts, and the like; but it is further provided that "no testimony given by him * * * shall be offered in evidence against him in any criminal proceeding." It was contended that since the immunity provision was couched in unambiguous words, the command to give testimony could not be so construed as to render such testimony admissible in a criminal prosecution for perjury; but, said Mr. Chief Justice White (222 U. S. 143, 32 Sup. Ct. 73, 56 L. Ed. 128):

"* * * It is impossible in reason to conceive that Congress commanded the giving of testimony, and at the same time intended that false testimony might be given with impunity in the absence of the most express and specific command to that effect."

This court had occasion to apply the rule in Daniels v. United States, 196 Fed. 459, 116 C. C. A. 233. See, also, Lau Ow Bew v. United States, 144 U. S. 47, 56, 57, 12 Sup. Ct. 517, 36 L. Ed. 340; United States v. Hogg, 112 Fed. 909, 912, 50 C. C. A. 608 (C. C. A. 6th Cir.). Apt and convincing illustration of the rule thus pointed out appears in Holy Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, where the church had made a contract with a rector, an alien residing in England, according to which he was to remove to New York and enter into the service of the church. He complied with his contract, and a fine was imposed upon the church. The question was whether the act to prohibit the importation of an alien, under contract, "to perform labor or service of any kind in the United States" had been violated. Mr. Justice Brewer, in reversing the judgment, said (143 U. S. 458, 12 Sup. Ct. 511, 36 L. Ed. 226):

"It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other."

In speaking of the argument of the court below, the learned justice said (143 U. S. 459, 12 Sup. Ct. 512, 36 L. Ed. 226):

"While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

It follows that the motion to elect was rightly denied both before and after the introduction of evidence; and it may be added that the record itself shows that repugnancy could not have entered into the verdict. Assuming for the sake of the question that the words "otherwise mailable" would bear the interpretation that defendant's counsel claim,

the most that could be urged would be that the court erred in failing to instruct the jury that if the inside matter was nonmailable, a verdict of acquittal should be returned upon the odd counts (section 212). Those counts are in terms aimed alone at the matter impressed upon the first page, and not against anything contained on the second page. The charge of the court respecting these counts was, however, extended to a consideration of (1) the matter "appearing on each page," that is, the first and second pages, and (2) the question whether the first and last pages constituted an outside cover. Except as it may be implied in the motion to elect, no request was made to instruct the jury that it could not convict on the odd counts unless the matter appearing on the second page was mailable, and no instruction to that effect was given; but the charge did include an instruction that if the language "appearing on each page is scurrilous," etc., it fell "within the ban of the law." It, therefore, cannot rightfully be affirmed that the verdict upon the odd counts amounted to a finding that the inside matter was mailable; on the contrary, the conclusion is inevitable that the jury found the inside matter to be nonmailable. It obviously results, upon defendant's interpretation of section 212, that so far as the odd counts are concerned, error entered into the verdict, but not repugnancy.

[2] The only other question arising under section 212 is whether in view of its language the first and last pages of each copy of the paper constituted an outside cover. If any infirmity exists in this behalf, it, too, is only a matter of error. We are therefore not called upon to pass on either of the questions of error so arising under section 212, if the judgment is sustainable under the even-numbered counts. The penalty imposed upon the defendant was less than the maximum which could have been imposed upon conviction under either section 211 or 212, and consequently no substantial right of defendant was prejudiced, no matter whether the judgment can be upheld under section 212 or not. The verdict was general, and amounted to a conviction upon all the counts submitted under both sections, and the sentence was also general; and the rule is that a general conviction and judgment cannot be reversed on error where one of the counts or sets of counts is good and warrants the judgment. Mr. Justice Gray stated the rule and the reason for it in Claassen v. United States, 142 U. S. 140, 146, 12 Sup. Ct. 169, 170 (35 L. Ed. 966):

"It is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only."

See, also, Evans v. United States, 153 U. S. 584, 595, 14 Sup. Ct. 934, 38 L. Ed. 830; Hocking Valley Ry. Co. v. United States, 210 Fed. 735, 740 (C. C. A. 6th Cir.); Wesoky v. United States, 175 Fed. 333, 334, 99 C. C. A. 121 (C. C. A. 3d Cir.); United States v. Lair, 195 Fed. 47, 50, 115 C. C. A. 49 (C. C. A. 8th Cir.); Greene v. United States, 154 Fed. 401, 410, 85 C. C. A. 251 (C. C. A. 5th Cir.); 2 Bishop's New Crim. Proc. (Ed. 1913) § 1015, par. 4, and section 1015a, par. 2, pp. 882, 883.

[3] We may therefore turn to a consideration of the even-numbered counts. Assignments of error are presented to the overruling of an objection made against receiving in evidence copies of the paper, The Owl, then in dispute, and also to a denial of a motion, made at the close of the evidence, to direct a verdict of not guilty upon each of the even-numbered counts. The reason assigned by counsel in support of the objection and motion was that the papers were not "obscene, lewd, lascivious, or indecent" within the purview of the statute. This presented merely a question of law. It is alleged in each of the even-numbered counts that the "paper and publication was then and there obscene, lewd, lascivious, and of an indecent character, and consisted in part of an article and so-called 'story' commencing with the words, 'Caught in the bathroom at 3 a. m.,' and is unfit to be set forth in this instrument or to be spread upon the records" of the court. It cannot be necessary here to state more than the substance of the publication. The principals involved were described in several ways; for instance, as a "merchant prince" and a "long-lost niece," the former being named, while the latter was not named, but was stated to have been "discovered in Europe;" pictures purporting to represent each were displayed in the article; it was stated that the niece "was quartered in a room" of the man's home; that from day to day they were seen at a restaurant at dinner time; that, suspicions being aroused, they were watched and finally found in the bathroom of his home "at about 3 o'clock in the morning;" a picture of a bathtub was given, bearing the man's initials and the word "Private," and it was stated that "after rumors of the escapade became current," the man "sent the long-lost niece back to her home in Germany."

It is enough to say of this that the publication falls within the general rule, which is well expressed in one of the decisions relied on by defendant's counsel (although that case in its facts differed from those involved here):

"The question of the character of the contents of the paper—namely, whether it comes within the inhibited class named in the statute—is one ordinarily to be determined by the jury under appropriate instructions from the court; that is, when there is such doubt as to the meaning and effect of the same that persons would reasonably differ in respect thereto." United States v. Journal Co. (D. C.) 197 Fed. 415, 416.

Error is assigned to the district judge's definition of the word "obscene," on the ground that as applied to this case it is too broad; but no assignment is found concerning the definitions given to the other words of the statute with which this one is associated; and this is important, because it will be observed in the portion of the charge below quoted that the definition complained of is in effect reduced to the meaning of the words, including the word "indecent," employed to define the word "obscene," and whatever is "indecent" is also prohibited by the same section. Besides, it is not perceived how the jury could have misapprehended the charge, taken as a whole, concerning the meaning of the words "obscene, lewd, lascivious, and of an indecent character," as they were used in the indictment and applied to the publication. The assignment will be better understood from the following portion of the charge:

"You observe that each of these even-numbered counts charges that the paper therein mentioned was obscene, lewd, lascivious, and of an indecent character. Now, what do these respective terms mean? As used in the statute, and in the several counts now under consideration, the word 'lewd' means having a tendency to excite lustful thoughts. 'Lascivious' means pertaining to that form of immorality which has relation to sexual impurity. 'Obscene' has a broader significance than the word 'lascivious.' 'Obscene' comprehends whatever is impure, unclean, indecent, foul, filthy, or disgusting. Obscenity is that form of indecency which is calculated to promote the general corruption of morals, while 'lewdness' and 'lasciviousness' are that form of immorality which has relation to sexual impurity. What is an obscene, lewd, or lascivious paper or publication is largely a question of your conscience and your own opinion. Before it can be said that a paper or publication is obscene, lascivious, lewd, or indecent, it must come to this point: It must be calculated with the ordinary reader to deprave his morals or lead to impure purposes. It is your duty to ascertain whether or not the paper or publication offered in evidence, as to each of the even-numbered counts, is calculated to deprave the morals, to lower that standard which we regard as essential to civilization, whether or not it is calculated to excite those feelings which in their proper field are all right, but which, transcending the limits of that field, play most of the mischief in the world. * * *

"The paper offered as to each count includes the article in question, and will be before you for your inspection and investigation, and it is for you to determine its character. If the paper or publication is obscene, or is lewd, or lascivious, or of an indecent character—if it has any one of these four characteristics, it falls within the ban of the law; but if it is not obscene, nor lewd, nor lascivious, nor of an indecent character, if it has no one of these four characteristics, then no offense has been committed as to any one of the even-numbered counts."

The similarity between this and the portion of the charge approved in Dunlop v. United States, 165 U. S. 486, 500, 17 Sup. Ct. 375, 41 L. Ed. 799, respecting the words "obscene, lewd, lascivious, or indecent;" and the observations of Mr. Justice Brown in that case (165 U. S. at page 501, 17 Sup. Ct. 375, 41 L. Ed. 799), and of Mr. Justice Harlan in Rosen v. United States, 161 U. S. 29, 43, 16 Sup. Ct. 434, 480, 40 L. Ed. 606, furnish a complete answer to counsel's objection. No decision has been cited or has come to our notice which in principle militates against this conclusion; and it is to be noted that in the Dunlop and Rosen Cases sanction was given to the action of the trial court in placing a material degree of reliance upon the good sense and judgment of the jury touching the practical meaning and effect of the words of the statute as applied to the particular publication in dispute.

Error is assigned to the portion of the charge that submitted to the jury the entire paper, The Owl, as to the even-numbered counts, and especially to that part concerning the "other bathtub tragedies in Cincinnati, and likewise to the Leverone divorce case;" but when exception was taken to this, while the whole paper was allowed to remain in evidence, the court expressly restricted the consideration of the jury to the portion beginning on the first page and extending into the second page, that is, to the publication complained of in the indictment; even if error would otherwise have intervened, the court's instruction avoided it. Dunlop v. United States, supra, 165 U. S. at page 498, 17 Sup. Ct. 375, 41 L. Ed. 799.

Error is assigned to a statement in the charge that the jury was not concerned with the question whether or not the person named in the publication was damaged, because that question was "properly left

with the state or other courts under other and different proceedings." We do not see how this could have prejudiced the defendant. It was apparently designed to prevent the jury from considering the rights of any person mentioned in the publication; and the natural effect of this must have been more certainly to direct and confine attention to the single issue, whether there had been a misuse of the mails.

It can serve no useful purpose to extend the discussion to further details. All the assignments concerning the even-numbered counts have been fully considered and no reversible error has been found. The charge concerning those counts, not to speak of the others, was full, and was also calculated to advise and to admonish the jury of its province and duty as respects both prosecution and defense. From all these considerations we are constrained to believe that the finding upon the even-numbered counts cannot rightfully be disturbed. Dunlop v. United States, supra, 165 U. S. at page 501, 17 Sup. Ct. 375, 41 L. Ed. 799; Knowles v. United States, 170 Fed. 409, 411, 95 C. C. A. 579 (C. C. A. 8th Cir.), and cases there cited.

It results that the judgment must be affirmed.

ROWE et al. v. HILL et al.

(Circuit Court of Appeals, Sixth Circuit. May 15, 1914.)

No. 2412.

1. DEEDS (§ 194*)—TIME OF DELIVERY—PRESUMPTION.

In the absence of proof to the contrary, a deed shown to be in the possession of the grantee must be presumed to have been delivered on the day it bears date.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574–583, 623, 634; Dec. Dig. § 194.*]

2. JUDGMENT (§ 682*) — PERSONS BOUND — GRANTEE IN UNRECORDED DEED — SUIT AGAINST GRANTOR.

Complainants, I. W. Rowe and Hannah Rowe, citizens and residents of West Virginia, were grantees in a deed to land in Kentucky. After delivery of their deed, but before it was recorded, a suit was begun in a state court to quiet title to the same land in the present defendant against their grantor, and a warning order was issued to "J. W. Rowe," described as a citizen and resident of Pennsylvania, as an alleged purchaser under an unrecorded deed. Service was not made on the defendant in such suit, so as to create a lis pendens, until after the deed was recorded. *Held*, that complainants were not bound by the decree in said suit, either as actual parties or privies in estate with their grantor, or as purchasers pendente lite.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1203–1205; Dec. Dig. § 682.*]

3. BOUNDARIES (§ 3*)—RELOCATION OF SURVEY—GENERAL RULES.

In a suit to quiet title, defendant claimed under an older survey made in 1858; the question being whether the boundaries of such survey included the tract in suit. The beginning corner was established, but no marked lines or corners were found. The survey and patent described the tract as containing 100 acres, and the calls, when run according to course and distance, inclosed about that quantity of land, but did not even approximately reach points and lines and corners of older surveys

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

claimed by defendant to be called for, which would inclose about 650 acres, nor was it shown that such lines and corners had been marked, or were otherwise known and established, in 1858. The evidence fairly showed that the survey was a "paper" survey, and that a very small part, if any, of the lines were actually run. *Held*, that the case did not come within the established rule in Kentucky that course and distance must yield to calls for natural objects or the lines of other surveys which were then actually marked and visible on the ground, or were susceptible of definite and certain location.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 3-41; Dec. Dig. § 3.*]

4. QUIETING TITLE (§ 12*)—RIGHT OF ACTION IN FEDERAL COURT—NECESSITY OF POSSESSION.

Under the federal equity practice, independent of a state statute, a bill to remove a cloud from title will not lie where the complainant is not in possession of the premises, and cannot be maintained without proof both of possession and of legal title; nor is the complainant relieved from the necessity of making such proof by the fact that the denial of his possession in the answer is accompanied by an allegation of possession in defendant and an incidental prayer that his own title be quieted.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 44, 45; Dec. Dig. § 12.*]

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew N. J. Cochran, Judge.

Suit in equity by I. W. Rowe and Hannah Rowe against John Hill, Nancy Hill, Sam Kidd, Pinkie Kidd, and W. A. Kinne. Decree for defendants, and complainants appeal. Reversed.

For opinion below, see 196 Fed. 910.

H. C. Gillis and J. B. Snyder, both of Williamsburg, Ky., for appellants.

O. H. Waddle, of Somerset, Ky., for appellees.

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

SANFORD, District Judge. This suit was brought by the plaintiffs, I. W. Rowe and Hannah Rowe, his wife, citizens of West Virginia, by bill in equity against five citizens of Kentucky, of whom Pinkie Kidd, wife of Sam Kidd, hereinafter called the defendant, is the real party in interest, to remove an adverse claim of the defendant as a cloud upon the plaintiff's title to a tract of land in Wayne County, Kentucky, of the requisite jurisdictional value.

The plaintiffs claim title under patents issued to one Alexander in 1880 and 1881. The defendant claims under a patent issued to one Mills in 1858, which, being senior to the Alexander patents, is admittedly superior thereto to the extent to which it may be properly located within their boundaries. The Mills patent calls on its face for only one hundred acres; but if located according to the defendant's contention, contains about six hundred and fifty acres. The extent of the conflict between these patents, involving the question of the location and extent of the Mills patent, is the underlying question in controversy. By a judgment of the Circuit Court of Wayne County, Kentucky, in a former suit of Alexander et al. v. Hill, which was affirmed

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

by the Court of Appeals of Kentucky, and which is relied on by the defendant as a bar to the present suit, the location and extent of the Mills patent was adjudged in accordance with her present contention.

The court below, after a hearing on pleadings and proof, was of opinion that the plaintiffs were estopped from claiming that the true location of the Mills patent is not as adjudged in said former suit, and that, even if such location were still an open question, it would not be justified in deciding the matter differently from the state courts; and hence dismissed the plaintiffs' bill with costs; from which decree the plaintiffs have appealed to this court.

[1] The following facts are undisputed in reference to the former judgment in the case of Alexander et al. v. Hill.

By warranty deed, dated November 1, 1903, and acknowledged November 22, 1903, Alexander, the patentee in the above mentioned junior patents, conveyed them to the plaintiffs, Rowe and wife, who were then citizens and residents of West Virginia. This deed was lodged for record in the county court clerk's office on January 12, 1904. While proven by a certified copy, the original was shown to be in the possession of the plaintiffs. The inference from the testimony is that it was delivered to them at least a month before its lodgment for record. And, under the great weight of authority, in the absence of proof to the contrary, it must be presumed to have been delivered on the day it bears date. Land Co. v. Hilton, 121 Tenn. 308, 321, 120 S. W. 162; Raines v. Walker, 77 Va. 92, 93; and cases cited. And see Goodlett v. Goodman Co. (6th Circ.) 192 Fed. 775, 113 C. C. A. 61.

On January 11, 1904, after the delivery of this deed, but before its lodgment for record, the defendant Pinkie Kidd, then Pinkie Hill, claiming to be owner of the Mills patent by mesne conveyances from the patentee, filed a petition in equity in the Circuit Court of Wayne County to quiet her title to this patent, against Alexander, the patentee under the junior patents, and one "J. W. Rowe," described as a citizen and resident of Mahaney City, Pennsylvania, to whom it was alleged Alexander had conveyed a portion of the land by an unrecorded deed. On the same day summons issued for Alexander, which was served February 1, 1904. On January 25, 1904, a warning order was issued for the defendant "J. W. Rowe." Apparently, however, this order was not based upon the affidavit required by sec. 58 of the Kentucky Civil Code, and no report was filed by the warning order attorney, as required by sec. 59 of said code. On March 17, 1904, an answer was filed in the name of Alexander and "J. W. Rowe," which was signed "Alexander and Rowe," by their attorneys, in which the defendants admitted that Alexander had conveyed a part of the land covered by his patents to "his co-defendant, J. W. Rowe," who then claimed to be the owner thereof. Alexander having subsequently died, an attempt was made to revive the cause against his widow and heirs, some of whom were proceeded against by a warning order without proper affidavit. An order of revivor having been entered, a trial was had, resulting in the entry of a judgment adjudging the present defendant, then Pinkie Hill, to be the owner of the Mills patent, locating its boundaries as now claimed by her, and quieting her title to such bound-

ary as against the defendants. On an appeal taken by the defendants this judgment was affirmed by the Court of Appeals of Kentucky. Alexander v. Hill, 108 S. W. 225, 32 Ky. Law Rep. 1148 (not officially reported).

[2] The plaintiffs are not, however, bound by said former judgment, as actual parties thereto; the warning order against "J. W. Rowe," a citizen and resident of Pennsylvania, being insufficient to bring before the court I. W. Rowe, a citizen of West Virginia, even if the proceedings had been otherwise regular, and no steps at all having been taken to make Hannah Rowe a party. They are not bound by said judgment as privies in estate with either Alexander, his widow or his heirs, even if the judgment rendered after Alexander's death can be regarded as valid, since the deed from Alexander to them had been delivered before the institution of the suit. Dull v. Blackman, 169 U. S. 243, 18 Sup. Ct. 333, 42 L. Ed. 733; Cook v. Lasher (4th Circ.) 73 Fed. 701, 704, 19 C. C. A. 654; Carroll v. Goldschmidt (2d Circ.) 83 Fed. 508, 509, 27 C. C. A. 566; Lynch v. Burt (8th Circ.) 132 Fed. 417, 428, 67 C. C. A. 305; Ingersoll v. Jewett, 16 Blatchf. 378, 13 Fed. Cas. 45; Allin v. Hall, 1 A. K. Marsh. (Ky.) 525, 527; 23 Cyc. 1253, 1257. Neither are they bound by said judgment by reason of the fact that their deed was not recorded until after the commencement of the suit, since, apart from the disputed question as to whether a vendee under a prior unrecorded deed is bound as a purchaser pendente lite (25 Cyc. 1480, 21 Am. & Eng. Enc. Law [2d Ed.] 650), their deed was lodged for record before the lis pendens began by the service of process upon Alexander. County of Warren v. Marcy, 97 U. S. 96, 106, 24 L. Ed. 977; Pitt v. Rodgers (9th Circ.) 104 Fed. 387, 390, 43 C. C. A. 600; McClaskey v. Barr (C. C.) 48 Fed. 130, 133; Wheeler v. Walton Co. (C. C.) 65 Fed. 720, 722; Wickliffe v. Breckenridge, 64 Ky. (2 Bush) 427, 443; Staples v. White, 88 Tenn. 30, 31, 12 S. W. 339; 25 Cyc. 1463; 21 Am. & Eng. Enc. Law (2d Ed.) 610. Nor are they bound by said judgment, even if, as found by the court below, the defense made by Alexander to the suit was made both for himself and them, in pursuance of an understanding and agreement with them, since, whatever may have been Alexander's action in that regard it was not open and known to the other party; and the estoppel arising by reason of assuming the defense of a suit must, as in other cases, be mutual. Lane v. Welds (6th Circ.) 99 Fed. 286, 288, 39 C. C. A. 528; Andrews v. Pipe Works (7th Circ.) 76 Fed. 166, 173, 22 C. C. A. 110, 36 L. R. A. 139; Cramer v. Manufacturing Co. (9th Circ.) 93 Fed. 636, 637, 35 C. C. A. 508; Hanks Assoc'n v. International Co. (2d Circ.) 122 Fed. 74, 75, 58 C. C. A. 180; 23 Cyc. 1250. It is true that if the plaintiffs knew of the pendency of said suit, and, either through the agency of Alexander or by attorney, actually participated in its defense in the name and under the guise of "J. W. Rowe," and through such representative filed the answer in such name in which it was admitted that Alexander had made a conveyance to such "J. W. Rowe," thereby misleading the defendant as to the name and identity of the purchaser and causing her to fruitlessly pursue her litigation against such fictitious vendee, they would now, in our opinion, be

estopped from denying their identity with "J. W. Rowe" as Alexander's vendee, and would, by reason of such estoppel, be bound by the judgment rendered against "J. W. Rowe" in the former suit, as if they had actually been parties. However, while the circumstances are such as to create a suspicion that the facts were as above suggested, yet, after careful consideration of the meager evidence in the record, especially in default of the testimony of either of the attorneys who represented "Alexander and Rowe" in the former suit, one of whom apparently died before proof was taken, we are constrained to conclude that the evidence is sufficient only to create such suspicion and not substantial enough to establish the fact.

We hence must hold, upon the evidence in the record, that the plaintiffs, not having been actually parties to the former suit, not being estopped from denying that they were parties, and not being privies in estate with Alexander, either as purchasers pendente lite or otherwise, are not now bound by the former judgment in said cause or estopped from contesting the location of the boundaries of the Mills patent as therein determined.

The defendant, on the other hand, is not estopped from claiming that the Mills patent is to be located in accordance with said former judgment, by reason of an earlier judgment, upon which the plaintiffs rely, in an action for trespass in cutting timber, brought by Alexander in 1902 against one John Hill, who is claimed to have been the equitable owner of the Mills patent, since, apart from other questions, it does not appear from the record in said trespass suit that the question of the boundary of the Mills patent was adjudged therein, either expressly or by necessary implication. The court below, therefore, correctly held that such judgment was not res adjudicata as against the defendant.

[3] The question as to the location and boundaries of the Mills patent presents great difficulty. The survey was made and the patent issued in 1858. Both describe the tract as containing one hundred acres. The description in the survey, which is substantially followed in the patent, is as follows:

"Being and lying in the County of Wayne on the waters of the Big South Fork and bounded as follows, to-wit: Beginning at a poplar; running S 55 E 200 poles to a stake at the river cliff; N 40 E 40 poles to a stake; N 50 W 200 poles to a stake; N 21 E 40 poles to a stake; N 20 W 60 poles to a stake at the river cliff; S 80 poles to a stake; N 70 W 10 poles to a stake; S 45 W 20 poles to a stake at the river cliff; N 10 E 60 poles to a stake on Thomas Ryan's line; thence with said line N 85 W 60 poles to a stake on said line; S 71 W 40 poles to a stake on Isaac Foster line; S 33 E 150 poles to J. W. Mills' corner a pine; thence with Mills' old line to the beginning."

The location of the poplar beginning corner is, we think, established by the preponderance of the evidence in accordance with the defendant's contention. However, no marked lines or corners of this survey have been found; and it is clear, from the character of the surveyor's plat and otherwise, that he did not actually run its lines, except perhaps for a short distance, but made, in the main at least, a paper survey merely. The calls of this survey when run according to course and distance, enclose a boundary of about one hundred acres;

but they do not even approximately reach either the river cliffs or the lines and corner claimed by the defendant to be the Ryan, Foster and Mills lines and the Mills pine corner called for in the survey, to which she contends the lines of the patent should be extended, as located in the former suit of Alexander et al. v. Hill, thereby enclosing a boundary of about six hundred and fifty acres. In such former suit the Kentucky Court of Appeals, having first found that the Ryan, Foster and old Mills lines and the Mills pine corner were "well known and established" at the time of the Mills survey in 1858, thereupon held that the courses of the patent should be changed and the distances extended so as to reach the river cliffs and such lines and corner under the "well settled" law that, "where there is a conflict between the course and distance and recognized objects establishing the boundary lines of a survey, course and distance must yield and the natural objects and established boundaries of other tracts called for, and designated known points therein must be accepted as the true boundary of the land in question." Alexander v. Hill, supra, 108 S. W. at page 228, 32 Ky. Law Rep. at page 1150.

In so far as the principle of law upon which this decision is based has become a rule of property in Kentucky, it should unquestionably be followed by this court, if applicable to the facts now in evidence, even although the judgment itself is not binding upon the parties as res adjudicata; and, regardless of its binding effect, we would with great reluctance feel ourselves constrained to differ from the highest tribunal of the state in a decision affecting title to real estate within its borders.

However, the evidence in the present case is not the same as that formerly before the state courts. While it partly consists of depositions taken in the former suit, it does not appear that it contains all of the former evidence, and, on the other hand, some new and material evidence was introduced. After careful consideration of the evidence in the present record, we find that it does not justify us in locating the boundaries of the Mills patent in accordance with the former judgment, under the rule of law applied by the Kentucky Court of Appeals. The essential difference is that there is no evidence in the present record that either the Ryan, Foster or old Mills line or the Mills corner were "well known and established" in 1858, when this survey was made. Even assuming that the tracts whose lines and corner are called for in the survey have been satisfactorily identified by the defendant, which is not entirely clear, especially in reference to the old Mills line and corner, the evidence, construed most favorably to the defendant, merely shows that some of the lines and corners of these tracts had been marked when examined many years later by the witnesses whose testimony was introduced in the present case. There is no evidence, however, as to the age of the marks on these lines and corners; and no evidence whatever establishing, either directly or by necessary inference, that any of the lines and corners of these tracts had been marked or were otherwise well known and established in 1858. The evidence therefore is entirely insufficient to bring the case either within the rule of decision applied by the Kentucky Court of Appeals in the former

suit, or within the otherwise well settled Kentucky rule that a course and distance called for in a survey, when not actually run and marked by the surveyor, will be controlled by a call for the line of another tract which was then actually marked and visible on the ground, so as to be assimilated to a natural object. Mercer v. Bate, 4 J. J. Marsh. (Ky.) 334, 343; Ralston v. McClurg, 9 Dana (Ky.) 338, 341; Mathews v. Pursifull (Ky.) 96 S. W. 803, 804, 29 Ky. Law Rep. 1001, 1002. And see Jones v. Hamilton, 137 Ky. 253, 258, 125 S. W. 695. Nor does the evidence bring the case within the rule stated in Morgan v. Renfro, 124 Ky. 314, 99 S. W. 311, 313, 30 Ky. Law Rep. 533, 535, quoted and approved in Brashears v. Joseph, 108 S. W. 307, 310, 32 Ky. Law Rep. 1139, 1143, decided on the same day as Alexander v. Hill, that, in locating a patent, "calls for the lines of other patents, which are of record and which are susceptible of definite and certain location," are to be preferred to courses and distances. And see Baxter v. Evett, 7 T. B. Mon. (Ky.) 329, 333. The record contains no copy of either the survey or patent of the Ryan or Foster tracts. While it is said that there was a recorded survey of the Ryan tract upon which a patent issued, it is shown that no survey can be found in Foster's name; and there is no evidence whatever that any patent ever issued to the tract claimed by the defendant to be identified as the Foster tract. Nor does the proof show any recorded survey or patent for the tract which the defendant claims to have identified as the old J. W. Mills tract. Obviously, therefore, the case is not brought within the rule laid down in Morgan v. Renfro, supra, as above quoted.

We are furthermore satisfied from evidence in the present record not contained in the former suit, that the map on which the defendant relies, which was made the basis of the judgment in the former suit of Alexander et al. v. Hill, is incorrect in substantial respects, especially in reference to the location of the river cliffs and their proximity to the Ryan tract.

For the foregoing reasons, without setting forth other difficulties in the way, we are constrained to hold that the evidence in the present case does not bring it within the rule laid down in Alexander v. Hill, supra, or justify us in locating the boundaries of the Mills patent as therein adjudged.

[4] We find it unnecessary, however, to now determine the true boundary of the Mills patent under the confused and unsatisfactory evidence in the record, involving the extent to which such evidence would, under the rules of law applicable in such cases, justify a departure from the courses and distances given in the survey; or the extent to which the defendant has, under her deeds, deraigned title to such boundary. This is a bill to remove the defendant's claim as a cloud upon the plaintiff's title, or as it appears to be called under the Kentucky practice, a bill to quiet title. See Whitehead v. Shattuck, 138 U. S. 145, 153, 11 Sup. Ct. 276, 34 L. Ed. 873. It is well settled, however, that, under the Federal equity practice, independently of a state statute, a bill to remove cloud from plaintiff's title will not lie where the plaintff is not in possession of the premises, and can not be maintained without proof both of possession and of legal title. United

States v. Wilson, 118 U. S. 86, 6 Sup. Ct. 991, 30 L. Ed. 110; Frost v. Spitley, 121 U. S. 552, 555, 7 Sup. Ct. 1129, 30 L. Ed. 1010; Peck v. Ayers Co. (6th Circ.) 116 Fed. 273, 275, 53 C. C. A. 551; American Ass'n v. Williams (6th Circ.) 166 Fed. 17, 20, 93 C. C. A. 1; Butterfield v. Miller (6th Circ.) 195 Fed. 200, 202, 115 C. C. A. 152. The remedy at law by ejectment is otherwise plain, adequate and complete. United States v. Wilson (U. S.) supra, 118 U. S. 89, 6 Sup. Ct. 991, 30 L. Ed. 110; Butterfield v. Miller (6th Circ.) supra, 195 Fed. 202, 115 C. C. A. 152. The Kentucky practice is furthermore the same in this respect, the Act of July 3, 1893 authorizing "any person, having both the legal title and possession to lands, to institute and prosecute suit, by petition in equity in the circuit court of the county where the lands or some part of them may lie, against any other person setting up claims thereto." Carroll's Kentucky Statutes, 1909, c. 1, § 11, p. 185. "To entitle a party to maintain an action to quiet his title, he must show possession in himself as well as title." Webb v. Adams (Ky.) 58 S. W. 585, 586.

The bill in the present suit alleged that the plaintiffs were the owners and in actual possession of the tract of land sued for. The defendant, in her original and amended answers, denied both the plaintiffs' possession and ownership of the tract claimed by them, and also alleged her own ownership and possession of the land claimed by her within the boundaries sued for. The plaintiffs' possession of the land sued for having thus been directly put in issue, it therefore became necessary for them to prove, not only title, but also possession, in order to entitle them to maintain their suit.

The fact that the defendant in her amended answer accompanied her denial of the plaintiffs' possession with an assertion of her own possession and an incidental prayer that her own title be quieted, did not relieve the plaintiffs from the necessity of proving their possession. The instant case is, in this respect, entirely different from those in which it has been held that where the want of equitable jurisdiction by reason of a plain and adequate remedy at law, appears upon the face of the plaintiffs' bill, the defendant waives objection to such jurisdiction unless made in limine. Reynes v. Dumont, 130 U. S. 394, 9 Sup. Ct. 486, 32 L. Ed. 934; Kilbourn v. Sunderland, 130 U. S. 514, 9 Sup. Ct. 594, 32 L. Ed. 1005; Brown v. Lake Superior Co., 134 U. S. 530, 536, 10 Sup. Ct. 604, 33 L. Ed. 1021; Hollins v. Brierfield Co., 150 U. S. 371, 381, 14 Sup. Ct. 127, 37 L. Ed. 1113; Perego v. Dodge, 163 U. S. 160, 164, 16 Sup. Ct. 971, 41 L. Ed. 113. Here no defect in the equitable jurisdiction appeared upon the face of the plaintiffs' bill, which alleged the plaintiffs' possession. The defendant specifically raised this issue in limine by denying plaintiffs' allegation of possession; and the fact that she asserted in her answer that she was herself in possession of the land in controversy and claimed the right to have her own title quieted—although her answer was not filed as a cross-bill for that purpose—not only did not waive the plaintiffs' proof of possession, but, on the contrary, emphasized her denial of the plaintiffs' possession. In this respect the case is analogous to Webb v. Adams (Ky.) supra, in which, under a petition to quiet the plaintiffs' ti-

tle and a cross petition, denying the plaintiffs' title and possession and seeking to quiet the defendant's title, it was held that, as the controversy arose over the location of a line dividing the lands of the parties, and the disputed territory was open woodland, common to both parties, so far as possession went, and "ground of common dispute," neither had shown such possession as was essential to the right of action, and that both the petition and cross petition should be dismissed, without prejudice to their legal rights.

The plaintiffs have, however, failed to show any actual possession of the lands sued for within the boundary claimed by the defendant. While there is some evidence that Alexander at one time had an enclosure extending a short distance within this boundary, it is not shown that this enclosure was being maintained by the plaintiffs at the time they filed their bill. And while they have shown possession of a house formerly built by Alexander within the boundaries of his patents, nevertheless, as this is outside of the boundary claimed by the defendant under her older patent, it is doubtful, by analogy to the rule laid down in Trimble v. Smith, 4 Bibb (Ky.) 257, 258; Kentucky Co. v. Crabtree, 113 Ky. 922, 926, 70 S. W. 31, and Curtis v. Warden, 144 Ky. 383, 384, 138 S. W. 245, whether this can, in any event, be regarded as even a constructive possession of the land in dispute as against the defendant's older patent, regardless of the question, which we do not determine, whether the defendant has likewise failed to show any actual possession within the disputed boundary.

On the whole we have grave doubt whether, under the evidence in the record, the plaintiffs have shown such possession of the land in controversy as is essential to the maintenance of their bill, even in the light of the rule stated in Roberts v. Northern Pacific Co., 158 U. S. 1, 30, 15 Sup. Ct. 756, 39 L. Ed. 873, that under a statute similar to that in Kentucky a bill to quiet title may be maintained upon an actual possession of part of the land in controversy and constructive possession of the remainder, if vacant and unoccupied.

However, as we are not entirely satisfied that plaintiffs' failure to offer more definite proof on the question of their possession may not have been due to a misconception of the legal effect of the defendant's prayer that her own title be quieted, and in view of the fact that the court below did not pass upon this question and of the amount of proof that has been taken upon the various issues in the case, we think it proper, under all the circumstances, without further definite determination, to now reverse the decree below dismissing the plaintiffs' bill and to remand the case for further proceedings not inconsistent with this opinion, with the direction to the court below to reopen the case for further proof at large, not only as to the question of the plaintiff's possession and title, including the location and extent of the Mills patent, but also as to the former judgment in Hill v. Alexander, and all other issues in the case. (For instances of analogous action by the appellate court, see Noble v. Seary, 223 U. S. 65, 32 Sup. Ct. 194, 56 L. Ed. 353; Snead v. Scheble [6th Cir.] 175 Fed. 570, 574, 99 C. C. A. 578; Butterfield v. Miller [6th Cir.] supra.) And since, upon the reopening of the proof in the court below, further testimony may be

taken in open court under the new Equity Rules, we have no doubt but that the learned trial judge, by his direction and supervision of the case, will be able to bring clearness and precision out of the present confused testimony and to satisfactorily ascertain the facts necessary to a just determination of the several issues involved.

A decree will accordingly be entered, reversing the decree below and remanding the case for further proceedings in accordance with this opinion. Neither party will recover costs in this court; the costs below will abide the event.

NASHVILLE SYRUP CO. v. COCA COLA CO.

COCA COLA CO. v. NASHVILLE SYRUP CO.

(Circuit Court of Appeals, Sixth Circuit. June 13, 1914.)

Nos. 2439, 2440.

1. TRADE-MARKS AND TRADE-NAMES (§ 45*)—DESCRIPTIVE WORDS—EFFECT OF REGISTRATION.

The federal trade-mark statute does not directly operate to grant a monopoly to one who rightfully registers a descriptive or geographical word under the 10-year clause of Act Feb. 20, 1905, c. 592 (U. S. Comp. St. Supp. 1911, p. 1461) § 5, but removes from words which had been exclusively used as a mark in interstate commerce for 10 years the bar or disability caused by their descriptive or geographical character, and makes them, after their registration, subject to exclusive appropriation with the same effect, in the main, as if the disability had never existed.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 53, 59; Dec. Dig. § 45.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 59*)—INFRINGEMENT—"COCA COLA."

The name Coca Cola, duly registered as a trade-mark for a syrup used as a basis for carbonated drinks, and which had by more than 10 years exclusive use prior to 1905 become the distinctive name under which complainants' product was known, *held* infringed by the name "Fletcher's Coca Cola" used on a similar product.

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

3. TRADE-MARKS AND TRADE-NAMES (§ 22*)—VALIDITY—DECEPTIVE NAMES.

Whether a claimed trade-mark is so descriptive of something else as to be deceptive must be decided as of the time of its adoption.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 25; Dec. Dig. § 22.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 22*)—VALIDITY—DECEPTIVE NAMES.

The name "Coca Cola" as applied to a flavoring syrup for carbonated drinks, containing about 2 per cent. of a compound made from coca leaves and cola nuts, *held* not so substantially and really deceptive as to invalidate it as a trade-mark under the 10-year clause of the act of 1905.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 25; Dec. Dig. § 22.*]

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

Where a name has been exclusively used to designate the product of a particular manufacturer for so long a time as to have become identified with it in the minds of purchasers and to be a valid trade-mark it cannot be used by another on a similar product merely because ingredients

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

are used in such other product which make the name in a sense descriptive of it.

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

6. TRADE-MARKS AND TRADE-NAMES (§ 98*) — SUIT FOR INFRINGEMENT — ACCOUNTING FOR PROFITS.

On an accounting for profits for infringement of a trade-mark by a bona fide corporation, defendant is entitled to credit for the salary paid its manager, who was a minority stockholder only, as a part of its operating expenses.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. § 98.*]

7. APPEAL AND ERROR (§ 339*)—TIME FOR APPEAL—SUIT FOR INFRINGEMENT OF TRADE-MARK.

Where an interlocutory decree in favor of complainant was entered in a suit for infringement of a trade-mark, directing a reference for an accounting, a subsequent decree entered on the report of the master, whether or not it refers to the interlocutory decree in terms, has the effect of reaffirming it and rendering it final, and an appeal may be taken by the defendant at any time within the statutory time after entry of such final decree on which the decision embodied in the interlocutory decree may be reviewed. The fact that the appeal purports to be from the interlocutory decree, and that steps were taken therefor before such decree became final, which were perfected afterwards, is not a fatal irregularity.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1883-1887; Dec. Dig. § 339.*]

Appeals from the District Court of the United States for the Middle District of Tennessee; Edward T. Sanford, Judge.

Suit in equity by the Coca Cola Company against the Nashville Syrup Company. From the decree both parties appeal. Affirmed.

For opinion below, see 200 Fed. 157.

Coca is a South American shrub, from the leaves of which cocaine, among other substances, is obtained; the cola tree grows in Africa, and from its nuts caffeine may be extracted. The use of these leaves and these nuts by the natives in their respective countries, and for the supposed stimulating qualities, had long been known in this country, and before 1887 extracts respectively from coca leaves and from cola nuts had found a place in the pharmacopœia. There was little popular knowledge concerning them. The extracts were used only by druggists in compounding medicine. In 1887 Pemberton, an Atlanta druggist, registered in the Patent Office a label for what he called "Coca Cola Syrup and Extract." The plaintiff below, the Coca Cola Company, was organized as a corporation in 1892, and acquired Pemberton's formula and label. Since that time, it has continuously manufactured and sold a syrup under the name, "Coca Cola"; and, used as a basis for carbonated drinks, the syrup, under this name, has had a large sale in all parts of the country. In 1893 the Coca Cola Company (herein called plaintiff) registered the name "Coca Cola" as a trade-mark, and again in October of 1905, and pursuant to the act of February 20, 1905, the name was registered by plaintiff as a trade-mark under the 10-year proviso of that act. Plaintiff enjoyed the exclusive use of the name from 1892 until 1910. In that year, J. D. Fletcher, now the active manager of the Nashville Syrup Company (herein called defendant), became interested with others in the manufacture of a somewhat similar syrup being sold under the name "Murfe's Cola." Later in that year they changed the name of their product to "Murfe's Coca Kola," and shortly afterwards, Mr. Fletcher became sole owner of the business, and the product was named "Fletcher's Coca Cola," and has been sold by him and his successor, the Nashville Syrup Company, under that name. The bill of complaint herein claimed

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

for plaintiff a common-law trade-mark in the name, and also claimed trade-mark rights by virtue of the registration under the act of 1905. It also alleged that the words of the name, if they ever indicated anything other than plaintiff's product, had acquired a secondary meaning limited to that article, and that defendant was engaged in unfair competition. Jurisdiction sufficiently depended on diverse citizenship.

On the usual so-called final hearing, the District Judge concluded that plaintiff had a valid statutory trade-mark under the act of 1905, and that it had been infringed, and accordingly ordered an injunction and a reference to ascertain the damages (200 Fed. 153, 157). The master reported his finding of damages, but defendant's exception was sustained and a decree was entered finding no damages. The defendant appealed from the decree for injunction, and plaintiff appealed because it failed to recover damages.

J. B. Sizer, of Chattanooga, Tenn., and Harold Hirsch, of Atlanta, Ga., for plaintiff.

Perkins Baxter, of Nashville, Tenn., and E. W. Bradford, of Washington, D. C., for defendant.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] 1. Passing, for the present, without deciding, the question whether the name Coca Cola was, in 1887 or in 1892, so far descriptive of the article as to be incapable of appropriation as a common-law trade-mark, and passing, also without deciding, the question whether the name, if primarily descriptive, had, before suit was brought in 1910, acquired a secondary meaning, we come to the effect of the registration under the act of 1905. The broad questions on which defendant relied concerning the effect of this act have been set at rest against defendant's contention, by the decision of the Supreme Court in Davids Co. v. Davids, 233 U. S. 461, 34 Sup. Ct. 648, 58 L. Ed. 1046. In view of the settled rule that the federal trade-mark statute does not create any exclusive right, as the patent statute does, but only recognizes a right which has been already acquired by exclusive appropriation, and then furnishes evidence and remedies (Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550; Hopkins on Trade-Marks, § 27; Hesseltine's Law of Trade-Marks, p. 139), we do not regard the decision in the Davids Case as holding that the statute directly operates to grant a monopoly to one who rightfully registers under the ten-year clause a descriptive or geographical word. We take it as holding that the statute was not intended to permit, under this clause, an ineffective and useless registration, and so, in effect, holding that the statute removed from descriptive words which had been exclusively used as a mark in interstate commerce for 10 years the bar or disability caused by their descriptive character, and made them, after that probation, subject to exclusive appropriation with the same effect, in the main, as if the disability had never existed. Since the statute relates primarily to registration, it may well be that the disability continues until registration, somewhat retroactively, removes it; that is not now important. Neither is it important at present to know the exact distinctions between the manufacturer's rights formerly existing under the secondary meaning theory

and those now existing under the statute. Since it appears that plaintiff had enjoyed the exclusive use of the name "Coca Cola" for more than 10 years before 1905, and that there was due registration under the act of 1905, it follows that plaintiff's exclusive rights as a trade-mark owner and as defined in the Davids Case, are established.

Whether any exclusive rights which, in an essential part, depend on this statute can extend to the regulation of strictly intrastate commerce, or whether the effect must be limited to the field where Congress had power to act, is an interesting question, which is only suggested, but not presented, by this record. It is not raised by assignment of error or by the briefs. We, therefore, give it no consideration.

[2] 2. We think the infringement sufficiently appears. Here, also, the Davids Case is instructive. The specific form in which the mark was registered in that case was not considered important; and so it cannot be here controlling, whether the words "Coca Cola" are with or without a hyphen, or are in script or in plain letters. Neither is infringement avoided because defendant marks its bottles "Fletcher's Coca Cola." Not only does this qualification in the name fail effectively to reach the ultimate consumer (Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720, 119 C. C. A. 164, and 211 Fed. 942, 128 C. C. A. 440), but a trade-mark right which could be so avoided would be of no value. Indeed, even under the secondary meaning theory, and without the aid of the statute, such marking would not sufficiently differentiate. Merriam v. Oglivie, 170 Fed. 167, 95 C. C. A. 423, and cases cited on page 168; Davids Co. v. Davids, supra. A case may arise where the words registered under the statute are so wholly and so merely descriptive and so unfit to carry an arbitrary meaning indicating registrant's product only that the use of the words coupled with defendant's name as manufacturer would not infringe; but this is not that case. The words here involved were, if fairly "descriptive" at all, not purely descriptive, and by 10 years' exclusive use they had become the distinctive appellation of plaintiff's product. To permit defendant to use them in connection with his own name is not to avoid or mitigate the wrong, but is rather an aggravation, because of the false implication that plaintiff has parted with the exclusive right. Jacobs v. Beecham, 221 U. S. 263, 272, 31 Sup. Ct. 555, 55 L. Ed. 729.

3. There remains the question whether the mark is deceptive. Defendant does not expressly make this point, but it is so bound up with the questions of how merely descriptive the words are, and whether the same words as used by defendant are only the rightful name of its product, that it must be decided. The act of 1905 makes no exception in this respect, but we assume that if the registered words clearly carried deception, and if their use really represented to the purchasers that the article was something essentially different from the thing which they actually received, the courts would not enforce any exclusive rights under such registration, both because plaintiff would come into court with unclean hands (California Co. v. Stearns, 73 Fed. 812, 816, 20 C. C. A. 22, 33 L. R. A. 56), and because such words could not be within the fair contemplation of the act, when it refers to "any mark * * * which was in actual and exclusive use as a trade-mark,"

etc. The inquiry whether the mark is deceptive and misleading is not dissimilar to the question whether the same words constitute the distinctive name of another article, which question we have considered in our opinion in United States v. Coca Cola Co., 215 Fed. 535, this day filed; but there may be some such special force in the words "distinctive name" found in the Pure Food Law that a mark might be thought deceptive or misleading even though it was not the "distinctive name of another article." Hence, the point requires, in this case, further consideration.

The argument is that the use of the name, "Coca Cola," implies to the public that the syrup is composed mainly or in essential part of the coca leaves and the cola nut; and that this is not true. The fact is that one of the elements in the composition of the syrup is itself a compound made from coca leaves and cola nuts. This element becomes a flavor for the complete syrup, and is said to impart to it aroma and taste characteristic of both. This flavoring element is not in large quantity (less than 2 per cent.), but it is impossible to say that it does not have appreciable effect upon the compound. The question then is whether the use of the words is a representation to the public that the syrup contains any more of coca or of cola than it really does contain.

[3] We think it clear that whether the claimed trade-mark is so descriptive of something else as to be deceptive must be decided as of the time of adoption. It cannot be that rights once lawfully acquired by exclusive appropriation can be defeated by subsequent progress of public knowledge regarding some other substance of similar name. It is undisputed that during the period shortly after 1892, while this name was coming into public knowledge in connection with plaintiff's product, little or nothing was popularly known about either coca leaves or cola nuts, although existing technical or cyclopedic publications gave information. It is not important whether Pemberton's original form, "Coca Cola Syrup and Extract," was so descriptive as to be deceptive if applied to a compound not composed mainly of these ingredients. The name in which trade-mark rights have been acquired is the compound name "Coca Cola," and this name may not, for all purposes, be the same as if it was "Extract of Coca and of Cola."[1] Neither of these words alone had any absolute complete meaning, but when the words were put together to make the compound term, the ambiguity of meaning was intensified. If coca was spoken of, the reference might be to the leaves, or to a decoction or to an extract; "cola" might refer to the nuts or to a powder or to a paste or a fluid; and so, when the public first saw the name "Coca Cola," it could not know, as we said in the accompanying case, whether the substance was medicine, food, or drink, or whether it was intended to swallow, smoke, or chew. One who had all the existing available information could only infer that the new substance, whatever it was, had some connection with these two foreign things. The case would be somewhat different if each of the two named elements was itself definite and certain, but neither is. To illustrate by more common substances: Sage

[1] But see Coca Cola Co. v. American Co. (D. C.) 200 Fed. 107, where Judge Lacombe thinks this form to be an infringement.

is a shrub, used in various ways; the almond is a nut, eaten raw or prepared in numerous methods. The compound name "Sage-Almond," as a label, would convey a very indefinite idea, if any, as to what would be found when the package was opened; and, if we assume that "Sage-Almond" turned out to be a drink in connection with which sage leaves and almonds had been used, we have, in this illustration, a close analogy to Coca Cola; yet this name, applied to a soda fountain beverage, would not deceive the public into supposing that it contained all the virtues of sage tea and all of the nourishment of the almond nut meats. Such an article could honestly enough carry the supposed name "Sage-Almond"; and after 20 years exclusive use of the name it would not still be common property. A newcomer might rightfully sell (e. g.) "Sage Tea with Almond Flavor"; he might not take the peculiar, precise, and really arbitrary compound name.

Plaintiff's counsel say, and so far as we see accurately say:

"The use of a compound name does not necessarily * * * indicate that the article to which the name is applied contains the substances whose names make up the compound. Thus, soda water contains no soda; the butternut contains no butter; cream of tartar contains no cream; nor milk of lime any milk. Grape fruit is not the fruit of the grape; nor is bread fruit the fruit of bread; the pineapple is foreign to both the pine and the apple; and the manufactured food known as Grape Nuts contains neither grapes nor nuts."

Many names which, as to the claim that they are so descriptive as to be deceptive in the manner in which they are used, must be classified with Coca Cola, have been sustained as proper trade-marks. The Court of Appeals of New York thought that "Sliced Animals" was not merely descriptive, and was capable of exclusive appropriation. Selchow v. Baker, 93 N. Y. 59, 45 Am. Rep. 169. The same court considered "Bromo Caffeine." Defendant in that case insisted that he could call his product "Bromo Caffeine" because it was, and because plaintiff could not adopt, as a trade-mark, the words so indicating the composition of the article. It was decided that while the name indicated a compound of caffeine with some bromide, this indication was too vague and indefinite to put the name beyond the forbidden limit. The discussion by Judge Peckham is thoroughly applicable to the instant controversy. Keasbey v. Bromo, etc., Wks., 142 N. Y. 467, 474, 476, 37 N. E. 476, 40 Am. St. Rep. 623. A very similar case is that concerning "Lacto Bacilline." Application of La Societe Ferment, 81 L. J. R. 724.[2] In Ludington v. Leonard, 127 Fed. 155, 62 C. C. A. 269, it was specially urged upon the Circuit Court of Appeals of the Second Circuit that the name "carroms" as applied to a game resembling billiards was either too accurately descriptive or too deceptive and misleading to be exclusively used even under the secondary meaning theory; but the contention was not upheld. Perhaps the controlling distinction cannot be better expressed than was done by Judge Sho-

[2] This case is more fully reported in the Official Journal of the Patent Office, "Reports of Patent and Trade-Mark Cases, Vol. 29," before Justice Joyce, at p. 149, and on appeal, at p. 497, Justice Joyce was reversed. These reports are in the old English method, and the discussions between court and counsel cover every phase of the question.

walter when he said (American Fiber Chamois Co. v. De Lee [C. C.] 67 Fed. 329, 331):

"If said words, as here combined, have any sense, as descriptive of the class of goods in question, it is not so pronounced, obvious, and usual as to make said combined words unfit, inappropriate or misleading, as a name, sign, or mark of origin of complainant's goods."

Cases like Standard Co. v. Trinidad Co., 220 U. S. 446, 31 Sup. Ct. 456, 55 L. Ed. 536, are sharply distinguishable. In that case, it was found as a fact that the word involved, "Rubberoid," was in common dictionary use as an adjective, so that it was merely descriptive. There was no room for it to carry any arbitrary character in addition. This feature, with its attendant distinction, is typical of the cases relied upon by appellant. When it cannot be said that the words "Coca Cola," from 1895 to 1905, gave to the public "reasonably accurate, and tolerably distinct knowledge as to what the ingredients"[3] were, these cases relied on by appellant lose their pertinence.

[4] We conclude that the name Coca Cola as applied to plaintiff's product, while undoubtedly suggestive, is not so substantially and really deceptive as to invalidate the registered mark.

[5] 4. Closely connected with what has been said, but separately urged by defendant, is the claim that because in compounding its product defendant has used coca leaves in considerable quantity and has used real cola nuts to furnish the caffeine, it must be permitted to call its article "Coca Cola." This is really another aspect of the matter already decided. If the name is not so substantially and definitely descriptive (rather than suggestive) as to be deceitful if employed where the supposed description is not true, it follows that the name is not so merely descriptive that its use remains of common right after public acquiescence for 20 years in plaintiff's exclusive appropriation. Analogy is found in the illustration above quoted from counsel. Assuming that "Grape Nuts" had been exclusively used for a long period as the distinct name of a particular maker's compound food, could a newcomer rightfully take away a part of the established trade by using the same name for his new compound, just because it contained some nuts and was flavored with grape juice? To us, a negative answer seems imperative, and no less so in the instant case.

[6] 5. On the accounting before the master, plaintiff did not seek damages as such, but asked an award of the profits made by defendant. No question arises except that presented by the fact that Mr. Fletcher, the general manager of defendant corporation, received during the infringing period a salary of $2,700. If defendant was entitled to credit for this salary as a part of its operating expenses, there were no profits; if the item was an improper credit, there was a balance of profit to be recovered. Without question, the defendant was an actual corporation organized in the regular way for business purposes. It succeeded to Mr. Fletcher's private business. He actively caused it to be organized, and he became and continued president and general manager. Two-thirds of the capital was contributed by others, and Mr. Fletcher

[3] Judge Peckham's language in Keasby v. Bromo, etc., Wks.

did not have the control of the corporation, except by sufferance of the majority of the stockholders. There is no claim that the corporation was a mere sham or subterfuge brought into existence to cover up his individual activities. Under these circumstances, and when the only question is the amount of profits which the corporation actually made, justice to the majority stockholders, if no other reason, requires that his fair and reasonable salary be treated like any other disbursement. The District Judge was right in concluding that there was no profit.

[7] 6. The plaintiff moved to dismiss defendant's appeal from the interlocutory decree for injunction, because the appeal was not taken within 60 days; and, as this motion raises a question of our jurisdiction, it must be considered. The interlocutory decree awarding injunction and making a reference to take an account of damages was entered July 29, 1912. The master's report was filed October 8th; defendant excepted, and the final order of the court on the exceptions was dated November 25th. This order made no reference in terms to the order of July 29th, and was, in terms, confined to the sustaining of one exception, the overruling of another, an adjudication that the plaintiff had failed to establish any damages, and a disposition of the costs. November 11th, the defendant had claimed and had been allowed "an appeal from the decree of July 29th," and had assigned errors thereon, but the citation was not issued nor the bond on appeal approved until November 26th. Clearly the decree of July 29th did not become final until the order of November 25th. This last order might well have repeated, in terms or by reference, the provisions of the order of July 29th, so that there would have been one complete, final decree, and we think this would have been according to the most careful practice; but the order of November 25th necessarily has this effect, and operates to redeclare the adjudications which, up to that time, had been interlocutory and within the control of the court, and which then, for the first time, became final. The defendant then had six months within which to appeal from any part of this consolidated final decree. Loveland's Appellate Jurisdiction, 467, 468; Grant Co. v. Laird Co., 212 U. S. 445, 29 Sup. Ct. 332, 53 L. Ed. 591. Inasmuch as the appeal which defendant did take was not perfected until after this final decree had been entered, we think it may properly be treated as having been taken from that decree. No prejudicial irregularity comes from the fact that July 29th was named as the date of the decree from which appeal was taken and to which error was assigned. It would have been absolutely accurate to appeal "from the decree of July 29th as re-entered on November 25th," and this is the substantial effect of what was done. The same result is reached by considering that the time for appeal from the decree of July 29th (under section 11 of the Circuit Court of Appeals Act [Act March 3, 1891, c. 517, 26 Stat. 829; U. S. Comp. St. 1901, p. 552], as distinguished from one under section 129 of the Judicial Code [Act March 3, 1911, c. 231, 36 Stat. 1134; U. S. Comp. St. Supp. 1911, p. 194]) did not begin to run until November 25th. That the appeal was prayed and allowed prematurely and before the effective entry of the decree appealed from is not a fatal irregularity. For this purpose, these preliminary steps may

be treated as speaking as of the day when they became fully effective by the perfecting of the appeal. The motion to dismiss must therefore be denied.

Upon both appeals, the judgment below is affirmed.

UNITED STATES v. FORTY BARRELS AND TWENTY KEGS OF COCA COLA.

(Circuit Court of Appeals, Sixth Circuit. June 13, 1914.)

No. 2415.

1. STATUTES (§ 184*)—CONSTRUCTION—LEGISLATIVE INTENT.

In applying a statute to particular facts, and when it becomes necessary to construe language to which the parties give different meanings, the court have in mind the essential scope and purpose of the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 262; Dec. Dig. § 184.*]

2. FOOD (§ 2*)—FOOD AND DRUGS ACT—CONSTRUCTION—PURPOSE.

The purpose of the Food and Drugs Act (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1911, p. 1354]), entitled, "An act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods," etc., and prohibiting interstate commerce in any article which is adulterated or misbranded, defining an article deemed to be adulterated or misbranded, providing for the seizure and forfeiture of offending articles, and prohibiting importations from foreign countries of food adulterated or misbranded or otherwise dangerous to the health of the people, is to prevent fraud and deception, so that a purchaser can obtain the thing he supposes he is obtaining, rather than the protection of the public health to the extent of preventing a purchaser from deliberately and intentionally buying a particular food which is what it purports to be, though a jury may think it deleterious.

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

3. FOOD (§ 5*)—FOOD AND DRUGS ACT—CONSTRUCTION—"ADDED."

The word "added" in Food and Drugs Act, § 7, declaring that an article shall be deemed to be adulterated if it contain any added poisonous or other added deleterious ingredient which may render the article injurious to health, implies the existence of a standard, and an element necessarily used to create a standard is not "added," and caffeine, forming a valuable constituent of Coca Cola, made up of water, sugar, caffeine, phosphoric acid, glycerine, lime juice, coloring, and flavoring matter, is not "added," where for 15 years before the act the article containing all the ingredients had been widely used.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*

For other definitions, see Words and Phrases, vol. 1, pp. 174, 175.]

4. FOOD (§ 5*)—FOOD AND DRUGS ACT—CONSTRUCTION—"ADDED."

The court, in construing the Food and Drugs Act, § 7, cl. 5, declaring that an article shall be deemed to be adulterated if it contain any added poisonous or other added deleterious ingredient which may render the article injurious to health, must give effect to the word "added," and not construe the clause in the same way that an almost identical clause relating to confectionery with the exception of the omission of the word "added" must be construed, for the court must give effect to all the words of a statute in their ordinary sense.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*]

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

5. FOOD (§ 5*)—FOOD AND DRUGS ACT—CONSTRUCTION—"ADDED."

The test whether a deleterious ingredient is added to an article of food within Food and Drugs Act (Act June 30, 1906, c. 3915, 34 Stat. 769 [U. S. Comp. St. Supp. 1911, p. 1356]) § 7, declaring that an article shall be deemed adulterated if it contain any added poisonous or deleterious ingredient, depending on whether the ingredient is in its natural or in an artificial form, may often be a useful aid in applying and interpreting the statute, but it cannot be applied where artificially compounded foods are under consideration.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*]

6. FOOD (§ 5*)—FOOD AND DRUGS ACT—CONSTRUCTION—"ADDED."

The court, in construing the phrase "added poisonous or added deleterious ingredient," in Food and Drugs Act, § 7, cl. 5, declaring that an article shall be deemed to be adulterated if it contain any added poisonous or other added deleterious ingredient, must consider section 8, providing that an article of food which does not contain any added poisonous or deleterious ingredient shall not be deemed to be adulterated or misbranded, in specified cases, and, when so construed, the act requires a standard before there can be any added ingredient or adulteration.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*]

7. FOOD (§ 5*)—FOOD AND DRUGS ACT—CONSTRUCTION—ADDED.

The Food and Drugs Act, entitled "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods," makes no distinction between compounds known at its date and those thereafter devised, but the act does not absolutely forbid the use in any compound of any element that a jury may call deleterious, but Congress, having selected and regulated the use of those things known to be particularly dangerous, has not wholly forbidden other things from which no serious danger need be anticipated.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*]

8. FOOD (§ 5*)—FOOD AND DRUGS ACT—CONSTRUCTION—"ADDED."

The word "added" in Food and Drugs Act § 7, declaring that any article shall be deemed adulterated if it contain any added poisonous or other added deleterious ingredient, may be construed as being used with reference to a possibly deleterious food ingredient beyond the quantity in which the ingredient is normally found in usual or customary articles of food, and no such ingredient should be considered as added, provided it is present only in the quantity in which it existed in common articles of food generally known, and so construed, caffeine, forming an ingredient of Coca Cola, and in less amount than common in coffee, is not an added deleterious ingredient.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*]

9. FOOD (§ 15*)—FOOD AND DRUGS ACT—MISBRANDING.

Under the Food and Drugs Act, § 8, declaring that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be misbranded in specified cases, a compound sold under the distinctive name of Coca Cola, which is a distinctive name of the product of the manufacturer thereof and of nothing else, is not misbranded, "Coca" being indicative of one article, "Cola" being indicative of another distinct article, and the combination not being descriptive of any substance or combination known until adopted by the manufacturer, and still unknown as an appellation for any other substance on the market.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. § 15.*

What constitutes a violation of pure food regulations, see note to Brina v. United States, 105 C. C. A. 559.]

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

In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

Libel by the United States for condemnation of 40 barrels and 20 kegs of Coca Cola, the Coca Cola Company claimant. There was a judgment (191 Fed. 431) denying relief, and the United States brings error. Affirmed.

W. B. Miller and Lewis M. Coleman, U. S. Atty., both of Chattanooga, Tenn., for the United States.

J. B. Sizer, of Chattanooga, Tenn., and Harold Hirsch, of Atlanta, Ga., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. This proceeding was brought by the United States to condemn a quantity of syrup called Coca Cola. Forfeiture was claimed under the Pure Food Law (34 U. S. S. L. 768), because the syrup was said to be adulterated and misbranded. The case was tried at great length before a jury; at the conclusion of the trial, the government withdrew certain issues, and upon the two remaining matters, the court instructed a verdict for the Coca Cola Company, the claimant of the property. The sole question presented by this writ of error is whether there was any evidence tending to show that the article was either adulterated or misbranded within the prohibition of the act. The facts presented and the questions involved are so well set out by the District Judge in his carefully prepared opinion (191 Fed. 431)[1] that we refrain from further preliminary statement. The sections and clauses of the act which it seems may have some bearing on the question before us are given in the margin.[2]

[1] The parts of the libel voluntarily dismissed by the government were those matters numbered 4 and 5 in the District Judge's opinion; the statement on page 440 of 191 Fed. is erroneous in this respect.

[2] "Sec. 6. * * * the term 'food,' as used herein, shall include all articles used for food, drink, confectionery or condiments, by man or other animals, whether simple, mixed or compound.

"Sec. 7. That, for the purposes of this act, an article shall be deemed to be adulterated * * * in the case of food * * * third, if any valuable constituent of the article has been wholly or in part abstracted * * * fifth, if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health.

"Sec. 8. That the term 'misbranded' as used herein, shall apply to all drugs or articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article or ingredients or substance contained therein which shall be false or misleading in any particular * * * that for the purposes of this act, an article shall also be deemed to be misbranded * * * in the case of food: First, if it be in imitation of or offered for sale under the distinctive name of another article. Second, if it be labeled or branded so as to deceive or mislead the purchaser * * * or if it fail to bear a statement on the label of the quantity or proportion of any morphine, opium, heroin, alpha or beta eucane, chloroform, cannabis indica, chloral hydrate or acetanilid or any derivative or proportion of any such substances contained therein. * * * Fourth, if the package containing it or its label shall bear any statement, design or device regarding the ingredients or the substance contained therein, which statement, design or device shall be false or misleading in any particu-

[1, 2] In applying a statute to particular facts and where it becomes necessary to construe language to which opposing sides give different meanings, it is vital to have in mind the essential scope and purpose of the act. The present case well illustrates the importance of this consideration. Much of the government's contention as to the extent of the prohibitions here found rests upon the theory that Congress intended to protect the public health by preventing (to the extent of the constitutional power resting in the commerce clause) the sale or transportation of deleterious foods. The opposing contention denies this broad purpose and concedes only the intent to prevent any fraud or deception in the sale of foods. The title to the act is broad enough to support the government's utmost claim as to general purpose. It is, "An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods," etc. If there was nothing in the body of the act expressly prohibiting the sale of deleterious food, qua deleterious, this title would furnish some reason for expanding in that direction any terms of prohibition there might be ambiguous enough to permit the implication (Goodlett v. L. & N. R. R., 122 U. S. 391, 408, 7 Sup. Ct. 1254, 30 L. Ed. 1230); but we find in section 11, which relates solely to importations from foreign countries, an express direction that such importation shall be wholly forbidden if the food is adulterated or misbranded "or is otherwise dangerous to the health of the people of the United States." We have therefore a provision which responds to the call of the title in this particular and makes it unnecessary to resort to any otherwise unjustifiable construction for the mere purpose of giving some effect to all parts of the title. With the exception of this clause of section 11, every other directly or indirectly prohibitory clause of the act relates to articles which carry the taint of deception and fraud by being adulterated or misbranded. Section 2 prohibits interstate commerce in any article "which is adulterated or misbranded, within the meaning of this act" and subsequent clauses of the same section refer to "any such article so adulterated or misbranded within the meaning of this act," and to "any such adulterated or misbranded foods." The expert examination provided for by section 4 is to determine "whether such articles are adulterated or misbranded." Section 7 defines when, for the purposes of the act, an article shall be deemed to be adulterated, and section 8 defines the term "misbranded" as used in the act, and specifies when, for the purposes of the act, an article shall be deemed

lar; provided that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases: First, in the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food under their own distinctive names and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand, with a statement of the place where said article has been manufactured or produced. Second, * * * and provided further that nothing in this act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient, to disclose their formulas, excepting so far as the provisions of this act may require to secure freedom from adulteration or misbranding."

to be misbranded. Section 9 prescribes a certain immunity from prosecution when there is a guaranty to the effect that the article is not adulterated or misbranded within the meaning of the act. Section 10 provides for the seizure and forfeiture of the offending articles, but its effect is limited to an article which is adulterated or misbranded within the meaning of the act. A subsequent clause of section 10 furnishes some superficial support for the broader theory of the purpose of the act by providing for the disposition of the offending article, if it "is condemned as being adulterated or misbranded or of a poisonous or deleterious character within the meaning of this act"; but this support is only superficial, because the power to condemn, given by the first part of section 10, rests on the finding that the article is "adulterated or misbranded." This general reference to a poisonous or deleterious character as ground of condemnation must be to instances where that character, by incorporation into the article, causes the fatal adulteration or misbranding. Considering all these parts of the act, together with its title, we cannot doubt that, so far as its general purpose and intent furnish any aid for interpretation, that general purpose and intent must be deemed to be the prevention of fraud and deception, so that the purchaser can get the thing he has a right to suppose he is getting, rather than the protection of the public health to the extent of preventing the purchaser from deliberately and intentionally buying a particular food which is what it purports to be, even though a jury might think it "deleterious." If argument were needed to sustain this conclusion, it could be found in the provisions as to drugs. Foods and drugs are put on the same basis throughout, save as to matters of definition, and some detailed requirements. There can be no room to suppose that the act was intended to prohibit broadly the sale of all deleterious foods and not to prohibit with equal breadth the sale of all poisonous drugs. The latter supposition is impossible, and so the former cannot be accepted. Further support will be found in the provisions which, by necessary implication, permit the sale of foods containing cocaine, morphine, and the like, provided the purchaser is properly advised of the contents. These views of the general purpose of the act have been accepted by the decisions, so far as they go. Savage v. Jones, 225 U. S. 501, 533, 535, 32 Sup. Ct. 501, 56 L. Ed. 1182; McDermott v. Wisconsin, 228 U. S. 115, 131, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984; United States v. Lexington Co., 232 U. S. 399, 409, 34 Sup. Ct. 337, 340 (58 L. Ed. 658).

The general language of the court in the last-cited case that "the statute was intended to protect the public health from possible injury" is not at all inconsistent with the view we have expressed, because that language is used with reference to adulterations and the addition to known foods of injurious elements. The very word "adulterated" imports fraud and deception; it implies that the article is not what it purports to be.

[3] Under the statement of facts, it is clear that the only question arising under section 7 is whether the caffeine in the Coca Cola is an "added poisonous or other added deleterious ingredient which may render such article injurious to health"; and, under the assumption made by the District Judge, of which the government cannot com-

plain, and which we here adopt, but only for the purposes of this opinion—i. e., that there was evidence requiring submission to the jury to the effect that caffeine is a poisonous or deleterious ingredient which may render the Coca Cola injurious to health—it is equally clear that the turning point is whether it can be said, or whether a jury could be permitted to say, that the caffeine was "added" within the meaning of this clause.

It is impossible intelligently to conceive the meaning of "added," unless we suppose a base upon which the addition is placed, and we at once meet the question: If caffeine is the addition, what is the base? For 15 years before the passage of the act, Coca Cola had been an existing article of food (within the statutory definition of "food"), and in the latter 10 years of that period it had been one of the most widely known and used articles of its general class. It was a compound; it had no distinctive base (unless water, by reason of its larger proportion); it was made up of water, sugar, caffeine, phosphoric acid, glycerine, lime juice, coloring matter, flavoring matter and "merchandise No. 5." Each of these elements is more or less important; there seems to be no method of determining their relative importance; but if any one may be rejected as comparatively negligible or secondary or noncharacteristic, that one is not caffeine. In the manufacturing process, water and sugar are boiled to make a syrup; this boiling is repeated; then caffeine is "added," and then the syrup is boiled once or twice more; the syrup is then put into a cooling tank and then into a mixing tank in which the remainder of the process is carried on, and in which the other elements become part of the ultimate combination. It is plain as may be that without caffeine the mixture would not be Coca Cola, and the purchaser who had been using it in its standard form 15 years when the act was passed, and who might then buy an article of the same name which did not contain any caffeine, would rightfully think that he was deceived; and yet it is said that the act intended to prevent misleading the public is violated unless the public is thus misled.

It is another form of the same thought to say that the mere use of the word "adulterate" or "added" implies the existence of a standard, and it is a contradiction in terms to say that the use of an element necessary to constitute the standard is an adulteration of, or addition to, the standard; but to this contradiction, the argument for the government necessarily leads. So, further, we find that clause 3 of that division of section 7 relating to foods declares adulteration if any valuable constituent has been abstracted. Caffeine is a valuable constituent. If it is omitted, the article is adulterated, and if it is included, the article is adulterated. We must break clause 3, to keep clause 5.

[4] It is urged that in case of a compound article each element is, in a proper sense, "added," and so, if any element is deleterious, it is an "added deleterious ingredient." This position not only depends in part upon what we have thought an erroneous view of the general purpose of the statute, but it destroys all force in the word "added" and gives clause 5 of that part of section 7 relating to food precisely the same meaning as if it read "if it contain any poisonous or other deleterious ingredient," etc. The deliberate and careful insertion of the

word "added" before the word "poisonous" and again before the word "deleterious," while the word is omitted in the preceding almost identical clause relating to confectionery, cannot be treated as accidental or meaningless. So to do would violate the settled rule of construction which requires us to "give full effect to all the words in their ordinary sense" (Bend v. Hoyt, 13 Pet. 263, 10 L. Ed. 154), and requires that "signification and effect shall, if possible, be carried to every word" (Washington Co. v. Hoffman, 101 U. S. 112, 115 [25 L. Ed. 782]), and declares it the "duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the Legislature was ignorant of the meaning of the language it employed" (Montclair v. Ramsdell, 107 U. S. 147, 152, 2 Sup. Ct. 391, 395 [27 L. Ed. 431]).

[5] Again, it us urged that the true test whether the deleterious ingredient is "added" is whether this ingredient is in its natural or in an artificial form. This criterion is supposed to find support in statements made during the Congressional debates, and in the well-known fact that many natural articles of food, like fruits, contain elements which in the combination formed by the complete fruit are not materially harmful, but which, when extracted and administered separately, may be injurious. This criterion may often be a useful aid in applying and interpreting the statute, but to apply it as a hard and fast rule where artificially compounded foods are under consideration comes to saying, in the case before us, that if coffee berries or tea leaves, or, we take it, the complete extract of coffee berries or tea leaves, containing the amount of caffeine now in question, were put into the compound in its manufacture, there would be no violation of the law, but that if the caffeine, and that only, which was in these same coffee berries or tea leaves, or in some other natural product, is put into the syrup, the law is broken. Alcohol surely might be considered a "deleterious ingredient" if caffeine may be; but can we suppose that a compound food would be obnoxious to this law if it contained 5 per cent. of alcohol purchased in the market ready distilled and yet that a compound otherwise the same would be within the approval of the law though it contained 25 per cent. of alcohol distilled from grain during the process of making the compound? There has been much controversy whether "blended whisky" could be sold under that name, but it has never been thought to be forbidden merely because its alcohol was an "added" ingredient. Many wines are "fortified" by adding alcohol, and these may be obnoxious to the law for other reasons; but if the theory now under consideration is correct, they could not be sold at all, no matter how labeled. This theory must even lead us to say that if a ground or pulverized coffee or a coffee extract is so deficient in caffeine as to be below standard, the law is violated by adding from another source caffeine enough to make the coffee of full normal strength, or to say that it is a vital distinction whether the citric acid contained in any familiar and popular acid beverage is, at the time of compounding, squeezed from a lemon or poured from a bottle. We cannot follow the argument which brings us to those results. Not only is it without basis in the statute, but it lacks inherent cogency.

[6] We get from section 8 some help on the proper meaning of the phrase "added poisonous or deleterious ingredient," because unquestionably the two sections must be construed together and the same phrase should have the same construction in each. The proviso of the fourth paragraph of that part of section 8 relating to food seems to be drawn with express reference to situations like the present. Congress must have known that many proprietary articles of food and drugs were upon the market under proprietary or trade names, and Congress thought fit to provide that these things should not be deemed to be adulterated unless any deleterious ingredient contained therein was "added." This recognizes somewhat more expressly than is done by section 7 the thought that the necessity of a standard before there can be any adulteration applies as well to compounds as to simple foods, and then avoids future difficulties in application by providing that the compound article, in its distinctive and known form, should be the standard.

[7] We do not overlook the argument that the act makes no distinction between compounds known at its date and those thereafter devised, and so that the construction which prevents an inherent element from being considered as "added" leaves the manufacturer at liberty to use any poison he pleases in making up his compound "food," provided only he gives to it and sells it under a distinctive name. This conclusion must, to some extent, be granted, yet it loses most of its apparent force when we remember the real purpose of the act and observe the express direction of the law that the maker of a proprietary food need not disclose its contents if he states the place of manufacture. It would seem a proper provision that if a proprietary food contains any ingredient fairly subject to be called deleterious, the maker should disclose on the label its presence and its extent, just as is required in numerous specific instances; but we cannot make such a law. On the other hand, it is difficult to suppose that Congress intended absolutely to forbid the use in any compound of any element that a jury might later call "deleterious"; but it must be one thing or the other. From this point of view, the prohibition is either absolute or nonexistent. The best known habit-forming drugs are selected, and implied permission is given to allow their use in compounding products for sale, provided they are named on the label; but as to the great mass of other food and drug elements which are undoubtedly deleterious if used to excess, there is no provision for naming them on the label. If they are within the definition of "added deleterious ingredient," they may never be used under any conditions or in any quantity that may be injurious to health, even though they are described in the largest of letters on the outside of the package. This way of reading the statute would practically greatly impede the progress of synthetic chemistry in foods, and we think it distinctly more unreasonable than it is to suppose that Congress, having selected and regulated the use of those things known to be particularly dangerous, thought best not wholly to forbid at that time other things from which no serious danger need be anticipated.

[8] There is a middle view which is sufficient for the purposes of this case, and which will recognize the composite meaning of "added

deleterious" rather than the separate meaning of each word. This view is that in using the word "added" with reference to a possibly deleterious food ingredient, Congress had in mind an addition above and beyond the quantity in which such ingredient was normally found in usual and customary articles of food, and that no such ingredient should be considered as "added" if it was present only in the quantity in which it existed in these common articles of food with which every member of Congress was familiar, and which had generally been thought wholesome. For example, creosote and other products of destructive wood distillation are, independently considered, injurious, but they have always been present in smoked hams. Can the addition of the same preservatives to the same extent to the same meat be something that Congress intended to prohibit? The boric acid, found in apples, is a preservative. If certain apples which are to be preserved are not up to the maximum in this element, did Congress intend to forbid supplying the deficiency by the same element from another source? Acetic acid may, of course, be injurious, but if, by its use, an artificial vinegar is made which is chemically and in every way equivalent to the natural vinegar familiar to the members of Congress in many compounds, would they have thought of it as a deleterious addition? No example is so clear as the very one here involved. Every member of Congress had been familiar, from childhood, with tea and coffee; perhaps most of them drank one or the other. The average cup of coffee contains more than two grains of caffeine; the average cup of tea, one and one-half grains. A glass of Coca Cola, as consumed, contains one and one-fifth grains of caffeine. The chemical qualities and the physiological effects of the caffeine which is in the tea or coffee and of the caffeine which is in the Coca Cola are precisely the same. We are quite convinced that the use in an artificial beverage of a certain element which had been one of its characteristic elements for many years, and when such use was in a less proportion than the same element was known to make up in different natural beverages then in universal use and generally thought wholesome—that such an element so employed could not have been within the meaning of Congress when it chose the words "added deleterious ingredient."

[9] The question arising under section 8—the misbranding section—is to be determined by the proviso under the fourth clause relating to food. Separate reference to the first clause which forbids sale "under the distinctive name of another article" is unnecessary, because the same prohibition is repeated in the proviso under clause 4. We have reached the conclusion that Coca Cola does not contain any "added poisonous or deleterious ingredients," and it is undisputed that the labels carry a statement of the place of manufacture. Hence, this proviso declares that Coca Cola shall not be deemed to be adulterated or misbranded if it was or is known as an article of food under its own distinctive name and if it is not in imitation of or offered for sale under the distinctive name of another article. It is an article of food, under the definition of the statute. That it was, at the time of the passage of the law and ever since has been, known under its own distinctive name is too clear for question, except as it is said that the

adopted name cannot be its distinctive name because it is the distinctive name of another article.. Neither is it said to be an imitation of another article, except as these words also raise the same question whether it is sold under the distinctive name of another article. Coming to that question, and just as on the subject of adulteration we must first find the standard, we here first meet the inquiry: What is the "distinctive name of another article" under which name Coca Cola is sold? The record makes it very clear to us that there is no such other article. No article except plaintiff's compound is or ever has been sold "under the distinctive name," Coca Cola (until defendant's infringement). These words constitute and are the distinctive name of claimant's product, and they are the distinctive name of nothing else. "Coca" is indicative of one article; "cola" is indicative of another, very distinct, but "Coca Cola" was not, in 1892, and (save for the general knowledge of plaintiff's article) is not now intelligently descriptive of any combination of the two. It might be medicine, food or drink; it might be to swallow, smoke, or chew. These associated words as the distinctive name of any substance or combination of substances were unknown until adopted by plaintiff; that "distinctive name" is still unknown as an appellation for any other substance on the market.

The burden put upon the government to show that Coca Cola is masquerading under the distinctive name of another article is surely more exacting than the burden on one attacking the trade-mark to show that the name is sufficiently misleading as indicating the make-up of the product so that it is an improper trade-mark. We consider the latter question in our opinion this day filed in Nashville Syrup Co. v. Coca Cola Co., 215 Fed. 527, 132 C. C. A. 39, and conclude that the name carried no forbidden deception. We need not here repeat that discussion. If that conclusion is correct, it is even more certain that Coca Cola is not guilty of posing "under the distinctive name of another article."

It follows that the judgment below must be affirmed.

FISH v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. July 10, 1914. Rehearing Denied August 11, 1914.)

No. 1065.

1. CRIMINAL LAW (§ 369*)—EVIDENCE—EVIDENCE TENDING TO PROVE PRIOR OFFENSES.

Where, in the trial of a defendant charged with having burned a yacht of which he was owner with intent to prejudice the insurer, the only doubtful question was whether the fire which burned the yacht was set by defendant, it was error to admit evidence that during the preceding 14 months an automobile and another yacht owned by him had been burned, that both were overinsured, and that defendant was heavily in debt and without money, and was in each case the first to discover the fire, but made no attempt to save the property; the only tendency of

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

such evidence being to prove the commission of crimes by defendant in the other cases, which in the instant case was incompetent.

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

2. CRIMINAL LAW (§ 1171*)—MISCONDUCT OF DISTRICT ATTORNEY—COMMENTS ON CHARACTER OF ACCUSED.

Remarks made by a district attorney in his argument to the jury, reflecting upon the defendant's character, which was not put in issue, and going beyond any evidence in the case, and which were not withdrawn or corrected when called to the attention of the court and counsel, *held* to constitute prejudicial error.

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

In Error to the District Court of the United States for the District of Massachusetts; Clarence Hale, Judge.

Criminal prosecution by the United States against John A. Fish. Judgment of conviction, and defendant brings error. Reversed.

William H. Lewis, of Boston, Mass., for plaintiff in error.

Asa P. French, U. S. Atty., of Boston, Mass. (James S. Allen, Jr., of Boston, Mass., on the brief), for the United States.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

BINGHAM, Circuit Judge. The plaintiff in error, hereinafter called the defendant, was indicted in the District Court of the United States for the District of Massachusetts for willfully and corruptly burning and destroying an auxiliary gasoline schooner yacht called the Senta, of which he was the sole owner, on October 25, 1910, in Edgartown Harbor, Mass., upon waters within the admiralty and maritime jurisdiction of the United States, with intent thereby to prejudice the underwriters who had insured the yacht. The provisions of law under which the indictment was framed will be found in section 300 of the Criminal Code of the United States (Act March 4, 1909, c. 321, 35 Stat. 1147 [U. S. Comp. St. Supp. 1911, p. 1678]; R. S. U. S. § 5365 [U. S. Comp. St. 1901, p. 3641]). The jury returned a verdict of guilty. The case is now here on the defendant's bill of exceptions, and the errors assigned are: (1) To the reception of evidence relating to two fires other than the one charged in the indictment; (2) to the admission of certain other evidence; (3) to the argument of the district attorney; and (4) to the refusal of the court to give certain instructions.

The evidence tended to show that the yacht, which for convenience will hereafter be spoken of as the second Senta, was destroyed by fire between 2 and 3 o'clock on the morning of October 25, 1910, while at anchor in Edgartown Harbor, and within a few hundred yards of the shore; that the defendant was then on a pleasure cruise, and had come into the harbor some two or three days before, and had with him a cousin by marriage, Mrs. Williams, a friend, Miss Barnes, and a crew consisting of a sailing master and three men; that on the afternoon of October 24th the defendant went ashore in Edgartown, and while there at that time, or a day or so before, became acquainted with two men,

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

Osborn, a local ferryman, and Dexter, a member of the state police, both of whom he invited to dinner that evening on the yacht; that Osborn and Dexter came to the dinner, and while they were there the defendant arranged a gunning trip with Dexter, upon which they were to start at an early hour the next morning; that Dexter and Osborn went ashore somewhere between 8 and 10 o'clock; that the ladies concluded to retire about 10:30, but before doing so requested the defendant to light the oil stove, which was in the cabin, so that they might warm their feet; that, after warming themselves for a short time, they retired to the stateroom they were to occupy that night, which was situated on the starboard side and forward of the main cabin; that as they did this the defendant, who was in the aft stateroom, on the port side and forward of the main cabin, called out to them not to turn out the stove, as he wanted to come out and write some letters; that when they left the cabin the stove was about halfway between their stateroom and the dining table, the distance between the end of the table when extended and the partition to their room being five or six feet; that the table was not extended when they retired, and the stove was several feet away from it; that the stove was then burning and not smoking; that previous to this night Mrs. Williams had occupied the stateroom which the defendant was occupying, but on this night she slept with Miss Barnes, who was the regular occupant of the stateroom on the starboard side; that this change was made at the defendant's request, he stating that possibly one of the guests would stay aboard, but neither of them did, and neither was invited; that before this the defendant had slept in the transom berth in the main cabin; that after the ladies had gone to sleep, and between 2 and 3 o'clock in the morning, they were awakened by the defendant, who opened their door, saying, "Get out as quick as you can;" that they both arose, Mrs. Williams going at once, without stopping to dress, into the cabin, where she met the defendant near the door of his stateroom, holding her coat, which he helped her to put on; that at the defendant's direction she passed through the cabin, up the companionway to the deck, and went forward; that her coat was usually kept in the companionway, which was at the rear end of the cabin and opposite the door of the defendant's stateroom; that as she passed through the cabin she saw, and smelled, smoke, but observed no flame; that she passed within two feet of the stove, which was where they had left it the night before, and there was a dark object—cloth, she thought, thrown over the top of it; that the captain, who occupied the stateroom on the port side, forward of the one occupied that night by the defendant, was awakened by hearing the ladies' voices; that he went on deck as soon as he could, reaching there shortly after Mrs. Williams; that either before or after going on deck he learned from the defendant that something was the matter with the oil stove, and was directed to look out for the ladies and call the crew, which he did at once; that after getting on deck, and while speaking to the defendant through one of the skylights, he smelled smoke, but saw none; that Miss Barnes came on deck about three minutes after Mrs. Williams; that before Miss Barnes came on deck flames were seen emerging from the portholes on the starboard side; that the captain and the ladies got into the launch, the

captain remaining in it until the launchmen got in and hauled it up to the bow and around to the port side, when he boarded the skiff, which lay on that side; that while the launch was passing under the bow, and before the defendant appeared, flames were seen coming out of the companionway and the skylight; that later, and about 8 or 10 minutes after Miss Barnes reached deck, the defendant came on deck from out the forward galley; that about five or six minutes before the defendant came on deck, and after the launch had reached the port side of the yacht, an explosion was heard, "a fairly loud, muffled explosion"; that when the defendant came on deck he had a bundle and two guns with him, and at once got into the launch, and all went ashore; that neither the captain nor any of the crew went below after going on deck; that the defendant was the only one below after Miss Barnes came on deck; that the defendant at no time called for assistance, and no attempt was made to put out the fire; that just aft of the cabin were tanks containing several hundred gallons of gasoline; that there were on board tanks containing several hundred gallons of water, some buckets, and means provided for admitting salt water to the bathtub; that after getting on shore the defendant stated, in explanation of the fire, that he was awakened between 2 and 3 o'clock, and found the cabin full of smoke, and the tablecloth and the partition on fire; that he threw a blanket over the kerosene stove, which was burning, and called the captain and the ladies; that he thought the kerosene stove set the fire; that while he was in the stateroom getting his guns there was an explosion which knocked down the partition of the stateroom, striking him.

It also appeared in evidence that on October 8, 1910, the defendant shipped from the yacht to his address in New York three boxes and a bag, the aggregate weight of which was 215 pounds; that two days before the fire a box weighing 65 pounds was brought ashore from the yacht, which contained clean bed and table linen and other things, which the defendant himself had packed; that this box was shipped in Osborn's name, addressed to Miss Barnes, New York; and that subsequent to being indicted the defendant said to Mrs. Williams that he did not see how he could be convicted, as no one saw him set the fire.

As bearing on the question that the defendant and no one else had a motive to set the fire, and that it was intentionally set by the defendant, it further appeared that two days before the fire the defendant made the remark that he wished some one would show him how to raise some money; that at the time of the fire he had insurance on the yacht for $15,000; that while the cost of the yacht ($1,500), plus the repairs ($4,700), made it stand him at a little rising $6,000, it was only worth about $3,800, and consequently was largely over-insured; that he had come into no property other than what he received from a wife who died in 1904, and that he disposed of that in one way or another shortly after she died; that subsequent to that time, and during a part of 1906 and 1907, he worked in a store for $20 a week, and after that, through his association with a firm of insurance brokers, had earned from $500 to $1,000 a year; that he received a pension of $45 a month; that by reason of loans obtained from Miss Barnes he was indebted to her in the sum of from $12,000 to $15,000; that he had an account

with only one bank in New York, at which his balance on October 25, 1910, the date of the fire, was $42.58, and on the day following the fire, being out of funds, he borrowed $400 from Osborn, $300 of which he failed to repay; that immediately after the fire he applied for the insurance, but the underwriters declined to pay it.

[1] Subject to the defendant's objection and exception, assigning specific reasons, and under agreement that the objection and exception should be held to relate to every portion of the testimony and to every use made of it, the government was allowed to introduce testimony concerning the burning of a yacht owned by the defendant, and hereinafter called the first Senta, that was burned on October 1, 1909, and as to the burning of an automobile, owned by the defendant, that was burned on September 3, 1910, to show that the burning of the second Senta was not accidental, but designed.

The evidence as to the first Senta was substantially as follows: That the defendant bought the yacht May 20, 1908, for $300; that on October 1, 1909, she took fire, and was a total loss; that when she took fire she lay at anchor near the coast of Connecticut; that the hour was about 3:30 in the morning; that the defendant was on board, and then had insurance on the yacht in the Lloyds of London for $15,000, which he subsequently collected; that he was practically out of funds at the time, having a balance of only $4.59 in his New York bank; that he was heavily indebted; that all on board except the defendant were asleep when the fire broke out; that he was the first to discover the fire; and that no effort was made to put it out.

As to the automobile, the evidence was: That March 3, 1909, the defendant obtained by barter a Rainier automobile, giving for it some paintings and bric-a-brac; that on September 3, 1910, at about 9 o'clock, on a rainy evening, while the automobile was standing in a closed barn belonging to his cousin, whom he was visiting in Connecticut, the defendant and Miss Barnes being the only persons about the premises, an explosion occurred, and the automobile and barn were burned; that a short time before the defendant had suggested to his cousin that he procure a permit from the insurer of the barn to keep an automobile there, although it had been previously kept there at various times without a permit, and that a permit was procured; that at the time of the fire the automobile was worth about $1,500; and that he had $3,500 of insurance in the Hartford Fire Insurance Company at Hartford, which he subsequently collected; that he was without funds, and largely indebted, his bank account at the time showing a balance of only $1.77.

A consideration of the evidence that relates strictly to the fire of October 25, 1910, to the second Senta, leads one to the conclusion that the doubtful question as to which the jury was called upon to decide was not whether the fire was accidentally set, but whether the defendant set it; that, if it were established that the defendant set the fire, there could be no doubt that the act of setting it was not accidental, but intentional, and was done for the purpose of prejudicing the underwriters and replenishing the defendant's depleted and empty pockets. He had procured insurance upon the yacht exceeding its value by about $11,000. He was without funds to meet his bills

and pursue a life of ease, which he apparently was desirous of leading; and he had said a day or so before the fire that he wished some one would show him how to raise some money. In this frame of mind, and to avoid possible complications in the execution of his plan, he changed his sleeping place on the yacht the night of the fire, under the pretext that Osborn or Davis would remain on board, when neither of them was invited to remain. He arranged a hunting trip for the early morning, so that no one would be alarmed if they were disturbed by noises at an unseasonable hour. He threw a blanket over the oil stove to impair its draft, so that it would smoke and create a basis for his alarm of fire when he should arouse the ladies and send them on deck. Having aroused the ladies, he directed the captain to go on deck, call the crew, and attend to the ladies. He at no time called for assistance. He stated after reaching shore that the tablecloth and the partition of the cabin caught on fire from the oil stove, although the tablecloth and the partition were not near the stove, and there was no fire in the cabin at the time Mrs. Williams passed through it to go on deck. And he remained below for some 10 minutes after Mrs. Williams went on deck, during which time an explosion took place and flames were seen to come from the cabin.

Such being the state of the proof negativing any idea that the fire might be accidental, we are of the opinion that this was not a case where evidence of previous fires should have been received for this purpose. Evidence of this character necessitates the trial of matters collateral to the main issue, is exceedingly prejudicial, is subject to being misused, and should be received, if at all, only in a plain case. People v. Sharp, 107 N. Y. 427, 469, 14 N. E. 319, 1 Am. St. Rep. 851; State v. Lapage, 57 N. H. 245, 295, 24 Am. Rep. 69. But, if this is not a correct view of the law as applied to the facts in this case, the question is whether all the evidence that was introduced as to the previous fires was legally relevant upon the issue to which the court limited its use, and, if some of it was not, whether that portion was harmless or prejudicial. As above stated, the defendant's exception is to all the evidence, to every portion of it, and to every use made of it, and the special reasons assigned are:

"(1) The fact that a man has committed one crime has no tendency to show that he has committed another crime.

"(2) The admission of this evidence makes it necessary for the defendant to meet in one trial evidence as to several distinct, separate crimes.

"(3) The evidence offered has no probative force.

"(4) The evidence offered has no probative force except coupled with a finding by the jury that the defendant set the previous fires.

"(5) The circumstances of the previous fires are not sufficiently related in point of time and similarity to have probative force."

Upon the admissibility and use of this evidence the court instructed the jury as follows:

"Now, in order to show that the fire was incendiary, and not accidental, I have permitted certain evidence to be received about other fires. Now, this does not impose upon the jury the duty of trying the defendant for these other fires. It is not offered, and it could not be offered, for the purpose of showing that he had burned the first Senta, and that he had burned an automobile, and therefore that you might more readily be induced to the belief that

he burned this yacht. That is not the purpose of this evidence, and that is not what it is offered for, or what it could be admitted for. It is for the purpose of showing that the fire was not accidental, but was incendiary. * * * The government is not bound to prove, and has not undertaken to prove, that the defendant set fire to the first yacht Senta, or to his automobile. If you are satisfied that those fires occurred, you may use that fact, and the fact of any condition or circumstance attending or surrounding either or both of them, similar to any which you find existed with the fire charged in the indictment, to assist you in determining an important question in this case, namely, Was the fire charged in the indictment accidental or intentional? That is to say, Was it accidental or incendiary? The only question to which you can properly apply the evidence offered as to the two preceding fires is: Is it probable or improbable that these fires should occur to property of the defendant within the space of 13 or 14 months under somewhat similar circumstances (if you find them to be similar), and yet all be accidental? And it is on this question of whether or not those fires were accidental that I have allowed the government to show the similarity of circumstances, the fact of overinsurance, alleged overinsurance in the past cases, the fact of his condition of finances, and various other facts which the government claims to have been similar, and which the government claims to be circumstances which should induce the minds of the jurors with great directness to find that this fire was not an accidental fire, but was an incendiary fire."

It is thus seen that the court told the jury they might use the fact of overinsurance, in the case of the first yacht and of the automobile; that they might use the fact of the defendant's financial condition at the respective times these two fires occurred; and that they might use any of the other facts—some of which were that the defendant had his cousin, shortly before the fire to the automobile and the barn, procure a permit from the insurers of the barn to keep the automobile in it; that the defendant was the first person to discover the fire on the first Senta and the last person to come on deck, and then only after an explosion had taken place; and that he was the first person to discover the fire to the automobile, and shortly after the fire broke out was found at the telephone, either pretending he was giving a warning, or undertaking to prevent others from giving one—in determining whether the fire to the second Senta was accidental or incendiary.

The pertinent inquiry which suggests itself on reading these instructions is, What possible relevancy had any of these facts upon any question other than the very one on which the court instructed the jury that they could not consider them, namely, that the defendant set the fire to the first Senta and the automobile for the purpose of obtaining the insurance, and, having shown him to have committed those crimes, to more readily induce the jury to find that he committed the crime charged in the indictment? The fact that he overinsured the first Senta and the automobile had no probative value upon the question whether the second Senta was burned accidentally or intentionally. It no doubt has probative force for the purpose of showing the defendant set the fires to the first Senta and the automobile, but not that he intentionally set fire to the second Senta. Then, again, does the fact that the defendant had his cousin obtain a permit to keep the automobile in the barn lead one's mind, by any logical process of reasoning, to the conclusion that the fire to the second Senta was intentionally set? It is apparent that it does not. These facts, and others of like import, are undoubtedly relevant upon the question of who was the

responsible agency for those fires; they do not, however, as the government contends, show that an indefinite somebody set them, but suggest, if anything, that the defendant set them, and that he set them intentionally. If the evidence disclosing the defendant's possible connection with the setting of the fires to the first Senta and the automobile were eliminated from the case, the question would be presented whether proof of the occurrence of three fires, within a period of 14 months, to property owned by the defendant, on which he had insurance, is of any probative value on the question whether the third fire was accidental or designed. If it can be said that such evidence may reasonably and logically lead one's mind to the conclusion that the third fire was designed, and that the conclusion involves something more than mere guesswork, it is a sufficient answer to the contention of the government that the evidence which it was allowed to introduce was not thus limited; and, some of it being irrelevant and prejudicial, the defendant's exceptions should be sustained. In Regina v. Gray, 4 F. & F. 1102, a case much relied upon by the government in support of its contention, the evidence received of previous fires was of a limited nature. In that case it simply appeared that other houses in which the defendant had lived, and on which he had insurance, were destroyed by fire. There was no evidence allowed to be introduced as to the nature of the fires, their cause, the number of persons present at the time, that the defendant was near the houses or even in England when the fires took place, nor that the houses were overinsured, nor that the defendant was without money to meet his wants. This is as far as any court has gone in the reception of evidence of previous fires upon the question of accident or design, and falls far short of meeting the claim of the government for the admission of the evidence received in this case. The case of Regina v. Gray, supra, is a nisi prius case. It has been questioned by Sir James Fitzjames Stephen, in his Digest of the Law of Evidence (Stephen's Dig., Chase [2d Ed.] p. 51, n. 1), and has not been generally followed in this country.

While there are exceptions to the general rule—that on the trial of a person for one crime evidence that he has been guilty of other crimes is irrelevant—it is not to be understood that any of the exceptions, when rightly applied, go to the extent of sanctioning the idea that a defendant's propensity to commit crime, or to commit crimes of the same sort as the one charged, can be put in evidence to prove him guilty of the particular offense; and that to come within the exceptions there must be some other real connection between the extraneous crime and the crime charged. As said by Judge Dixon in State v. Raymond, 53 N. J. Law, 265, 21 Atl. 330:

"However reasonable would be the deduction that, when a pocket is picked in a group of persons, of whom only one is addicted to picking pockets, he is the offender, his singularity in this respect could not, under our legal theory, figure as proof of his guilt. There must appear, between the extraneous crime offered in evidence and the crime of which the defendant is accused, some other real connection, beyond the allegation that they have both sprung from the same vicious disposition."

This is the rule that is generally followed in this country, and that prevails in Massachusetts and in the federal courts, as will be seen from

an examination of the following cases: Boyd v. United States, 142 U. S. 454, 12 Sup. Ct. 292, 35 L. Ed. 1077; Thompson v. United States, 144 Fed. 14, 18, 19, 75 C. C. A. 172, 7 Ann. Cas. 62; Marshall v. United States, 197 Fed. 511, 117 C. C. A. 65; Commonwealth v. Jackson, 132 Mass. 16; Commonwealth v. Bradford, 126 Mass. 42; Commonwealth v. McCarthy, 119 Mass. 354; Commonwealth v. Robinson, 146 Mass. 571, 579, 16 N. E. 452; State v. Sharp, 107 N. Y. 427, 466, 14 N. E. 319, 1 Am. St. Rep. 851; People v. Fitzgerald, 156 N. Y. 253, 261, 50 N. E. 846.

[2] We have examined the other exceptions relied upon by the defendant, and find that most of them relate to questions that are not likely to arise at another trial. We, therefore, pass them by, except the one relating to the argument of counsel. In his closing argument counsel for the government said:

"To the time of the fire in Edgartown Harbor he [Fish] had been living on the proceeds of fire insurance, eked out by loans from a woman whom he had made his dupe and his prey, who had given herself up to him, and intrusted herself and her property to him without a scrap of paper to show for it, * * * a woman with whom he had been on intimate terms for 10 years, to whom he owed from $12,000 to $15,000 at the time of this fire, yet, though there seems to be no legal impediment, he has never made her his wife. Gentlemen, is there much lower degradation than that of a man who lives in this way upon a woman?"

We are of the opinion that the district attorney, in saying what he did, departed from the evidence and issues in the case. The defendant's character was not put in issue; and the attempt on the part of counsel for the prosecution to have the jury believe that the defendant's relations with Miss Barnes were not above suspicion, but were base and immoral, was without evidence for its support, and was an appeal to the passion and prejudice of the jury. Immediately upon the statement being made counsel for the defendant objected, and brought the matter to the attention of the court and of counsel for the prosecution. It then became the duty of the district attorney to withdraw the statement and ask the jury to disregard it; and the court should at that time have instructed the jury that the statement was improper, and that they should not allow it to influence their action. The district attorney did not withdraw the statement, but replied that it "was not necessary for him to impugn Miss Barnes' virtue," and then added that he was talking "only about the financial aspect of their relations." The objectionable statement being allowed to stand, defendant's counsel followed it up with an exception. The objection and exception were seasonably and properly taken. Odell Manufacturing Co. v. Tibbetts, 212 Fed. (June 4, 1914) 652, 655, 129 C. C. A. 188.

The judgment of the District Court is reversed, the verdict is set aside, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

ST. LOUIS INDEPENDENT PACKING CO. v. HOUSTON, Secretary of Agriculture, et al.

(Circuit Court of Appeals, Eighth Circuit. May 27, 1914.)

No. 3974.

1. COURTS (§ 273*)—JURISDICTION OF FEDERAL COURTS—DEFECT OF PARTIES.

A federal court has jurisdiction to determine a suit by a packer and manufacturer of meat food products to require the inspectors of the Department of Agriculture to inspect and pass a meat product under the provisions of Act March 4, 1907, c. 2907, 34 Stat. 1260 (U. S. Comp. St. Supp. 1911, p. 1366), where the chief inspector in charge at the place of suit is before the court, although the Secretary of Agriculture and Chief of the Bureau of Animal Industry, who are also made parties defendant, cannot be served by reason of their nonresidence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 813; Dec. Dig. § 273.*]

2. CONSTITUTIONAL LAW (§ 62*)—EXECUTIVE DEPARTMENTS—DELEGATION OF POWERS—ADMINISTRATIVE RULES.

It is within the power of Congress to vest in executive officers the power to promulgate administrative rules, but this is never deemed to extend to the making of rules to subvert the statute.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94–102; Dec. Dig. § 62.*]

3. FOOD (§ 1*)—MEAT INSPECTION ACT—CONSTRUCTION—REGULATIONS OF DEPARTMENT.

It was not the intention of Congress by the enactment of the Meat Inspection Act of March 4, 1907, c. 2907, 34 Stat. 1260 (U. S. Comp. St. Supp. 1911, p. 1361), to provide standards of quality except to prohibit the sale of food which is unsound, unwholesome, or otherwise unfit for human food, and to secure true branding, and the Secretary of Agriculture had no power to adopt and enforce section 16 of regulation 18, promulgated thereunder, which was added February 28, 1913, and provides that "sausage shall not contain cereal in excess of two per cent.," and that water or ice shall not be added to sausage in excess of 3 per cent. if it be construed as contended by the department to prohibit the addition of cereal or water to a greater per cent., even though their presence is stated on the label, it being shown that both cereal and water have been used in greater per cent. in the making of sausage for many years, and do not render it deleterious to health.

[Ed. Note.—For other cases, see Food, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*

What constitutes a violation of pure food regulations, see note to Brina v. United States, 105 C. C. A. 559.]

Amidon, District Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit in equity by the St. Louis Independent Packing Company against David F. Houston, Secretary of Agriculture, A. D. Melvin, Chief of the Bureau of Animal Industry, and James J. Brougham, Chief Inspector of said Bureau at St. Louis. Complainant appeals from an order denying a preliminary injunction. Reversed.

For opinion below, see 204 Fed. 120.

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

Franklin Ferriss, of St. Louis, Mo. (J. H. Zumbalen, Henry T. Ferriss, and Matt G. Reynolds, all of St. Louis, Mo., on the brief), for appellant.

Homer Hall, Asst. U. S. Atty., of St. Louis, Mo. (Charles A. Houts, U. S. Atty., of St. Louis, Mo., and Francis G. Caffey, of New York City, on the brief), for appellee James J. Brougham.

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

SMITH, Circuit Judge. This is an appeal from an order denying a preliminary injunction. Plaintiff below, appellant here, owns and operates at St. Louis, Mo., a slaughtering and packing establishment and sells its products in interstate commerce. Among these products are various combinations with sausage. Its plant and products have been under the inspection of the Department of Agriculture in pursuance of (Act June 30, 1906, c. 3913, 34 Stat. 669, 674) the meat inspection law. This portion of the act in question starts in its first subdivision with a declaration that it is for the purpose of preventing the use in interstate or foreign commerce of meat and meat products *which are unsound, unhealthful, unwholesome or otherwise unfit for human food,* and this subdivision provides for an ante mortem examination or inspection. The second subdivision provides for post mortem examinations and declares that they are for the *purposes hereinbefore set forth.* The fourth subdivision makes it the duty of the Secretary of Agriculture to inspect meat food products for the *purposes hereinbefore set forth,* and provides that his inspectors shall mark, stamp, tag, or label, as—

"'Inspected and passed' all such products found to be sound, healthful, and wholesome, and which contain no dyes, chemicals, preservatives, or ingredients which render such meat or meat food products unsound, unhealthful, unwholesome, or unfit for human food; and said inspectors shall label, mark, stamp, or tag as 'Inspected and condemned' all such products found unsound, unhealthful, and unwholesome, or which contain dyes, chemicals, preservatives, or ingredients which render such meat or meat food products unsound, unhealthful, unwholesome, or unfit for human food."

The fifth subdivision has reference to meat and meat food products packed in any can, pot, tin, canvas or other receptacle or covering, and concludes:

"And no such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted."

In the nineteenth subdivision it is provided:

"Said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary for the efficient execution of the provisions of this act, and all inspections and examinations made under this act shall be such and made in such manner as described in the rules and regulations prescribed by said Secretary of Agriculture not inconsistent with the provisions of this act."

The Attorney General of the United States on March 24, 1913, rendered an opinion that the provisions of the pure food law (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1911, p. 1354]) which was passed on the same day as the meat inspection law, namely, June 30, 1906, are applicable to meat and meat food products.

Without passing upon the correctness of his ruling attention is called to the following provisions of the pure food law:

"It shall be unlawful for any person to manufacture * * * any article of food or drug which is adulterated or misbranded, within the meaning of this act. * * *

"Sec. 7. That for the purposes of this act an article shall be deemed to be adulterated: * * * In the case of food: First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

"Second. If any substance has been substituted wholly or in part for the article.

"Third. If any valuable constituent of the article has been wholly or in part abstracted. * * *

"Sec. 8. * * * That for the purposes of this act an article shall also be deemed to be misbranded: * * * In the case of food. * * * Fourth. * * * Provided, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

"First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

"Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale."

It is provided by section 3 of the pure food act:

"That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this act."

It will be observed therefore that, while the power to make rules for the enforcement of the meat inspection law is vested exclusively in the Secretary of Agriculture, rules for the enforcement of the pure food law must be made by the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor.

Immediately upon the passage of the meat inspection law the Secretary of Agriculture promulgated a set of rules and regulations under the nineteenth subdivision of that law.

By regulation 18, subdivision 13, it was then provided:

"A meat food product that contains a substance or substances, including water, added for the purpose of adulteration and which lessens its food value shall bear a label stating that such substance or substances have been added."

At some time on or prior to April 15, 1912, the Secretary of Agriculture promulgated the following service announcement:

"Labels for meat and meat food products to which cereal, potato flour, or similar substances are added will in the future be required to have the statements 'Cereal added,' 'Potato flour added,' etc., appear thereon in type of

such size as will be in good proportion to the name of the product, provided the product does not contain more than five per cent. of cereal, potato flour, etc. If this percentage is exceeded the words 'Cereal,' 'Potato flour,' etc., must appear as a part of the name of the product in the same size and style type and on the same line; for example, 'Sausage and Cereal,' 'Sausage and Potato Flour.'"

In the same announcement and at the same time the Secretary of Agriculture promulgated the following:

"Referring to instructions in service announcement of April 15, 1912, page 26, under the heading 'Labeling of meat and meat food products containing added substances,' attention is called to the fact that this applies to ink brands and burning brands as well as to labels, cartons, etc. Such brands should bear the statement 'Sausage and Cereal' if cereal is added in excess of 5 per cent. or 'Cereal added' if not in excess of 5 per cent."

On February 28, 1913, the Secretary of Agriculture, for the purpose of preventing the use in interstate and foreign commerce of meat or meat products under any false or deceptive name, under the authority conferred on the Secretary of Agriculture by the provisions of the act of Congress approved June 30, 1906 (34 Stat. 674), amended regulation 18 by the addition of section 16, as follows:

"Section 16. Paragraph 1. Sausage shall not contain cereal in excess of two per cent. When cereal is added its presence shall be stated on the label or on the product.

"Paragraph 2. Water or ice shall not be added to sausage, except for the purpose of facilitating grinding, chopping or mixing, in which case the added water or ice shall not exceed three per cent., except as provided in the following paragraph.

"Paragraph 3. Sausage of the class which are smoked or cooked, such as Frankfurt style, Vienna style, and Bologna style, may contain added water in excess of three per cent., but not in excess of an amount sufficient to make the product palatable. When water (in excess of three per cent.) and cereal are added to this class of sausages the statement 'Sausage, water and cereal' shall appear on the label or on the product but when no cereal is added the addition of water need not be stated."

It is against the enforcement of this new section 16 of regulation 18 that this injunction was sought.

The word "sausage" is defined by all the lexicographers as an article of food composed of meat, salt, and spices.

The bill alleges that the complainant's sausages are compounds and mixtures composed and manufactured from meat of hams, pork, spices, and cereals; that the amount of cereals used in said compounds and mixtures going to the preparation and making of said sausage is from 1 to 10 per cent. of wholesome cereal and a varying amount of pure water, depending upon the meat used and the amount necessary for the compounding and mixture of the various ingredients, and that said cereal is not an inferior substance to the other ingredients entering into the compound or mixture composing sausage, but that said material is composed of ground grain, and the sausages thus manufactured by the complainant are sound, healthful, wholesome, and contain no dyes, chemicals, preservatives, or ingredients which render such meat food products unsound, unhealthful, unwholesome, or unfit for human food. It is further alleged that the use of cereal and water as aforesaid in the manufacture of sausage is customary and necessary, and has been

universally recognized by all manufacturers thereof for more than 50 years and ever since sausages have been known as a commercial product.

The suit was brought against Honorable David F. Houston, Secretary of Agriculture, A. D. Melvin, Chief of the Bureau of Animal Industry of the Department of Agriculture, and James J. Brougham, as Chief Inspector of said Bureau, with headquarters at the city of St. Louis. The Secretary of Agriculture and the Chief of the Bureau of Animal Industry being beyond the jurisdiction of the court, service was had only upon James J. Brougham, as Chief Inspector of said bureau.

[1] It is first contended that, as the Secretary of Agriculture and the Chief of the Bureau of Animal Industry were not found within the district where this suit was brought, and consequently were not served, the District Court had no jurisdiction to proceed to grant an injunction, and the government relies on Bogart v. Southern Pacific, 228 U. S. 137, 33 Sup. Ct. 497, 57 L. Ed. 768; and on Shields v. Barrow, 17 How. 130, 15 L. Ed. 158.

It becomes important at this point to first ascertain what was the relief prayed. Among other things the prayer was: (b) That Hon. David F. Houston, Secretary of Agriculture, Dr. A. D. Melvin, Chief of the Bureau of Animal Industry, and James J. Brougham, Chief Inspector of the Bureau of Animal Industry of the Department of Agriculture at St. Louis, defendants above named, be required by temporary mandatory injunction (to be made permanent upon a final hearing of this cause) to mark, stamp, tag, or label as "Inspected and passed" all the meat food products or sausage manufactured by your orator found to be sound, healthful, and wholesome, and which contained no dyes, chemicals, preservatives or ingredients which render said meat or meat food products unsound, unhealthful, unwholesome, or unfit for human food.

James J. Brougham being the Chief Inspector of the Bureau of Animal Industry of the Department of Agriculture at St. Louis and the one under whose charge the inspection and marking of complainant's goods must take place, the question is whether the Secretary of Agriculture or the Chief of the Bureau of Animal Industry is a necessary or indispensable party under R. S. § 737 (U. S. Comp. St. 1901, p. 587), and Judicial Code, § 50 (Act March 3, 1911, c. 231, 36 Stat. 1101 [U. S. Comp. St. Supp. 1911, p. 149]), which read:

"Sec. 50. When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and nonjoinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

And rule 39 (198 Fed. xxix, 115 C. C. A. xxix) of the new equity rules as follows:

"In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, cannot be made parties by rea-

son of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

We think that under the statute and rule there is no doubt that jurisdiction existed in this case.

A case on a similar subject to that here involved was before the Supreme Court of Michigan in Armour & Co. v. Bird, 159 Mich. 1, 123 N. W. 580, 25 L. R. A. (N. S.) 616. In that case the court said:

"The following facts are admitted or established beyond controversy: (a) The sausage manufactured by the complainant is a wholesome article of food. It contains nothing deleterious to health. (b) It is a mixture or compound within the meaning of the proviso in the statute above quoted, being composed of meat, cereal, salt, and spices. (c) It is made in accordance with the act of Congress and directions prescribed thereunder by the Commissioner of Agriculture, and under the inspection of the United States Inspectors. (d) Sausage is made of different kinds of meat, viz., pork, beef, and veal. Whether manufactured for interstate commerce or domestic use within the state, it is sometimes made with cereal, and sometimes without it. Cereal is not a necessary ingredient to its manufacture, although it has been used by most manufacturers for many years. (e) Water is an essential ingredient in the manufacture of sausage, whether made with or without cereal. This is shown by the evidence of the defendants. One of their witnesses, with an experience of 35 years, testified: 'In the manufacture of pork sausage we use pork, and, if the pork is a little too fat, we put in some veal or beef. It is necessary to have a little water added, a quart and a half to 100 pounds. It is pretty hard to make them without. We use a little more water than would be found in the meat when freshly killed.' Another, who has been engaged in the manufacture of sausage since 1864, testified: 'I put a little water in pork sausage. I use from 5 to 10 pounds of water to 100 pounds of meat. Enough to make it pliable, that is all. I use from 8 to 10 pounds of water in making beef sausage. I presume you could make sausage without water, but you could not stuff it very well.' Another, who learned to make sausages in Germany, testified: 'I have always used water, and still use water in the manufacture of sausage. Water is necessary. They use water in making sausage in Germany. So far as I know, every one used it.' The United States regulations require that the water used shall be pure. (f) It is not in violation of definitions 4 and 7 of the act. It does not violate definition 7, because it contains no substance or ingredient poisonous or injurious to health. It does not violate definition 4, because meat is the basis and principal ingredient of the article. As manufactured by complainant, it contains from 2 to 10 per cent. of cereal. It is and has been for more than 40 years recognized in the trade as sausage. When sold as sausage with cereal added, it deceives no one, is not an imitation, and manufacturers are entitled to manufacture and label it as sausage with cereal. It is not contended that manufacturers have not the right to use the name 'sausage' when sold with a proper label. The federal statute is practically identical with that of Michigan, and contains a proviso reading: 'That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases: First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.' * * * Acting under this law, the Department of Agriculture, on September 12, 1906, adopted the following regulation: 'Sausages and Chopped Meats. The word "sausage" without a prefix indicating the species of animal is considered to be a mixture of minced or chopped meats with or without spices. If any

species of animal is indicated as pork sausage, the sausage must be wholly made from the meat of that species. If any flour or other cereal is used the label must so state. If any other meat product is added, the label must so state.' To this regulation the department added: 'Manufacturers are warned that the above rulings do not exempt them from the enforcement of state laws.' The learned circuit judge in his opinion found that sausage manufactured as is that of the complainant 'is probably as healthy as pure sausage such as was known to the fathers.' * * * 'Sausage' is defined by all the lexicographers as an article of food composed of meat, salt, and spices. See Worcester's and Century Dictionaries. The people generally so understand it. The writer of this opinion would be compelled to admit that until very recently he had no knowledge that cereal was used in the manufacture of sausage. * * * The consumer who prefers sausage made of meat alone is entitled to be informed that he is buying such an article. The consumer who prefers sausage mixed with cereal is entitled to know that he is purchasing that article. * * * The use of cereal in the manufacture of sausage has been very general. The State Food and Dairy Commissioner of Iowa, who at the time of the hearing below had held office for five years, testified to its general use in that state, stating that 'the ingredients used by the Iowa manufacturers in making sausage are chopped meats, salt, spices, flour, and sufficient water.'"

In view of the statements made by the Supreme Court of Michigan we are the more inclined to believe the allegation of the bill of complaint that it has been the practice for 50 years to compound in the preparation of sausages, so-called, some cereals. It is stated by the Supreme Court of Michigan that it appears to be established by the evidence that sausage made with cereal is sold cheaper than that made of meats alone.

[2] It was in apparent knowledge of this history that the early regulations of the Department of Agriculture were promulgated on this subject. It is within the power of Congress to vest in executive officers the power to promulgate administrative rules, but this never is deemed to extend to the making of rules to subvert the statute. Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278; United States v. United Verde Copper Co., 196 U. S. 207, 25 Sup. Ct. 222, 49 L. Ed. 449; Morrill v. Jones, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267; United States v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563; Leecy v. United States, 190 Fed. 289, 111 C. C. A. 254.

[3] The entire meat inspection law (Act March 4, 1907, c. 2907, 34 Stat. 1260 [U. S. Comp. St. Supp. 1911, p. 1366]) was, as distinctly indicated in it, to prevent the sale of food which is unsound, unwholesome, or otherwise unfit for human use or misbranded. It was not the design of Congress in that law to provide standards of quality except to prohibit the sale of food which was unsound, unwholesome, or otherwise unfit for human use and secure true branding. The article in question, being sausage with cereal or sausage and cereal, was not intended to be prohibited by Congress. The act of Congress did contemplate, however, that the purchaser should know what he was buying. The early regulations of the Department of Agriculture were in strict accordance with the statute, and, nowithstanding the fact that it had been the practice in compounding sausage for many years at that time to mix cereal and the great quantities of water which it would absorb, that fact was not generally known outside of the trade, and can-

not be presumed to have been known by Congress. If such combination was sold as sausage it might be said to be sold under a false or deceptive name as prohibited by the meat inspection law, and, it might be said that another substance had been mixed and packed with it so as to lower or injuriously affect its quality or strength and that a substance had been substituted wholly or in part for the article as prohibited in the pure food law, but when sold as sausage with cereal or as sausage and cereal none of these provisions would apply.

We come now to the provision inserted in section 16 of rule 18 that sausage shall not contain cereal in excess of 2 per cent. If this simply means that it shall not be sold as sausage, it possibly may have been valid, but the government does not contend that this is its true meaning. If it meant that sausage sold as such should not contain cereal in excess of 2 per cent., but that sausage and cereal might contain more, it might be sustained. But the contention is that the Secretary of Agriculture had power to prohibit the manufacture and sale of sausage and cereal where the cereal was in excess of 2 per cent. This the Secretary of Agriculture had no power to do. Basing all our statements upon the allegations of the bill, which have never been controverted, sausage and cereal which contain no dyes, chemicals, preservatives or ingredients which render such meat or meat food product unsound, unhealthful, unwholesome, and unfit for human food and which is not by any other reason unsound, unhealthful, unwholesome, or unfit for human food, is not subject to condemnation under the meat inspection law except as hereafter indicated.

It is claimed that the power existed to pass this regulation under the last portion of the fifth subdivision of the meat inspection law, but this is an error. The subdivision in question prohibits a sale under any false and deceptive name and such it probably would be to sell a combination of sausage and cereal under the name of sausage, but not under the name of sausage and cereal. The section then continues:

"But established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted."

What is meant by trade name or names? The answer to this question will be at once apparent to students of the law of trade-marks, trade-names, and unfair competition.

"Trade-names have been frequently confused with trade-marks, and, broadly considered, they do include names which may constitute technical trade-marks. More accurately, however, trade-names are names which are used in trade to designate a particular business of certain individuals considered somewhat as an entity, or the place at which a business is located, or of a class of goods, but which are not technical trade-marks either because not applied or affixed to goods sent into the market, or because not capable of exclusive appropriation by any one as trade-marks. Such trade-names may, or may not, be exclusive. Exclusive trade-names are protected very much upon the same principles as trade-marks, and the same rules that govern trade-marks are applied in determining what may be an exclusive trade-name. Nonexclusive trade-names are names that are publici juris in their primary sense, but which in a secondary sense have come to be understood as indicating the goods or business of a particular trader. Trade-names are acquired by adoption and user, and belong to the one who first used them and gave them a value." 38 Cyc. 764; Cady v. Schultz, 19 R. I. 193, 32 Atl. 915,

29 L. R. A. 524, 61 Am. St. Rep. 763; Fairbank Co. v. Luckel, K. & C. Soap Co., 102 Fed. 327, 42 C. C. A. 376; Millspaugh Laundry v. First Nat'l Bank, 120 Iowa, 1, 94 N. W. 262.

It is such trade-names that the Secretary of Agriculture must approve. As illustrations of trade-names of meat if not trade-marks, take "Premium," "Empire," "Star," "Shield," "Diamond C," "Rex," "Supreme," "Coupon." These are doubtless legitimate trade-names, but if lard should be marked "Pure Premium Leaf Lard" and it should appear that it was not pure, or was only a part from the leaf, this would be false and deceptive and could be rejected by the Secretary of Agriculture although a trade-name. But the Secretary of Agriculture has nothing to do with the name of an article so long as it is not false and deceptive. Beef, pork, veal, quarters, ribs, sausage, and the like are common nouns which are names indicative from what animal or what part of the animal or how the article is made, and, so long as not false or deceptive, the Secretary of Agriculture has no right to object to their use.

It is claimed by the government that the rule simply prevents the product from being stamped by the government as "Inspected and passed," and that plaintiffs can manufacture sausage and cereal and sell it in interstate commerce without this stamp, but this seems to be an error. The law contemplates that, as before stated, an ante mortem examination of the animal, a post mortem examination of the carcass, and in the fourth subdivision an examination of meat food products and their being "Passed" or "Condemned." This combination of meat and cereal is a "meat food product" as this term is used, and it must be inspected and passed or condemned. There is no branch of the packing business which so imperatively requires inspection as that of the making of sausage and kindred articles. The law requires that they be inspected and passed or condemned, and provides that the inspector may be withdrawn from any plant that does not destroy any condemned meat food product for use as food.

We are not required to pass and will not pass upon whether the Secretary of Agriculture could expand the old regulation so as to require the manufacturer to show what amount or per cent. of cereal and water is used.

The question is simply, Could he prohibit the making of a compound which was sound, healthful, wholesome, and free from dyes, chemicals, preservatives, or ingredients which render such unfit for human food by a mere regulation? We are constrained to say that he cannot. A compound of beef and pork would not entitle the Secretary of Agriculture to prohibit the words "beef" and "pork" to appear in the title and to condemn all such compounds on the label of which they appear.

Slightly similar to this is the case of the United States v. Eleven Thousand One Hundred and Fifty Pounds of Butter, 195 Fed. 657, 115 C. C. A. 463.

The government has cited, since the submission United States v. Antikamnia Chemical Co., 231 U. S. 654, 34 Sup. Ct. 222, 58 L. Ed. 419, but we find nothing in it conflicting with our position, but much that sustains it.

It follows that the case is reversed and remanded, with directions to issue an injunction restraining the Chief Inspector of the Bureau of Animal Industry in charge of plaintiff's plant from refusing to mark complainant's product as "Inspected and passed" upon the ground that it contains cereal in excess of 2 per cent. or water in excess of 3 per cent., so long as it is marked "Cereal added," or "Sausage and Cereal," as now or hereafter required by regulation of the Secretary of Agriculture, and if the Secretary of Agriculture shall hereafter require that the product shall be marked "Water added," or with the amount of water added, the preliminary decree shall be subject to be modified accordingly.

AMIDON, District Judge, dissents.

PERRIS IRR. DIST. v. TURNBULL.

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

No. 2356.

COURTS (§ 344*)—FOLLOWING STATE PROCEDURE—PROCESS.

Rev. St. § 914 (U. S. Comp. St. 1901, p. 684), provides that, in actions at law, the forms and service of process in federal courts shall conform, as near as may be, to the requirements of the state law in like cases in state courts of record in the state in which the federal court is held. Code Civ. Proc. Cal. § 406, declares that the clerk must indorse on the complaint the day, month, and year that it is filed, and at any time within a year thereafter plaintiff may have summons issued. *Held* that, where summons was issued by the clerk within a year after the filing of the complaint, the fact that it was not placed in the hands of a marshal for service until after the year had expired was not ground for dismissal.

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

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.]

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Olin Wellborn, Judge.

Action by R. B. Turnbull, as administrator of the estate of R. H. Thompson, deceased, against the Perris Irrigation District. From an order denying a motion to vacate a default judgment in favor of plaintiff, and to dismiss the action, defendant brings error. Affirmed.

C. Hughes Jordan, Frank W. Stafford, and Kenyon F. Lee, all of Los Angeles, Cal., for plaintiff in error.

William M. Hiatt and Oscar C. Mueller, both of Los Angeles, Cal., for defendant in error.

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

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

ROSS, Circuit Judge. On the 18th of February, 1913, the court below entered a money judgment by default against the plaintiff in error, which thereafter entered a special appearance for the purpose of its motion only, and moved the court to vacate the judgment and to dismiss the action, which motion was denied March 31, 1913. The present writ is brought for a review of that action of the trial court; the sole contention of the plaintiff in error being that the summons in the action was not issued within one year after the filing of the complaint therein.

The record shows that the complaint was filed December 29, 1904, and that on the 16th day of December, 1905, the clerk of the court prepared and signed as such clerk the usual summons, and affixed thereto the seal of the court; that the Marshal received the summons January 3, 1907, and personally served the same on the various officers of the defendant irrigation district on various stated days in 1907; and that on the 12th of September of that year the default of the defendant to the action was duly entered for its failure to appear and plead to, answer, or demur to the plaintiff's complaint.

The various and long delays in the course of the proceeding are accounted for by one of the attorneys for the plaintiff in the cause as follows:

"Oscar C. Mueller, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action; that the complaint in said action was filed December 29, 1904; that the summons in said action was duly issued by the clerk of this court on December 16, 1905; that Hon. C. C. Wright was the attorney for the plaintiff in said action and appeared as such attorney at the time of the filing of said complaint herein, and continued as the attorney for the plaintiff in said action until his death, January 18, 1906; that thereafter affiant was substituted as one of the attorneys for the plaintiff in said action and has continued ever since to be and now is one of the attorneys for said plaintiff in said action; that he inquired of Hon. John D. Works, one of the attorneys now appearing for the defendant in said action, as to who were the officers of the said defendant district; that said Hon. John D. Works had theretofore represented said Perris irrigation district in another action brought in the Circuit Court of the United States for the Southern District of California, by said plaintiff against said defendant, which action had theretofore been tried and judgment entered and had been appealed and the judgment affirmed by the United States Court of Appeals, Ninth Circuit; that said Hon. John D. Works informed affiant that he did not know who are the officers of the district; that he did not know where the minute books or records of the district could be obtained, and that he did not know where the information which affiant desired could be obtained; that thereafter, and in early part of the year 1907, affiant made a trip to the town of Perris, situated within the limits of said defendant district; that he inquired of many persons living there who the officers of the district were, but could obtain no information concerning the same; that affiant employed the Pinkerton Detective Agency to make an investigation for the purpose of learning who were the officers of said defendant district; that after such investigation, which investigation covered a considerable period of time, said detective agency gave affiant the names and residences of three of the persons, to wit, W. H. Pilch, Duncan McPherson, and A. R. Frederick, who were reputed to be the directors of said defendant district, and reported that said W. H. Pilch was reputed to be the president of said district; that from the time affiant became one of the attorneys for the plaintiff in said action, until just prior to the time the summons in said action was delivered to the United States Marshal for service, affiant was making every effort to learn who were the officers of said defendant district, and who was the president of said dis-

trict, and the person upon whom such service should be made; that during said time, whenever he met any person residing in said district, or who had resided in said district, or whom he thought by any chance might have knowledge of who were the officers of said district, he inquired concerning such officers, but was never able to get any such information until prior to the delivery of said summons to said United States Marshal for service; that during said time he inquired and endeavored to obtain such information from a very large number of people; that the plaintiff in said action resided in the city of Brooklyn, in the state of New York; that said plaintiff informed affiant that he had no knowledge concerning who were the officers of said district. Oscar C. Mueller."

Whatever the cause of the delays in the proceedings, the fact remains that the sole contention of the plaintiff in error is that the summons was not issued within one year from the filing of the complaint.

Sections 911, 912, and 914 of the Revised Statutes (U. S. Comp. St. 1901, pp. 683, 684) provide as follows:

"Sec. 911. All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the Supreme Court or a circuit court shall bear teste of the Chief Justice of the United States, or, when that office is vacant, of the Associate Justice next in precedence, and those issuing from a district court shall bear teste of the judge, or, when that office is vacant, of the clerk thereof. The seals of said courts shall be provided at the expense of the United States."

"Sec. 912. All process issued from the courts of the United States shall bear teste from the day of such issue."

"Sec. 914. The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

Nowhere is it required by statute of the United States that the clerk shall deliver the summons to the Marshal for service, and, when the clerk has performed all of the acts prescribed by Congress for the issuing of writs and processes, the writ or process, as the case may be, is, in our opinion, clearly issued by him. And such have been the rulings upon the subject.

In Leas & McVitty v. Merriman (C. C.) 132 Fed. 510, 512, the court said:

"I think section 911, Rev. St. (U. S. Comp. St. 1901, p. 683), means no more than that, when a writ or process issues from a federal court, it must be signed by the clerk, and shall be authenticated in the manner therein set out."

In Jewett v. Garrett (C. C.) 47 Fed. 625, 627, the court said:

"The statute governing the issue of writs and process from the courts of the United States requires that such writs and process shall be under the seal of the court, and shall be signed by the clerk thereof (Rev. St. U. S. § 911); and there is a further requirement that all process must bear teste from the day of its issue (Id. § 912). Other than in these necessary particulars, neither the form of the writ or process, nor its contents, nor the manner nor method of its delivery to the Marshal for service, nor its formal drafting, is sought to be controlled or affected by any legislation of Congress, further than to ordain generally that the writ shall, as to those particulars, as far as possible, harmonize with, and be similar to, the writs and processes obtaining under the Code of Procedure of the state in which the court has jurisdiction."

As has been seen, section 914 of the Revised Statutes in terms provides in effect that in actions at law the forms and service of process in the federal courts shall conform, as near as may be, to that existing at the time in like cases in the courts of record of the state within which such federal court is held, any rule of court to the contrary notwithstanding.

Turning to the statutes of California, it is seen that at the time in question the Code of Civil Procedure of California provided as follows:

"Sec. 405. Civil actions in the courts of this state are commenced by filing a complaint.

"Sec. 406. The clerk must indorse on the complaint the day, month, and year that it is filed, and at any time within one year thereafter, the plaintiff may have a summons issued, and if the action be brought against two or more defendants, who reside in different counties, may have a summons issued for each of such counties at the same time. But at any time within the year after the complaint is filed, the defendant may, in writing, or by appearing and answering or demurring, waive the issuing of summons; or, if the action be brought upon a joint contract of two or more defendants, and one of them has appeared within the year, the other or others may be served or appear after the year, at any time before trial."

In construing those provisions of the California statute, the Supreme Court of that state said, in the case of Cowell v. Stuart, 69 Cal. 525, 11 Pac. 57:

"The statute does not now require, as it did when the case of Reynolds v. Page, 35 Cal. 296, was decided, a certified copy of the complaint to be served with the summons, so that, when the clerk in the present case delivered to the plaintiff's attorney a summons duly signed and sealed, he had performed every act it was essential for him to perform in the matter. The action was commenced by the filing of the complaint (section 405, supra), and within a year thereafter the summons was issued by the officer charged by the law with the duty of issuing it, namely, the clerk. Under the statute in force when Reynolds v. Page, 35 Cal. 296, was decided, it was essential to serve a copy of the complaint certified by the clerk, with a copy of the summons, and for that reason the court held that the summons could not be considered as issued until the clerk had also issued that which the law made an essential accompaniment to constitute a valid service. But, as already observed, since the amendment of the statute of 1874, a certified copy of the complaint is no longer necessary, and, when the officer who is charged with the duty of issuing the summons has done all that the law requires him to do, we can see no ground for holding that the summons is not issued. The action being commenced and the summons issued within statutory time, the action may nevertheless be dismissed for an unreasonable delay in the service of process or other want of prosecution, when the circumstances of the case show such action to be proper."

As said by the learned judge of the court below, the doctrine of that case, so far from being contrary to, is impliedly sanctioned in, Reynolds v. Page, 35 Cal. 296, 300, where the court says:

"The issuing of the summons intended is issuing it accompanied with everything necessary to enable the party, when he receives it, to make it available for the purpose of effecting a valid service. * * * And we think the summons not issued, within the meaning of the act, till all the papers essential to enable the plaintiff to make a valid personal service on the defendants, duly attested, are placed at his disposal."

Other California cases in line with the foregoing might readily be cited, but it is unnecessary to do so.

It is manifest that cases arising under statutes authorizing the attorney for the plaintiff to issue summons, and under statutes providing that an action is commenced when the summons is issued, are inapplicable to the present case. Nor is there anything supporting the contention of the plaintiff in error in rule 7 of the late Circuit Court of this district, which provides as follows:

"Rule 7. Dismissal of Actions—Failure to Prosecute.—Whenever a complainant shall fail to have process issued upon any complaint hereafter filed in this court, within one year after the filing thereof against any defendant named therein, who has not voluntarily made a general appearance in the action, or who shall fail to make a bona fide effort to procure service of summons upon such defendant within sixty days after the issuing thereof, such defendant may, upon due notice to the complainant, have said complaint dismissed for want of prosecution; but this rule shall not affect the right of the court to dismiss actions for want of prosecution in other proper cases"—

first, because the rule provides for a motion on the part of the defendant to dismiss the action for lack of prosecution when there has been an unreasonable delay in the effort to procure service of summons, which is not the point involved upon the present writ of error; and, secondly, because no rule of court is effective against the provisions of section 914 of the Revised Statutes, according to the express terms of the latter.

The judgment is affirmed.

PERRIS IRR. DIST. v. ESCHER et al.

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

No. 2357.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Olin Wellborn, Judge.

Action at law by Conrad Escher and Louis Rahn, copartners doing business as Escher & Rahn, against the Perris Irrigation District. From an order denying a motion to vacate a default judgment in favor of plaintiffs, and to dismiss the action, defendant brings error. Affirmed.

C. Hughes Jordan, Frank W. Stafford, and Kenyon F. Lee, all of Los Angeles, Cal., for plaintiff in error.

William M. Hiatt and Oscar C. Mueller, both of Los Angeles, Cal., for defendant in error.

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

PER CURIAM. The question in this case is the same as that in Perris Irrigation District, a Corporation, v. R. B. Turnbull, Administrator of the Estate of R. H. Thompson, Deceased (No. 2356) 215 Fed. 562, 132 C. C. A. 74, and, for the reasons there stated, the judgment is affirmed.

KELLY v. ILLINOIS STATE TRUST CO.

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

No. 2055.

1. DEPOSITARIES (§ 2*)—STOCKS AND BONDS—DISTRIBUTION—SYNDICATE AGREEMENT.

Where a trust company, with which stocks and bonds to be issued by a railroad company were to be deposited, was not mentioned in the recitals of a syndicate agreement as a party thereto and did not execute the document, but the agreement was executed by certain persons named as syndicate managers as parties of the first part and by subscribers as parties of the second part, and only as to the original stock was the trust company referred to as a trustee, and then as trustee for persons named as voting trustees, and not for the subscribers or syndicate managers, the trust company was a mere depositary, and in no sense accountable to the subscribers as a trustee.

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

2. DEPOSITARIES (§ 11*)—TRUST COMPANY—DEPOSITARY OF SECURITIES—RIGHTS OF OWNER—REMEDIES.

Where a syndicate agreement provided for the deposit of certain railroad bonds and interim stock certificates with a trust company, which was a mere agent of the syndicate managers, to be distributed among the subscribers unless sold or exchanged by the managers of the syndicate before July 1, 1908, the remedy of a subscriber for the alleged wrongful act of the trust company in refusing to make distribution after the date specified and in permitting the syndicate managers thereafter to exchange the securities for other stocks and bonds and to cancel the original securities would ordinarily be an action at law and not a suit in equity.

[Ed. Note.—For other cases, see Depositaries, Cent. Dig. §§ 14–19; Dec. Dig. § 11.*]

3. DEPOSITARIES (§ 11*)—DEPOSIT OF SECURITIES—SYNDICATE AGREEMENT—ENFORCEMENT—EQUITABLE RELIEF.

Where syndicate managers were authorized to exchange certain railroad bonds and interim stock certificates of a railroad company for other securities deposited for the benefit of subscribers with a trust company, and such exchange was duly made, but, on suit being brought in equity by a subscriber against the trust company to recover complainant's proportion of the original securities, defendant admitted that it held the exchange securities for complainant, but wrongfully claimed a lien thereon, and it also appeared that such securities were without a definitely ascertainable market value, a subscriber was entitled to maintain her bill, not for the relief prayed, but for a delivery of her proportionate share of the exchange securities, free from lien.

[Ed. Note.—For other cases, see Depositaries, Cent. Dig. §§ 14–19; Dec. Dig. § 11.*]

4. APPEAL AND ERROR (§ 1135*)—DECREE—AFFIRMANCE.

Where defendant did not object to jurisdiction in equity either in the trial court or on appeal, and made no complaint of the decree, and it appeared that complainant had obtained all and the only equitable relief to which, in lieu of an action at law, she could have been entitled under any circumstances, the decree would be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4454, 4455; Dec. Dig. § 1135.*]

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

5. DEPOSITARIES (§ 2*)—STOCKS AND BONDS—DISTRIBUTION—SYNDICATE AGREEMENT—CONSTRUCTION.

A syndicate agreement for the disposition of the stocks and bonds of a projected railroad company provided that the syndicate managers were given the absolute control of the bonds and participation stock certificates until July 1, 1907, that they should have the right to sell the bonds, receive and distribute the proceeds among the subscribers, or exchange the bonds and participation stock certificates during such time, and sell and exchange the right under any contract they might make, to acquire the same, and that defendant trust company, which was a mere depositary, was authorized and directed to deliver any and all the bonds and certificates or new securities as requested by the managers for the purpose of sale or exchange. It also provided that, if the managers had not sold or exchanged the bonds, etc., by July 1, 1907, the trust company should distribute securities to the subscribers, or, if they had been exchanged, then that it should distribute the new securities on that date or as soon thereafter as practicable. It further provided that the enumeration and expression of powers expressly conferred on the managers should not exclude the exercise by them of powers either as to the purchase, sale or exchange of the bonds or stock certificates or otherwise not expressed in the agreement, but they should have the power to do all such additional matters as in their sole judgment should be wise in the interest of the subscribers, etc. *Held* that, the managers having adopted a resolution on June 29, 1908, for the exchange of the bonds and certificates for stock and bonds of another railroad company, and the trust company having been notified of such resolution, it was authorized, as agent of the syndicate managers, to deliver the original securities for exchange after July 1, 1908, without obtaining the express consent of the syndicate subscribers, in the absence of fraud or conspiracy.

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

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

Suit by Marie H. Kelly against the Illinois State Trust Company. Decree for complainant for less than the relief demanded, and she appeals. Affirmed.

W. S. Oppenheim, of Chicago, Ill., for appellant.

L. O. Whitnel, of E. St. Louis, Ill., for appellee.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

MACK, Circuit Judge. Appellant's bill of complaint against appellee as sole defendant alleges that she executed a certain syndicate agreement dated July 20, 1904, purporting to be made between certain persons therein and hereinafter referred to as the syndicate managers and a number of other persons, including appellant, referred to as the subscribers. The agreement is made an exhibit to the bill. In substance, after reciting the willingness of the subscribers to advance the moneys necessary to enable a construction company to build a section of the Illinois, Iowa & Minnesota Railroad from Momence to Rockford, Ill., and to pay for the bonds and stock to be issued on completion, the agreement provides in sections 1 to 6 that the construction company (which, in fact, was owned by the syndicate managers) should receive from the managers from time to time certain moneys and bonds of the railroad, and that the managers might use

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

the funds, if they deem it best, for terminal facilities. Section 7 obligates subscribers, on notice from the managers, to pay their subscriptions in certain installments to appellee; that, when the railroad is completed, "the bonds are to be delivered to said syndicate managers as purchasers thereof, and are to be deposited with the Illinois State Trust Company, subject to the order of the managers, for the purpose of and under and subject to the terms and conditions of this agreement"; that the construction company, as soon as it receives the stock of the railroad, shall deposit all of it with the trust company in trust for certain named persons as trustees under a voting trust to continue till July 1, 1910; that "participation certificates covering the stock belonging to the syndicate subscribers shall be issued to the syndicate managers, and held by them with the bonds for the benefit of said subscribers"; that "said Illinois State Trust Company shall issue receipts for all payments made pursuant hereto, in such terms as may be approved by the syndicate managers." Section 8 provides that:

"The syndicate managers are hereby given the right to the absolute control of the bonds and participation stock certificates agreed to be purchased hereunder, until the 1st day of July, 1907. The managers shall hold the bonds so received from the Kenefick Construction Company, and shall within the period above mentioned have the right to sell said bonds at such prices as in their discretion they may see fit, and to collect and receive the money therefor and distribute the same pro rata among the subscribers to said bonds, or shall have the right to exchange said bonds and participation stock certificates during said time, and to sell or exchange the right under any contract they may make to acquire the same; and said Illinois State Trust Company is hereby authorized and expressly directed, from time to time, to deliver any or all of said bonds and participation stock certificates, or new securities, in event of exchange to said syndicate managers, or as they may direct, when and as requested by said managers, for the purpose of such sale or exchange, after said bonds and participation stock certificates or new securities are received by it. If, prior to July 1, 1907, said syndicate managers shall have exchanged said bonds and participation stock certificates, or agreed to exchange the same for other securities, the securities for which said bonds and participation stock certificates have or are to be exchanged shall be deposited with said Illinois State Trust Company in lieu and in the place and stead of said bonds and participation stock certificates, and said syndicate managers shall have the power to sell, exchange, or distribute such new securities as is herein given them to sell, exchange, or distribute said bonds and participation stock certificates. Upon any such sale or exchange being made, the proceeds of sale or exchange shall be deposited with said Illinois State Trust Company, to be by it distributed, upon the order of said syndicate managers, to subscribers. * * * Instead of making sale or exchange of said bonds and participation stock certificates, or new securities, said syndicate managers may distribute the same to subscribers entitled thereto at any time, in managers' discretion, prior to July 1, 1907. In the event said syndicate managers shall not have sold or exchanged said bonds or participation stock certificates by July 1, 1907, on that date, or as soon thereafter as practicable, the Illinois State Trust Company shall distribute said bonds and participation stock certificates to subscribers who have remained entitled thereto, which said distribution shall be in accordance with the share of each as set out heretofore. Or, if said syndicate managers shall have exchanged said bonds and participation stock certificates for new securities, and shall not have sold or exchanged said new securities by July 1, 1907, on that date, or as soon thereafter as practicable, the Illinois State Trust Company shall distribute said new securities to subscribers who have remained entitled thereto in the amounts and ac-

cording to their shares as heretofore set out. Provided, however, if the syndicate managers shall determine it is for the interest of the subscribers hereto that the syndicate be not dissolved at that time, then and in that case the syndicate managers shall have the right to extend the syndicate agreement for a period of one year, or until July 1, 1908. At that time, however, all the securities remaining in the hands of the Illinois State Trust Company, for the syndicate managers, shall be distributed pro rata among the subscribers in accordance with the agreement herein."

Section 9 reads as follows:

"The enumeration and expression of powers hereinbefore expressly conferred upon the syndicate managers shall not be construed as excluding or limiting the exercise by said syndicate managers of powers either as to the purchase, sale, or exchange of said bonds and participation stock certificates, or otherwise, not expressed herein; but they and their respective successors as managers shall have the power to do all such additional matters and things as in the sole judgment of managers, or the persons who constitute managers for the time being, shall determine to be wise and to the interest of subscribers for the purpose of effecting the object of this agreement including such alteration, change, and modification of the terms and conditions of this agreement, and of any contract or contracts which managers may make for the purchase and sale of said bonds and participation stock certificates, the amount and character of bonds and stock to be allotted or disposed of, and the method and manner of such allotment or disposition as managers may from time to time deem advisable, anything hereinafter expressed, implied, or to be inferred therefrom to the contrary notwithstanding."

The word "hereinafter" is evidently a misprint for "hereinbefore," as section 9 is the last section of the agreement.

The bill recites that the trust company accepted the trust provided for by this agreement and has acted thereunder; that complainant paid in $25,000, receiving an interim certificate signed by the trust company, reciting the payment made pursuant to the syndicate agreement, and that the holder of the certificate would be entitled to a pro rata share of bonds, stocks, or proceeds thereof when they "shall be deliverable under the terms of the agreement." The bill then charges that all of the bonds and stock of the Illinois, Iowa & Minnesota Railway Company were deposited with the defendant by the syndicate managers; that no sale or exchange had been made prior to July 1, 1908; that it then became defendant's duty to distribute to her 29 Illinois, Iowa, & Minnesota bonds and some money, her pro rata share; that defendant wrongfully, as against complainant, who had theretofore declined to join her cosubscribers in an extension agreement, canceled all of the bonds in March, 1909, and caused the trust deed to be released; that after October 30, 1908, defendant, at the instance of the syndicate managers received bonds and stock of the Chicago, Milwaukee & Gary Railway Company in pretended exchange for those of the Illinois, Iowa & Minnesota Railway Company and subsequently delivered them to the syndicate managers, who disposed of them.

The bill then charges defendant with conversion of her Illinois, Iowa & Minnesota bonds and stock and with refusing, on request, to render an account of the "said trust property received and possessed by it," prays an account "of all the trust property received by it under the syndicate trust agreeement," and that defendant might

be decreed to pay what shall appear to be the value of the proportion of the Illinois, Iowa & Minnesota bonds and stock held by it for the account of the complainant. A prayer for general relief was added.

In its answer defendant averred that prior to July 1, 1908, the syndicate managers had agreed to exchange the Illinois, Iowa & Minnesota for Chicago, Milwaukee & Gary bonds and stock and had so notified defendant on June 30, 1908; that, subject to a lien for her proportionate share of indebtedness incurred by the syndicate managers, complainant is entitled to 29 bonds and 250 shares of stock of the Chicago, Milwaukee & Gary Railway Company; and that it (the defendant) had ever had complainant's proportion of bonds and stock in its control and made tender thereof. It further averred "that it has in its dealings and transactions as trustee in the said matters and things mentioned and referred to in the bill of complainant dealt in all things fairly, impartially, and rightfully," obeying the commands of the syndicate managers.

We cannot agree with the construction placed by counsel for appellant on the bill of complaint that it is therein "substantially set out that, under date of June 20, 1904, she entered into a syndicate agreement with certain parties and the Illinois State Trust Company as trustee."

[1] The bill, in our judgment, clearly and correctly alleges that this agreement was executed between complainant and a number of other persons, as parties of the second part, and certain persons therein named, called syndicate managers, as parties of the first part. The trust company is not mentioned in the recitals as a party to the agreement, and, so far as the record shows, it did not execute the document.

The agreement was solely between the managers and the subscribers; it imposed the duty upon the managers to deposit certain bonds and stock with the trust company; so far as the bonds and interim stock certificates are concerned the trust company was a mere depositary and in no sense a trustee. Only as to the original stock was it referred to as a trustee, and then as trustee, not for the subscribers or the syndicate managers, but for the persons named as voting trustees. By the very terms of that clause in the agreement on which this bill is based, the clause under which complainant insists that it became the absolute duty of the defendant to make distribution on July 1, 1908, it is recognized that whatsoever securities then remained in the hands of the trust company were held by it for the syndicate managers.

[2] Assuming for the moment the soundness of appellant's contentions as to the construction of the agreement and interpretation of the transactions, the situation on July 1, 1908, would have been this: The syndicate managers had agreed that their agent, the trust company, into whose custody the Illinois, Iowa & Minnesota bonds and interim stock certificates had been placed, should distribute them to the subscribers, including appellant, unless they should have been sold or exchanged before July 1, 1908; the agent had notice of the agreement; they had not been sold, and the steps taken before July

1, 1908, did not amount to an exchange or even to an agreement to exchange the Illinois, Iowa & Minnesota securities; pursuant to orders from its principal, the trust company wrongfully refused distribution, subsequently permitted the syndicate managers to exchange the securities for other bonds and stocks and canceled the original Illinois, Iowa & Minnesota stocks and bonds. What is complainant's remedy against the trust company for the injury done to her through these alleged wrongful acts? Ordinarily not a suit in equity but an action at law.

A mere depositary is not a trustee; no trust relation was created between the parties to this suit; none was contemplated by the agreement between the managers and the subscribers. The trust company was a mere agent, primarily, of the managers, in certain respects, perhaps, of both parties. It held the securities, as the agreement expressly states, for the managers; in distributing them to the subscribers it was therefore to act for the managers. The managers were given the absolute control over the property; the proceeds of a sale or exchange deposited with the trust company were to be distributed by it, but, at any rate under some circumstances, only upon the order of the syndicate managers.

[3] If the trust company had had the possession or control of the Illinois, Iowa & Minnesota securities when this suit was begun, and if they were then without an ascertainable market value, a proceeding in equity might have been proper to secure not damages but the bonds and stocks. As the defendant admitted that it held the Chicago, Milwaukee & Gary securities for the complainant but wrongfully claimed a lien thereon, and moreover, as these securities were without a definitely ascertainable market value, a bill in equity (passing any question of necessary parties that might have been raised by the defendant) was maintainable under the evidence in this case, to obtain, not the specific relief prayed for, but the very relief which the court awarded, viz., the proportionate share of Chicago, Milwaukee & Gary bonds and stock free from any lien.

[4] Inasmuch as defendant did not object to the jurisdiction in equity either in the trial court or in this court, and now makes no complaint of the decree, and inasmuch as complainant has obtained the only and all of the equitable relief to which, in lieu of an action at law, she could have been entitled under any circumstances, the decree must be affirmed.

[5] While a consideration of the true construction of the agreement is thus rendered unnecessary, we may add that we entirely agree with the views of the master and the trial judge that the intention of the parties was to confer the largest possible powers on the managers; that by section 8 alone and a fortiori by section 9 of the agreement the managers were empowered to make the exchange after July 1, 1908, under resolutions adopted June 29, 1908, that the exchange be made, whether or not this action be regarded as technically equivalent to an exchange or a contract of exchange; that the endeavor to obtain the express assent of all of the subscribers to the extension agreement was not an essential but a precautionary step; that

appellant's refusal to join therein did not affect the syndicate managers' right; and that in any event, whatever the ultimate obligation of the syndicate managers to the subscribers might be held to be, defendant, as a mere depositary for the syndicate managers, was not required on July 1, 1908, and thereafter, to act at its peril, but in the absence of fraud or conspiracy, which are not charged, was justified in following the orders and directions of the syndicate managers.

Decree affirmed.

UNITED STATES ex rel. GEGIOW et al. v. UHL, Acting Immigration Com'r.

(Circuit Court of Appeals, Second Circuit. May 14, 1914.)

No. 290.

ALIENS (§ 54*)—ORDER EXCLUDING IMMIGRANTS—REVIEW ON HABEAS CORPUS.

A finding by immigration officers that alien immigrants were likely to become a public charge, and a consequent order excluding them, cannot be reviewed by the courts, if there is any evidence to support such finding; and the evidence need not be such as would be admissible in a court in formal legal proceedings.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

Ward, Circuit Judge, dissenting, holds that evidence to sustain such an order must be embodied in the record upon which the case is reviewable by the Secretary of the Department of Labor.

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 dated March 3, 1914 (211 Fed. 236), dismissing a writ of habeas corpus and remanding the relators to the custody of the respondent. The immigration officials having found that the relators were liable to become public charges they were excluded and ordered deported.

Ralph Barnett and Morris Jablow, both of New York City, for appellants.

H. Snowden Marshall, U. S. Atty., and Harold A. Content, Asst. U. S. Atty., both of New York City, for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The sole question presented by this appeal is whether there was any evidence to sustain the finding of the immigration officials that each of these aliens is liable to become a public charge. The law provides that the decision of the appropriate immigration officers, if adverse to the admission of the alien, shall be final unless reversed on appeal to the Secretary of the Department of Labor. Act Feb. 20, 1907, c. 1134, § 25, 34 Stat. 906 (U. S. Comp. St. Supp. 1911, p. 515). In the case at bar the decision of the board of special inquiry was affirmed by the Secretary of the Department of Labor.

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

In U. S. ex rel. Rosen v. Williams, 200 Fed. 538, 541, 118 C. C. A. 632, the leading authorities were reviewed by this court and the conclusion was reached that we considered the action of the immigration officers final in every case where there was any evidence to support it. In the nature of the case these inquiries must be swift and summary. The formality of court proceedings cannot be had and is not expected where, in many cases, witnesses cannot be produced for examination and cross-examination. The members of these boards have, however, the great advantage of seeing the immigrant and determining from personal observation and examination his fitness to enter the country. It is plain from a reading of the law that degenerates or those so constituted mentally, physically or morally that they may be a burden upon or a menace to society, are not wanted here. In the case at bar no one of the immigrants can speak our language or any language that is understood in this country. Even the Russian interpreters employed by the Department could not understand them. They all come from a remote province of Russia and have no one here under legal obligation to support them. They know no trade and only one can read or write in his own language. They were all ticketed through to Portland, Or., and had sums aggregating slightly more than $25 each. They were not employed and no actual promise of employment had been given them. On the contrary, the immigration officers had ascertained by published reports and inquiries that owing to depressed labor conditions, the prospect of an unskilled laborer obtaining work was most unfavorable. In such circumstances, how long after reaching Portland would it be before these immigrants became public charges? As soon as the $25 (only one in the party having as much as $51) is exhausted, what is to support them? What is to prevent them from being thrown upon the charity of the town? It is true that they may succeed in obtaining work, but it is, to say the least, equally true, that they may not do so. It is the latter contingency which makes them undesirable aliens. Certainly we cannot find that the decision of the board, that they are likely to become public charges, has no evidence to support it; on the contrary, the conclusion seems to follow directly from the facts.

We do not assert that all of this evidence would be admissible in a court of law or equity; it is not necessary that it should be. No immigration act could be enforced which required all these facts to be established with the same formality and certainty which is required in the courts. The board had an opportunity to see the relators and to determine by personal observation what manner of men they were. The board knew that they were unable to speak any language known in this country, that only one could read or write, that when the small sums in their possession were exhausted they would starve unless assisted and that there was no one here under any legal obligation to assist them. The board was also enabled from information derived from the press and other sources to determine the likelihood of the relators securing employment when they reached Portland and was justified in finding that conditions there were such that the chance of employment was most unlikely. It is true that in-

formation in this form would not be permitted in a court of law, but the immigration officers cannot delay these proceedings indefinitely. They cannot summon witnesses from the Pacific states or send commissions there. If they were satisfied from information received that there was no market in Portland for such services as these relators could render, they were justified in acting upon such information, just as they would be if satisfied from reports in the press or from any reliable source that Portland had been destroyed by flood or fire or that an epidemic of cholera was raging there. Congress has placed the determination of these questions in the hands of trained officials and their conclusions upon disputed questions of fact are final and conclusive. It is only in the very rare instance that a finding is without any proof to support it that the courts may interfere.

We think these views are sustained by the following authorities: Nishimura Ekiu v. U. S., 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; Lee Lung v. Patterson, 186 U. S. 168, 22 Sup. Ct. 795, 46 L. Ed. 1108; Lem Moon Sing v. U. S., 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082; U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040; Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165.

The order dismissing the writ is affirmed.

WARD, Circuit Judge (dissenting). Every alien not within the classes excluded by the act of 1907 has a right to enter this country and also has a right to the writ of habeas corpus to test whether his detention is lawful, but not whether the finding of the administrative officers is erroneous in point of fact. It is the law of this district that there must be some evidence to support the finding of the board. Rosen v. Williams, 200 Fed. 538, 118 C. C. A. 632. I think it is also the law of the Supreme Court, because Mr. Justice Pitney said, as to an objection that there was no evidence to support the order made by the Board in Zakonaite v. Wolf, 226 U. S. 272, 274, 33 Sup. Ct. 31, 32 (57 L. Ed. 218):

"As to the first point, an examination of the evidence upon which the order of deportation was based convinces us that it was adequate to support the Secretary's conclusion of fact. That being so, and the appellant having had a fair hearing, the finding is not subject to review by the courts."

The aliens were all young and healthy, were provided with transportation to Portland, Or., each having at least $25 cash and fellow countrymen at the point of destination. The ground upon which the board excluded them was because it was inclined to believe from reports of industrial conditions in Portland that they would not obtain employment at this season. The board does not state whether the reports were oral or written, when they were made, who made them, whether the person or persons making them were qualified to express an opinion, or finally, what the reports were.

Section 25 of the act of 1907 provides, inter alia:

"All hearings before boards shall be separate and apart from the public, but the said boards shall keep a complete, permanent record of their proceedings and of all such testimony as may be produced before them."

Then it goes on to provide an appeal for the alien to the Secretary of Labor, which shall stay proceedings—

"until the receipt by the Commissioner of Immigration at the port of arrival of such decision which shall be rendered solely upon the evidence adduced before the board of special inquiry."

Unless the alien gets this review from the Secretary, he has not had a fair hearing; but how could the Secretary possibly review this opinion of the board, when he was absolutely without any evidence as to what the opinion depended upon? Of course, the reports in question need not be proved in accordance with legal rules; but they should at least be so stated that the Secretary can review them. The case of Tang Tun v. Edsell, 223 U. S. 673, 32 Sup. Ct. 359, 56 L. Ed. 606, shows how merely hearsay evidence was obtained and included in the record.

I think there was no evidence whatever to support the order, and that the aliens should be discharged.

GARRISON, Secretary of War, et al. v. GREENLEAF JOHNSON LUMBER CO.

(Circuit Court of Appeals, Fourth Circuit. June 1, 1914.)

No. 1239.

1. NAVIGABLE WATERS (§ 39*)—RIPARIAN RIGHTS—PARAMOUNT AUTHORITY OF UNITED STATES.

All state laws and regulations with respect to navigable waters, and all rights acquired under them, are subject to the paramount right of the United States to appropriate any portion of the submerged soil for the purposes of navigation.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 21, 53, 82, 103, 112, 117, 127, 239–244; Dec. Dig. § 39.*]

2. EMINENT DOMAIN (§ 2*) — CHANGE OF HARBOR LINE — RIGHTS OF PIER OWNERS.

A harbor line established by the Secretary of War under authority conferred by Congress is subject to change by the same authority, and while a riparian owner may lawfully construct piers and docks to the established line, in doing so he takes the risk of such change if required for the improvement of navigation, which is not a matter for judicial inquiry, and the removal by the government of so much of his structures as extend beyond the new line is not a taking of his property for which he is entitled to compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 3–12; Dec. Dig. § 2.*

Nature and extent of power of United States to condemn property for public use, see note to Town of Nahant v. United States, 70 C. C. A. 653.]

Cross-Appeals from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Suit in equity by the Greenleaf Johnson Lumber Company against Lindley M. Garrison, Secretary of War of the United States, and

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

Henry S. Breckenridge, Assistant Secretary. From the decree both parties appeal. Reversed on appeal of defendants.

For opinion below, see 208 Fed. 1022.

John L. Jeffries, of Norfolk, Va. (L. D. Starke and Jeffries, Wolcott, Wolcott & Lankford, all of Norfolk, Va., on the brief), for plaintiff.

D. Lawrence Groner, U. S. Atty., of Norfolk, Va. (Hiram M. Smith, Asst. U. S. Atty., of Richmond, Va., on the brief), for defendants.

Before PRITCHARD and WOODS, Circuit Judges, and DAYTON, District Judge.

WOODS, Circuit Judge. The complainant, owner of about eight acres of land on the Elizabeth river opposite the navy yard at Norfolk, Va., brought this suit to enjoin the Secretary of War from threatened removal of its wharf and other structures used in its business as a manufacturer and shipper of lumber. The District Court overruled a demurrer to the bill and after hearing the answer and testimony on issues of fact granted a permanent injunction, holding that removal of the wharves and other structures would be taking private property without compensation.

There is little dispute as to the facts. Under the law of Virginia the complainant, as riparian owner, has fee-simple title to low-water mark in the bed of the river. At some time before the year 1873, the complainant built a wharf for shipping its manufactured lumber, and by means of piles enclosed enough water surface to make a pond for logs floated down the river for manufacture. As nearly as can be ascertained the first port warden or harbor line, which indicated the limit beyond which riparian owners could not use the water front, was established at this point in the river in 1876, by harbor commissioners under authority conferred by statute law of Virginia. When the harbor line was established it turned out that the complainant's wharf and log pond was outside the line of navigation. In 1883 or 1884 the wharf and other structures were improved and enlarged to their present dimensions, still not extending beyond the line of navigation. In 1890 the same harbor line was adopted by the Secretary of War in behalf of the United States under authority conferred by act of Congress, as the national government's limit of navigable water. On June 12, 1911, the Secretary of War under the authority of an act of Congress established a new navigation or harbor line, which brings a portion of complainant's structures within the navigable area of the river. The complainant was notified of the change, and the necessity of the removal of its structures; and negotiations for settlement of complainant's claim for compensation indicated an acknowledgment of the right of compensation by the officials of the office of the Secretary of War. Agreement could not be reached as to the value, and condemnation proceedings were instituted on behalf of the government. While these proceedings were pending, the Secretary of War, taking the position that the complainant had assumed the risk of estab-

lishment and change in the line of navigation when it located its structures, abandoned the condemnation proceedings and notified complainant of his intention to remove whatever portion of its structures fell within the new line of navigation. Thereupon the complainant, claiming the right of compensation, brought this suit for injunction.

[1] The general principles under which the relative rights of the owner of the shore of navigable water and of the state, and of the United States are to be determined have been so often and so elaborately set out by the Supreme Court of the United States and other tribunals that they require no discussion. The extent of the title and of the rights of the riparian owner in the soil under navigable water is fixed by state law, and under the law of Virginia the complainant owned the soil under the water to low-water mark. But all state laws and regulations with respect to navigable waters, and all rights acquired under them, are subject to the paramount right of the United States to appropriate any portion of the submerged soil for purposes of navigation. Hence the appropriation by the United States for purposes of navigation of the soil under the water to which the complainant has title under the state law is not a taking of private property, and the complainant has no right to compensation therefor.

[2] Under this principle, that the use and title of the riparian owner is subject to the dominant right of the United States, it has been held that it is not taking private property to require a bridge to be changed or removed, or a tunnel to be lowered, or to erect dams or dykes which incidentally cut off access to deep water, or access to a landing in the channel, or to flood lands by the erection of revetments along the banks of a navigable stream. Gilman v. Philadelphia, 3 Wall. 713, 18 L. Ed. 96; Illinois Cen. R. R. v. Illinois, 146 U. S. 446, 13 Sup. Ct. 110, 36 L. Ed. 1018; Shively v. Bowlsby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; Gibson v. United States, 166 U. S. 269, 17 Sup. Ct. 578, 41 L. Ed. 996; Scranton v. Wheeler, 179 U. S. 141, 21 Sup. Ct. 48, 45 L. Ed. 126; Bedford v. United States, 192 U. S. 217, 24 Sup. Ct. 238, 48 L. Ed. 414; C., B. & Q. Ry. Co. v. Illinois ex rel. Grimwood, 200 U. S. 561, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175; West Chicago R. R. v. Chicago, 201 U. S. 506, 26 Sup. Ct. 518, 50 L. Ed. 845; Union Bridge Co. v. United States, 204 U. S. 364, 27 Sup. Ct. 367, 51 L. Ed. 523; Monongahela Bridge Co. v. United States, 216 U. S. 177, 30 Sup. Ct. 356, 54 L. Ed. 435; Hannibal Bridge Co. v. United States, 221 U. S. 194, 31 Sup. Ct. 603, 55 L. Ed. 699; Philadelphia Co. v. Stimson, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570. This dominant right of the United States is thus stated in Union Bridge Co. v. United States, supra:

"Although the bridge, when erected under the authority of a Pennsylvania charter, may have been a lawful structure, and although it may not have been an unreasonable obstruction to commerce and navigation *as then carried on*, it must be taken, under the cases cited, and upon principle, not only that the company when exerting the power conferred upon it by the state, did so with knowledge of the paramount authority of Congress to regulate commerce among the States, but that it erected the bridge subject to the possibility that Congress might, at some future time, when the public interest demanded, exert its power by appropriate legislation to protect navigation against unreasonable obstructions."

In Scranton v. Wheeler, supra, the court uses this language:

"The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation."

In applying the general principle in many forms these authorities left open the specific question on which this case depends: Is the establishment of harbor lines or lines of navigation under authority of the act of Congress such a consent or invitation by the United States to riparian owners to build to that line wharves and other structures that such structures must be regarded, as against the United States, private property which cannot be taken without compensation even for purposes of navigation? In Yesler v. Washington Harbor Line, 146 U. S. 646, 13 Sup. Ct. 190, 36 L. Ed. 1119, a harbor line is defined as the line beyond which wharves and other structures cannot be extended. Prosser v. Northern Pac. Ry., 152 U. S. 59, 14 Sup. Ct. 528, 38 L. Ed. 352. In these two cases it was held that the mere laying out of new harbor lines so as to include structures before without the harbor lines was not a taking of private property without compensation; but the court expressly left open the question whether requiring the removal of such structures up to the line would be a taking of private property. As to such a structure as a bridge not used in direct aid of navigation, it was held in Philadelphia v. Stimson, supra, that the harbor line might be changed, and that the bridge company could not claim compensation when required to move its bridge to conform to the new line.

The case then comes to the still more definite question whether on the point at issue there is a distinction between bridges, and other like structures not directly aiding navigation, and wharves and other structures used for purposes of navigation. Laying aside for the moment the statute on the subject, the argument in favor of the distinction may be thus stated: The nation holds the navigable waters of the country in trust to keep them open for the free use of all in so far as it is possible for all to enjoy them in common, and to allow the riparian owner to promote navigation by the erection of wharves and other structures. While the first use is paramount and the other subordinate, the latter is very important to the public, inasmuch as it is impossible for the United States to erect and maintain all the piers, wharves, and other structures necessary to the conduct and advancement of navigation along the numerous navigable streams. This use of the riparian owner for his own good and the public good would be greatly impaired unless the dominant right to free public navigation be so managed as to give it stability and certainty. It is for the purpose of giving this stability that the government establishes harbor lines. Hence it may

be argued that the fixing of the lines should be regarded as an invitation to the riparian owner to come to that line and promote his own interest and that of the public by erecting wharves and other structures in aid of commerce. These lines are established, it is true, to limit, but they are established also to promote the use of the water by giving to it the assurance of stability. At many places the use of the soil under the water is of vast value if it can be depended on as stable, but this value would shrink to nothing if laying out the harbor line gave no assurance of stable use. Permanent and expensive docks and wharves would not be erected if they could be taken without compensation.

If this argument be sound, and the laying out of harbor lines be regarded as an assurance to the riparian owner that he may safely invest in wharves and piers erected by him in aid of navigation, the case of Monongahela Navigation Co. v. United States, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463, would be conclusive authority that for the taking of such wharves compensation must be made. It is true that case, in some of its expressions, seems to be irreconcilable with some of the later cases above cited. But its authority was recognized in Lewis Blue Point Oyster Co. v. Briggs, 229 U. S. 82, 33 Sup. Ct. 679, 57 L. Ed. 1083, for the proposition that structures erected in a navigable stream under the affirmative authorization of the United States could not be removed without compensation even in promotion of navigation.

The statute of 1888 (Act Aug. 11, 1888, c. 860, 25 Stat. 425) under which the harbor line here involved was established is as follows:

"Sec. 12. Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby, authorized to cause such lines to be established, beyond which no piers or wharves shall be extended or deposits made except under such regulations as may be prescribed from time to time by him."

The argument is not without force that while this authorization to the Secretary of War is negative in form, yet when it is taken in connection with the power conferred on him to grant permission, under regulations prescribed by him, to erect structures beyond the harbor line, it implies affirmative authorization to the riparian owner to erect structures to the harbor line without special authorization. In construing a similar provision of the act of 1899 (Act March 3, 1899, c. 425, 30 Stat. 1151 [U. S. Comp. St. 1901, p. 3541]), the Supreme Judicial Court of Maine, in Maine Water Co. v. Knickerbocker, etc., Co., 99 Me. 473, 59 Atl. 953, after elaborate discussion, held that the statute necessarily implied affirmative authorization.

We have thus stated what appears to us the strongest considerations in favor of the claims of the complainant. It cannot be doubted, however, that the Supreme Court of the United States in its later decisions has taken the larger view that under the Constitution of the United States the control and development of all navigable streams remains in the federal government, and that no rights can be acquired against it except under affirmative conferment of Congress, that the harbor lines of the federal government designating the limit of navigation are

changeable at its discretion, and that all who build wharves or other structures in, under, or over the water of navigable streams take the risk of whatever Congress either directly or through the Secretary of War may see fit to do for the promotion of navigation. All doubt upon these propositions seems to be set at rest by United States v. Chandler-Dunbar Co., 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063, and Lewis Blue Point Oyster Co. v. Briggs, 229 U. S. 82, 33 Sup. Ct. 679, 57 L. Ed. 1083. In the former case Mr. Justice Lurton thus treats the very question here involved:

"That riparian owners upon public navigable rivers have, in addition to the rights common to the public, certain rights to the use and enjoyment of the stream which are incident to such ownership of the bank must be conceded. These additional rights are not dependent upon title to the soil over which the river flows, but are incident to ownership upon the bank. Among these rights of use and enjoyment is the right, as against other riparian owners, to have the stream come to them substantially in its natural state, both in quantity and quality. They have also the right of access to deep water, and when not forbidden by public law may construct for this purpose wharves, docks, and piers in the shallow water of the shore. But every such structure in the water of a navigable river is subordinate to the right of navigation, and subject to the obligation to suffer the consequences of the improvement of navigation, and must be removed if Congress in the assertion of its power over navigation shall determine that their continuance is detrimental to the public interest in the navigation of the river."

It is true in that case the license from the Secretary of War under which the Chandler-Dunbar Company constructed its works for utilizing the water power was, by its terms, revocable at will, but it cannot be doubted that the court puts piers and wharves on the same footing as other structures like bridges and waterworks; and it was expressly decided in Philadelphia v. Stimson that as to these the lines of navigation were changeable at will, and that the owner took the risk of change. The Chandler-Dunbar Company Case also holds that the propriety of the change in navigable water under the authority of Congress is not a matter for judicial inquiry.

The argument that this view of the meaning of harbor lines and of the power of the Congress will impede rather than promote navigation by discouraging private enterprise in the construction of wharves and piers loses much of its force when it is remembered that riparian owners may well assume that changes in the harbor lines requiring the removal of valuable structures will not be made by the government except where clearly necessary for the promotion of navigation.

Reversed.

VAN KANNEL REVOLVING DOOR CO. v. AMERICAN REVOLVING DOOR CO.

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

No. 2008.

1. TRADE-MARKS AND TRADE-NAMES (§ 58*)—INFRINGEMENT.

One entitled to make and sell a patented revolving door by reason of the expiration of the patent may also illustrate its product in advertisements by a cut showing a cross-section of the door practically identical with one of the drawings of the patent without being chargeable with infringement of trade-mark, although the original maker and owner of the patent also used such cut in its advertisements.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 66, 67; Dec. Dig. § 58.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 3*)—SUBJECT OF APPROPRIATION—DESCRIPTIVE WORDS.

The words "always closed," as applied to a revolving door, are merely descriptive of the door in place and performing its proper functions, and cannot be monopolized as a trade-mark by one manufacturer.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4-7; Dec. Dig. § 3.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 70*)—INFRINGEMENT.

A manufacturer, having a right to make and sell a revolving door, may advertise the same by a conventional picture of such a door, without infringing on the rights of any other maker.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 92*)—SUIT FOR UNFAIR COMPETITION—SUFFICIENCY OF BILL.

A bill charging that defendant, by its wrongful acts set out, has diverted to itself trade to which complainant was entitled, does not state a cause of action for unfair competition, where the acts described were not wrongful.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 102, 103; Dec. Dig. § 92.*

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.]

5. TRADE-MARKS AND TRADE-NAMES (§ 58*)—MARKS SUBJECTS OF APPROPRIATION—DRAWINGS IN PATENT.

After the expiration of a patent, the public, who are entitled to manufacture the structure, have a right to employ in advertising the drawings of the expired patent, even though they have been used by the owner of the patent as a trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 66, 67; Dec. Dig. § 58.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; George A. Carpenter, Judge.

Suit by the Van Kannel Revolving Door Company against the American Revolving Door Company. From a decree denying a preliminary injunction and dismissing on motion the bill of complaint, complainant appeals. Affirmed.

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

T. W. Johnson, of Washington, D. C., and James S. Hopkins, of Chicago, Ill., for appellant.

Russell Wiles, of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

MACK, Circuit Judge. This is an appeal from a decree denying a preliminary injunction and, on motion, dismissing a bill of complaint. The bill sought to gain protection against the use by defendant of a certain geometrical figure, the phrase "Always closed," and a certain picture, in connection with the manufacture and sale of revolving doors.

It alleged that the geometrical figure or design was a valid trade-mark owned by plaintiff, used by it for years in connection with its advertising matter and applied by it to revolving doors; that the phrase "Always closed" had for eight years been used by it as a trade-name or trade-mark in its advertising and had been impressed on the doors themselves; that for years it had used a certain picture of a revolving door in place, as shown in its copyrighted catalogue attached as an exhibit to the bill, which, it was alleged, had become identified in the minds of architects, builders, and the public with its (the plaintiff's) doors.

The alleged wrongdoing consisted in the use by defendant of the design, phrase, and picture, as shown in the following cut, published by the defendant in a trade periodical.

The picture of the door here shown is similar to that in the plaintiff's catalogue.

It was agreed on the hearing for preliminary injunction that plaintiff had owned and conducted its business under a certain patent for revolving doors until the patent expired some years before the advertisement in question, and it was alleged in the bill that a consent decree had theretofore been entered against defendant for infringment of this patent.

Appellant urges that the bill is good as alleging: First. Infringement of a trade-mark, the geometrical design. Second. Infringement of the trade-mark or trade-name "Always closed." Third. Unlawful

simulation of the picture. None of these contentions can be upheld for the following reasons:

[1] First. Even if the geometrical figure used by defendant be deemed substantially similar to plaintiff's, both are mere cross-sectional views of the door of the expired patent and, except that they indicate four instead of three doors, are practically identical with one of the illustrations (Figure 3) of the patent. Inasmuch as defendant may now make the door, it may illustrate it in its advertisements. It is therefore unnecessary to consider whether a design of this character, not arbitrary or fanciful, but in a sense illustrative of the thing itself, could, in any event, be protected as a trade-mark.

[2] Second. The words "Always closed" are clearly merely descriptive of a revolving door in place and performing its proper function.

[3] Third. The picture shows only a conventional revolving door, one that defendant may make and therefore may illustrate.

[4] Fourth. While, therefore, plaintiff can have no exclusive rights in design, phrase, or picture, nevertheless it is entitled to protection against such use of them by defendant as would constitute fraudulent or unfair competition with it. The bill alleges that "by its wrongful acts above set forth the defendant has diverted to itself trade and custom to which plaintiff was entitled and that it otherwise would have received."

Clearly this is insufficient to sustain a bill to restrain unfair competition. Defendant's acts, as set forth in the bill, are not wrongful and cannot be made so by mere characterization; the trade is open to all honest competition; that plaintiff "was entitled" to it does not negative defendant's equal right to secure it by lawful means.

The decree must therefore be affirmed.

UNITED STATES v. THIRTEEN CRATES OF FROZEN EGGS.

(Circuit Court of Appeals, Second Circuit. June 3, 1914.)

No. 233.

1. FOOD (§ 5*)—"ADULTERATED FOOD."

Decayed frozen eggs, taken from the shell and mixed together, are within the prohibition of Food and Drugs Act of June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1911, p. 1354), which prohibits the transportation from one state to another of any adulterated article of food as defined in section 7.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.*

For other definitions, see Words and Phrases, vol. 1, pp. 210–212.

What constitutes a violation of pure food regulations, see note to Brina v. United States, 105 C. C. A. 559.]

2. FOOD (§ 14*)—VIOLATION OF FOOD AND DRUGS ACT—SHIPMENT OF ADULTERATED ARTICLE OF FOOD—INTENT OF PARTIES.

On the question of a violation of Food and Drugs Act of June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1911, p. 1354), by the shipment in interstate commerce of an adulterated article of food, the intent of either the shipper or consignee is immaterial.

[Ed. Note.—For other cases, see Food, Cent. Dig. §§ 10–13; Dec. Dig. § 14.*]

*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.

On appeal from the District Court of the United States for the Southern District of New York, from a final decree providing for the condemnation and forfeiture to the United States of thirteen crates, more or less, of frozen eggs, seized under the act of June 30, 1906, 34 Stat. L. 768.

For opinion below, see 208 Fed. 950.

See, also, 215 Fed. 585.

Breed, Abbott & Morgan, of New York City, for the claimant.

H. Snowden Marshall, U. S. Atty., and Addison S. Pratt, Asst. U. S. Atty., both of New York City.

Before COXE and ROGERS, Circuit Judges, and MAYER, District Judge.

COXE, Circuit Judge. The question involved in this controversy is simply this—whether decayed frozen eggs taken from the shell and mixed together are within the prohibition of the act of Congress which prohibits the transportation from one state to another of any adulterated article of food.

We are clearly of the opinion that they are and that the question of intent of either the shipper or the consignee has nothing to do with the question. The law could not be enforced if the government is compelled, in the case of articles clearly prohibited from interstate commerce, to establish the wrongful intent of the parties. It is enough that such articles are prohibited. All that it is necessary for the government to show is that an adulterated article of food has been transported in interstate commerce and it has amply shown this in the present case. Judge Ray has found the facts and correctly stated the principles of law applicable thereto.

The judgment is affirmed.

ARMOUR & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 3, 1914.)

No. 297.

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

In error to the District Court of the United States for the Southern District of New York to review a decree (208 Fed. 950) entered upon a trial directing the condemnation of certain frozen eggs seized under Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1911, p. 1354).

Breed, Abbott & Morgan, of New York City, for plaintiff in error.

H. Snowden Marshall, U. S. Atty., and Addison S. Pratt, Asst. U. S. Atty., both of New York City.

Before COXE and ROGERS, Circuit Judges, and MAYER, District Judge.

COXE, Circuit Judge. In view of our decision in the case of the United States against Thirteen Crates of Frozen Eggs, 215 Fed. 584, 131 C. C. A.

652, decided at this term, it is hardly to be expected that a conclusion in favor of the plaintiff in error would be reached herein even if we were permitted to review the questions presented at the argument and in the briefs. But we are not permitted to review these questions because there is no bill of exceptions. None of the questions discussed is properly before us.

The writ of error is dismissed.

JONES v. EVANS.

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

No. 2057.

1. PATENTS (§ 165*)—CONSTRUCTION—IMPLIED TERMS OF CLAIMS.

Elements in claims should be read with reference both to the structure and the function given in the description of the invention, and interpreted to include such connections and relations of the several means of the combination which are named as are implied therewith to make them operative.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—WINDOW LIFTER.

The Evans patent, No. 815,914, for a window lifter, construed, and *held* sufficiently specific to cover a structure erected in the particular manner shown in the drawings; also *held* valid and infringed.

Appeal from the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Suit in equity by John A. Evans against James E. Jones. Decree for complainant, and defendant appeals. Affirmed.

Russell Wiles, of Chicago, Ill., for appellant.

Arthur M. Hood, of Indianapolis, Ind., for appellee.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

KOHLSAAT, Circuit Judge. This case comes before us on appeal from the decree of the District Court holding claims 1, 4, 5, and 6 of patent No. 815,914, granted to patentee March 20, 1906, for a window lifter, to be valid and infringed. Those claims read as follows, viz.:

"1. In a window or other lifter, the combination of a rotatable fulcrum or carrying block, a pair of links pivoted at different points to the block, and a connecting-arm to which the links are pivoted at a point on the other side of its center to the object to be lifted."

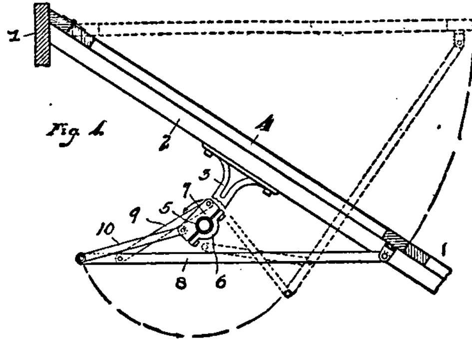
"4. In a window or other lifter, the combination of operating means, a rotatable fulcrum or carrying block, and means comprising a connecting-arm and two shorter arms or links, the two shorter arms or links being pivoted to a connecting-arm at one side of its center, the said arm being pivoted at a point on the other side of its center to the object to be lifted.

"5. In a window or other lifter, the combination of operating means a carrying or rotatable fulcrum-block and means comprising a connecting-arm and two shorter links or arms, the shorter links being pivoted to opposite sides of the carrying or fulcrum block at different points, and also pivoted to opposite sides of a connecting-arm at one side of its center, the said arm being pivoted at a point on the other side of its center to the object to be lifted.

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

"6. In a window or other lifter, the combination with a connecting-arm and a rotatable fulcrum or carrying block of two links pivoted to the fulcrum-block and a connecting-arm, and operating upon the connecting-arm, one of the links exerting a pushing action upon the arm while the other link exerts a pull upon the arm the said connecting-arm being pivoted to the object to be lifted and to the two links at points on opposite sides of its center."

The following is a reproduction of figure 1 of the drawings of the patent in suit:



1 represents a wall, sill door, beam, or gable; *2* represents the frame, *3* the usual bracket-support, *4* a hinged ventilator, to be operated by the device of the patent, *5* a pipe-shaft, which may have an operating gear or lever at one or both ends, *6* a cap sleeve bearing upon the pipe-shaft, *7* a block removably secured to the cap sleeve *6*; *8* is a connecting-arm pivoted to the ventilator and at the opposite end, having pivoted to it at different points and on opposite sides the two links *9* and *10* which are also pivoted to different points of the block *7*, the connecting-arm *8* being pivoted to the object to be lifted and to the two links *9* and *10* at points on opposite sides of its center. The drawing shows the arms *9* and *10* pivoted at opposite ends of the block *7*. This, patentee claims, may be varied. When power is applied through pipe-shaft *5*, it is communicated by the links *9* and *10* to the connecting-arm *8*, so that a swinging and lifting movement is imparted. Thus as block *7* is turned on the shaft *5*, it pushes the link *9* down on the arm *8*, while the outer link *10* pulls on the arm *8* so that the pivotal connection of the link *10* with the arm *8* moves farther away while the pivotal connection of the link *9* with arm *8* moves nearer to the pivotal point of shaft *5*.

"By this means," says the patentee, "I secured a peculiar twisting or what is an equivalent of an eccentric action, so that I have combined in this device a lifting and pulling effect, whereby the whole movement of the ventilator is made with the minimum application of power and with no possibility of a dead-center."

Appellant denies validity, but does not dispute infringement if the patent be valid.

Many patents in the prior art are set out in the answer, but appellant now urges only patent No. 706,829, granted to E. F. Johnson, August 12, 1902, for means for operating and locking scuttle covers, and patent No. 112,498, granted to E. G. Russell, March 7, 1871, for a mechanical movement. These we will discuss later.

For the patent it is contended that it is new; that by means of the relative arrangement of its parts the labor of operation is greatly reduced, whereby a series of ventilating windows or covers can be harnessed up together and worked as one, or separately. The saving of

power in operation is approximately 30 per cent., while the range of lift or opening is increased. Appellant asserts that patentee devised a structure embodying two separate and distinct principles: (1) The generic principle of a balanced push and pull; and (2) the specific principle of transmitting that push and pull through crossed links as shown in the patent drawing, to secure a particular leverage, but that he actually undertook to patent what appellant's counsel term the genus only—the generic principle of a balanced push and pull In support of this contention, appellant cites patentee's declaration in his co-pending application filed May 27, 1905, which resulted in patent No. 843,881, granted February 12, 1907, for a window lifter, which reads:

"This invention is, in fact, within the principle of my invention as described in my application, serial No. 250,588, filed March 17, 1905, for a window lifter [on which the patent in suit was granted] in which I have described a window lifter having the power applied through two links to different points of a connecting arm, so that I secure a combined pushing and pulling effect"

—and also the above-quoted language from the specification of the patent in suit (lines 71 to 76), and also, as he alleges, that nowhere in the patent in suit is there anything remotely indicating that it is limited to a structure in which the links *9* and *10* are crossed instead of parallel, or that such arrangement is desirable, and also the alleged absence of indication of any intention to limit the claims to any particular manner of erection with reference to the window. As to the recital in said patent No. 843,881, appellant has acquired no interest therein, nor is there any mutuality between appellant and appellee. The terms of an earlier patent cannot be modified by a later patent. The language, however, is not inconsistent with the construction placed by appellee upon the present claims. The general principle is the same in both, but the claims are different. Even were it otherwise, the scope of a patent must be determined from the instrument itself, read in view of the prior art. In setting up the alleged absence of reference in the specification to the effect that the links *9* and *10* are to be crossed save as contained in the lines 71 to 76, in support of his contention as aforesaid, appellant failed to call attention to the remainder of the specification. Beginning at line 77, it reads:

"As the block *7* turns on the shaft *5*, the arm *9* pushes down on the arm *8* while the outer arm *10* pulls on the arm *8*, so that the pivotal connection of the link *10* with the arm *8* moves farther away, while the pivotal connection of the link *9* with the arm *8* moves nearer to the pivotal point of the shaft *5*. By this means I secured a peculiar twisting, or what is an equivalent of an eccentric action, so that I have combined in this device a lifting and pulling effect, whereby the whole movement of the ventilator is made with the minimum application of power and with no possibility of a dead-center."

[1] While the use of the term "for example" is somewhat misleading, we are of the opinion that the specification is ample to establish the fact that the patentee claimed specifically the device shown in the drawings and specification, viz., a structure erected in the particular manner shown in the drawings, even though not described in terms in the specification, thus covering the advantages of reduced power and wide rotation.

It was said in Carnegie Co. v. Cambria Co., 185 U. S. 403–432, 22 Sup. Ct. 698, 710 (46 L. Ed. 968):

"Whether the claim would be void if construed to include cupola metal, it is unnecessary to consider. It clearly includes metal from blast furnaces, and is not rendered void by the possibility of its including cupola metal."

In Brill v. Washington Railway & Electric Co., 215 U. S. 527–532, 30 Sup. Ct. 177, 54 L. Ed. 311, the court held that while the ball and socket arrangement there involved was not described in the claims, it was covered by the specification, and gave the plaintiff the benefit of the doubt.

Elements in claims should be read with reference both to the structure and the function given in the description of the invention. Louden v. Strickler, 195 Fed. 751–756, 115 C. C. A. 551 (C. C. A. 7th Cir.). We said in Duncan v. Stockham, 204 Fed. 781–789, 123 C. C. A. 133, 141:

"The claim in suit does not name all the various means shown in the specifications and drawings for connection of the means or elements named therein to make them operative in the combination; but we believe the claim is nevertheless sufficient for enforcement, on reference to the specifications. It is to be interpreted to include such connections and relations of the several means of the combination which are named, as implied therewith to make them operative, in conformity with the specifications"—citing a number of cases.

The Supreme Court has said, in McClain v. Ortmayer, 141 U. S. 425, 12 Sup. Ct. 78, 35 L. Ed. 800:

"It is true that, in a case of doubt, where the claim is fairly susceptible of two constructions, that one will be adopted which will preserve to the patentee his actual invention."

This is followed in Robins Conveying Belt Co. v. American Road Mach. Co., 145 Fed. 923, 76 C. C. A. 461

We held in case No. 1995, Horton Mfg. Co. v. White Lilly Mfg. Co., 213 Fed. 471, 130 C. C. A. 117, decided at the January, 1914, session of the court, that while claims do not in terms call for certain features of the invention—

"those features may, for the purpose of restricting the claim so that it shall meet the requirements of the inventive idea, be gathered from the specification"—citing Klein v. Russell, 19 Wall. 433–466, 22 L. Ed. 116; Burke v. Partridge, 58 N. H. 351; Jones v. Barker (C. C.) 11 Fed. 600; Walker on Patents, § 185.

[2] Taking into consideration, therefore, the fact that the combination of the four claims in suit, when construed as aforesaid, covers the specific device erected exactly as set out in the specification and drawings, whereby there is secured high leverage between the shaft and window, resulting in a device which minimizes the power necessary to operate it and an increased rotation, we have little difficulty in finding a patentable degree of invention, provided the prior art contains no anticipating devices. The combination employed is new in the window lifting art, though it contains only old elements. The result attained is very desirable, adding substantially to the efficiency of the window lifting service of greenhouses in particular and of other similar applications of lifting power.

As above stated, counsel particularly limit their reference to the prior art to the Johnson and Russell patents. The latter may, in view of our construction above set out, be left without further discussion. It is

for a "mechanical movement," and would be in point as an anticipation only in case the claims in suit were limited to a generic patent as insisted by appellant; and against the claims as construed appellant concedes that the Russell is no stronger than the Johnson patent on the question of mechanical skill versus invention.

It is urged by appellant that the Johnson patent, by the shifting of a pivot only a few inches, would become a complete anticipation of the claims in suit, and that to make such change would involve only mechanical skill. Various arrangements of the parts of the Evans device are suggested and shown in the briefs. None of them seems to have appealed to appellant in selecting his lifting device. Nor had it occurred to any one before Evans, to attempt the combination of the claims in suit and secure the advantages which appellant has sought to appropriate. The shifting of the pivot does not appeal to us as a mere matter of mechanical skill. It involved an entirely different result in the way of efficiency. Its utility appellant must concede. It is not an easy matter to determine just where the domains of mechanical skill and inventive thought have erected their boundaries. It, however, has been the policy of the law, in order to secure advances in the liberal arts, to extend to the domain of invention the benefit of any doubt with respect to the question of the absence or presence of invention. In the present case the advantages obtained by the device of the claims in suit, as above construed, the desirableness of which seems to have appealed to the acquisitiveness of appellant, together with the presumptions arising from the grant, sufficiently attest the validity of the claims in suit. Infringement being conceded, there remains only to affirm the decree of the District Court.

Affirmed.

MASONIC FRATERNITY TEMPLE ASS'N v. MURPHY IRON WORKS.

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

No. 2039.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—SELF-FEEDING FURNACE.

The Murphy patent, No. 587,678, for a self-feeding furnace, claims 14 and 17, construed and *held* not anticipated, valid, and infringed.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Suit in equity by the Murphy Iron Works against the Masonic Fraternity Temple Association. Decree for complainant, and defendant appeals. Affirmed.

John G. Elliott, of Chicago, Ill., for appellant.

Walter M. Fuller and Charles C. Linthicum, both of Chicago, Ill., for appellee.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

KOHLSAAT, Circuit Judge. The District Court adjudged appellant to have been guilty of infringing claims 14 and 17 of patent No.

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

587,678 granted to Thomas Murphy on August 3, 1897, for improvements in self-feeding furnaces. The claims in suit are as follows, viz.:

"In a self-feeding furnace, the combination with the fuel-magazines in the side walls, and the coal-pushers for feeding the fuel, of the coking-plates constructed in independent sections and forming the top of an air-flue extending back of the fuel-magazine and into the air-feeding devices of the furnace."

"In a self-feeding furnace inclosed in brick walls and having side-feeding fuel-magazines and a V-shaped grate between the same, of fuel-magazines supported longitudinally in the sides of the furnace free and clear."

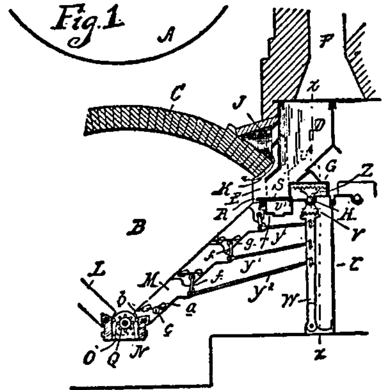
"My invention," says the patentee, "relates more particularly to steam-boilers and other furnaces of the self-feeding smokeless type, in which the grate-bars are arranged either in two rows on the opposite sides or in front of the furnace-chamber and incline downwardly toward the center or toward the rear, the fuel being introduced at the top and fed down toward the middle or rear, in which there is a device for mechanically removing the clinkers."

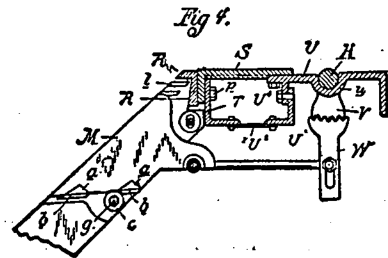
The specification further states:

"The object of my invention is to improve the mechanical devices for feeding the fuel * * * and further to safeguard against the destructive influence of the high heat, which is the most difficult factor to deal with in this class of furnaces."

Patentee specifically claims he has made provision to lessen the liability of damage to exposed parts and for facilitating the making of repairs, especially of the so-called coking-plate.

The following cuts, being figure 4 and a portion of figure 1 of the drawings of the patent, suffice to show the parts here involved:





A represents a steam generator, *B* a combustion chamber, and *C* the fire arch of the combustion chamber. *D* is the fuel magazine located in the sides of the combustion chamber having discharge opening *E* and supply chutes *F*. *G* are the coal-pushers actuated by the rock-shafts *H* to feed the coal into the grate. *J* represents the air-ducts supplying heated air through the passage *K* to the grate. *L* and *M* are the grate-bars, and *Q* is the clinker bar, whereby clinkers are crushed. *R* is a sectional wedge-shaped compensating plate against which the stationary grate bars abut. R^1 is a lip extending from plate *R* over the top of the grate bars into the fire chamber to prevent fuel falling between the grate bars, and allowing free passage of the air to keep plate *R* cool, while at the same time it forms a removable part of the so-called coking-plate *S*, which is also made in sections and which extends a short distance into the fire-chamber. U^3 is an air-chamber communicating with air-chamber U^4 formed at the rear

end of the magazine and leading into the air-flue *J*, from which it is fed through the passage *K* into the furnace. By this arrangement, the patentee claims a current of air will be induced to flow through the air-chambers U^3 and U^4 and keep the parts cool, while at the same time heated air is introduced into the furnace. By supporting the fuel magazines longitudinally in the sides of the furnace and dispensing with brick work underneath, and also by means of the circulation of the air through U^3 under the sectional coking-plate, it is claimed that the destructive effect of the heat upon the coking-plate and other exposed parts is lessened. The so-called coking-plate forms the floor of the fuel magazine and the top of the air flue U^3. When the fuel fails to feed down freely, or when for other causes the plate is bare or otherwise exposed to great temperature, the heat is apt to warp it, causing trouble to the movement of the coal-pushers, and otherwise injuring the action of the air and fuel supply. By reason of the removal of the brick foundation of the magazine, and the sectional construction of the coking-plate, access for purposes of repairs to said plate is readily attained and room is provided for expansion of the different parts thereof. The coking-plate, so-called, of the prior art was in one piece and, as it claimed, was easily warped and difficult to get at for purposes of repairs, and removal.

From the foregoing figures and description the claims will be readily understood.

While the advance in the furnace art set out in the claims is of a minor character, it must be remembered that the art is old and crowded; that it has been built up for many years, by similarly simple advances, until at the time the patent was granted there remained little room for basic invention, and that consequently invention has been practically limited to slight improvements. The addition to the effectiveness of the furnace covered by the patent, if new, is entitled to the protection of the statutes. To support the contention that the matters covered by the patent are not new, appellant cites numerous patents in the prior art hereinafter mentioned. Appellee was granted several patents for improvements in furnaces, which are cited as part of that prior art. Of these may be mentioned patents Nos. 316,641 and 316,642, both granted on April 28, 1885. Neither of these show the sectional coking-plate, the air flue under the plate so arranged as to effectively cool the plate while conducting the air to the rear of the furnace, or the opening obtained by supporting the fuel magazines in the side walls of the furnace and thereby doing away with the brick foundation.

It is appellant's contention that the burning out of the rear end of the magazine and arch plate, in connection with the 1885 patents, led Murphy in the claims in suit to connect the rear end of his circulating air dust-pit with the rear end of the chambers *F* and *P* of said prior Murphy patents, in order to more efficiently introduce air through the dust-pit and rear end uptake flue. While this end was attained, the patent had for its objective as well the protection and repairing facilities of the so-called coking-plate sections, as clearly appears from the claims in suit.

Patent No. 48,247, granted to J. Zeh June 13, 1865, for a furnace grate bar, shows a plate made in sections used as a substitute for the front fire bars. "In order to prevent this plate from becoming warped, it may be made in several pieces to allow for expansion and contraction," says the specification.

This device lacks the side-feed, the stationary coking-plate, the air-flue under a coking-plate, and the magazine supported in the side walls, whereby the space underneath the magazine is left open. While, in some sense, a base or coking-plate, it is not properly the bottom of the fuel magazine. It makes no provision for conducting the air to the rear part of the furnace, and is therefore clearly not the combination of the claims in suit.

The British patent, No. 6,466, granted to Haddan May 27, 1885, for a front-feed furnace, has no sectional coking-plate, nor is its plate the top wall of an air flue extending back into the air feeding devices of the furnace. Nor has it an air flue beneath it. The furnace has no V-shaped grate. Nor has it a side-feed. Whatever air it supplies is fed from above. The differences of the two are too many to permit its consideration as an anticipating device.

The British patent to Marchant and Parker, No. 601, granted March 4, 1867, for generating, superheating, and steam, etc., is cited to show a hollow metal dead plate through which water is made to circulate to prevent injury to the rollers and cams. We do not deem it a pertinent citation.

The Wilkinson patent, No. 480,538, granted August 9, 1892, for a furnace grate, is a front-feed device in which there is no so-called coking-plate. The grate extends into the fuel magazine. The furnace has no air flue conducting the air into the back thereof. Nor has it fuel magazines in its side walls, or a V-shaped grate.

Richards patent, No. 515,612, granted February 27, 1894, for a furnace, calls for a device in which the process called for may be carried out without a traveling grate, and for one which provides for the pre-heating of the fuel and for feeding the same over the grate or furnace floor. It is not a self-feeding furnace. It has no sectional coking-plate or air flue thereunder. Its magazine is not supported in the side walls of the furnace, nor has it any coking-plate forming the top wall of a coal-intake flue leading into the air feeding devices of the furnace.

Appellant sets up and discusses by way of defense a number of other patents, viz.: Richards patent, No. 535,413, granted March 12, 1895, for process of and apparatus for burning fuel; Sanderson patent, No. 573,298, granted December 15, 1896, for furnace grate and automatic stoker; Vicars patent, No. 296,301, granted April 1, 1884, for apparatus for feeding fuel to and in furnaces; Gregory patent, No. 228,061, granted May 25, 1880, for a furnace; Krudewig patent, No. 305,457, granted September 23, 1884, for a smoke and gas consuming furnace; Dunn patent, No. 561,097, granted June 2, 1896, for a furnace; and patent No. 395,739, granted to Campbell January 8, 1889, for a device for feeding fuel, together with a number of other patents not discussed by either counsel.

On examination, we are satisfied that none of the patents cited anticipates the combination in suit. We therefore hold both of the claims to be new, for anything that is shown by prior patents. Neither do we consider the alleged prior use in the construction of the furnaces at the John Hauck Brewing Company plant at Cincinnati, Ohio, to have been an anticipation of claims 14 and 17 or either of them. That work closely resembled Murphy's prior devices. It had air from the dust chamber and also air admitted through an opening in the front plate passing into the chamber at the rear of the furnace, but lacked the air-flue under the sectional coking-plate, as well as the sectional plate itself. The magazine rested on brick foundation walls instead of in the side walls of the furnace. The coking-plate was inaccessible for purposes of removal and repairs, and was of single thickness. That furnace cannot be considered as anticipating the combination of either claim 14 or claim 17.

We are not impressed with the appellant's claim of aggregation as applied to claims 14 and 17. In our judgment the parts co-operate to produce an improved furnace and are therefore properly treated as a combination, the utility of which appellant will not be heard to deny.

From the record it appears that Orville D. Cotton, practically constituting the appellant company, was formerly in the employ of Thomas Murphy, the patentee of the claims in suit; that appellee is the owner of the patent sued on, by assignment; that Cotton was familiar with appellee's patent and the device of the claims in suit.

We are unable to find any substantial difference between appellee's furnace and the alleged infringing device. The whole prior art was open to it. Why should it be permitted to appropriate appellee's device?

The decree of the District Court is affirmed.

GOSHEN MFG. CO. v. HUBERT A. MYERS MFG. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1914. Rehearing Denied May 12, 1914.)

No. 2027.

1. PATENTS (§ 282*)—SUITS FOR INFRINGEMENT—EQUITY JURISDICTION.

Damages are recoverable by action at law for infringement of a patent; and, as this remedy is ordinarily adequate, a court of equity is without jurisdiction of a suit to enjoin further infringement, unless such further infringement be either actually threatened or to be reasonably apprehended.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 440, 443; Dec. Dig. § 282.*]

2. PATENTS (§ 282*)—SUIT FOR INFRINGEMENT—EQUITY JURISDICTION.

A court of equity *held* without jurisdiction of a suit for infringement of a patent, where defendant, a corporation, had not only ceased making the alleged infringing article on notice from complainant, but had sold its entire physical property and gone out of business before commencement

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

of the suit, and no sufficient facts were shown to justify a reasonable apprehension of further infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 440, 443; Dec. Dig. § 282.*]

Appeal from the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Suit in equity by the Goshen Manufacturing Company against the Hubert A. Myers Manufacturing Company and Hubert A. Myers. Decree for defendants, and complainant appeals. Affirmed.

Fred L. Chappell, of Kalamazoo, Mich., for appellant.
V. H. Lockwood, of Indianapolis, Ind., for appellees.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

MACK, Circuit Judge. The first and decisive question raised in this appeal from a decree dismissing a bill in equity after a full hearing is whether a court of equity or a court of law is the proper forum in which to determine complainant's rights.

The bill, filed October 3, 1910, charged that defendants infringed letters patent for hoisting pulleys, No. 876,991, that they "still continue so to do," and that notice thereof and request to desist were given and disregarded. Defendants, after setting up, among other defenses, invalidity of patent and noninfringement, state in their answers that defendant Myers had not been connected with the defendant company in any way, as director, officer, stockholder, or employé, since December, 1909, that defendant company "has not manufactured any hoisting device of any kind whatsoever since the month of October, 1909, and that since the month of March, 1910, this defendant has not sold or had for sale any hoisting devices of any sort whatsoever, and that the complainant had knowledge of these facts prior to the bringing of this suit for an injunction." They further deny that they had avowed any determination to continue to manufacture or sell any such hoisting machines.

[1] It is elementary that for infringement of a patent, as for any trespass, damages are recoverable by action at law; that, as this remedy is ordinarily adequate, a court of equity will not lend its aid to enjoin further infringement, unless such further infringement be either actually threatened or reasonably apprehended. Kennicott Water Softener v. Bain, 185 Fed. 520, 107 C. C. A. 626; Chadeloid Co. v. Jackson, 203 Fed. 993, 122 C. C. A. 293. As this court said in the Bain Case, supra:

"The question is a question of fact, viz.: Assuming that the patent is valid, and that appellee had infringed, and that the infringement had ceased before the bill was filed, * * * did appellant, when the bill was filed, have any well-grounded apprehension that the infringement would be repeated?"

[2] The letters patent in question were applied for in 1906, were issued on January 21, 1908, to one Boyer, complainant's president, as assignee of defendant Myers, and were assigned, together with all

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

rights of action for infringement, in September, 1910, to complainant, after the action by defendant company against Boyer, hereinafter referred to, had been begun.

In 1907, defendant Myers induced some business men of Warsaw, Ind., to join with him in organizing defendant corporation for the manufacture of swings, ladders, and hay carriers. At that time he showed a hay carrier with a hoisting device, which he stated was an invention different from and superior to that theretofore sold by him to Boyer. In 1908 he applied for letters patent on this hoisting device. They were issued in December, 1909, No. 942,735, and are owned by the defendant company.

This company began manufacturing only ladders and lawn swings. It made its first hay carriers, 25 in number, in the spring of 1908. In the fall of that year it prepared to make 500 more. Three hundred of these were sold that winter and spring; the other 200 were never completed by defendant company, but were disposed of as hereinafter stated. In August, 1909, it contracted to manufacture and sell to one Diedrich 500 additional carriers for the season of 1910.

In October, 1909, however, complainant published a newspaper advertisement and sent direct notice to the defendant company, claiming that its carriers infringed upon the complainant's patent rights. As a result of this notice and the publication of the advertisement, defendant company was unable to obtain additional capital from parties with whom negotiations were then pending, or to secure bank loans, thereby rendering it impossible for it to go on in the business. It settled its contract obligations with Diedrich by permitting him to use its shop and materials to finish up the 200 carriers before referred to. Diedrich shipped these out during the winter; the final shipment being made not later than March, 1910.

In December, 1909, defendant Myers sold all of his stock in the defendant company to the other stockholders, and thereafter had no connection of any kind with it, or with the manufacture, use, or sale of hay carriers. Defendant company neither manufactured nor sold any carriers after the notice of infringement. Its president and general manager notified complainant's president and manager in February, 1910, that it was practically dead. In March, 1910, it sold its entire plant and all of its property, except only the letters patent, No. 942,735. Since then it has been completely out of business and without factory or office. In the latter part of 1909, after the notice of infringement, it had decided not to manufacture any more carriers.

On September 12, 1910, defendant company sued Boyer in the state court for the injury to its business caused by the alleged defamatory advertisement published a year before. This case has been continued from time to time, on application of the defendant therein, because of the pendency of the present litigation. The unsworn complaint, signed only by the attorneys at law, filed in the state court, begins with the allegation:

"That the plaintiff is a corporation duly organized under the laws of the state of Indiana, and is now and has been for more than five years last past engaged in the business of manufacturing hay cars."

The foregoing facts would seem to demonstrate clearly that as to defendant Myers since December, 1909, and as to defendant company since March, 1910, at the latest, no infringement of complainant's rights has been committed or threatened, and, but for three matters to be considered, none could reasonably be apprehended.

Complainant, however, urges that, first, the allegation in the complaint, filed three weeks before the present proceedings were begun, that defendant company "is now engaged in the manufacture of hay cars"; second, the continued ownership by defendant company of the letters patent No. 942,735, under which it claims to have manufactured, and which complainant says are, at best, good only for certain improvements, and therefore unavailable except in connection with its patent rights; and, third, defendant's assertion in this proceeding of the invalidity of complainant's patents and noninfringement—separately and together furnish sufficient ground for apprehension to justify the intervention of a court of equity.

In our judgment, this contention cannot be sustained. The unsworn allegation in the complaint is not one of intent, but of existing fact. It is so completely contradicted by the evidence that it must be deemed to have been an inadvertent, as it was an incorrect, statement by the attorneys, concededly without binding force, and clearly with but slight evidentiary value. The continued ownership of the patent, or even an attempt to sell it, would be but a justifiable exercise of defendant's rights. Whatever the scope of this patent, it belongs to defendant, not to complainant. This ownership, whether retained by defendant or disposed of to another, prevents complainant from adopting the improvement embodied in the patent, and, during the period between the expiration of the two patents, will give the defendant or its successor in title the exclusive right to make the improved carriers.

As to the answer filed in this suit: If, for any reason, the defense of an adequate remedy at law should have failed, the other defenses therein urged of invalidity and noninfringement would have been essential to save defendant both from payment of damages on account of the hay carriers admittedly sold by it and from the dismissal of the action in the state court. Neither separately nor jointly, therefore, do the facts urged by complainant furnish a sufficient basis for any well grounded fear of further infringement; at best they would justify an apprehension that if, in some proper court proceeding, defendant's contentions should ultimately be upheld, it might then, and only then, not unlawfully, however, but legally, resume the hay carrier business.

Complainant brought no such proceedings. Thereupon defendant company endeavored to test its legal rights by the action in the state court. If complainant, for any reason, was dissatisfied with this forum, it could have sued at law in the federal court. Defendant company's contention from the beginning, that an action at law with a jury trial would afford adequate relief if complainant's rights were violated, has been fully sustained by the evidence.

The decree must therefore be affirmed.

UNION SPECIAL MACH. CO. v. SINGER MFG. CO.

(District Court, D. New Jersey. May 18, 1914.)

No. 5702.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—IMPROVEMENT IN SEWING MACHINES.

The Woodward patent, No. 890,582, for an improvement in sewing machines, relating to mechanism for changing from a straight-away to a zigzag or overedge stitch, and vice versa, at the will of the operator, and without stopping the machine, in view of the prior art, is entitled to only a very narrow construction; as so construed, *held* not infringed.

2. PATENTS (§ 11*)—RIGHT TO PATENT—FUNCTION OF MACHINE.

No patent can validly issue for the mere function or abstract effect of a machine, but only for the mechanism which performs or produces it.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 9; Dec. Dig. § 11.*]

3. PATENTS (§ 157*)—INFRINGEMENT—PRESUMPTION FROM GRANT OF SECOND PATENT.

There is a presumption arising from the grant of a patent that the invention covered by it differs substantially from any other covered by a prior patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229–232; Dec. Dig. § 157.*]

In Equity. Suit by the Union Special Machine Company against the Singer Manufacturing Company. On final hearing. Decree for defendant.

Joseph C. Fraley, of Philadelphia, Pa., for complainant.
Gifford & Bull, of New York City, for defendant.

BRADFORD, District Judge. [1] The Union Special Machine Company, the complainant, has brought its bill against the Singer Manufacturing Company, defendant, alleging infringement by the latter of letters patent of the United States No. 890,582, granted June 9, 1908, to the complainant, then bearing the name of Union Special Sewing Machine Company, as assignee of Russel G. Woodward, for Improvements in Sewing Machines. The patent in suit contains 59 claims; but the charge of infringement was on the hearing restricted to claims 27, 39, 40, 41, 42, 43, 44, 46, 53, 54, 55, 56 and 58. The two substantial questions in the case relate, (1) to the validity of those claims, and (2) to their infringement. The patent in suit, if valid, by no means embodies a primary or broad invention. The patentee in the description states:

"My invention relates to certain improvements in sewing machines, and has for its principal object to construct a machine capable of forming both straight-away and zig zag or over edge stitches, in which the character of the stitch may be changed at the will of the operator. In Letters Patent granted to me on the 23d day of February, 1904, No. 753,187, I have shown, described and claimed a machine of a similar type, and the present invention consists in certain features of construction and arrangement of operating parts, whereby the change from zig zag to straight-away stitching and vice versa, can only be accomplished while the needle is descending, and about to enter the goods, this being accomplished on the left hand stitch when the zig zag mechanism

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

is at work. This machine, as well as the machine illustrated in the aforesaid patent, was designed principally for use in connection with the closing of the uppers of shoes at the rear portion, the object being to first sew the two superposed edges of the uppers together a short distance by a line of straight-away sewing, and then by a line of zig zag stitches, so that when the pieces of leather are spread out flat there will be no ridge upon the inside of the shoe, except at the very top of the rear part. The said strip is then applied in the usual manner over the upper and counter of the shoe. The seam adapted to be sewed on this machine, forms the subject-matter of another application filed October 30, 1902, Serial No. 129,383. In addition to the general object of the invention above stated, further objects are to so construct and arrange the mechanism for changing the character of the stitch as to render it in great measure self-adjusting, so that any premature movement of that portion of the stitch-forming mechanism adjusted may be prevented, the movement at either change being so governed by the mechanism as to at all times produce a perfect stitch at the changing-point. Other objects are to so construct the apparatus that the change of stitch may be made by the operator by a single movement, without stopping the machine; to provide for the positive operation of the parts, and for the adjustment of the various parts of the mechanism, and the renewal of adjustment of those portions subject to the greater wear. The features of the invention made by me having been set forth in the former patent, the present invention comprises, in a somewhat restricted sense, certain improvements therein, adapted to bring the machine to a greater degree of perfection, both in construction and mode of operation, or perhaps in one sense, the invention may be stated to consist in combining with an overseaming machine adapted to have a zig zag movement imparted to the needle, mechanism for imparting such movement, with means for throwing the same into and out of operation at the will of the operator, said means including locking devices which alternately act at the will of the the operator, to hold in engagement or release from engagement the zig zag needle mechanism from its operative connections with the driving shaft. Furthermore, the invention consists in combining with the usual zig zag mechanism of a sewing machine, with a driving shaft for operating it, of connections between the driving shaft and the zig zag mechanism, including two locking devices operable at the will of the operator, one of which locks the zig zag mechanism to the connections between it and the driving shaft, and the other of which, as said first locking device is thrown out of action, operated to clutch the zig zag mechanism and prevent any accidental swinging of the needle bar gate or frame. The above statements of the features included in the present invention relate particularly to the application thereof to a machine of the special type referred to, but it will be understood that so far as the feature of throwing into and out of operation a mechanism or member is concerned, the invention may be applicable to other uses, where it is desired to suspend at desired intervals and at the will of the operator, the action of some part of the machine, as for example, a ruffling blade, trimmer, feeding device, etc., or the same shifting mechanism might be arranged to be automatically operated at certain predetermined intervals to cause a member to be thrown into or out of action. The invention therefore is not limited solely to the application to the particular machine illustrated, but may be said in a broad sense, to consist of a sewing machine having a moving member whose action it is desired to suspend at intervals, of means for causing said suspension or operation, including locking devices for holding in engagement or out of engagement, the said member and its operative connections. * * * It will be understood that various minor modifications and changes in the construction of the parts of this machine may be made, without departing from the spirit of the invention."

The claims of the patent in suit relied on by the complainant are as follows:

27. In a sewing machine adapted for straight-away or zig zag stitching, a driving shaft, the combination of the needle bar and means for reciprocating it vertically, means for vibrating it laterally including a vibrating member,

connections between the vibrating member and the driving shaft, means for throwing said connections into and out of operation, and controlled by the operator, and a stop carried by a moving part of the machine mechanism for preventing complete movement of said controlling means, except at predetermined points; substantially as described.

39. In a sewing machine adapted for straight-away or zig zag stitching, the combination of a driving shaft, a needle, means for reciprocating the same vertically, means for vibrating the needle laterally, including a vibrating member, connections between the vibrating member and the driving shaft, controlling means for rendering the vibrations imparted through said connection ineffective, said controlling means being manually operated, and a stop carried by a moving part of the machine mechanism for preventing complete movement of said controlling means, except at a predetermined portion of the reciprocation of the needle.

40. The combination of a needle, complemental stitch-forming mechanism, means for vibrating said needle laterally to position the same for forming alternate stitches over the edge of the fabric, controlling means for rendering said vibrating means ineffective, whereby straight-away stitching may be produced, and means for preventing the operation of said controlling means when the needle is positioned for making the over edge stitches.

41. The combination of a needle and complemental stitch-forming mechanism, for producing straight-away stitching, means for vibrating said needle laterally, whereby alternating stitches are formed outside of the line of straight-away stitching, controlling means whereby said vibrating means may be rendered ineffective including a lever, a treadle connected to said lever, and means co-operating with said lever for preventing the operation of said controlling means when making stitches out of line with the straight-away stitching.

42. The combination of a needle, complemental stitch-forming mechanism, means for vibrating said needle laterally to position the same for forming alternate stitches over the edge of the fabric, controlling means for rendering said vibrating means ineffective whereby straight-away stitching may be produced, and automatic means for preventing the operation of said controlling means, when the needle is positioned for making the over edge stitches.

43. In a machine for straight-away and zig zag stitching, a needle, complemental stitch-forming mechanism, means for vibrating said needle laterally, manually controlled means for rendering said vibrating means effective to vibrate said needle, and automatic means operating upon the manually controlled means for causing said needle to form straight-away stitching when said manually controlled means is released, and means for preventing the operation of said automatic means when said needle is forming the stitches out of line with the straight-away stitching.

44. In a machine for straight-away and zig zag stitching, a needle and complemental stitch-forming mechanism, means for vibrating said needle to form zig zag stitches, a treadle, means intermediate said treadle and said vibrating mechanism including a lever, whereby the latter may be rendered effective or ineffective to vibrate the needle, and means co-operating with said lever for preventing the operation of said treadle except when said needle is in a predetermined position.

46. In a machine for straight-away and over edge stitching, a needle and complemental stitch-forming mechanism, mechanism for vibrating said needle to form the over edge stitching, controlling means for rendering said vibrating mechanism effective or ineffective, including a lever, a treadle connected thereto for operating the same to cause the over edge stitching to be effected, a spring for operating said lever to cause the straight-away stitching to be effected, and means for preventing the operation of said lever while the needle point is below the plane of the upper surface of the material during the formation of certain stitches.

53. In a sewing machine for straight-away and zig zag stitching, a needle, and complemental stitch-forming mechanism, means for vibrating the needle to form zig zag stitches, controlling means for rendering said vibrating means effective or ineffective, including a lever, a treadle for moving said lever in one direction, a spring for moving said lever in the opposite direction and

means for preventing the movement of said lever except at a predetermined time in the reciprocation of the needle.

54. The combination of a needle and complemental stitch-forming mechanism for producing straight-away stitching, means for vibrating said needle laterally whereby alternating stitches are formed outside of the line of straight-away stitching, controlling means whereby said vibrating means may be rendered ineffective, including a lever, a treadle for depressing said lever, a spring for raising said lever and means including a stop, carried by a moving part of the machine mechanism for preventing the operation of said lever except at a predetermined time in the reciprocation of the needle.

55. The combination of a needle, complemental stitch-forming mechanism, means for vibrating said needle laterally, controlling means for rendering the said vibrating means ineffective including a lever, a stop moving with said lever, and a member moving with the machine mechanism, and co-operating with said stop for preventing the movement of said lever except at a predetermined time in the reciprocation of the needle.

56. The combination of a needle, complemental stitch-forming mechanism, means for vibrating said needle laterally, controlling means for rendering said vibrating means ineffective, including a lever, a stop moving with said lever, a member moving with the machine mechanism and co-operating with said stop for preventing the movement of said lever except at a predetermined time in the reciprocation of the needle, a treadle, means for connecting said treadle to said lever and for moving the same in one direction and a spring for moving the lever in the opposite direction.

58. In a sewing machine, a needle, means for reciprocating said needle, mechanism for vibrating the same laterally, said lateral vibrating means including a fork, means for vibrating said fork, a member connected to and moving continuously bodily with said fork and manually controlled means for rendering the movements of said member ineffective, whereby the lateral vibrations of the needle are suspended, and means for preventing the operation of the manually controlled means except at a predetermined time in the reciprocation of the needle.

These thirteen claims may be divided into two groups, one relating to the prevention of the shift or change from zigzag to straight-away or from straight-away to zigzag stitching when the needle is at the wrong stitch, and the other to the prevention of the shift from zigzag to straight-away stitching, or conversely, when the needle is in the work or material to be sewed. I do not find anticipation of any of the claims in suit unless given an inadmissible scope and liberality of construction. While the complainant is entitled to the advantage of the prima facie presumption of validity arising from the grant of the patent in suit there are good reasons why its claims should be narrowly construed. The prior art requires such a limited construction. Further, the patent in suit purports to be for improvements upon a sewing machine covered by patent No. 753,187, granted to Woodward February 23, 1904, in the description of which the patentee says:

"My invention relates to certain improvements in sewing machines, and has for its principal object to construct a machine capable of forming both straight-away and zig zag or over edge stitches where the character of stitch may be changed automatically. A further object is to so construct and arrange the mechanism for changing the character of the stitch as to render it in great measure self-adjusting, so that any premature movement of that portion of the stitch-forming mechanism adjusted may be prevented, the movement at either change, being so governed by the mechanism, as to at all times produce a perfect stitch at the changing-point. Further objects of the invention are to so construct the apparatus that the change of stitch may be made by the operator by a single movement, to provide for a positive operation of the parts, and for the adjustment of the various parts of the mechanism and

the renewal of those portions subjected to the greatest wear. The invention consists, primarily, of a sewing machine adapted for both zig zag and straight-away sewing, with means whereby either form of stitch-forming mechanism may be thrown into and out of action without stopping or retarding the action of the stitch-forming mechanism."

[2, 3] The patent in suit thus is for improvements upon improvements to sewing machines as theretofore developed and improved. Again, the claims in suit are in form and character largely functional. It has long been settled law with respect to machine patents that no patent can validly issue for the mere function or abstract effect of a machine, but only for the mechanism which performs or produces it. Corning v. Burden, 15 How. 252, 14 L. Ed. 683; O'Reilly v. Morse, 15 How. 62, 112, 14 L. Ed. 601. It is not the legitimate office of a patent claim to state merely a mechanical problem or function. It must also clearly indicate the mechanical means for its solution or accomplishment. Claims so functional in character and form as those in suit must be read in the light of the drawings and description of the patent and be closely limited to what is there shown and described. The alleged infringing machine was the invention of C. F. Gray. It is covered by patent No. 933,032, granted August 31, 1909. There is a presumption arising from the grant of this patent that the invention covered by it differs substantially from any other sewing machine covered by a prior patent, the application for which had been pending in the patent office before the grant of the later patent. Boyd v. Janesville Hay Tool Co., 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973. Under the foregoing principles the machine of the complainant and defendant must be regarded as so distinguished from each other in details of construction and operation as to exclude infringement. Woodward states in the description of the patent in suit that under the invention covered by it the change from zigzag to straight-away stitching, and vice versa, "can only be accomplished while the needle is descending, and about to enter the goods." He has thus required as an essential feature of the machine of the patent in suit that the change from zigzag to straight-away stitching, and the converse, "can only be accomplished while the needle is descending." He has made this feature an essential element or characteristic of his patent monopoly. In the defendant's machine the change from one kind of stitch to the other certainly need not, and, as I understand the evidence, does not occur, while the needle is descending, but, on the contrary, while it is ascending. The following testimony of Arthur S. Browne, complainant's expert, is important in this connection.

XQ 7. At what stage in the excursion of the needle can the change from zig zag to straight-away stitching and vice versa, be accomplished in the defendant's machine, and at what stages can it not be accomplished?

A. As the exhibit machine now stands, the needle is substantially at its upper limit of movement when the change is made both from straight-away to zig zag stitching, and vice versa. It is possible that there may be a difference in adjustment in the exhibit as it now stands from when it was first received, because for the purpose of making the diagrammatic drawings it was necessary to remove the stop *O* to ascertain the way in which it is connected to the shaft *D*, and in getting these parts back there may have been some change in position; and if so, the timing would be slightly varied.

XQ 8. Would it make any difference to any of the testimony that you have

given, if the machine as sold by the defendant was adjusted so that the change from zig zag to straight-away stitching and vice versa was accomplished as the needle is rising, and after it has risen above the cloth?

A. No.

XQ 9. In the machine that has been introduced to represent the complainant's patent in suit, "Complainant's Exhibit, Complainant's Machine," at what stage of the excursion of the needle is the change from zig zag to straight-away stitching and vice versa accomplished?

A. As the needle is going down in making both changes.

XQ 10. About how far has the needle advanced on its downward stroke when the change occurs in complainant's machine?

A. A little over one-eighth of an inch. The total throw of the needle is about one and one-eighth inches.

XQ 11. What do you understand to be "the left-hand stitch," referred to in line 28, page 1, of the patent in suit? Whose left hand?

A. I understand it to be at the left hand of the person who faces the machine as shown in figure 1. It would be the position of the needle which is indicated in dotted lines in figure 1. This is the position the needle occupies during straight-away stitching.

XQ 12. If the defendant's machine as sold was adjusted so that the change occurred during the ascent of the needle after it left the goods, in what respect would its operation differ from the statement of the patent in suit, page 1, line 24, that "the change from zig zag to straight-away stitching and vice versa can only be accomplished while the needle is descending and about to enter the goods, this being accomplished on the left-hand stitch when the zig zag mechanism is at work"?

A. It would differ in the respect that the patent states that the change takes place while the needle is descending, while, on the contrary, in defendant's machine the change takes place while the needle is ascending. Also, in defendant's machine the change may take place while the needle is at the right during zig zag stitching. In such event, the action of the shifting mechanism is to shift the frame *C* (in which the needle bar reciprocates) so as to bring the needle to the left-hand position. This is another difference between defendant's machine and the quoted statement from the patent.

XQ 13. The difference mentioned in the last paragraph of your last answer is true with the defendant's machine in its present adjustment so as to make the change when the needle is substantially at its upper limit of movement; is that so?

A. Yes.

I do not deem it necessary to discuss other alleged points of infringement. Wholly aside from various questions raised by the counsel for the defendant as to the prosecution in the patent office of the application for the patent in suit, and sundry objections based upon alleged conduct of the complainant, I have reached the conclusion that the complainant has failed to prove infringement by the defendant of the claims or any of the claims in suit, and that, consequently, the bill of complaint must be dismissed with costs. A decree in accordance with this opinion may be prepared and submitted.

WOERHEIDE v. H. W. JOHNS-MANVILLE CO.

(District Court, S. D. New York. May 6, 1914.)

1. PATENTS (§ 101*)—CLAIMS—CERTAINTY.

Letters patent No. 973,902, for a cleat to secure prepared roofing in claims 2, 3, and 4, call for a cleat "arched transversely" and having greater length than breadth, the crown of the arch being narrow, the side walls leading with "sufficient abruptness" from the narrow crown to the base of the cleat to prevent depression of the crown between the side walls, the ends of the cleat being closed by stay portions leading abruptly from the crown to the base of the cleat and connecting the side walls to resist outward movement thereof beneath the crown of the cleat, etc. *Held*, that the use of the words "sufficient abruptness" and "arched transversely" did not render the claims objectionable as vague and indefinite.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 141; Dec. Dig. § 101.*]

2. PATENTS (§ 328*)—VALIDITY—INFRINGEMENT.

Patent No. 973,902, for a cleat to secure prepared roofing, *held* to involve patentable invention, valid, and infringed.

In Equity. Suit by William H. Woerheide against H. W. Johns-Manville Company for infringement of letters patent No. 973,902, for a cleat to secure prepared roofing. Decree for complainant.

Charles S. Champion, of New York City (Henry N. Paul, Jr., and Joseph C. Fraley, both of Philadelphia, Pa., of counsel), for complainant.

Odin Roberts, of Boston, Mass., and A. Parker Smith, of New York City, for defendant.

MAYER, District Judge. The sale of prepared roofings has increased extensively during the past 25 years. These roofings are shipped ready to be laid, and it has long been the usage of the trade to send with the rolls of roofing what are known as the "trimmings," i. e., the nails or other means of fastening. The familiar fastening means were flat-headed nails and tin caps with a nail in the center.

While there may be some difference of opinion as to the good and bad features of these old-fashioned devices, it is plain that they were open to some serious practical objection.

Workmen, in some instances, mashed the tin caps so as to invert them, and, when the caps became inverted, the area of the binding pressure was substantially impaired. In the use of the large-headed nails there was often left a considerable space of roofing between the nails upon which no pressure was exerted, and, as roofing fabrics of this character have a tendency to buckle, the buckling would frequently occur when the nails were driven hard. The liquid cement which went with this form of accessories and which was intended to cement the roofing sheets would sometimes in warm weather soften these sheets and in cold weather cause them to become springy or stiff. In short, while the old-fashioned method was fairly good, there was ample room for improvement.

Woerheide, who was a practical roofing man, realized the desirability of finding an improved method of fastening which would secure

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

a nearer approach to accuracy, careful handling, and firm holding. The result was the metal cleat which is the subject-matter of the patent. The device is simple and efficient.

It was the first practical and commercially availed of metal cleat for securing prepared roofings.

What little prior art was disclosed in the Patent Office constituted apt illustrations of how not to accomplish the result which was obviously attained by Woerheide. It is the old story of looking backward and seeing now how easy it was then. But patent cases sometimes are more than scientific discussions and have a good deal of flesh and blood in them.

The value of the Woerheide invention was seen at once by Mr. James of the Belknap Hardware Company of Louisville, Ky.—one of the large jobbers in roofing in this country. Mr. James appreciated that the Woerheide cleat was a great assistance in selling roofings, and so informed Mr. Wardell of the defendant company. Mr. Wardell is apparently an able up-to-date business man and, I think, can probably detect a good proposition in his line of business about as quick as any one. Mr. Wardell found from Mr. James that he could get a large order if he could supply a cleat similar to Woerheide's "Kant-Leak Kleet" and told Mr. James that "he would get up a cleat."

Mr. Wardell was able to work out the theory of the proposed cleat on the train returning to New York the night after his interview with Mr. James and, as a result, promptly produced the defendant's alleged infringing device.

When two alert business men like James and Wardell grasp, without hesitation, the commercial value of an article in their branch of business, that is convincing evidence of utility which would readily resolve a doubt as to patentability, if such existed. But I have no doubt on the question of invention because, in view of the state of the art, I think inventive ability was invoked to devise a metal cleat which would be strong, quickly and effectively nailed, and, generally speaking, easily handled.

[1] The next question is whether, from a technical standpoint, the claims are properly expressed. These claims are:

"2. A cleat arched transversely and having greater length than breadth, the crown of the arch being narrow, the side walls of the arch leading with sufficient abruptness from the narrow crown to the base of the cleat to prevent depression of the crown between the side walls, the ends of the cleat being closed by stay portions drawn from, and leading abruptly from, the crown to the base of the cleat and connecting the side walls to resist outward movement thereof beneath the crown of the cleat.

"3. A cleat arched transversely and having greater length than breadth, the crown of the arch being narrow, the side walls of the arch bending with sufficient abruptness from the narrow crown to the base of the cleat to prevent depression of the crown between the side walls, and the ends of the cleat being closed by stay portions restraining the side walls from spreading outwardly beneath said crown; the crown of said arch having therein, in alignment with each other longitudinally of the cleat a plurality of nail holes at the transverse center of the crown for a plurality of nails collectively of service in holding the cleat to its seat by direct action therefrom to and through said side walls.

"4. A cleat arched transversely and having greater length than breadth, the crown of the arch being narrow, the side walls of the arch leading with suf-

ficient abruptness from the narrow crown to the base of the cleat to prevent depression of the crown between the side walls, the ends of the cleat being closed by stay portions leading abruptly from the crown to the base of the cleat and connecting the side walls to resist outward movement thereof beneath the crown of the cleat; the crown of said arch having therein, in alignment with each other longitudinally of the cleat a plurality of nail holes at the transverse center of the crown for a plurality of nails collectively of service in holding the cleat to its seat by direct action therefrom to and through said side walls."

It is contended that such expressions as "sufficient abruptness" and "arched transversely" are vague and do not give that information to which the public are entitled.

[2] I cannot agree with this contention. It is a difficult, if not impossible, task to express "sufficient abruptness" and "arched transversely" in terms of mathematical accuracy. As Woerheide aptly pointed out, the necessary abruptness in a small device of this kind can only be ascertained by experience; and any one reading the specification and the claims ought not to have any trouble in understanding just what the claims comprehend. I think Mr. Wardell, for instance, did not encounter any difficulty on this score.

The real controversy in the case revolves around the question of infringement; for defendant claims that its cleat is the descendant of a mechanical ancestry different from that of the Woerheide.

This is not one of the cases where one, other than the patentee, worked out the problem independently; but, on the contrary, where, with the device of the patent in suit before him, he has attempted, if possible, to avoid the construction and claims of the patent. Of course, if he has succeeded, then the circumstances under which he undertook the creation of a new form of cleat become immaterial; but, on the other hand, he cannot escape infringement if his structure performs the same function as the patented structure in substantially the same way. An adequate understanding will be had if claim 3 is read on one of defendant's cleats, such as complainant's Exhibit 22.

There is much controversy as to the limitation of the phrase "arched transversely."

I am satisfied that defendant's cleat is arched transversely throughout its entire length in the sense of the patent, and that the duplication of the arch intermediate between the nailing points does not take the structure out of the claim in this respect. The crown of the arch of the patent is described as being "narrow." This is a structural limitation which is adequately explained in the specification (page 2, lines 53–64) as follows:

"The crown of the arch being practically no wider than the head of the nail being driven through it therefore presents no surface beyond the head of the nail for the face of a hammer to come into contact with when the blow is not accurately delivered, so that the impact of the blow is always caught by the head of the nail and the pressure distributed evenly throughout the cleat at the base flange. Missing the nail entirely, the hammer would be apt to hit, not the side, but the base flange."

A substantially similar construction is found in defendant's structure.

The main controversy, however, is as to the requirement as to "the side walls" of the arch leading with "sufficient abruptness" from the narrow crown between the "side walls." This definition is partly structural and partly functional. The purpose was to obtain a high degree of resistance so that force applied to the crown would be transmitted directly therefrom through the side walls to the object on which the cleat is laid. Defendant contends that its cleat is based on an entirely different principle, and that the Sherman patent for a nailing strip is the predecessor in principle of defendant's cleat; but such was evidently not Wardell's theory when he filed his application which resulted in patent No. 1,017,611. In that patent, referring to the corrugated edges, Wardell states, "This gives" the cleat "stiffness against bending strains" (page 1, line 59), and again:

"In operation the tacks or other fastening means are forced down until the dome-like portions 2, 2, are partly collapsed. This causes the elastic reaction of the metal to force the cleat down on the roofing with a uniform pressure, and to take up any inequalities in the thickness of the roofing material beneath it, due to wear or original unevenness. The roofing is firmly grasped by the ribs and crimped edges which form a plurality of gripping means on its under surface, and these also contribute greatly to the strength of the structure, without presenting any substantial obstruction to the flow of water over the cleats when in position on the roof. In short, the dome-like portions give strength in transmitting the pressure of the nails to the body of the strip and distributing the same over it, while the corrugated form of the strip produces a truss-like structure that transmits said pressure along from one dome-like portion to another without presenting any substantial obstruction on the roof's surface." (Lines 65 et seq.)

This point of view was stated in lay language in a small advertising pamphlet known as the "Blue Advertisement" issued by defendant in March, 1912.

I am not unmindful of the able discussion of Mr. Wadsworth, defendant's expert; but the most favorable view for defendant is that it has used equivalents, and, if regarded as equivalents, I think complainant's patent is entitled to at least the range disclosed in defendant's structure.

Finally, as to the Leslie patent, I may observe that on the evidence I think it is not a part of the prior art, and, even if it were, it is of no service from the standpoint either of anticipation or as a step in the prior art which would negative invention.

The defendant further insists that the words "the crown of the arch" limit the patent to a single arch, whereas "the arch" of the defendant's cleat is, in fact, many arches, and that in the cleat four domes appear, no one of which has a "narrow" crown. Defendant contends that six corrugations appear in the defendant's construction, and if they are arches they are plural and parallel so that the "crown of the arch" is an expression which cannot be stretched to cover several crowns of several arches, especially if these corrugated arches have no relation whatever to nails or nail heads or nail pressure, since no nails are driven through them and no nailing pressure directly sustained by them.

This, it seems to me, is entirely too limited an interpretation of the claims of complainant as applied to defendant's cleat. It is not neces-

sary to speculate as to what form of construction may avoid the language of the claims of the patent in suit; but, so far as concerns the particular controversy here, I am of opinion that defendant has infringed all three claims.

To be frank, I have returned to my first impressions, in regard to which I had some doubt, created largely, I think, because of Mr. Wadsworth's testimony; but a final analysis has convinced me that the case is one of clear infringement.

The complainant may have the usual decree, with costs.

BARNHILL'S ADM'R v. MT. MORGAN COAL CO.

(District Court, E. D. Kentucky. May 13, 1910.)

1. NEGLIGENCE (§ 23*) — INJURIES TO CHILDREN — DANGEROUS PREMISES — "TURNTABLE DOCTRINE."

The turntable doctrine imposes a liability on a property owner for injuries to a child of tender years, resulting from something on his premises that can be operated by such a child and made dangerous by him, and which is attractive to him and calculated to induce him to use it, where he fails to protect the thing so that a child of tender years cannot be hurt by it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 33, 34, 129; Dec. Dig. § 23.*]

2. NEGLIGENCE (§ 23*)—INJURIES TO CHILDREN—DANGEROUS PREMISES—TURNTABLE DOCTRINE.

Defendant coal company maintained a quantity of empty coal cars weighing 1,000 pounds each on a side track. There were 300 feet of level track between the point where the cars were located and a point in the main track where it began to run down hill, and the company had derailed a car at the connecting point of the side track with the main track so that it was necessary to re-rail such car before any of the cars could be moved down the incline. Certain boys from 15 to 17 years of age accomplished this, pushed the empties to the incline, and mounted them, and were running them on the main track down the incline when plaintiff's intestate, a child 10 years of age, ran behind the front car and fell on the track and was run over and killed by a following car. There was no proof that these cars could be moved by children under 14, or that defendant had ever been notified that such children had ever attempted to operate the cars, or that a similar accident had ever occurred. *Held*, that defendant was not guilty of actionable negligence under the turntable doctrine.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 33, 34, 129; Dec. Dig. § 23.*]

3. NEGLIGENCE (§ 23*)—INJURIES TO CHILDREN—"CHILDREN OF TENDER AGE."

A child of tender age must be less than 14 years old.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 33, 34, 129; Dec. Dig. § 23.*]

Action by Barnhill's administrator against the Mt. Morgan Coal Company, for alleged wrongful death of a child 10 years of age. Verdict directed for defendant.

R. S. Rose, of Williamsburg, Ky., for plaintiff.

J. N. Sharp, of Williamsburg, Ky., for defendant.

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

COCHRAN, District Judge (charging jury): I have considered the decisions that have been offered on both sides, and the suggestions that have been made, and I have a clear conviction as to the law of this case and as to my duty in reference to it, and I will try to make plain my conception of the law. I will deal with it, first, on the basis that the defendant took no precaution to prevent the operation of the empty coal cars, and then allude to that feature of the case.

[1] This case is based on what is known as the "Turntable Doctrine." To deal with a case claimed to be based on any such ground as this, one should have an accurate knowledge of just what the turntable doctrine is. That doctrine is, as I understand it, that if one has on his premises something that is dangerous to children, i. e., of such character that it is likely that children themselves can create danger out of it, and it is attractive, or alluring, or enticing to children, he owes the duty, as a matter of common humanity, to protect that thing and guard it from danger to children. Now, I said "to children." That is too broad. The doctrine is not that broad. It is to children of tender age. It is essential that the dangerous condition, whatever it may be, on one's premises, should be a danger to children of tender age. There is no doctrine here in the law that if a man has on his premises that which can be made dangerous by grown men, or children who are not of tender age, which may thus be made attractive to such children, so that they may be hurt or injured thereby, the owner of the premises must guard that from being interfered with. It is absolutely essential that the thing which it is claimed should be guarded against operation or handling in any way should be something that can be handled by children of tender age and made dangerous by them. And so it is that we find all of these cases based on the turntable doctrine that have been cited are cases where the children were of tender age.

Take the Stout Case (Sioux City v. Stout, 17 Wall. 657, 21 L. Ed. 745), for instance. The child there was 6 years of age, and of the two boys that went with him, one was 9 and the other 10 and these three young boys could operate that turntable by themselves, and could create a danger there.

Then take the case of Illinois Central R. R. v. Wilson, 63 S. W. 608, 23 Ky. Law Rep. 684, a hand car case, where the railway company left the hand car out on the macadam, and some small boys came along and used it, and one of the little boys got hurt, and it was held that the railway company ought to have guarded and protected that hand car. There the boy was nine years of age.

And so in the Hicks Case (U. S. Natural Gas Co. v. Hicks, 134 Ky. 12, 119 S. W. 166, 23 L. R. A. [N. S.] 249, 135 Am. St. Rep. 407), where a natural gas company up here in Eastern Kentucky had some defect in its pipe line, by which a little boy got hurt. At the time of his injury, appellee was about 8 years of age, and he was with a brother about 4 years old and a neighbor's boy about 7 years of age.

Then this later case that went up from Pike county against the Chesapeake & Ohio Railway (Brown v. C. & O. Ry. Co., 135 Ky. 798, 123 S. W. 298, 25 L. R. A. [N. S.] 717), which was a turntable case.

The boy that was hurt was 12 years of age. There the petition alleged:

"That said draw bolt was an insecure fastening, and said draw bolt could easily be removed and slipped to either side by a child 7 or 8 years old, so that said turntable would revolve, and small children had previous to the time of the injuries complained of been in the habit of removing said draw bolt and using said turntable as a merry-go-round, and said turntable was very attractive to children," and so on.

Now these are all of the cases that the plaintiff cites, and they are all cases involving children of tender years. Only one of them was a child over 10 years of age, and that is the last one, and the thing complained of was a thing that it was alleged could be made dangerous by a child 7 or 8 years of age.

Then there is the New Jersey case, in 169 Fed. (Snare v. Friedman, 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. [N. S.] 1367), where the little fellow fell in a canal, or something of that sort, I think—no, this was some obstruction in the street, and hardly comes within the doctrine. There the little fellow was 4½ years of age is my recollection.

On the other side, the cases cited were all of children of tender age.

This, then, is the doctrine: That if a man has on his premises something that can be operated by a child of tender years, and made dangerous by him, and which is alluring to him, attractive to him, and calculated to induce him to use it, that man who has that thing on his premises owes it to the child, as a matter of common humanity, to protect that thing so that a child of tender age cannot be hurt by it. That is called the "Turntable Doctrine," and this case is attempted to be brought within it. The question is, Does it come within that doctrine?

[2, 3] Here were a lot of empty coal cars, weighing 1,000 pounds each. There is no evidence in this case that any child of tender years ever attempted to operate any of these cars, or ever had anything to do with their operation, apart from this little fellow's running behind the front one of the two cars in motion, as shown by the evidence here. It is true that these cars could be operated by boys 15 or 16 or 17 years of age, and made dangerous, and made attractive to young children; but they are not children of tender age. The limit of children of tender age cannot go beyond 14. In the Hicks Case cited, in which Judge Nunn wrote the opinion, it is said:

"The proof shows, without contradiction, that appellee was only 8 years of age at the time he received his injuries, an age at which the legal presumption is that he was not accountable for his conduct. * * * The general rule is that, when a child reaches the age of 14 years, the legal presumption is that it knows right from wrong, and it is responsible for its acts. Between that age and 7 years the legal presumption is with the child, and to make it responsible it must be shown by testimony that it had sufficient intelligence and discretion to realize and to know what would be the result of its act."

So far as this evidence shows, these coal cars had never been operated by anybody except children over 14. There is no evidence here that children 14 or under had ever undertaken to, or could, run or push these cars the 300 feet over the level track, in order to get them to the

place where the main track ran down hill, or would have had the hardihood after they had pushed them there to get on these cars and run down the incline. So the condition of things here is that there is no evidence that cars left as the Mt. Morgan Coal Company left these cars could have been handled by children 10 years of age, or by children of tender years, and made dangerous, or that if they had handled them, it was likely that they could have operated them, or that notice had ever been brought to the Mt. Morgan Coal Company that such children had ever attempted or undertaken to make that shift, or in any manner to handle these empty cars. And so this case, even if no precaution had ever been taken by the coal company, is outside of the turntable doctrine on which it is based.

Assuming that one of these boys who testified here had been hurt in running these cars, could he have recovered? Why, certainly not. Each one of them was old enough to know what he was about, what he was doing—that he was playing and fooling with other people's property that he had no right to handle, and to appreciate the risk—and so none of these boys could have recovered, if he had been injured. The condition of things was that these cars were left there so that children who were not of tender age, or a grown man, could operate them and make them attractive and alluring to younger children. And that is what actually happened. These boys 15, 16, and 17 years of age were operating that car, and this little fellow, 10 years old, came along with his blackberries, and saw them going by there, and he put down his blackberries, ran behind the front car, and fell and was run over by the hind car and was injured and killed.

But I should respond to the position in Brown v. C. & O. R. Co., where it was held that the railway company was liable under the turntable doctrine, because, notwithstanding the little boys had not pulled the bolt that operated it, grown men had done it, Judge Nunn holds that that did not relieve the railway company from liability. In that case the railway company had been guilty of negligence in leaving the turntable so that it could be operated by a child of seven or eight years. The petition alleged in so many words:

"That said draw bolt was an insecure fastening, and said draw bolt could easily be removed and slipped to either side by a child 7 or 8 years old, so that said turntable would revolve, and small children had, previous to the time of the injury complained of, been in the habit of removing said draw bolt and using said turntable as a merry-go-round."

There was, then, in this Brown Case, negligence on the part of the railway company, because the turntable was left in such condition that it could be operated by children under 10 years of age, the grown men co-operated with their negligence, and the two negligences concurred to produce the injury.

But that is not this case. Here the coal company was not negligent, because there is no evidence here that these coal cars had ever been attempted to be operated by children of tender years, or that it was likely they could have been operated by them.

But that is not all of this case: The coal company knew and recognized the fact that these cars were being thus operated, or might be so

operated, and it took precaution to prevent it, and had derailed a car at the connecting point of the side track on which they were standing with the main track. The evidence agrees on both sides as to that; there is no difference and no conflict in the evidence. If that car had been allowed to stay there, nobody could have operated these cars, and it could not have been moved by children of tender years—it could only have been moved by large boys or men.

But it is said that it remained there for some time in that condition, and that the coal company ought to have put it back; and this case of Illinois Central R. R. Co. v. Wilson—the hand car case—is cited as authority for that position. In that case, the hand car had been placed on a strip of ground which had been macadamized by the company, and used by the public in going to and from its trains; and the hand car was left without guard, and unlocked, and had been left so from Monday until Friday, when the accident occurred. The employés of the railway company in that case had put the hand car there, and had left it in an unguarded condition. Here, no employé of the coal company had removed that coal car; it had been removed by these larger boys, in order to operate the cars. And after that car had been derailed there, as an additional precaution to prevent the operation by these boys of these empty cars, the coal company had the right to rely on the fact that that derailed car would remain where it was until it had notice to the contrary; and there is no evidence here that, prior to the accident, they had any notice of the removal of that car. So I am constrained to hold as a matter of law that there is no legal liability on the part of the defendant.

Now, gentlemen of the jury, the law imposes on me a certain duty, and that is that if there is no conflict in the evidence, or as to the reasonable inferences therefrom, to direct a verdict. That is a matter in which I have no option. I cannot say I will or I will not leave a case to the jury, just as I please. The law imposes on me the obligation and the duty that if, according to my conviction (and I may be wrong; I do not pretend further than to follow my convictions), under the undisputed evidence, there is no liability, to direct the jury to find for the defendant. I would be only too glad to get rid of that responsibility, and let other men than myself assume it and determine whether property should be taken from one and given to another, because it is a serious responsibility. But I cannot shirk it, and I have given you my reasons for the view I have, so that you can see what the reasons are that have driven me to this course, and that it is not an arbitrary action on my part.

So you can prepare your verdict.

THE EARL K.

(District Court, N. D. California, First Division. May 14, 1914.)

No. 15509.

ADMIRALTY (§ 99*)—DECREES—VALIDITY—JURISDICTION.

While Act March 3, 1893, c. 225, 27 Stat. 751 (U. S. Comp. St. 1901, p. 710), provided that sales of personal property under orders or decrees of the federal courts shall be made in the county where the property is located, unless the court shall deem it best to sell in some other manner, and rule 9 of the admiralty rules (29 Sup. Ct. xl) provides that notice of the arrest of a vessel shall be given by publication, neither of such requirements is jurisdictional, and the sale of a vessel in a county other than where it is located, under a decree in a suit in rem of which no notice was published, will not be set aside on motion of a claimant, who actually had timely notice of both decree and sale, but took no action until the proceeds of the vessel had been distributed and the purchaser had made expensive repairs thereon.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 661–669; Dec. Dig. § 99.*]

In Admiralty. Suit by the Johnson & Joseph Company against the gasoline launch Earl K. On motions of R. H. Clarke, claimant, to set aside sale and default. Denied.

S. C. Wright, of San Francisco, Cal., for libelant.
H. W. Hutton, of San Francisco, Cal., for R. H. Clarke.

DOOLING, District Judge. On December 28, 1913, a libel was filed in this court against the gasoline launch Earl K., and on the same day a monition was issued directing the marshal to attach the said launch, and fixing January 6, 1914, as the day upon which all persons claiming said launch should appear in court and interpose their claims therefor. On December 24, 1913, the marshal filed this monition, with his return thereon, showing that on December 23d he had attached the said launch, and had given due notice to all persons claiming the same that this court would on January 6, 1914, proceed to trial and condemnation thereof, should no claim be interposed for the same, and showing, further, that he had posted a notice of such seizure, together with a copy of the monition, upon said launch (there being no person in charge of her), and that he had placed a keeper in charge. Proclamation was duly made, and, no person appearing to claim said launch, default was entered and the cause referred to the commissioner, to take testimony and report the amount due to libelant. No notice of such seizure or of the return day of the monition was published by the marshal in any paper.

In due time the commissioner's report was filed, and a decree was entered for the amount found to be due, together with costs, and directing a venditioni exponas to issue to the marshal, and ordering him to sell the said launch at public auction, upon giving not less than five days' notice of such sale by publication in the Recorder, a newspaper published daily in the city and county of San Francisco. The marshal published such notice, to the effect that on January 20, 1914, he would

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

sell the launch at the post office building in San Francisco "as she now lies on the premises of the E. K. Wood Lumber Company, San Rafael, California." San Rafael is in the county of Marin, and the sale was had, as noticed, in the city and county of San Francisco on January 20, 1914, though at the time of the sale the launch was still in the county of Marin. On January 24, 1914, a decree was entered distributing the proceeds of said sale, the proceeds were so distributed, and the case was apparently closed. On April 15th, however, R. H. Clarke filed a notice of motion to set aside the sale, because of inadequacy of the sum for which the launch was sold, and because said sale was not made in the county where the launch was situated; also a motion to set aside and vacate the default and the decree entered thereon, on the ground that the court was without jurisdiction to enter said default and decree, because no notice of the time fixed for the return of the process and the hearing of the cause was ever published in any newspaper in the district, or at all.

It is true that the statute (27 Stat. p. 751) requires that all personal property sold under any order or decree of any court of the United States shall be sold at the courthouse of the county, parish, or city in which the property is located, unless in the opinion of the court rendering the decree it would be best to sell it in some other manner, and upon a timely objection any sale not so made would be set aside by the court. It is also true that rule 9 of the admiralty rules of the Supreme Court (29 Sup. Ct. xl) and rule 2 of the admiralty rules of this court require that the marshal, upon the arrest of a ship, shall cause public notice thereof, and of the time assigned for the return of the process and the hearing of the cause, to be given in such newspaper as the District Court shall order. If this be essential to the jurisdiction of the court, the default and decree herein must be set aside.

It appears that Clarke, the moving party, had actual notice of the arrest of the Earl K. and of the sale some time in January. It further appears that the purchaser has expended $600 in repairs on the launch since he purchased it, and after Clarke had full notice of what had been done. Both motions, therefore, seem to me, under the circumstances, to have been unduly delayed. The moving party had timely notice of the entry of the decree and timely notice of the sale. If he had applied to the court before the proceeds were distributed, and before the purchaser of the launch had expended a considerable sum of money in repairing her, the court would be more disposed to listen to his application. It is quite true that, if the proceedings complained of were absolutely without jurisdiction, this attack upon them would be in time; but I am disposed to adopt the views expressed by the court in Daily v. Doe (D. C.) 3 Fed. 918, as follows:

"While the rules and the practice of the court require notice by publication, these rules and this practice have not the force of statutory requirements, nor do they prescribe such publication as an absolutely essential prerequisite, either to the assumption of jurisdiction or to the exercise of the power of the court to condemn and sell the vessel to satisfy a maritime lien. They are precautionary measures, of the greatest value and importance as such, to prevent possible injustice, and to secure, as far as is consistent with the speedy action of the court in hearing and determining the cause, an actual notice to the parties who have already, by the seizure, constructive notice of

the proceedings. * * * But the disregard of the rules in this respect, in whole or in part, through mistake or inadvertence, while it may furnish a most conclusive ground for opening a decree, or, perhaps, for reversing it on appeal, is simply error or irregularity. It does not make the proceedings null and void, or the less binding on all the world. The rules in admiralty prescribed by the Supreme Court are obligatory upon this court, and one of those rules (rule 9) requires notice to be given in a newspaper of every seizure in cases in rem. But the rules, though obligatory, are obligatory only as rules of practice. Their nonobservance is only error, for which the remedy is by appeal, or on application for opening the decree. See Poultney v. La Fayette, 12 Pet. 472, 473 [9 L. Ed. 1161]; also, Fraser v. Prather, 1 MacArthur [8 D. C.] 206, 215."

Neither the decree nor the sale being absolutely void, and the rights of another not a party hereto having intervened, no order will be made disturbing such rights. The motions will therefore be denied.

THE SAN CRISTOBAL.

(District Court, S. D. Alabama, S. D. June 12, 1914.)

No. 1451.

1. SALVAGE (§ 7*)—NATURE OF SERVICE—INDIRECT ADVANTAGE TO ANOTHER VESSEL—"SALVAGE SERVICE."

   A salvage service is a service 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, and an indirect advantage derived from the rendering of a salvage service to another vessel cannot be made the basis for a salvage award.

   [Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 13, 16, 26; Dec. Dig. § 7.*

   For other definitions, see Words and Phrases, vol. 7, pp. 6316–6318.]

2. SALVAGE (§ 10*)—NATURE OF SERVICE—INDIRECT ADVANTAGE TO VESSEL.

   Libelants' tugs rendered valuable service in preventing the spread of a fire which consumed a lumber mill. At the end of a pier extending from the mill into the river was a dry dock upon which was respondents' steamship. Neither the dock nor vessel was injured by the fire, nor were any of the services of the tugs rendered to them. *Held*, that the vessel was not liable for salvage services.

   [Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 18–20; Dec. Dig. § 10.*]

3. SALVAGE (§ 3*)—SUBJECT OF SALVAGE SERVICE—MOORED DRY DOCK.

   A floating dry dock permanently moored is not a subject of salvage service which can be made the basis of a suit in admiralty.

   [Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 5, 6; Dec. Dig. § 3.*]

In Admiralty. Libel by the Mobile Towing & Wrecking Company against the steamboat San Cristobal, for salvage. Heard on exceptions. Decree for respondent.

Hanaw & Pillans, of Mobile, Ala., for libelant.
G. L. & H. T. Smith, of Mobile, Ala., for claimant.

TOULMIN, District Judge. The facts of this case as they appear from the libel are substantially these: That Ollinger & Bruce owned a

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

lumber mill on the eastern shore of the Mobile river. It was connected by a pier or wharf about 75 feet long, with a dry dock moored to said wharf also owned by said Ollinger & Bruce. The dry dock was elevated out and above the water. The steamship San Cristobal was on the dry dock. The mill was afire, and, while afire, two tugs of the libelant went to its relief and rescue, and rendered valuable services, to the extent of confining the fire to the mill proper. The mill was totally destroyed. The fire did not reach the dry dock or steamship. Neither were at all damaged by the fire. No direct service was rendered said steamship. No effort or offer was made to render any, and she remained on the dry dock undisturbed or untouched by either of the libelants' tugs, so far as appears from the libel.

Among salvage services are those of saving a stranded ship; taking aid to a distressed ship; saving a ship from fire either aboard or in dangerous proximity; removing a ship from any impending danger.

[1] 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.

Assisting a vessel "in a situation of actual apprehension, though not of actual danger," is salvage. The Lowther Castle (D. C.) 195 Fed. 605.

"Services rendered by vessels in moving a vessel, which was in danger of fire by communication from another vessel, although rendered in connection with the salving of such vessel, held salvage services, and entitled to compensation as such." But "an indirect advantage derived from the rendering of a salvage service to another vessel" cannot be made the basis of an award for salvage. The Acre (D. C.) 195 Fed. 1022.

[2] "Where a vessel afire, to which salvage services are being rendered, is, in the operation of such services, towed away from a second vessel, in whose vicinity she has been lying, such second vessel is not liable to pay salvage on account of her release from the possible danger of catching fire." No case has been cited or found "in which one vessel has been charged with payment of salvage for an indirect advantage derived from the rendering of a salvage service to another vessel." The City of Atlanta (D. C.) 56 Fed. 252–256. The court in that case said: "The absence of authority is no small evidence that an indirect claim forms no part of the law of salvage."

[3] "A floating dry dock, permanently moored, is not a subject of salvage service." Cope v. Vallette Dry Dock, 119 U. S. 625, 7 Sup. Ct. 336, 30 L. Ed. 501.

Admiralty has no jurisdiction of a claim for damages caused by vessels to a dock which, although in navigable water, is so connected with the shore that it concerns commerce on the land. C. T. & Valley R. Co. v. Cleveland S. S. Co., 208 U. S. 316, 28 Sup. Ct. 414, 52 L. Ed. 508, 13 Ann. Cas. 1215.

Moreover if the dry dock had caught fire and the libelants' tug had rendered services in extinguishing the fire, but not without some damage, there would have been no liability on the owner of the dry dock for salvage in this the admiralty court. The liability would be for services rendered the owner by suit in a common law court.

In re BOWERS.

(District Court, N. D. Georgia. June 6, 1914.)

No. 386.

BANKRUPTCY (§ 54*)—INSOLVENCY—INDEBTEDNESS AS SURETY OR INDORSER.

In determining the question of insolvency of an alleged bankrupt, the liability as surety or indorser of a solvent principal, who is abundantly able to pay, is not to be counted as a liability of the bankrupt, since, if he was called upon to pay the debt, he would immediately have an asset which would be equal to the amount he was required to pay.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 54, 84, 85; Dec. Dig. § 54.*]

In Bankruptcy. In the matter of bankruptcy proceedings against D. T. Bowers, alleged bankrupt. Adjudication denied.

H. W. Dent, of Atlanta, Ga., and Cobb & Erwin, of Athens, Ga., for petitioning creditors.

A. G. & J. B. McCurry, of Hartwell, Ga., and Stephen C. Upson, of Athens, Ga., for bankrupt.

NEWMAN, District Judge. A petition in bankruptcy was filed against D. T. Bowers, the alleged bankrupt, and he denied insolvency and the commission of the acts of bankruptcy. The question thus made between the petitioning creditors, alleging insolvency and the commission of acts of bankruptcy, and the denial by the bankrupt that he is either insolvent or guilty of the acts of bankruptcy, was referred to Horace M. Holden, Esq., as special master.

Judge Holden has made his report, in which he finds that the bankrupt had property at the time of the filing of the petition in bankruptcy amounting to $17,044, and liabilities of $16,072.27. Judge Holden excludes from the indebtedness of the alleged bankrupt certain alleged claims against him as surety or indorser, holding that they should not be considered or counted in finding the aggregate of his indebtedness. On that subject he says this:

"I find that the principal obligors on all obligations outstanding on February 20, 1913, on which D. T. Bowers was surety or indorser, were solvent, and had property, respectively, amply sufficient to discharge said obligations; and it does not appear that at that time there were any facts or circumstances indicating that collection of the amounts of said obligations that had then matured could not then be enforced out of the property, respectively, of the principal obligors, or that collection of the amount of said obligations of the amounts not due on February 20, 1913, could not be enforced out of the property, respectively, of the principal obligors when said obligations respectively matured. I find that a debt outstanding on February 20, 1913, for which D. T. Bowers was only liable as surety or indorser, should not be considered as a liability against him in determining the question as to whether or not he was solvent on February 20, 1913, where the principal obligor of said debt was then solvent and had property amply sufficient to pay said debt, and it does not appear that at that time there were any facts or circumstances indicating that collection of the amounts of said obligations that had not matured then could not then be enforced out of property, respectively, of the principal obligor, or that collection of the amount of said obligations of amounts not due on February 20, 1913, could not be enforced out of the property, respectively,

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

of the principal obligors when said obligations respectively matured. Should one pay the amount of a debt on which he was surety or indorser when the principal obligor was solvent, there would at once come into existence an available asset of the surety or indorser paying the debt equal to the amount thereof, by reason of the right of such surety or indorser to collect out of the principal obligor the amount of the latter's debt paid by the surety or indorser."

There is no controversy as to the facts in the case on the part of the petitioning creditors, who are excepting here to the report of the special master, who found the alleged bankrupt to be solvent. The main question is the correctness of the special master's finding that where a man was surety or indorser for another, who was perfectly solvent and amply able to pay the debt, and no circumstances indicating that the collection of the debt could not be enforced against the principal debtor, such debts should not be counted against him in deciding the question of his solvency or insolvency. I think the decision of the special master is right. Finding the facts as he did, that the principal obligors were amply able to pay the debts for which they were liable as principals, it follows, of course, that if the alleged bankrupt, D. T. Bowers, had been compelled to pay such debts, a right would have arisen at once on his part to collect the same from the principals, so that, on the facts found by the special master, he would be in no worse position, even if he was required, as surety or indorser, to pay these debts, than he was before.

I place my decision in the case distinctly upon the ground that the liability of a person as surety or indorser, if the principal is solvent and abundantly able to pay, is not such a liability as could be counted against him on the question of his solvency or insolvency, because, if called on to pay such debt, he would immediately have an asset which would be equal to the amount he would be required to pay.

In my opinion, the special master decided the case correctly, and the judgment should be, and is hereby, approved and confirmed.

COLUMBIA DIGGER CO. v. RECTOR et al.

(District Court, W. D. Washington, S. D. July 14, 1914.)

No. 1218.

1. COURTS (§ 23*)—DISMISSAL AND NONSUIT (§ 65*)—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.

   Where necessary diverse citizenship does not exist, federal jurisdiction based on such ground cannot be conferred by the consent of the parties, and the court on its own motion will dismiss the action when it appears to it that the necessary jurisdictional fact does not exist.

   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 75, 75½, 81; Dec. Dig. § 23;* Dismissal and Nonsuit, Cent. Dig. § 160; Dec. Dig. § 65.*]

2. COURTS (§ 308*)—FEDERAL COURTS—DIVERSE CITIZENSHIP.

   Requisite diversity of citizenship, in order to establish federal jurisdiction, does not exist when one of the defendants is a citizen of the same state as plaintiff.

   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 855, 856; Dec. Dig. § 308.*]

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

3. COURTS (§ 315*)—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP—PARTNERSHIP.
Where a partnership is sued in a federal court and jurisdiction depends on diversity of citizenship, each of the members of the partnership must have the requisite citizenship, to give the court jurisdiction; it being neither conferred nor withheld by reason of the state of the partnership's organization, or in which it conducts business, nor is there any presumption therefrom that the members are citizens of that state.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 861; Dec. Dig. § 315.*]

4. COURTS (§ 322*)—FEDERAL COURTS—LIMITED JURISDICTION—RECORD.
Federal courts being courts of limited jurisdiction, jurisdictional facts must be made to appear clearly and distinctly, either by pleadings or the record.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 876-881, 887; Dec. Dig. § 322.*]

5. COURTS (§ 322*)—FEDERAL COURTS—DIVERSE CITIZENSHIP—ALLEGATION.
A complaint in a federal court, alleging that certain defendants, copartners, were "of" the city of Vancouver, state of Washington, did not allege that they were citizens of Washington, or that that state was more than their temporary place of sojourn.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 876-881, 887; Dec. Dig. § 322.*]

6. COURTS (§ 343*)—FEDERAL COURTS—PROCEDURE—STATE LAWS.
The common-law rule that plaintiff, in an action on a bond, might sue all the parties jointly or each severally is modified by Rem. & Bal. Code, § 192, providing that persons severally liable on the same obligation or instrument may all or any of them be included in the same action at plaintiff's option, which statute controls federal courts sitting in Washington as to who are necessary parties in an action on a bond, so that in such action the principals are not indispensable parties.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 915, 916, 919, 920; Dec. Dig. § 343.*]

7. COURTS (§ 318*)—FEDERAL COURTS—JURISDICTION—PARTIES—CITIZENSHIP—DISMISSAL.
Where, in a suit against contractors and their sureties, jurisdiction depended on diversity of citizenship, but the complaint did not sufficiently allege the citizenship of the contractors, complainant was entitled to cure the defect by dismissing as to them.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 863; Dec. Dig. § 318.*]

8. PAYMENT (§ 63*)—DEFENSE.
Payment is matter in bar and not in set-off, and particular appropriations of payment, and objections to appropriations, may be made under such defense.
[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 152-161; Dec. Dig. § 63.*]

9. PAYMENT (§ 63*)—PLEA—EVIDENCE.
Under a plea of payment, any matter may be given in evidence tending to show payment, so that evidence of erroneous application of payments may be introduced at law.
[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 152-161; Dec. Dig. § 63.*]

10. PLEADING (§ 428*)—OBJECTIONS—WAIVER.
Where a defense of misapplication of payments was not objected to before trial on the ground that it was an equitable defense and could not be pleaded at law, and plaintiff stipulated to a waiver of a jury, its right

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

to object to evidence of such misapplication, on the ground that the defense was equitable, was waived.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1433–1436; Dec. Dig. § 428.*]

11. PRINCIPAL AND SURETY (§ 113*)—PAYMENT—DISCHARGE OF SURETY.

Where contractors made payment for certain materials, and directed the creditor to apply the same on materials purchased for a particular work, such payment operated instanter to discharge the liability of the contractors' sureties therefor pro tanto, and, while the creditor and the contractors might thereafter as between themselves change the application of such payment, it would not revive the extinguished obligation of the sureties.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 235–239; Dec. Dig. § 113.*]

12. PAYMENT (§§ 38, 39, 41*)—APPLICATION.

In general, a debtor is entitled to direct how payments shall be applied, but if he omits to do so, the creditor may make such application as he desires, and if both omit to make any application, the law will apply the payments according to its own notion of justice.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 99–103, 104–114, 115–120, 128; Dec. Dig. §§ 38, 39, 41.*]

13. PRINCIPAL AND SURETY (§ 113*)—PAYMENTS—APPLICATION—RIGHTS OF SURETY.

Where defendants became sureties on a bond of certain contractors for the construction of a public improvement, they were equitably entitled to have the installments of the price paid by the municipality applied to the payment of bills for materials, and materialmen, receiving payments with knowledge that the money was a part of the proceeds of the work, were not bona fide purchasers, but were bound as to such sureties to apply the payments to the indebtedness of the contractors for the materials used on that particular work, in accordance with the contractors' direction.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 235–239; Dec. Dig. § 113.*]

14. SALES (§ 82*)—CONSTRUCTION OF CONTRACT—TIME OF PAYMENT—"AS SOON AS."

Where a contract for the purchase of sand and crushed rock provided that plaintiff should be paid cash for the sand and gravel, and for the crushed rock as soon as the contractor got his money from the improvement of B. street, the clause "as soon as he got his money" meant immediately on receiving the money, so that the contractor was not entitled to delay payment until he got "all" of his money, but required that he make the payment as soon as he obtained "the money" or sufficient money. (Citing Words and Phrases, vol. 1, p. 527).

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 229–233; Dec. Dig. § 82.*]

15. MUNICIPAL CORPORATIONS (§ 373*)—PUBLIC IMPROVEMENTS—LIEN.

The state has power to regulate rights in its soil, to deny a lien where the soil is that of a municipal corporation, and to provide that in such case a bond shall be exacted to take the place of the lien.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 913; Dec. Dig. § 373.*]

16. COURTS (§ 365*)—FEDERAL COURTS—RULES OF DECISION—STATE LAW.

The rights and equities incident to bonds given by a municipal contractor to secure performance of contracts for public improvements being affected by the public policy of the particular state, the declaration of the highest court of the state concerning such rights, equities, and policy will

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

be regarded as rules of decision by the federal courts sitting in such state, unless directly opposed to higher federal authority.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969–971; Dec. Dig. § 365.*]

At Law. Action by the Columbia Digger Company against A. B. Rector and another, doing business as Rector & Daly and others. Judgment for defendants.

Plaintiff relies upon the following authorities: Crane Co. v. Pacific Heat & Power Co., 36 Wash. 95, 78 Pac. 460; Getchell & M. Lumber & Mfg. Co. v. Peterson, 124 Iowa, 599, 100 N. W. 550; Cain v. Vogt, 138 Iowa, 631, 116 N. W. 786, 128 Am. St. Rep. 216; Board of Com'rs v. Citizens' Bank, 67 Minn. 236, 69 N. W. 912; Thomason v. Keeney, 8 Ga. App. 852, 70 S. E. 220; Schwartz v. Gerhardt, 44 Or. 425, 75 Pac. 698; George H. Sampson Co. v. Com., 208 Mass. 372, 94 N. E. 473; Cohnfeld v. Tanenbaum, 176 N. Y. 126, 68 N. E. 141, 98 Am. St. Rep. 653; Bross v. McNicholas, 66 Or. 42, 133 Pac. 782; Lowe v. Jones, 192 Mass. 94, 78 N. E. 402, 6 L. R. A. (N. S.) 487, 116 Am. St. Rep. 225, 7 Ann. Cas. 551; Grafton v. Reed, 34 W. Va. 172, 12 S. E. 767; Merchants' Ins. Co. v. Herber, 68 Minn. 420, 71 N. W. 624; Thacker v. Bullock Lumber Co., 140 Ky. 463, 131 S. W. 271; Beutler v. Grand Trunk Ry., 224 U. S. 85, 32 Sup. Ct. 402, 56 L. Ed. 679; Liverpool Steam Co. v. Phœnix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788; Merc. Trust Co. v. St. L. S. F. Ry. Co., 99 Fed. (C. C.) 485.

Defendants Sparks and Blurock, cite the following authorities: Mirabile Corp. v. Purvis (C. C.) 143 Fed. 920; Coal Co. v. Blatchford, 11 Wall. 172, 20 L. Ed. 179; Smith et al. v. Lyon, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635; Hooe v. Jamieson, 166 U. S. 395, 17 Sup. Ct. 596, 41 L. Ed. 1049; Excelsior Pebble Phosphate Co. v. Brown, 74 Fed. 321, 20 C. C. A. 428; Anderson v. Watt, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078; United States v. Kirkpatrick, 9 Wheat. 720 (6 Curtis, 244) 6 L. Ed. 199; Jones v. United States, 12 L. Ed. 870, 7 How. 681 (17 Curtis, 349); United States v. January, 7 Cranch, 572 (2 Curtis, 673), 3 L. Ed. 443; United States v. American Bonding & Trust Co. (C. C.) 89 Fed. 921, 925; 30 Cyc. 1240; Thompson v. Phelan, 22 N. H. 339; Merrimack County Bank v. Brown, 12 N. H. 320; 8 Cyc. 380; Willis v. Wozencraft, 22 Cal. 608; Cummings v. Neb., 101 U. S. 153, 25 L. Ed. 903; Equity Rule 23 (198 Fed. xxiv, 115 C. C. A. xxiv), Enc. of U. S. Sup. Ct. Rpts., vol. 5, p. 826, and cases cited; section 1159, Rem. & Bal. Code.

Giltner & Sewall, of Portland, Or., for plaintiff.

Miller, Crass & Wilkinson, of Vancouver, Wash., for defendants Sparks and another.

CUSHMAN, District Judge. Plaintiff, an Oregon corporation, sues the defendants for material furnished defendants Rector & Daly, and used by them in a street improvement in Vancouver, Wash. The defendants Sparks and Blurock were sureties upon the bond of Rector & Daly, given to the city for the performance of the work, which bond was also for the benefit of materialmen. The complaint alleges that, after entering upon the performance of the contract, Rector & Daly abandoned it and turned it over to their sureties, with all their rights thereunder; that the sureties completed the contract, and received, in money and bonds, from the city of Vancouver, $11,633.98. The sureties answer, denying the receipt of anything in excess of $9,158.70, and alleging the expenditure of this amount in completing the contract. They further allege that,

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

under the agreement between the plaintiff and the contractors, Rector & Daly, it was provided that payments made from time to time from the street improvement should be credited, by plaintiff, to the general, unsecured indebtedness of Rector & Daly, and that plaintiff would look to the sureties, Sparks and Blurock, for its pay for the material furnished for this particular improvement; that the sureties were ignorant of this arrangement; that it was carried out and constitutes a fraud upon the sureties; that the amount so paid plaintiff exceeds the amount claimed by it for material furnished; that it had been fully paid for such materials from money derived from the improvement; that Rector & Daly have been adjudged bankrupts, and, if the sureties are compelled to pay this claim, they will be unable to recover from them. The cause was tried to the court, upon stipulation without a jury. After the trial, a question was raised as to the court's jurisdiction, which is based upon the diverse citizenship of the parties. Plaintiff is an Oregon corporation. The defendants Sparks and Blurock are alleged to be citizens of the state of Washington. The allegation of the complaint as to Rector & Daly is:

"That the defendants A. B. Rector and Charles Daly are and were at all the times herein mentioned copartners doing business under the firm name and style of Rector & Daly, and engaged in a general contracting business in the city of Vancouver, county of Clarke, state of Washington."

The following general propositions are well settled:

[1] Where the necessary diverse citizenship does not exist, jurisdiction cannot be conferred by the consent of the parties.

The court, on its own motion, will dismiss the action when it appears to it the necessary diverse citizenship does not exist.

[2] The requisite diverse citizenship does not exist when one of the defendants is a citizen of the same state as the plaintiff.

[3] Each of the members of a partnership must have the requisite citizenship to give the court jurisdiction, and it is neither conferred nor withheld by reason of the state of the partnership's organization, or in which it conducts business. Nor does any presumption arise therefrom that the members of the partnership are citizens of said state. Carnegie, Phipps & Co. v. Hulbert, 53 Fed. 10, 3 C. C. A. 391; Chapman v. Barney, 129 U. S. 677, 9 Sup. Ct. 426, 32 L. Ed. 800; Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449, 20 Sup. Ct. 690, 44 L. Ed. 842; Ralya Market Co. v. Armour & Co. (C. C.) 102 Fed. 530 (third syllabus); Bruett & Co. v. Austin D. E. Co. (C. C.) 174 Fed. 668 (second syllabus).

[4] This court being one of limited jurisdiction, the jurisdiction must be made to appear clearly and distinctly, either by the pleadings or the record. Chapman v. Barney, 129 U. S. 677, 681, 9 Sup. Ct. 426, 32 L. Ed. 800; Robertson v. Cease, 97 U. S. 646, 649, 24 L. Ed. 1057.

[5] The complaint sets out, as an exhibit, a copy of the contract between Rector & Daly and the city of Vancouver, in which it is provided:

"This agreement made and entered into this 6th day of May, A. D. 1911, by and between A. B. Rector and Charles Daly, copartners doing business un-

der the firm name and style of Rector & Daly, both of the city of Vancouver, county of Clarke, and state of Washington. * * *"

The exhibit, although a part of the record, does not furnish the necessary allegation of citizenship. To say one is "of" a place is neither to allege temporary residence nor such residence as to show a domicile, which latter it would have to do in order to aver the necessary citizenship. Horne v. Hammond Co., 155 U. S. 393, 15 Sup. Ct. 167, 39 L. Ed. 197.

[6] The bond sued on is the joint and several bond of the defendants. At common law, the plaintiff, suing on such an obligation, might sue all the parties jointly or each severally (9 Cyc. 708 [3]). The common law in this respect is modified in the state of Washington by section 192, Rem. & Bal. Code., which provides:

"Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all, or any of them, be included in the same action, at the option of the plaintiff." Pacific Bridge Co. v. U. S. F. & G. Co., 33 Wash. 47, 73 Pac. 772.

Such a statute, under the Conformity Act (Act June 1, 1872, c. 255, § 5, 17 Stat. 197, section 914, Rev. St. 4 Fed. Stat. Ann. 563 [U. S. Comp. St. 1901, p. 684]), controls in this court as to what parties are necessary. Sawin, Adm'r, v. Kenny, 93 U. S. 290, 23 L. Ed. 926. Rector & Daly are therefore not indispensable parties. Hicklin v. Marco, 56 Fed. 549, 6 C. C. A. 10.

"The obligation assumed by the surety in such cases is coextensive with that of the principal debtor, and if the plaintiff sees fit to sue the surety, together with the principal, in a suit brought to enforce the obligation, the presence of the surety upon the record cannot be ignored, in an application made to remove the case to the federal court, on the theory that the surety is merely a nominal party." Mut'l Reserve Fund Life Ass'n v. Farmer, 77 Fed. 929, 931, 23 C. C. A. 574, 577.

"Where defendants' liability is joint as well as several, and plaintiff elects to sue them jointly, this determines the character of the suit; and neither defendant can treat it as several against him, so as to authorize him to remove it." Moore v. Los Angeles Iron & Steel Co. (C. C.) 89 Fed. 73; Pirie v. Tvedt, 115 U. S. 41, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331; Torrence v. Shedd, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528.

[7] The defendants Rector & Daly are not only named as defendants in the complaint in the case at bar, but summons was sued out, directing them to appear and defend. Summons was never served on them.

"It is a general rule, except when it has been otherwise provided by statute, that the action is deemed commenced, so far as the parties to it are concerned, from the time the writ or summons is sued out." 1 Cyc. 747.

In Washington, actions are commenced by the service of summons, or the filing of the complaint with the county clerk, as clerk of the court. 1 Rem. & Bal. Code, § 220. With the action in this situation, it would appear that all that is necessary, if aught is necessary to oust the court of jurisdiction, would be for one of the defendants, Rector or Daly, to appear herein, providing he were a citizen of Oregon, which, in the absence of other allegation, will be presumed. Thus would the court's jurisdiction be jeopardized to the moment of judgment, a most

weak and unsatisfactory position. The mere fact that the record does not show service of summons upon Rector and Daly does not necessarily have the same effect as an affirmative showing upon the record that they have been dismissed from the action, for, as long as not dismissed, the summons remains an invitation, if not a command, for them to appear, which would not be the case after a dismissal.

Upon the suggestion of want of jurisdiction, after hearing the evidence and arguments upon the issues made on the merits by the pleadings, the plaintiff now has moved to dismiss as to Rector & Daly. This renders it unnecessary to determine the effect upon the jurisdiction of no service being shown upon such parties.

While Chief Justice Marshall, in Conolly v. Taylor, 2 Pet. 556, 7 L. Ed. 518, announced the rule to be that, where the bill failed to show jurisdiction by omitting to state the character of the parties, while the court could not exercise jurisdiction while the defect remained, yet "it might be corrected at any time before the hearing," it is clear that this was a careful statement of the doctrine only as far as the needs of that case required it to be announced. By later cases such amendments have been allowed upon the entry of the final decree, and even after reversal by the Appellate Court and remand. Carneal v. Banks, 10 Wheat. 181, 6 L. Ed. 297; Tug River Coal & Salt Co. v. Brigel, 86 Fed. 818, 30 C. C. A. 415; Grove v. Grove (C. C.) 93 Fed. 865; Holloway & Bro. v. White-Dunham Shoe Co., 151 Fed. 216, 80 C. C. A. 568, 10 L. R. A. (N. S.) 704.

The motion to dismiss is granted, and the court held to have jurisdiction of the cause between the remaining parties.

[8] Upon the trial, plaintiff objected to any testimony to support the defense that the payments made by Rector & Daly should be applied in reduction of defendants' obligation, as sureties, on the ground that it was an equitable defense and in the federal court, could not, for that reason, be made in a law action. The defense of payment is a matter in bar and not set-off. 30 Cyc. 1252A. Particular appropriation of payments and objections to appropriations of payments may be made under this defense. 30 Cyc. pp. 1253 (2) and 1254.

[9] Under a plea of payment, any matters may be given in evidence which tend to show payment. 30 Cyc. 1260.

In making application of payments, the principles of equity are recognized at law, so far as the nature of the proceeding will admit. 30 Cyc. 1240 (3).

Among the decisions, the only exception to the foregoing general rule appears to be certain of those of the state of Pennsylvania. 30 Cyc. 1260, note 81.

In Steiner, Adm'r, v. Erie Dime Sav. & Loan Co., 98 Pa. 591, it was held, in a suit by a bank against the surety upon a promissory note, where the defendant pleaded payment, that defendant could not offer in evidence the bank book of the principal debtor to show deposits made by the latter in the bank after the maturity of the note, in excess of the amount due thereon; defendant's contention being that plaintiff was bound to appropriate the deposits in payment of the note, and its failure to do so relieved defendant from liability. Covely v. Fox, 11

Pa. 171, and other cases of that court are along the same line. These decisions are based upon a Pennsylvania statute providing for defenses of payment and "payment with leave," that is, leave of court. In case of the latter defense, a notice is required to be served in the nature of a bill of particulars, informing the plaintiff of the exact nature of the defense. Under this statute and the court rule promulgated under it, evidence of technical payment only was held admissible under the general plea of payment. The existence of this statute is itself an argument for allowing, in the absence of its like, defense of a more or less equitable nature under a plea of payment, else why the necessity of the statute? It is upon these cases that the text (16 Encyc. Pl. & Pr. 215) is based, to the effect that "evidence of merely equitable defenses is not, as a rule, admissible under a plea of payment."

As pointed out by Judge Lurton in First National Bank v. National Surety Co., 130 Fed. 401, 64 C. C. A. 601, 66 L. R. A. (N. S.) 777, the principles controlling courts in the application of payments have not been clearly defined. While what would constitute an equitable defense, not to be interposed in a law action in a federal court, may not be definitely determined, it is clear from many federal decisions, including, from the Supreme Court, United States v. Eckford's Executors, 1 How. 250, 11 L. Ed. 120, United States v. Kirkpatrick, 9 Wheat. 720, 6 L. Ed. 199, and United States v. January, 7 Cranch, 572, 3 L. Ed 443, that a defense, by a surety, as to an improper application of payments by the creditor, has frequently been upheld in a law action. The courts in this circuit, recognizing the rule forbidding equitable defenses at law, do not appear to have gone further in enforcing the rule than to exclude such defenses where it was sought to establish fraud preceding or coincident to the execution of the instrument made the basis of suit or claim. Hill v. N. P. Ry. Co., 113 Fed. 914, 51 C. C. A. 544; Mahr v. U. P. R. Co., 170 Fed. 699, 705, 96 C. C. A. 19; Standard Portland Cement Co. v. Evans, 205 Fed. 1, 4, 125 C. C. A. 1; Cook v. Fidelity & Deposit Co., 167 Fed. 95, 101, 92 C. C. A. 547; Price v. Connors, 146 Fed. 503, 505, 77 C. C. A. 17; Seefeld v. Duffer, 179 Fed. 214, 103 C. C. A. 32.

[10] While recognizing that allegations of fraud in securing a release constitute an equitable defense, it is a matter of everyday practice to permit in evidence, in law actions, evidence of the release of a joint tort-feasor, as relieving from liability the cotort-feasor, which is but an effect that flows from the release, itself. It is therefore held that the defense interposed is not objectionable as an equitable defense, and that plaintiff, not raising any objection to the defense as pleaded in the answer, but awaiting the offer of testimony before objecting, coupled with the stipulation waiving a jury and for the trial of the issues to the court, constituted a waiver of such objection.

The controlling issues of fact are: Was the money paid to the plaintiff by Rector & Daly realized from the work done under the contract secured by defendants' bond; and, if it was, did plaintiff know it was realized from such work? Further, how was the money actually applied to the payment of the debts owing plaintiff by Rector & Daly?

The controlling questions of law to be applied to these facts are: If the money paid the plaintiff was realized from the work secured

under the contract, will it be applied in payment for the crushed rock furnished Rector & Daly by plaintiff? and whether it is necessary to show that the plaintiff knew it was realized from such source before such application will be made.

The contract for the improvement provided:

"Second party agrees to pay said parties of the first part for the said materials and labor in the manner following, namely * * * Said prices to include all material and labor expended in connection with this work by said parties of the first part; payments under the contract are to be made by said second party every thirty days on estimates furnished by the city engineer in charge of the work. Twenty per cent. of the estimates shall be withheld until the contract is fully completed and accepted by the city.

"The party of the second part is to issue local improvement bonds on the local improvement fund for said local improvement district of said city for all sums of money to be paid to said parties of the first part under this contract, and said parties of the first part herein agree to receive and accept said local improvement bonds for all sums of money which they are to receive from said party of the second part under this contract."

The bond provided:

"If the said contractors Rector & Daly shall well and faithfully perform all of the covenants and conditions in said contract mentioned and shall pay all claims for labor and work or material on account of subcontractors, materialmen, laborers and mechanics furnishing labor and material under said contract, then this obligation shall be void, otherwise to remain in full force and effect."

The contractors, Rector & Daly, arranged with the Vancouver Trust & Savings Bank, about the time of beginning the performance of the contract, for money to carry it on. They assigned to the bank their rights under the contracts with the city, giving the bank an order upon the city for the bonds to be issued. The bank was to advance money as the work progressed upon the estimates of work done, from which the amount earned could be computed. The admitted payments in question exceed the amount claimed by the plaintiff in its suit against the defendant sureties. These payments were made by checks of Rector & Daly against their general account in the bank; but it is shown in the case of each check, except as hereafter pointed out, that the money with which the check was paid was obtained upon notes given the bank by Rector & Daly. These notes were secured, collaterally, by the assignment of the rights of Rector & Daly against the city under the contract made with it. This collateral was never redeemed. Bonds of the city were turned over to the bank under the assignment in an amount in excess of the payments made to plaintiff. Upon each occasion when a note was given to the bank, the account of Rector & Daly was either overdrawn or had a comparatively small balance. Upon each occasion the note and the credit given by the bank exceeded the amount of the check paid out of such credit. Upon the presentation of one of these checks payment was refused and the proffered note not accepted until additional security, consisting of a sight draft, was given. Nothing was ever realized upon this draft.

One of the checks, amounting to $859.90, was given at a time when the account was overdrawn $2,565,45. Before the check was cashed, the bank took a note of Rector & Daly for $2,079.40, and to secure it,

an estimate, under the assignment, upon the work in question, of $574.20, and estimates under other contracts which Rector & Daly had with the city of $990.40, and $514.80. If only $574.20 of this credit be allowed defendants, yet with the other checks given, where the notes were not complicated with other securities than that upon the work in question, the credits would still exceed plaintiff's asserted claim. Rector & Daly, during the period in question, gave the bank other notes and made a great number of other checks and deposits upon, and in their general account.

The foregoing is sufficient to show the substantial identity of the money paid plaintiff with that realized by Rector & Daly under their contract with the city. Plaintiff contends that it was not realized from this work, that the money paid plaintiff was raised by Rector & Daly upon their credit, and that no money was paid by the city until long after the payments to plaintiff. If such an exact identity in a fund were ever required, it would be seldom attained. If this money advanced to Rector & Daly was not realized from this work, then Rector & Daly never obtained any money under it, yet they had and disbursed thousands of dollars advanced upon the obligations for that work and so realized under it.

Plaintiff's statement concerning its contract with Rector & Daly is given by Captain Hackett, its manager, as follows:

"'Now,' he said, 'I will have to pay cash for this sand and gravel, and I want it cheap,' and I told him I would give it to him cheap for cash, and it was agreed that he would pay cash for it, and I told him he could have the gravel for 80 cents a yard, delivered on the bank or in the bunkers at Vancouver, and sand for 60 cents a yard, a very low price. Then he wanted to know what he could get the rock for, but as I was not in the rock business and had nothing to do with the rock business, I called up Mr. Hume, who was the agent for the Riverside Rock Company, and asked him what I could get crushed rock for, in Vancouver. He said he could let us have crushed rock for 85 cents, at the quarry, per yard, and I told Mr. Rector that I would boat it there, and unload and deliver it at Vancouver for 40 cents per yard, which would make it $1.25 a yard. * * * Along some time in June, he stated that he wanted us to deliver him some crushed rock, I think on Fourth Plain avenue and B street, and that he would be ready for rock at any time, so I called Mr. Hume to find out when he could make deliveries to us on the barges, and Mr. Hume wanted to know where we were going to get our money for this crushed rock. * * * I called Mr. Hume, and we went over to Vancouver and saw Mr. Rector, and he said that he could not pay cash for the crushed rock, but as soon as he got his money off of B street, why he would pay us for the crushed rock, and that he would have to ask us to wait for money until he did get his money from B street, and we asked him what surety we would have if we waited for our money, and he said that he had a bond to the city to pay for all labor and material, a good bond, and mentioned who was on the bond, Mr. Blurock and a man named Sparks, I think, and so, under those conditions, we thought we were perfectly safe in furnishing him the rock and waiting until he got his money off B street, so we began to make deliveries as soon as we could."

The evidence shows that one check given plaintiff, marked "530 yds. rock @ 1.25, 662.50," was credited in payment of crushed rock and not of sand and gravel. It is shown that, in general dealings between plaintiff and Rector & Daly, checks had been so marked as indicating that of which they were payment. Later one of the checks in question was transmitted to plaintiff with a similar notation on its

face. Plaintiff, realizing that an application was intended by Rector & Daly, called Rector up on the telephone and objected, claiming that payments should be upon the sand and gravel account. Rector was evidently evasive in his answer to the objection and, making due allowance for the interest of the witnesses, I am unable to find that Rector consented to a change in the application of the payment.

Capt. Hackett, manager of the Columbia Digger Company, testifies that the payment was applied to the sand and gravel account. The plaintiff did not object to the payment being made by check, but only objected to its being applied in payment for the crushed rock.

[11] Rector & Daly had a right to make application of this payment and, in the manner indicated, had done so. This operated instanter to discharge the liability of the sureties pro tanto and, while plaintiff and Rector & Daly might thereafter, as between themselves, change the application of such payment, it would not operate to revive the extinguished obligation of the defendants. 32 Cyc. 14, 170e1, and 171. A short time before Rector & Daly abandoned the contract to the sureties, plaintiff refused to surrender one of the barges of rock, now in suit, until $1,000 was paid, for which amount one of the checks in question was given. This alone is sufficient to show that it should be applied in part payment of this account.

While not entirely satisfied upon the question of whether there was an actual appropriation by plaintiff of the checks in payment of what plaintiff refers to as "sand and gravel account," in view of the conclusion reached, a finding upon the question is deemed not necessary. While witnesses for the plaintiff testified to such appropriation, the fact that plaintiff did not produce its books; that a statement rendered by it, purporting to be of the account and admitted in evidence, did not show such application; that this statement was rendered for $158 in excess of the amount now claimed, occasioned by the fact that an application of all of these credits in payment of the sand and gravel account would overpay such account, if one were kept separately, to that extent—tends to render doubtful the question of any such actual application.

While not altogether free from doubt, there is less question under the testimony concerning whether plaintiff knew that the payments in question were, in fact, realized under the contract with the city. Capt. Hackett testifies he did not know the payments were from the B street improvement. Rector testifies that he was not told of it. This warrants a finding that he did not know, in spite of the fact that generally payments are made upon such contracts as the work progresses; that certain checks were post dated; that a part of them were marked for crushed rock; and that, as explained by him in his testimony, the agreement was that the rock would be paid for as soon as Rector & Daly got their "money off of B street." Knowing these things would doubtless constitute reasonable grounds for belief upon his part that such payments were from that source, and was enough to put him upon inquiry as to the source from which they were derived; but they are not enough to warrant a finding of actual knowledge on the part of Capt. Hackett in the face of the positive testimony of himself and Rector.

[12] The general doctrine is that:

"The debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments, according with its own notions of justice." United States v. Kirkpatrick, 9 Wheat. 720, 737 (6 L. Ed. 199).

In Crane v. Pacific Heat & Power Co., 36 Wash. 95, 78 Pac. 460, it was held:

"Where a surety company guarantees the faithful performance of a school building contract, pursuant to the statute, for the benefit of laborers and materialmen, and the contractor pays the money received from the school district to a party who furnished material for the building, and to whom the contractor was indebted, also upon an older unsecured account, the surety is not bound by an application of the school money to the old account, but is entitled to have the same applied on the school contract in discharge of its liability."

In so deciding, the Washington court cited with approval the following from Merchants' Ins. Co. v. Herber, 68 Minn. 420, 71 N. W. 624:

"It is true, as a general proposition, that a surety cannot direct the application of payments made by his principal, and is bound by any application made by the principal and creditor, or either of them. * * * This rule, as thus broadly stated, applies to cases only where the principal makes the payment from funds which are his own, and free from any equity in favor of the surety to have the money applied in payment of the debt for which he is liable. Hence, where the specific moneys paid to the creditor, and applied on a debt of a principal for which the surety is not held, are the very moneys for the collection and payment of which he is obligated to the creditor, he is not bound by such application, and is equitably entitled to have the moneys applied to the payment of the debt for which he is surety, unless the creditor can show that he has a superior equity to have them applied as they were applied. The adjudged cases are not harmonious on this proposition, but any attempt to here cite and analyze them would be unprofitable. Many of them which are apparently conflicting may be reconciled by observing the distinction between payments made from funds which were the absolute property of the principal and those made from funds affected by an equity in favor of the surety. Upon principle we hold that the proposition we have stated is correct."

The Washington court, after making the foregoing quotation, held that the amounts owing by the school district on the contract—

"were the moneys for the collection and payment of which the surety was obligated * * * to the creditor and the surety is not bound by such application."

The foregoing decision was made upon demurrer to the answer of the surety, in which answer it was alleged that the creditor knew the source from which the money paid was realized, but the decision is not placed upon that ground. Justice, then Judge, Lurton, in a somewhat similar case says:

"Neither does the fact that the officials receiving the payment were aware of the source of the money appear to have been regarded as material." First Nat'l Bank v. Nat'l Surety Co., 130 Fed. 401, 408, 64 C. C. A. 601, 608.

[13] It is the contention of plaintiff that the money, when received by Rector & Daly, became absolutely theirs, freed from any equities whatever on the part of the sureties, and that for the court to appro-

priate it to the payment of the sureties' obligation would be an extreme and wholly unwarranted application of the trust fund doctrine.

In this circuit the rule is laid down as denying a general lien upon the assets of a trustee. Spokane Co. v. First Nat'l Bank, 68 Fed. 979, 16 C. C. A. 81. Though that case was one where the owner was seeking to impress a trust, yet the principle is not unlike where one with an equity seeks to do so. In that case it was said:

"The newer and more equitable doctrine permits him to recover it from any one not an innocent purchaser, and in any shape into which it may have been transmuted, provided he can establish the fact that it is his property or the proceeds of his property, or that his property has gone into it and remains in a mass from which it cannot be distinguished." 68 Fed. 980, 16 C. C. A. 83. In re Gaskill et al. (D. C.) 130 Fed. 235.

The plaintiff in this case does not occupy the position of an innocent purchaser. The want of knowledge may strengthen an existing equity, but it does not create an equity. Speaking generally, the debtor is given the right to make application of payment because the money is his, and it is only equitable that he should do so; but, if the debtor makes no application, the creditor is permitted to make it, not on account of any equity, as to its application, in him, for, as yet, the money has not become entirely his, but on account of an artificial rule in the interest of simplicity and certainty. If neither the debtor nor the creditor make an application, the court will do so and, in the absence of other equities, will apply it to the debt the debtor had most interest in discharging, which doctrine is itself a recognition that the controlling equity is that of the debtor.

It is contended that the sureties had no equity in this money. The rule has been laid down in this circuit, under a statutory bond, similar to the one in question, that the materialman has a lien (an equitable lien) upon the funds in the hands of the city, not limited to the percentage retained under the terms of the contract, and that the surety who, upon the failure of his principal, discharges the claim of the materialman has a like lien by subrogation, superior to that of his principal's assignee. First Nat'l Bank v. City T. S. D. & S. Co., 114 Fed. 529, 52 C. C. A. 313; Henningsen v. U. S. F. & G. Co., 143 Fed. 810, 74 C. C. A. 484. This is but another way of stating the rule laid down by the Washington court that the money to be paid under the contract was the very money the payment of which to the laborers and materialmen was secured by the bond. If the surety has such a lien upon the money in the hands of the city, he must retain such lien or equity in the money as far as it can be clearly traced, which the courts will protect until it is borne down by some other superior equity, and in a case of the character where, upon principles analogous to those controlling the marshaling of securities, the creditor may not realize upon such security and, over the objection of a bondsman having a potential equity in such security, apply it to an unsecured debt, depriving the bondsman of all benefit from it and hold said bondsman for the secured debt.

[14] Hackett, the manager of plaintiff, testifies that his arrangement with Rector was that the plaintiff was to be paid cash for sand and gravel, and that it was to be paid for the crushed rock "as soon as he

(Rector for Rector & Daly) got his money off of B street," and that he (Hackett) "did not suppose he would get it until it was completed." Cash was not paid for the sand and gravel as it was delivered.

"As soon as he got his money" means "immediately upon getting the money." 1 Words and Phrases, p. 527. It does not mean "as soon as he got *all* his money." It means no more than to say "as soon as he got money," "the money," or "sufficient money." There was nothing in the circumstances to warrant the inference that the entire contract would have to be completed before any money was paid on it, more than to suppose that it would be paid for as the work progressed, and especially would this be true after the receipt by the plaintiff of the first check marked "crushed rock." The presumption would follow that, the contract being that it was to be paid for as soon as the money was received under the contract with the city, that was the source from which the payment, by the marked check, was being made. If plaintiff was mistaken, both in supposing that the money would not be paid until the completion of the contract and in not understanding that the payments made came "off B street," it was a mistake for which the defendant-sureties were in no way responsible; and, whether payments from this source were diverted from that part of the account to which it was understood they would be applied, intentionally or mistakenly, it is nothing for which the sureties were responsible. This being the contract which plaintiff made and to secure the performance of which the bond was given, and it being in substantial accord with what the courts have held to be equitable under such circumstances, there would be no authority in the principals to that contract to change it so manifestly to the sureties' disadvantage, without releasing them, to the extent of the diversion. What the principals could not do directly they should not be allowed to do indirectly.

In First National Bank v. City Trust, Savings Deposit & Surety Co., 114 Fed. 529, 52 C. C. A. 313, the Circuit Court of Appeals for this circuit, upon the question of the right of subrogation of the surety to a lien upon the money held by the city to pay for work under a contract, declined to acknowledge as controlling the decision of the Supreme Court of the state of Washington. Dowling v. City of Seattle, 22 Wash. 592, 61 Pac. 709. The Circuit Court of Appeals held that it was bound by a contrary doctrine. Prairie State Nat'l Bank v. United States, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412. Under such circumstances, the court found the case to fall within an exception to the general rule, which rule would render controlling the state's decision on a question as to the public policy of the state.

The Supreme Court has recently held that bonds of the character in question are affected by a public policy:

"The public is concerned, not merely because laborers and materialmen (being without the benefit of a mechanic's lien in the case of public buildings) would otherwise be subject to great losses at the hands of insolvent or dishonest contractors, but also because the security afforded by the bond has a substantial tendency to lower the prices at which labor and material will be furnished, because of the assurance that the claims will be paid." Equitable Surety Co. v. United States, etc., 234 U. S. 448, 34 Sup. Ct. 803, 58 L. Ed. 1394, decided June 8, 1914.

[15] The state has power to regulate rights in its soil; to give a lien for labor and material entering into an improvement; to deny a lien where the soil is that of a municipal corporation; in such case to provide a bond in the place of the lien; to declare the purpose and effect of such arrangement and the equities and rights growing out of it.

[16] While the question of the superior right or equity involved may be said, speaking broadly, to be one of general law which the federal court will decide for itself, despite the holding of the state court, yet such statutory bonds affected by such public policy, the rights and equities incident thereto are likewise so affected; and, while the declaration of the highest court of the state concerning such rights, equities, and policy may not involve the construction of a state law, in the sense of its literal interpretation, yet it is considered that such decision is entitled to more than ordinary consideration, if it is not absolutely controlling, where, as here, it is not directly opposed to any higher federal precedent. The rule is stated as follows:

"Questions of public policy, as affecting the liability for acts done or upon contracts made and to be performed, within one of the states of the Union—when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application—are governed by the law of the state as expressed in its own Constitution and statutes, or declared by its highest court." Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry., 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193, affirmed 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84.

The authorities are not uniform upon the questions involved in this case. Thacker v. Bullock Lbr. Co., 140 Ky. 463, 131 S. W. 271, and People v. Powers, 108 Mich. 339, 66 N. W. 215, are decisions directly opposed to the conclusion reached, but the weight of authority supports it. Many of the cases which have been cited are not to the contrary, as appears upon a careful examination.

In Grafton v. Reed, 34 W. Va. 172, 179, 12 S. E. 767, 769, relied upon by the plaintiff, the court held that the sureties for the year 1879 could not object to the application of payment made by the plaintiff—

"unless they had satisfactorily shown that the money with which said receipts and vouchers (the credits) were procured was money collected on tax tickets, licenses, etc., which went into his hands for the year 1879, or that the plaintiff was informed as to the source from which the money was derived with which said vouchers were obtained."

This is far from holding that both the source of the credit must be shown and that the plaintiff knew of its being so derived.

In Schwartz v. Gerhardt, 75 Pac. 698, 44 Or. 425, it was held that a trust fund does not lose its identity though the money changes semblance, and in whatsoever form it may have assumed a trust still attaches, whether it remains in the hands of an original trustee, or goes into other hands, especially if the other has taken with knowledge of the trust relation.

The determination reached in defendants' favor finds support in the following cases: United States v. January, 7 Cranch, 572, 3 L. Ed. 443; Jones v. United States, 7 How. 681, 12 L. Ed. 870; United States v. Kirkpatrick, 9 Wheat. 170, 171, 6 L. Ed. 199.

CHASE & BAKER CO. v. NATIONAL TRUST & CREDIT CO.

(District Court, N. D. Illinois. June 26, 1914.)

No. 50.

1. BANKS AND BANKING (§ 86*)—ORGANIZATION—PURPOSE—DISCOUNTING ACCOUNTS AND COMMERCIAL PAPER—"BANKING BUSINESS."

Discounting accounts and commercial paper is not exclusively a banking function or business, where the corporation uses its own funds for such purpose, since the banking business in which an ordinary Illinois corporation may not engage involves the receipt of deposits from customers and the use of money so obtained for banking purposes.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 218; Dec. Dig. § 86.*]

2. CORPORATIONS (§ 387*)—ULTRA VIRES ACTS—EFFECT.

Where complainant sold certain accounts at a discount to a credit company guaranteeing payment thereof, complainant having power to sell, defendant's act in buying the accounts, even if ultra vires, could not reinvest complainant with title to the accounts so as to entitle it to recover them, since, if defendant was powerless to hold them, the state only could call it to account.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1548–1553; Dec. Dig. § 387.*]

3. ASSIGNMENTS (§ 16*)—ACCOUNTS—COLLATERAL—EXECUTED TRANSACTION.

Where complainant assigned certain accounts to a credit company under an agreement by which complainant guaranteed payment, 20 per cent. of the purchase price being retained as security, not for the performance of complainant's guaranty, but for the obligations of the debtors owing the accounts assigned, the assignment, except as to complainant's obligation to guaranty, was an executed one.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 24; Dec. Dig. § 16.*]

4. USURY (§§ 92, 115*)—FORM OF TRANSACTION—RECOVERY OF COLLATERAL—PAYMENT OF DEBT.

A court of equity will not be frustrated in ascertaining the real intention of the parties to make a usurious loan by the fact that parol proof thereof would contradict the written evidence of the apparent transaction; but, if it appears that the real intent of both parties was to make a usurious loan, then, so far as the transaction is still executory, the debtor may recover his collateral on payment of the debt with legal interest.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 191–193, 196, 326; Dec. Dig. §§ 92, 115.*]

5. SALES (§ 3*)—ASSIGNMENT DISTINGUISHED.

A contract provided that defendant, in consideration of $1, agreed to buy from complainant all acceptable accounts tendered to it and pay therefor the face value thereof less specified discounts, depending on the number of days the accounts were to run, etc., complainant to act as defendant's agent without compensation or costs, to collect and receive payments, and to hold the same in trust and pay over the same to defendants, complainant guaranteeing the payment to defendant or its assigns of all accounts purchased and within five days after receipt of written request to do so, to repurchase at their face value all accounts in default or against insolvent debtors, etc. *Held*, that the transaction on its face was a sale and assignment of the accounts and not an agreement for

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

the loan of money, the sale and guaranty being separate and distinct contracts, the former being executed and the latter executory.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 6–19; Dec. Dig. § 3.*]

6. USURY (§ 72*)—SALE OF ACCOUNTS—SERIES OF TRANSACTIONS.
Though an original agreement by which defendant bound itself to purchase such accounts as complainant offered to it, complainant guaranteeing the accounts and defendant retaining 20 per cent. of the purchase price as collateral to the debtor's obligation to pay, was regarded as an agreement to make such loans as complainant might require and for which it could give the collateral specified, it would not make an entire series of such transactions a single one, but for the purpose of determining whether they were usurious each loan must be considered separately.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 147; Dec. Dig. § 72.*]

7. USURY (§ 102*)—USURIOUS TRANSACTION—EXECUTED CONTRACT.
An executed transaction cannot be opened for usury under the rule that usurious interest actually paid on a completed transaction must be deemed to have been voluntarily paid, and is not recoverable.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 197, 241, 242, 244–258; Dec. Dig. § 102.*]

8. CORPORATIONS (§ 385*)—POWERS—ULTRA VIRES ACTS—EXECUTED TRANSACTION.
Ultra vires is not ground for reopening a completely executed transaction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1545–1547; Dec. Dig. § 385.*]

9. CORPORATIONS (§ 487*)—ULTRA VIRES LOANS—REPAYMENT OF PRINCIPAL AND LEGAL INTEREST.
Though a loan made by a corporation is ultra vires, repayment of principal and legal interest by the debtor is a prerequisite to a suit to recover collaterals.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1893–1898; Dec. Dig. § 487.*]

10. USURY (§ 95*)—USURIOUS LOAN—RECOVERY OF COLLATERALS—PAYMENT OF DEBT AND LEGAL INTEREST.
Though a loan is usurious, repayment of principal and legal interest by the debtor is a prerequisite to a recovery of collaterals.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 198–202; Dec. Dig. § 95.*]

In Equity. Suit by the Chase & Baker Company against the National Trust & Credit Company. On motion to dismiss bill. Leave granted to complainant to amend, in default of which the motion granted.

The following is a copy of the contract in question:

This agreement made this ...... day of ...... 19.., at Chicago, Ill., by and between ...... of ...... hereinafter called First Party and the National Trust & Credit Company, Chicago, hereinafter called Second Party, witnesseth: That, for one dollar ($1.00) and other good and valuable considerations, each to the other paid, receipt whereof is hereby acknowledged, the parties hereto have agreed and do hereby agree as follows:

First. That said Second Party shall buy from said First Party all acceptable accounts, tendered to it by said First Party (it being understood that there is nothing in this Contract that can be construed to obligate the First Party

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

to sell accounts to Second Party unless it desires so to do), and pay therefor the face value thereof, less the following discounts:
One per cent. on Accounts that are paid within.................fifteen days;
Two per cent. on Accounts that are paid within.................thirty days;
Three per cent. on Accounts that are paid within................sixty days;
Four per cent. on Accounts that are paid within................ninety days;
Five per cent. on Accounts that are paid within..one hundred and twenty days;
Six per cent. on Accounts that are paid within....one hundred and fifty days;
Seven per cent. on Accounts that are paid within..one hundred and eighty days;
subject, however, to the terms of this and any subsequent written agreements executed by the parties hereto; that the Second Party shall pay:
Seventy-eight per cent. on.............................thirty day Accounts;
Seventy-seven per cent. on..............................sixty day Accounts;
Seventy-six per cent. on.............................ninety day Accounts;
Seventy-five per cent. on............one hundred and twenty day Accounts;
Seventy-four per cent. on..............one hundred and fifty day Accounts;
Seventy-three per cent. on...........one hundred and eighty day Accounts;
upon delivery and acceptance of such accounts. The remainder, less discount and deductions taken by the debtor, and exchange on checks, etc., charged by Chicago banks, shall be paid immediately after the collection of the account by the Second Party; but no payment shall be made while any of said accounts are in default.

Second. The First Party shall assign and deliver to said Second Party all accounts purchased, including the right of stoppage in transitu and title to the merchandise named in the accounts, subject only to the rights of the purchaser therein.

Third. That the First Party shall act as the Second Party's agent, without compensation or cost, to collect, and receive in trust for said Second Party and to transmit and deliver, on the day of the receipt thereof, the original checks, drafts, notes and other remittances received by said First Party in payment of or to apply on accounts sold pursuant to this agreement but in no event shall said trust funds be commingled with the funds of said First Party; that the First Party shall cause such attention to be given to the collection of said accounts as the Second Party may require; that the Second Party has the right to terminate this agency at any time for failure of the First Party to comply with the terms of this agreement.

Fourth. Said First Party hereby guarantees the payment to the Second Party or its assigns of all accounts purchased hereunder according to the terms thereof, and agrees that, within five days after receipt of written request so to do, the First Party shall repurchase, at their face value, all accounts in default or against insolvent debtors and make payment therefor to said Second Party at its office in Chicago, Ill. Immediately after the purchase of every account hereunder, said First Party shall make upon its books an entry showing the sale of said accounts to said Second Party, and said Second Party is hereby given the right and privilege of auditing the books and accounts, and of inspecting the records of said First Party, including all correspondence relating to said accounts, at any time that it may see fit so to do.

Fifth. Said First Party hereby appoints Melville N. Rothschild and John L. Little and each of them, attorney in fact, with power of substitution, to endorse the name of said First Party upon all notes, checks, and other forms of exchange received in payment on said accounts and to endorse all bills of lading and shipping receipts relating to said accounts.

Sixth. That said Second Party in making purchase of accounts hereunder relies upon the guarantees and covenants of said First Party herein contained and upon the written representations made to it by said First Party as to the financial responsibility of said First Party; that said written representation heretofore made and that may hereafter be made are for the purpose of establishing the credit of said First Party with said Second Party so that sale of accounts may be made hereunder.

Seventh. That said First Party shall execute and deliver to said Second Party or its assigns, any document necessary or proper to carry into effect

this contract and should said Second Party employ counsel or cause legal action to be instituted to enforce the payment of any of said accounts, or any part thereof, then and in either case, said First Party shall immediately pay to said Second Party or its assigns, all court costs, expenses, attorney's and stenographer's fees which may be by it expended in such proceedings:

In witness whereof the said First Party has hereunto set its hand and seal, and said Second Party has caused these presents to be executed by its President and Secretary, and its corporate seal to be hereto attached.

....................[Seal.]

Attest....................
Secretary.

....................[Seal.]

National Trust & Credit Company,

Attest....................
Secretary.

By....................
President.

Guarantee and Waiver.

For One Dollar ($1.00), and other good and valuable consideration, receipt whereof from the National Trust & Credit Company is hereby acknowledged, we, and each of us, hereby guarantee to the said National Trust & Credit Company and its assigns, the full, prompt and faithful performance of the foregoing contract, and every provision and condition thereof by......, and we, and each of us, hereby waive notice of any breach of said contract or any provision thereof by said First Party and we also waive notice of acceptance of this guarantee by the National Trust & Credit Company.

In witness whereof, we, and each of us have hereunto set our hands and seal this ...... day of ...... Month, 19...

....................[Seal.]
....................[Seal.]
Witness....................
....................[Seal.]
....................[Seal.]
....................[Seal.]

Number......

Certificate of Indebtedness.

This is to certify that the persons named below are indebted to the undersigned in the sums set opposite their respective names, for goods sold and delivered.

Date of Bill	Debtor	Address	Amount	Terms
	This contract is not binding on either party until accepted by National Trust & Credit Company, at Chicago, Ill.			

Dated at ...... this ...... day of ...... 191..

For and in consideration of the sum of ...... Dollars, ($......) to the undersigned in hand paid, the receipt whereof is hereby acknowledged, the undersigned hereby sells, assigns and transfers to National Trust & Credit Com-

pany, a corporation, all right, title and interest in and to the contracts and open accounts above named, including the right of stoppage in transitu, and the invoices which amount to ...... Dollars ($......) are herewith delivered to National Trust & Credit Company at Chicago, Illinois. The undersigned guarantees that the balances due on said contracts and open accounts are correctly set out in the above schedule thereof, and that full deliveries have been made on all said contracts and open accounts in accordance with the specifications of the buyer; that there is no contra account against any of them, that the amounts due on said contracts and open accounts, as set out in said schedule, are not disputed by the debtor, are not past due, that there are no off-sets against said accounts or any of them for freight, drayage or other carrying charges, commissions, damages or any other counter claims of any nature whatsoever, but the amount set out in each item of said schedule is net and the payment of said item or items is not contingent on the fulfillment of any contract, past or future, and that entries have been made on our books disclosing the absolute sale thereof to National Trust & Credit Company.

In Consideration of the premises aforesaid and the further sum of One Dollar to the undersigned heretofore paid the undersigned hereby guarantees the payment in full to the National Trust & Credit Company, its successors and assigns, of the above named contracts and open accounts in accordance with the terms indicated and appearing thereon.

....................[Seal.]

Accepted at Chicago, Ill.,......191..
National Trust & Credit Company
By......................
Its..................

Culver, Andrews & King, of Chicago, Ill., for complainant.
John W. Creekmur, of Chicago, Ill., for defendant.

MACK, Circuit Judge. In this case, one who appears on the face of the papers to be a vendor and guarantor of open mercantile accounts and commercial paper at a discount greater than the legal interest rate is seeking to rescind the transactions and to recover back the accounts or the proceeds thereof on repayment of the purchase price with legal interest, on the ground that the transactions were ultra vires.

The basis for the charge of ultra vires is that such sales, viewed from the standpoint of the purchaser, are discounts; that discounting is a banking function; that defendant, although empowered to purchase accounts, could not lawfully engage in the business of purchasing accounts because that is a banking business and corporations cannot be organized, under the general incorporation act of Illinois, to do a banking business.

There are several answers to these contentions:

[1] First. Discounting accounts and commercial paper, while the proper function of a bank or banker, is not exclusively a banking operation. The banking business in which an ordinary Illinois corporation cannot engage involves the receipt of deposits from customers and the use of money so obtained for banking purposes. An individual or a corporation, using its own funds or moneys borrowed in the ordinary course of business for the purchase of commercial paper for investment or other purpose, does not thereby engage in the banking business. Lending money is one of the most important banking functions. The Illinois act, however, clearly does not regard the prohibition of doing a banking business as sufficient to prevent the organization of corporations to engage in the business of lending their own

capital; in express terms it forbids the creation of corporations under the general act for either purpose.

[2] Second. But if this were a banking business, and if these deals were ultra vires, whatever defense the plaintiff might have if sued on its guaranty, it could not rescind the executed sales or recover back collateral security delivered by it to secure the obligations of its debtors sold by it and now due to the defendant. Plaintiff had power to sell even if defendant had no power to buy the accounts. Plaintiff does not thereby become revested with title to the accounts; the title to the obligations had passed; if defendant is powerless to hold them, if it usurped powers not conferred upon it, the state alone can call it to account.

[3] There is nothing executory in the transactions except plaintiff's obligation as guarantor, and that is not now sought to be enforced. The collateral held by defendant, 20 per cent. of the part purchase price of the accounts, is held as collateral, not for plaintiff's guaranty, but for the obligations of plaintiff's debtors, in which plaintiff, as vendor, no longer has any interest.

B. But in the alternative plaintiff seeks an accounting on the charge that these apparent sales were, in fact, only devices or subterfuges to conceal loans; that such loans were usurious; that they were also ultra vires, inasmuch as defendant was not and could not be organized under the general incorporation act to engage in the business of loaning money.

[4] 1. A court of equity will not be frustrated in ascertaining the real intention of the parties to make a usurious loan by the fact that parol proof thereof would contradict the written evidence of the apparent transaction; not only, however, must such proof be clear, but it must go to the real intent of both parties. If, in fact, both parties intended a usurious loan, then, in so far as the transactions are still executory, the debtor may recover his collateral on payment of the debt with legal interest.

The ninth paragraph of the amended bill falls short however, of making any clear charges that both parties actually contemplated and made loans disguised as sales with guaranties; it merely gives plaintiff's conclusion of law that the transactions amounted to loans.

[5] If it is intended to charge that on the face of the documents the transactions were loans, then clearly the exhibits contradict the averments. They clearly indicate an apparent intention to make an outright sale of open accounts; to permit a part of the purchase money to be held as security for the performance of the debtor's obligation; and in addition, to guarantee the accounts sold.

The decision in Re American Fiber Reed Co. (D. C.) 206 Fed. 309, affirmed in the Court of Appeals, that the transactions were loans, not sales, was based not merely on the documents but on an agreed statement of facts. Moreover, the documents are not identical with those in the present case. Both courts emphasize the importance of a provision deemed by them to indicate that the entire title to the accounts did not pass. This provision, that in case an account is not paid at maturity it shall be repurchased at the amount theretofore actually

paid thereon, about 75 per cent. of the face value, is replaced by the positive agreement to repurchase accounts sold at their full face value. So far as the apparent intention of the parties is thereby indicated, this provision negatives any possibility of an apparent intent to retain title to any part of the account.

The sale and guaranty are separate and distinct; the former is executed, the latter executory. While there is a conflict in the authorities as to whether one who sells commercial paper or open accounts at a discount greater than the legal interest rate and also indorses or guarantees payment may defend on the ground of usury when sued on his conditional executory obligation, clearly usury, even if a shield against such liability, cannot be used as a sword to destroy the executed sale. Usury involves a loan; an actual sale cannot be usurious.

Leave will, however, be given to amend paragraph 9 of the bill so as properly to charge, if plaintiff be so advised, that the transactions were in fact usurious loans.

[6, 7] 2. The original agreement under which defendant was to purchase such accounts as plaintiff offered it, even if proven to be only a subterfuge for an agreement to make such loans as plaintiff might require and for which it could give the kind of collateral specified, and the provision that 20 per cent. of the amount might be retained as collateral for all the deals would not make the entire series of transactions a single one. Each loan would have to be dealt with separately in determining the question of its usurious character and also whether it had been repaid. In so far as any transaction was executed by repayment, it could not be reopened because of usury. The law is well settled that usurious interest actually paid on a completed transaction is deemed to have been voluntarily paid and is therefore not recoverable.

[8-10] 3. Ultra vires no more than usury will justify the reopening of a completely executed transaction. In so far as any loan has been fully repaid, whether at a legal or usurious rate of interest, there can be no recovery. In so far as any loan is still outstanding, repayment of principal with legal interest is concededly a prerequisite, whether it be ultra vires or within the powers of the lender corporation and whether it be at a legal or usurious rate of interest.

Leave will be granted to plaintiff to amend paragraph 9 in accordance with the views herein expressed within ten days. In default thereof, the bill will be dismissed.

In re COLONIAL MILL & LUMBER CO.

(District Court, D. Connecticut. July 16, 1914.)

No. 3027.

BANKRUPTCY (§ 184*)—TRANSFERS—VALIDITY UNDER STATE LAW.

Claimant furnished lumber to a corporation, which was the sales agent of the bankrupt. The corporation turned the lumber over to the bankrupt to use in its manufacturing business, and claimant being unable to procure payment because of the corporation's financial condition, it was arranged that claimant should order certain columns from the corporation to be delivered in settlement of the claim for lumber. Claimant ordered 200 columns, which the corporation ordered the bankrupt to manufacture and hold for delivery at claimant's order. The columns were made, charged to the corporation by the bankrupt, and in turn charged to claimant, but, with the exception of 55, were held by the bankrupt awaiting claimant's shipping orders, without marks of any kind to indicate the passing of title until they were attached at the bankrupt's plant as its property. *Held*, that the transfer as to the columns retained was fraudulent in law, under Connecticut Sales Act (Pub. Acts 1907, c. 212) § 26, providing that when a person having sold goods continues in possession thereof, and such possession is fraudulent in fact, or is deemed fraudulent in law, creditors of the seller may treat the sale as void, and hence claimant was not entitled to recover possession from the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275–277; Dec. Dig. § 184.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Colonial Mill & Lumber Company. Application by the Hotchkiss Bros. Company for the delivery of certain wooden columns in the custody of the trustee, alleged to belong to claimant. Petition to review a referee's order denying the claim. Affirmed.

Walsh & Hubbell, of Norwalk, Conn., for petitioner.
Keogh & Candee, of South Norwalk, Conn., for trustee.

THOMAS, District Judge. The Hotchkiss Bros. Company presented its petition to the referee, wherein it claimed title and possession to 145 wooden columns in the custody of the trustee, which were inventoried as a part of the bankrupt corporation's estate. The referee, after hearing had upon said petition, denied the same, and the matter is now before the court on petition for review of the referee's finding and order.

The evidence discloses that the Colonial Mill & Lumber Company, the bankrupt, a corporation organized under the laws of the state of New York, was engaged in business in South Norwalk, Conn., where it maintained a mill and plant for the manufacture of wooden columns, while the Colonial Column Company, also a corporation organized under the laws of the state of New York, was engaged in business in New York City, making sale of columns which were manufactured by the bankrupt corporation at its South Norwalk plant. Both corporations were controlled by practically the same interests; one Charles

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

V. D. Peak of Winsted, Conn., being the secretary and treasurer of each of the corporations.

To avoid confusion, the Colonial Mill & Lumber Company, bankrupt, will be referred to as the South Norwalk company and the Colonial Column Company as the New York company.

The New York company took practically the entire output of the bankrupt corporation's mill, although the South Norwalk company was allowed to fill orders for mill work in South Norwalk, and a large portion of the material used by the bankrupt corporation in its mill was bought by the New York company and shipped in its name to the bankrupt's plant. Where the stock came from which was used to make the columns now in dispute, by whom it was shipped, or in whose name received is not, however, shown by the evidence.

The Hotchkiss Bros. Company made two shipments of lumber to the South Norwalk mill on the order of the New York company, to whom it charged the same, one shipment being sent in December, 1910, and the other in January, 1911. On July 11, 1911, the New York company owed the petitioner something over $500 on account of these shipments, but was unable to pay it. In order to reduce this indebtedness the New York company agreed to manufacture for the Hotchkiss Bros. Company 200 8″x8′ columns at $2.10 each, and to set them aside as the property of the Hotchkiss Bros. Company and hold the same awaiting shipping orders, with the understanding that it would receive credit on its own account with Hotchkiss Bros. Company for the sum of $420 when the columns would be completed. The New York company shortly after directed the bankrupt corporation to manufacture the 200 columns for the Hotchkiss Bros. Company and hold them for that company until shipping instructions would be received from the New York company.

The bankrupt corporation undertook immediately to manufacture the columns, so that on September 7, 1911, the New York company was able to and did write Hotchkiss Bros. Company that 160 of the columns had been completed and were ready for shipment and made request for shipping directions. Four days later the New York company notified the petitioner by letter that the 200 columns ordered were ready and would be shipped upon receipt of instructions from them. An invoice of the entire order of 200 columns was inclosed in the same letter to Hotchkiss Bros. Company, and the New York company charged Hotchkiss Bros. Company upon its own books with $420, and the latter in turn gave credit to the New York company for a like sum on the lumber shipment accounts.

In accordance with the method of dealing which existed between the South Norwalk company and the New York company (and that method applied in this case), when articles were manufactured and shipped from the mill, they were charged at cost of manufacture on the books of the South Norwalk company to the New York company, and it in turn gave credit upon its books for the cost price to the account of the South Norwalk company. The invoices were then sent to customers by the New York company, and, when it received payment for the same, it would in turn make payment to the South Norwalk com-

pany. The method adopted, however, was purely a bookkeeping arrangement, the books of both concerns being kept in the office in New York City. All bills, however, sent to purchasers indicated that the indebtedness was due to the New York company.

Of the order of 200 columns made up for the Hotchkiss Bros. Company, only 55 were shipped prior to attachments which were placed upon the plant of the South Norwalk company a short time before its adjudication in bankruptcy, which was on December 31, 1912, so that 145 of the columns were at that time in the mill where they had been stored on the second floor, awaiting shipping orders. They were not, however, labeled or tagged, nor was anything further done to them, so far as physical appearances were concerned, to indicate that they were the property of the Hotchkiss Bros. Company or of any person other than the bankrupt concern. When the trustee was appointed on January 24, 1913, he had them inventoried as part of the bankrupt's estate, and he now holds possession of them as trustee.

So far as appears, the bankrupt never had any dealings with the Hotchkiss Bros. Company, all transactions of the latter concern being had solely with the New York company through correspondence with its New York office; and, in the matter of the setting aside of the columns with a view of protecting it in its ownership thereto, the Hotchkiss Bros. Company left the same in the hands of the New York company. It would seem that no officer or agent of the Hotchkiss Bros. Company had ever inspected or ever attempted to take possession of, or in any other way exercise dominion over, the 145 remaining columns after they had been completed. No evidence was introduced to indicate that the Hotchkiss Bros. Company knew of the exact location of the bankrupt corporation's mill or where the columns were actually located.

The facts in the case are undisputed in so far as the leaving of the 145 columns on the second floor of the South Norwalk mill is concerned. The petitioner says, however, that because it never had any direct business transactions with the bankrupt corporation, and had dealt only with the New York company, therefore the relationship of vendor and vendee did not exist between the petitioner and the bankrupt corporation, and the mere fact that the 145 columns were allowed to remain in the mill should not be held a sufficient cause to deprive the petitioner of its right to title and possession of the columns. In other words, its claim is that the Connecticut rule, which is applied to cases where a vendor retains possession of personal property after a sale thereof, should not be applied in this case, as the cost of stock and expense of manufacturing the columns were paid by the New York company crediting the account of the bankrupt corporation with the cost of the columns a long time before attachments were brought or bankruptcy proceedings commenced; that the New York company was its vendor, and that there was in fact a complete and valid delivery of the columns into petitioner's possession when the New York company had them set aside in the bankrupt's mill awaiting the convenience of the petitioner as to shipment. And petitioner quotes, in support of its contention, rule 2 of section 19, c. 212, of the Public Acts

of the state of Connecticut, passed in 1907, otherwise known as the "Connecticut Sales Act," which reads:

> "Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done."

The rule which petitioner quotes can, however, throw no appreciable light upon the main point in this case, as it evidently was intended for no other purpose than to show that the buyer, under ordinary circumstances, is expected to be ready to take over manufactured articles upon their completion. However, if this rule does in fact have any bearing upon the case, when one takes into consideration section 26 of the same act, which reads:

> "Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, and such retention of possession is fraudulent in fact, or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void"

—it will readily be seen that, by the adoption of the Sales Act, it was not intended to change the law of Connecticut relative to the retention of possession of personal property by a vendor.

There is a question as to what was the actual relationship existing between the New York company and the South Norwalk company, but whether the New York company occupied the position of an agent for the South Norwalk company in making the sale of the columns to the Hotchkiss Bros. Company (in which event the South Norwalk company was an undisclosed principal), or whether the New York company was in fact a vendee to whom the South Norwalk company sold the columns which it manufactured for the use of the Hotchkiss Bros. Company, is immaterial, as the result in this case must be the same in either event.

If the New York company was merely the agent of the South Norwalk company, then the South Norwalk company, as the undisclosed principal, was the actual vendor to the Hotchkiss Bros. Company, while, on the other hand, if the New York company was the actual purchaser of the columns from the South Norwalk company, and in turn sold them to the Hotchkiss Bros. Company, the South Norwalk company occupied the position of vendor to the New York company. So we find that the South Norwalk company was the vendor of the 145 columns which it was holding awaiting shipping orders from the New York company when the attachments were made and bankruptcy proceedings begun, even though the Hotchkiss Bros. Company knew only the New York company in the transaction and supposed that it occupied the position of a vendor of lumber to the New York company in the first instance, and as a purchaser of the 200 columns from that corporation in the second instance.

Whether there has been a change of possession of personal property following a sale in any case, so that the sale will be valid as against the creditors of the vendor, is a mixed question of law and fact. After the facts are ascertained, the law determines whether or not there has been a change of possession. Mead v. Noyes, 44 Conn. 489.

So that the court is now called upon to apply to the facts in this case that rule of law which seems best suited to the occasion, and in discharging this duty the court must be guided by the decisions of the highest court of Connecticut.

At the outset it becomes necessary to observe that there has been no rule of law more clearly expressed or more closely adhered to by the courts of Connecticut than in those cases where the vendor of personal property is permitted to remain in possession thereof, after sale made. This fact in itself is held to be such evidence of fraud, as against an attaching creditor of the vendor, that, unless there is a legal excuse shown to and approved by the court, the evidence becomes so conclusive that no amount of good faith on the part of the parties to the transaction will be sufficient to overcome the presumption of fraud. Greenthal v. Lincoln Seyms & Co. et al., 68 Conn. 384, 36 Atl. 813; Patchin v. Rowell, 86 Conn. 372, 85 Atl. 511.

It is not enough that there was a formal change of possession of the property accompanying the sale, as the law requires an open, visible, and permanent change of possession to make the sale good as against the vendor's creditors, except in those cases for which the law has specially provided. While the vendee may be in possession of property as between himself and the vendor, still his possession may not be sufficient to protect the property from the vendor's creditors. The rule which requires the vendee of personal property to take and retain the possession of it in order to protect it from the vendor's creditors is a rule of policy as well as of evidence, and was extended from a mere rule of evidence calling it a "badge of fraud" only, and arbitrarily declared a matter of law, so that it renders the sale void as to creditors, notwithstanding the highest evidence of the honesty of the sale, because it has been thought better to take away the temptation to practice fraud than to incur the dangers arising from the facility with which testimony may be manufactured to show that the sale was honest.

Our courts have said over and over again that:

"The policy which dictates it (the rule) and the prevention at which it aims require its rigid application to every case where there has not been an actual, visible, and continued change of possession." Norton v. Doolittle, 32 Conn. 410.

In the application of the rule the court must look beyond the good faith of the parties, or the secret technical features of the transaction, so that "purchasers must learn and understand that if they purchase property and, without a legal excuse, permit the possession to remain in fact or apparently and visibly the same, or, if changed for a brief period, to be in fact or apparently and visibly restored, and thereafter in fact or apparently and visibly continued as before the sale, they hazard its loss by attachment for the debts of the vendor, as still, to the view of the world and in the eye of the law, as it looks to the rights of creditors and the prevention of fraud," it is still the vendor's property. Norton v. Doolittle, 32 Conn. 411; Kirtland v. Snow, 20 Conn. 23; Mead v. Noyes, supra; Hull v. Sigsworth, 48 Conn. 266, 40 Am. Rep. 167.

Applying this rule to the case in question, it is clear that there was not such an open, visible, and continued change of the possession of the columns as the law requires in order to have protected the petitioner's title thereto against either the attaching creditors or the trustee in bankruptcy.

In arriving at this conclusion, the court is not unmindful of the equities which the facts of the case disclose in behalf of the petitioner, but there have been other cases in which the same rule was applied where the equities were equally as strong, if not stronger, than in the present case. Take for instance the cases of Hull v. Sigsworth, 48 Conn. 258, 40 Am. Rep. 167, and Shaw v. Smith, 48 Conn. at page 306, 40 Am. Rep. 170; in the first of these cases the defendant was a farm hand and paying his employer, by a receipt for wages earned on the farm, $250 for a horse purchased by him from his employer. After taking possession of the horse, he still continued to work on the farm for the vendor, keeping the horse in the stable thereon, where it had been kept by his employer for some two years prior to the sale, and feeding it from his employer's hay and grain, for which he paid a weekly allowance to the vendor out of his wages; the defendant exercised exclusive care of the horse, which was an unbroken colt, and broke it to harness, kept it shod, and at all times after the sale the defendant claimed to own and be in possession of it. About two months after the sale, the horse was attached by one of the creditors of the vendor. Nevertheless, in rendering a decision against the defendant, the Supreme Court of Connecticut, after referring to the continued use of the premises by the vendor, and the continued employment thereon of the vendee as his servant, the feeding by the latter of the horse from the stock of grain and hay belonging to his employer, has made use of the expression at page 266 of 48 Conn. (40 Am. Rep. 167) that:

"To the world all things remained unchanged, and it might well be presumed that the continued acts of feeding, shoeing, and training, subsequent to the sale, were a part of the duties incident to the continued service."

Further along in the opinion of the case it is stated:

"There was no visible change in the relation of each to the other; nor in that of either to the property."

And:

"The declarations of ownership by the vendee, including that made at the time of the attachment, must go for nothing, because the apparently unchanged ownership by the vendor was a constant denial of their truth, and as a matter of law bore them down. So must also his good faith, for, in the presence of the facts found, the law will not consider it."

The case of Shaw v. Smith was one where a party agreed to make for plaintiffs, for a specified sum, a complete set of special tools, suitable only to the manufacture of a certain make of sewing machine; payments to be made as the work progressed. When the maker had completed a part of the set of tools, and another part was nearly completed, and still another part was in the rough, he became insolvent and made an assignment of his property to the defendant for the benefit of his creditors. At the time of the assignment, the plaintiffs had paid the makers $5,000 which was the entire contract price, although none

of the tools had in fact been delivered into their possession, the last payment being one of $500, and procured from them by the maker fraudulently representing that the entire set of tools was substantially completed. The plaintiffs having brought replevin for the tools against the maker's trustee in insolvency, and the case being reserved for the advice of the Supreme Court, it was held that where parties agree that the title to chattels shall at once vest in the buyer, and the sale be complete as between the parties, yet the retention of possession by the vendor of chattels leaves them open to attachment by the creditors of the latter, and that notwithstanding the maker of the tools in question did fraudulently represent to the buyers that the tools were substantially complete and ready for delivery, and that the buyers, trusting in the maker's representations, paid the balance of the contract price, still the plaintiffs were not entitled to judgment, as there was no such delivery of the chattels nor possession of them by the plaintiffs as would answer the law, which requires a change of possession in order to make a sale of chattels good, as against creditors of a vendor.

Then, too, from another viewpoint of the present case, one could easily get the idea that, when ordering the columns to be manufactured, the petitioner was not altogether actuated by altruistic motives, but, on the contrary, thought by that method to secure to itself something valuable as an offset to its claim with a concern which it believed to be in a shaky financial condition, and a reading of the correspondence which forms part of the evidence tends largely to confirm such idea. While no exception can be taken to petitioner's endeavor to obtain a settlement of its claim, one cannot help but marvel at the fact that the petitioner, a Connecticut corporation, engaged in business in Torrington, in this state, did not at the time take the precaution to obtain the advice of some Connecticut attorney as to what the law required of a vendor and vendee of personal property, instead of depending, as it did, upon the New York company to advise and protect it in the premises. By then neglecting to ascertain the requirements of the law in this respect, and by allowing the columns to remain in the possession of the bankrupt corporation for over a year after it knew of their completion, the petitioner was guilty of such laches as modify very materially any equities otherwise existing in its favor. The position in which the petitioner now finds itself is of its own making, and its loss is directly due to its failure to take the property out of the bankrupt corporation's possession into its own.

In view of the circumstances in the case and of the law as the court views it, the referee, by his finding and order, wherein he denied the petitioner's claim to the title and possession of the 145 columns held by the trustee in bankruptcy as part of the bankrupt's estate, committed no error, and the same is affirmed.

Decree accordingly.

WEEHAWKEN DRY DOCK CO. v. CITY OF NEW YORK et al.

(District Court, S. D. New York. December 4, 1913.)

COLLISION (§115*)—LIABILITY—CONTRACT WITH CITY FOR USE OF SCOW.

A firm contracted with the city of New York to remove with its tugs scows loaded with street sweepings and ashes by the street cleaning department, and dispose of their contents. The scows were owned by the department, and the contractors were charged by the day for their use. In practice, when a scow was emptied, it was returned to a dump for reloading, and delivered to the inspector in charge, and was then credited to the contractors, until the time it was again taken out. Another concern also had the privilege of sorting the refuse after loading before the scow was delivered to the contractors for removal. *Held*, that after a scow was returned to an inspector, and until it was again loaded and delivered to the contractors, they were not responsible for its handling, and that the city was alone liable for damage caused by a collision between a loaded scow which had been removed from the dump by direction of the inspector, and tied up outside of another and a schooner lying at a wharf, against which the scow drifted after breaking loose because of being insufficiently secured.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 244-247; Dec. Dig. § 115.*]

In Admiralty. Suit for collision by the Weehawken Dry Dock Company against the City of New York, with Dailey & Ivins impleaded. Decree for libelant against the city.

Peter Alexander and Allen S. Davenport, both of New York City, for Dailey & Ivins.

Archibald R. Watson, Corp. Counsel, and George P. Nicholson, Asst. Corp. Counsel, for respondent.

MAYER, District Judge. Libelant seeks to recover damages sustained by the schooner George Knapp by collision, on the evening of May 11, 1911. On that day, the schooner was lying at the bulkhead between Seventy-Ninth and Eightieth streets, East river, in the borough of Manhattan, city of New York, discharging a cargo of brick. She was headed downstream; her stern being a short distance below the southerly line of Eightieth street. The city of New York owns the bulkhead at the foot of the latter street, and on the date above mentioned owned and operated a dumping board erected on the bulkhead, by which ashes and street sweepings collected by it, through its department of street cleaning, were deposited into vessels and conveyed thence by the latter to various places for final disposition. On May 11th the scow D. S. C. No. 36, owned by the city of New York, was lying under the dumping board, receiving cargo, and some time on the same day, the scow Bat, was brought there, empty, to take her place as soon as she was loaded. During the afternoon, the loading of No. 36 was completed, and at about 5 p. m., she was hauled out, the Bat was placed under the dumping board, and No. 36 was made fast to and outside of her. No. 36 was moved under the direction of the city inspector, who was in charge at that place, the actual hauling

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

being performed by men employed around the dump, under an agreement made with the city. The Bat was attached to the bulkhead with her own lines, in the usual manner. No. 36, instead of running lines across the Bat to the dock, depended entirely upon the latter's lines. There is no wharf at the place in question, but simply a bulkhead running parallel with the course of the river. Eightieth street is a little below the Gate in direct line with the current, and gets the full force of the Gate tide. The ebb tide is strong, and it was not safe to leave No. 36 moored as she was. At about 10:30 p. m., during the ebb tide, under the additional strain caused by her having No. 36 loaded and attached to her, the line between the up-river end of the Bat and the mooring post on the bulkhead parted. This allowed both vessels to swing off, and as they caught the tide crosswise, it parted one line after another, until the boats were cast adrift. Under the influence of the tide, and by reason of their lines parting in the manner specified, the two scows swung completely around, and the stern of No. 36, which had been her up-river end, came into contact with the schooner George Knapp, and caused the injuries for the recovery of which this suit was brought. Both respondents admit that libelant is free from fault, and is entitled to recover the amount sued for, with interest. The Bat owed no duty to No. 36. It was the duty of the latter vessel to retain herself in her position, by running her own lines to the wharf. In so far as she depended upon the lines of the Bat, she took the risk, and must make good the damages which were caused by her own fault.

The suit was instituted against the city alone. The latter interpleaded Dailey & Ivins, who were duly brought in by petition. The city, as owner of No. 36, is primarily liable, and the real object of the litigation is to determine whether or not the city can impose its liability upon Dailey & Ivins.

The city bases its contention upon the provisions of a certain contract entered into between it and Dailey & Ivins, for the removal of street sweepings and ashes. This contract was dated in 1907, and became operative in January, 1908. Dailey & Ivins maintain that they are not liable on two grounds: (1) At the time of the accident, No. 36 was not under their control, but in the custody and under the control of the city. (2) The collision was caused by the fault of the city and not through any fault on their part, and for that reason they cannot in any event be held responsible. In the contract above referred to, there is no provision respecting the status of the department scows, from the time they are returned empty by the contractors to the various dumping boards, and delivered to the city inspectors, until they are loaded and delivered by the city to the contractors' tugs, to be towed away and discharged, except in so far as the instrument itself, speaking of its general purpose, says that it is for the removal by the contractors of vessels loaded with street sweepings and ashes from the various dumping boards, and the final disposition of their contents.

Subdivision 3 of the contract, page 12, provides that the contractors are to receive at the water front dumps of the department of street

cleaning all scows loaded with ashes, street sweepings and rubbish, and dispose of the material on said scows.

Subdivision 4, page 13, provides:

"The contractor, under this contract, is not to assort or pick over any light refuse or rubbish at the department dumps; but he shall receive and finally dispose of all such light refuse and rubbish as the person or persons, firm or corporation, having the privilege of assorting and picking over such light refuse and rubbish shall deem unsalable."

Subdivision 2, under the heading "Specifications" in the contract, provides:

"The contractor shall at all times be solely responsible for the safety of all scows and other vessels while in his charge, and shall, at his own cost and expense, keep in good condition and repair all the said scows; and all the repairs and alterations made necessary in said scows shall be made by the contractor under the supervision of the commissioner."

It will be noted that there is no definite provision as to when a scow is "in charge" of the contractors. Ordinarily the property of one is deemed to be in charge of another when the latter is able to exercise control over such property, and here it is clear that the contractors have no authority over the scows until their tugs arrive to tow the scows to the dumping grounds. Where, as here, the contract is blind upon the crucial question in the case, "there is no surer way to find out what the parties meant than to see what they have done" and the rule of practical construction, based, as it is, on good sense and experience, has usually been found of great value. Insurance Co. v. Dutcher, 95 U. S. 269, 273, 24 L. Ed. 410; Woolsey v. Funke, 121 N. Y. 87, 24 N. E. 191. Upon this theory, the testimony of Messrs. Dailey and Lancaster was adduced and admitted. Lancaster has been in the employ of the city for 19 years, in the bureau of final disposition. He was an intelligent, clear-minded witness, thoroughly familiar with all the workings of the department. His testimony was, in all respects, in accord with that of Dailey respecting the practical construction of the contract by the parties, and also their operation under it during the five years of its existence. By the testimony of these two witnesses the following facts were established: The department scows were not assigned to the contractors for any definite term, but by the day. The city charged the contractors $6 per day for each day, or any part of a day, commencing at 8 a. m. All scows which were returned empty to the department dumping boards before 8 a. m. were marked discharged on the inspector's books. By this was meant they automatically went out of the employ of the contractor and were not charged against them again, until they went back into their service. Each of these vessels was in charge of a master, who was hired by the city, paid by the city, and over whom the contractors had no control. When a scow was returned empty by the contractors to a dumping board for cargo, she was delivered into the custody of the city, acting through its inspector, and the contractors had absolutely nothing further to do with her, until she was reloaded and again turned over to their tugs for removal. During

the interim, she was in charge of the inspector, with her own master on board, to look after her; was made fast to the city's wharf under the city's dumping board; was loaded by persons over whom the contractors had no control; was shifted and made fast under the directions of the inspector; and her cargo was trimmed and sorted over by persons not in the employ of the contractors.

There are two other facts proven in the case, which strongly support the contention of the contractors. (1) The city entered into an agreement with some party or parties, whereby the latter obtained the privilege of picking over the cargoes loaded upon the scows, and, as a part of the consideration for this privilege, agreed that their employés should do the actual hauling and shifting of the scows under the direction of the city inspector. (2) If anything occurred while the scows were under the various dumping boards, which required the assistance of tugs to shift them, or, in case of their springing a leak, to pump them out, the city hired tugs for that purpose and paid the tugs for the services so rendered.

Subdivision 1 of the contract, page 17, provides as follows:

"The above-mentioned prices or sums shall be the sole compensation for the work to be performed under this contract, and no claim shall be made by the contractor for any greater or extra compensation. * * *"

If the vessels, during the period referred to, were in the custody and care of the contractors, or under the contractors' control, the city certainly would not hire these tugs and pay for them.

At the termination of the case, the question was raised whether or not it was a fault on the part of the contractors not to have removed No. 36 after her loading had been completed at 3:30 on the afternoon of the day in question. The issue was not raised by the pleadings, and the city did not regard it as a fault at the time. On the contrary, it evidently recognized No. 36 as being in its own care and custody, for it paid the bill of the tug Automatic for putting her to a dock, after she had broken adrift and injured the schooner. Further, the captain of the Bat says No. 36 was hauled out and made fast alongside of him at about 5 p. m., and her master went ashore for the night. On the evidence in the case it is fair to assume that the going ashore of the master of the scow shows it was well understood at the time that she would not be taken away until the following morning. The contractors brought the Bat empty to the dump that day, and there is nothing in the contract which required them to tow away No. 36 until one of their tugs returned to this bulkhead. There is no provision in the contract requiring the contractors to move the scows within a limited time, after they are loaded, and if there were any intention between parties to limit or restrict that time, the instrument should say so in appropriate words. The court cannot read into the contract such a provision, especially in view of the practical construction which has been placed upon the contract by the parties themselves. The city, acting through its servants and employés, placed the boat in a dangerous position, improperly secured. That was the proximate cause of the damage.

Assuming that the contractors were notified about 3:30 in the afternoon that the scow was loaded, there is nevertheless no change in the situation. No doctrine of reasonable time can be invoked in this case either from the provisions of the contract or from the practice of the parties.

We are not concerned here with any question as to the proper performance of the contract by Dailey & Ivins, but only as to their responsibility and liability for the damage done.

In view of the reasons outlined, it is unnecessary to consider the second ground upon which the contractors resist liability, but it may be remarked, in passing, that on either branch of the case, the city has failed to sustain the burden of proof cast upon it.

Libelant may have a decree for the amount of its damages, with costs, and the petition of the city will be dismissed with costs.

In re BUSHNELL.

(District Court, D. Connecticut. July 9, 1914.)

No. 3002.

1. BANKRUPTCY (§ 346*)—PREFERRED CLAIMS—TAXES.

Where a preferred claim by a city and town against a bankrupt for unpaid taxes is supported by sworn valuations, neither unjust nor illegal, it must be allowed as preferred, as provided by Bankr. Act (Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447]) § 64a, without reference to the hardship thereby occasioned general creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 535; Dec. Dig. § 346.*]

2. TAXATION (§ 335*)—ASSESSMENTS—TAXPAYER—ESTOPPEL.

Where there is no competent evidence on which to base a finding that the assessed valuation of a bankrupt's property was either unjust or illegal, the taxpayer is bound and estopped by his own statements in lists returned by him as to the nature, title, and value of his property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 562; Dec. Dig. § 335.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Henry E. Bushnell, bankrupt. Appeal by the City and Town of Meriden from a referee's order disallowing certain taxes and interest owed by the bankrupt and claimed to be due the city and town, under Bankruptcy Act, § 64a. Reversed.

Geo. A. Clark, of Meriden, Conn., for town of Meriden.
Alfred B. Aubrey, of Meriden, Conn., for city of Meriden.
Wm. C. Mueller, of Meriden, Conn., for trustee.

THOMAS, District Judge. The city of Meriden claims to be a preferred creditor of the bankrupt, Henry E. Bushnell, for city taxes,

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

with interest due and unpaid amounting on June 11, 1913, to $688.80 for the years and in the amounts as follows:

Year.	Assessment.	Tax.	Interest.	Total.
1906	$6700	$73.70	$31.09	$104.79
1907	6700	80.40	28.34	108.74
1908	9975	79.80	22.54	102.34
1909	9975	84.79	18.02	102.81
1910	9900	84.15	11.99	96.14
1911	9900	84.15	5.68	89.83
1912	9900	84.15	——	84.15

The town of Meriden also claims to be a preferred creditor for taxes and interest amounting on said day to $737.20, for the years and in the amounts as follows:

Year.	Assessment.	Tax.	Interest.	Total.
1907	$6700	$88.10	$33.11	$121.21
1908	9975	100.75	30.81	131.56
1909	9975	100.75	23.76	123.51
1910	9900	101.00	15.75	116.75
1911	9900	110.90	10.57	121.47
1912	9900	121.79	.91	122.70

Said taxes were assessed and levied by the city and town upon personal property of the bankrupt, consisting of goods and property used by him in the business of a retail grocery and liquor store, about which the dispute is in this case, and upon horses, wagons, and musical instruments owned by him, about which there is no dispute.

The amounts of said assessments for the several years as shown by the assessment lists, were as follows:

Year.	Assessment on Am't Employed in Merchandise and Trade.	Assessment on Horses, Wagons, and Musical Instruments.
1906	$6000	$700
1907	6000	700
1908	9000	975
1909	9000	975
1910	9000	900
1911	9000	900
1912	9000	900

The trustee claims that the assessments as to the amounts employed in merchandise and trading were invalid because the amounts thereof were excessive. As to the assessments on the horses, wagons, and musical instruments there is no dispute. The evidence offered by the trustee in support of the disputed amounts was the testimony of the bankrupt and of the trustee, together with the inventory, schedules, and tax returns which were introduced in evidence. It was not shown that the remedies prescribed by the statutes of Connecticut to obtain relief from excessive assessments had been pursued at any time by the bankrupt or by the trustee with respect of any of the assessment valuations in dispute. It was shown that in each of the years mentioned, (excepting 1912) the bankrupt returned his assessment lists to the board of assessors, subscribed and sworn to by him in person, as re-

quired by the statute laws of Connecticut, and that in all said lists so returned the amounts employed in merchandise and trade were set forth in the same amounts that the trustee now disputes. It was also shown that the original assessment lists, including the personal property of the bankrupt and the items and amounts employed in merchandise and trade, disputed by the trustee, were the same lists subscribed, verified and returned by the bankrupt. As to the assessed valuation of horses, wagons, and musical instruments mentioned in said tax assessment lists, no objection was made by the trustee, but the referee did not allow or include said items in the amount which he fixed as the total assessed valuation. From the testimony of the bankrupt, which was the only evidence offered, I find that all of the assessments (excepting 1912) were properly prepared, and were not excessive.

The referee concluded that the amount proper to be assessed as the "amount employed in merchandise and trade" was not above the amount set opposite the respective years, as follows:

Year.	Assessment.
1906	$6000
1907	6000
1908	5500
1909	5500
1910	5000
1911	5000
1912	3000

—and passed an order that the taxes be computed upon each year's assessment, as above indicated, and allowed the city $500.35 and the town $487.35. This conclusion was partly reached upon the testimony of the trustee, whose knowledge of any of the matters in question did not begin until after the last assessment in question was made, and upon the testimony of the trustee as to the amount for which said goods were thereafter sold. This evidence was sufficient to justify the conclusion as to $3,000 being the amount proper to be allowed for 1912, but manifestly nothing upon which a conclusion could properly be based for the years 1906–1911, inclusive. Nor was any evidence offered, other than the testimony of the bankrupt, to show the value of the property in dispute during the years 1906 to 1911, inclusive, which was indefinite in character.

[1] The referee held that it was "very unjust to general creditors that the whole amount received from the sale of personal property should be taken for taxes on that property." While it may be unjust, yet it constitutes no legal reason for the disallowance of the amount due, unless it is shown by competent evidence that the valuations are unjust or illegally made. From the record I cannot find from competent evidence, that the referee's finding is correct, for it appears that the sworn valuations are neither unjust nor illegal. Such being the case, the taxes must be paid as a preferred claim, no matter what hardship is thereby worked upon the common creditors.

In New Jersey v. Anderson, 203 U. S. 483, 489, 27 Sup. Ct. 137, 139 (51 L. Ed. 284) the Supreme Court, speaking by Mr. Justice Day, said:

"The requirement of the present law (section 64a) is a wide departure from the act of 1867, and specifically obliges the trustee to pay all taxes legally due and owing, without distinction between the United States and the state, county, district, or municipality.

"An argument is made to the alleged injustice of this requirement, in that it may take away from the local creditors in the state where the property of the corporation is situated practically all the assets of the corporation in favor of the state where the corporation is organized, but has no business or property. And it is urged that to permit a state under such circumstances to have a preference in the payment of taxes would give to it an advantage which it could not otherwise obtain for want of charge or lien upon the property. But considerations of this character, however properly addressed to the legislative branch of the government, can have no place in influencing judicial determination. It is the province of the court to enforce, not to make the laws, and if the law works inequality the redress, if any, must be had from Congress."

See, also, In re Weissman (D. C.) 178 Fed. 115.

[2] If the bankrupt from 1906 to 1911, inclusive, had believed that the assessments were too high, the statute laws of the state afforded him ample remedy for a reduction of those assessments, and neither he nor his trustee can now complain that those assessments were excessive. If there is no competent evidence from which it may be found that the assessed valuation was unjust or illegal, a taxpayer is bound and estopped by his own statements, as to the nature, title, and value of his property. Waterbury v. O'Loughlin, 79 Conn. 630, 66 Atl. 173; Union School District of Guilford v. Bishop, 76 Conn. 695, 58 Atl. 13, 66 L. R. A. 989; 37 Cyc. 994; 5 Cyc. 341.

From the record therefore, I find that the amounts of the assessments should be as follows:

Year.	Assessment on Amount Employed in Merchandise and Trading.	Assessment on Horses and Musical Instruments.
1906	$6000	$700
1907	6000	700
1908	9000	975
1909	9975	975
1910	9900	900
1911	9900	900
1912	2100	900

—upon which the tax and interest upon the tax may be computed for both the city and town (excluding the year 1906 for the town), together with interest to June 11, 1913.[1]

Let a decree be entered accordingly.

[1] In view of the conditions existing in this court since that date, of which counsel on both sides are cognizant, it seems inequitable to allow interest beyond the date when the appeal was taken, and while the court may not have the power to order that no interest be allowed or collected, yet it trusts that this suggestion may be adopted as effectually as though such an order were passed.

THE NORWOOD.

(District Court, W. D. Washington, S. D. July 9, 1914.)

No. 1265.

1. COLLISION (§ 71*)—MOVING AND MOORED VESSEL.
A steamer, being navigated down a river under usual and ordinary conditions, *held* in fault for a collision with a scow lying at a wharf.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.*]

2. COLLISION (§ 132*)—MEASURE OF DAMAGES.
Restitution is the rule of damages for collision, where the injured vessel is not a total loss and repairs are practical.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 286; Dec. Dig. § 132.*]

In Admiralty. Suit for collision by the Grays Harbor Construction Company against the steamship Norwood, Sudden & Christensen, claimants, and the Soule Tug & Barge Company, owner of the tug Hoquiam. Decree for libelant against the Norwood.

C. W. Hodgdon, of Hoquiam, Wash., and Frederick H. Murray and Charles W. Stewart, both of Tacoma, Wash., for libelant.

John C. Hogan, of Aberdeen, Wash., for respondents Sudden & Christensen and steamship Norwood.

Hudson, Holt & Harmon, of Tacoma, Wash., for respondent Soule Tug & Barge Co.

CUSHMAN, District Judge. [1] A libel was filed herein to recover damages on account of a collision between the steamship Norwood and a scow belonging to libelant. Claimant answered, denying negligence in the navigation of the Norwood, and alleging that, at the time of the collision, the Norwood was in the exclusive control, direction, and management of the tug Hoquiam and its master, which was towing the Norwood down the Hoquiam river, and averring that the collision was either the result of an inevitable accident, or due to negligence on the part of the tug and contributory negligence on the part of libelant. Thereafter, an amended libel was filed, charging the collision to have been caused through the fault of the Norwood and the tug Hoquiam.

At the point of collision the river makes an abrupt bend to the left—in going down the stream. At this point the river is about 200 feet wide. The steamer was a lumber-carrying schooner 203 feet long, with a 38.5-foot beam, drawing 19½ feet of water, laden. Her master was a man 49 years of age, who had been following the sea for 24 years—13 years as a master. The Norwood had taken a cargo of lumber about one mile above the point of collision. It was low tide on the 19th day of July, 1912, at 10:44 a. m. and high tide at 5 p. m. The Norwood engaged the services of the tug Hoquiam for the pur-

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

pose of towing her down the Hoquiam river into Grays Harbor proper. The Norwood, in tow of the Hoquiam left the mill dock at 2:15 p. m., and arrived opposite the wharf of the Grays Harbor Construction Company at 3 p. m., two hours before high tide. The day was clear, and there was no obstruction of any kind to the view. It was the usual and customary stage of the tide at which the Norwood and other vessels of her type went down the river. It was customary for such vessels to leave at a stage of tide that would permit them to go over the Grays Harbor bar at high tide. One hour's time was required for the Norwood to go down the river, a distance of about a mile and a half, two hours being required to go from the mouth of the river over the Grays Harbor bar. The river shoals on the left, or inside of the bend, the deeper water being on the outside of the bend, immediately in front of or underneath the wharf of libelant, at which the scow was lying moored, awaiting repairs. This wharf was placed in the position in which it was with the approval of the government engineers. At the time of the collision, the Norwood was being handled by her own crew, the tug having preceded her down the river to assist in getting her around the bend, where the collision occurred. The Norwood struck the mud in the bottom of the river causing her to sheer to port. The master signaled the engineer full speed astern as soon as the vessel struck bottom. The starboard anchor was thrown overboard and the helm put to starboard. The propeller of the Norwood is such that she backs to port, which, with the incoming tide on the port bow of the Norwood swung her bow to starboard, striking the libelant's scow. The tug Hoquiam cast off from the Norwood, made fast to the scow, and towed it across the river to the shallower water, where, having sprung a leak, she listed in such shape as to allow the machinery with which she was equipped, for screening sand and gravel, to slide off the scow into the water. The scow was 17 feet, 10 inches, in width, by 51 feet in length, with a depth of 4 feet, and had on her a screener, weighing several thousand pounds, set up on timbers at a height of 15 feet above the deck of the scow. There was a boiler on the scow about 11 feet high, resting on a brick foundation. Around this machinery was built a house.

It was realized by the captain of the Norwood and the captain of the tug that this was a dangerous bend in the river. The captain of the Norwood testified:

"I won't swear I didn't cut across the bend. I couldn't tell exactly the course without looking back, which I didn't do. At the time of the accident, the Hoquiam was on the port bow. I steered my boat on my own judgment."

While the captain of the Norwood was familiar with the navigation of the river, he was not accustomed to handling, in its navigation, vessels as large as the Norwood. He had only been running the Norwood a short time, and had been navigating a smaller boat theretofore. The Norwood, however, was of the average size of the lumber schooners navigating the river, and larger vessels were accustomed to navigate it past the point of collision. It was shown that no sudden shoaling in the stream at the point of grounding had occurred.

Libelant relies upon the following authorities: The Transit, Fed. Cas. No. 14,138; The Cayuga, 59 Fed. 483, 8 C. C. A. 188; Spencer on Marine Collision, p. 370, 1 et seq.; The Conqueror, 166 U. S. 125, 17 Sup. Ct. 510, 41 L. Ed. 937; Evans v. The Belgenland (D. C.) 36 Fed. 504; The North Star (D. C.) 140 Fed. 263; The Schooner Catharine v. Dickinson, 17 How. 170, 15 L. Ed. 234; Williamson v. Barrett, 13 How. 101, 14 L. Ed. 73; 7 Cyc. 391, 392, 394, 8 and 8b, 390; 10 Cent. Dig. 289. Respondents cite the following cases: Stainback v. Rae, 14 How. 532, 14 L. Ed. 530; Ralli v. Troop, 157 U. S. 406, 15 Sup. Ct. 657, 39 L. Ed. 751; The Lepanto (D. C.) 21 Fed. 651; note 45 Am. Dec. 51, 52; 7 Cyc. 314; 1 Parsons, Sh. & Adm. 541; Williamson v. Barrett, 13 How. 101, 14 L. Ed. 68; The Schooner Catharine, 17 How. 170, 15 L. Ed. 233; Smith v. Condry, 1 How. 28, 11 L. Ed. 35.

In view of the foregoing and the general rule that, where a vessel in motion comes in collision with one moored at the wharf, the presumption is that the fault was that of the vessel in motion, unless the moored vessel was where she should not have been, it is clear that the collision was the fault of the Norwood, and that no negligence is shown on the part of the construction company, either in the location of its wharf, or because of the scow's being kept moored in the position it was at the wharf, as it was of no unusual dimensions. It is also found that no negligence has been shown, contributing in any way to the injury, on the part of the tug Hoquiam.

[2] The scow was raised and repaired. The greater part of the machinery was recovered. Partly influenced by a desire to avoid delay, the machinery was installed by libelant, not upon the injured scow, but upon a new and larger one. Testimony was given to the effect that the cost was no greater for placing this machinery upon the new scow than it would have been to have replaced it on the old.

"In case of the total loss of a vessel in collision, solely through the fault of the other vessel, the measure of damages recoverable by her owner is her market value where she has such a value and it can be shown." Alaska S. S. Co. v. Inland Nav. Co., 211 Fed. 840, 128 C. C. A. ;.

"Restitution is the rule in all cases where repairs are practical, and compensation when the loss is total." Spencer on the Law of Maritime Collisions, § 200.

"But when the injured vessel is not a total loss, and is capable of being repaired and restored to her original situation, the cost necessary to such repair cannot be said to be an incorrect rule of damages." The Granite State, 70 U. S. (3 Wall.) 310, 18 L. Ed. 179.

The testimony on behalf of libelant is very unsatisfactory as to the cost of repairing the old scow and placing the machinery on the new. The following items and amounts will be allowed:

For services of the tug Manette, in raising the scow and machinery..	$ 50 00
Like services upon the part of a dredge..........................	60 00
For diver and tender..	60 00
The bill of Endresen & Co. for repairing the old scow...............	295 00
The cost of removing the salved machinery from the dock and installing it on the new scow..	487 26
	$952 26

Libelant makes certain claims for special damages, on account of the excessive cost to it of sand and gravel necessary to fill its contracts after the collision and before getting into commission the new scow, for loss of profits for the same time, and for lessened value of the scow, even after its repair. The evidence is not sufficient to support any finding of damage upon the latter item.

Owing to the uncertain and indefinite character of the evidence concerning any excessive cost of sand and gravel and as to the loss of any profits because of not being able to use the scow, coupled with the facts that the scow was, at the time of the collision, awaiting repairs; that the length of time which would have been required for that purpose is problematical; that the scow had not lately been, and was not immediately intended to be used in securing sand and gravel; that no satisfactory evidence was offered as to the value of the use of the old scow—it is considered more just and equitable to allow libelant interest, at 6 per cent., on the value of the old scow and machinery from the time of collision until the new scow was put in commission, which was 33 days. For this purpose, the value of the old scow and machinery is found to be made up as follows:

Bare scow	$650 00		
Boiler	500 00		
Pump	725 00		
Engine	90 00		
Screener	800 00		
		$2,765 00	
to which should be added the cost of installing the machinery		487 26	
			$3,252 26

Costs will be allowed respondent Soule Tug & Barge Company, owners of the tug Hoquiam against libelant and claimant, to be equally divided, one-half against each.

JENNINGS v. AUGIR.

In re PAXSON-CADWELL.

(District Court, W. D. Washington, N. D. July 17, 1914.)

No. 2236.

1. Frauds, Statute of (§ 152*)—Defenses—Necessity of Pleading.

The defense of the statute of frauds is unavailable, unless pleaded.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 363-366, 371, 372; Dec. Dig. § 152.*]

2. Frauds, Statute of (§ 66*)—Equitable Mortgage—Delivery of Title Papers.

An equitable mortgage, consisting of the delivery of unrecorded title papers by the debtor to the creditor, is not within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 107; Dec. Dig. § 66.*]

3. Mortgages (§ 30*)—Equitable Mortgages—Delivery of Title Papers—Validity.

Surrender by a bankrupt of an unrecorded deed to certain real property to the grantor, with a clearly shown intention to mortgage the prop-

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

erty to such grantor for advances, consisting of taxes paid on the land and other claims arising out of the property, which was vacant, and therefore in the constructive possession of the grantor, constituted a valid and enforceable equitable mortgage in his favor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 59; Dec. Dig. § 30.*]

In Equity. Action by I. H. Jennings, as trustee in bankruptcy of Paxson-Cadwell, against W. B. Augir. Judgment for defendant.

J. H. Allen, of Seattle, Wash., for plaintiff.
Byers & Byers, of Seattle, Wash., for defendant.

CUSHMAN, District Judge. Plaintiff, as trustee of the estate of Thomas J. Paxson, sues to recover from defendant, an undivided one-half interest in certain lands, alleging the delivery to defendant, more than four months prior to bankruptcy, of a deed thereto by the bankrupt, without consideration, charged to have been done in order to defraud the bankrupt's creditors, and to conceal the fact of his ownership.

The evidence shows: That in February, 1902, the defendant purchased, from the treasurer of San Juan county—half for himself, and half for the bankrupt—the property in question. That, for several years—the exact time is not definitely fixed—the defendant furnished stock for, and was interested with the bankrupt in the farming of, other lands. The record title to the land in question remained in the defendant until September, 1903, when the defendant gave the bankrupt a deed to an undivided half of it, which was never recorded. The lands are vacant and unimproved.

The defendant paid all the taxes thereon from 1903 until 1909. The bankrupt, being indebted to the defendant for such taxes and in other amounts, redelivered the unrecorded deed to the defendant and took back the following writing:

"Seattle, Washington, November 16, 1909.

"This writing certifies that I have received from T. T. Paxson, of Deer Harbor, Washington, an unrecorded deed, dated September 1, 1903, executed by me, conveying to him an undivided one-half of lots one (1) and two (2) in section nineteen (19), lots four (4) and five (5) in section twenty (20), and the northwest quarter of the northwest quarter of section twenty-nine (29), all in township 36 north, range 2 west W. M., on Shaw's Island, in San Juan county, Washington, which deed is delivered to me as a mortgage or lien upon his interest in said land to secure the payment by him of balance found due to me in settlement of account for stock, timber and use of land.

"It is understood that balance will be struck and amount owing ascertained on or before January 1, 1910, at which time said balance shall be payable on demand and bear interest at 8% per annum from said date until paid.

"Witness: [Signed] Wayland B. Augir.
"Ovid A. Byers,
"Residing at Seattle, Washington."

The defendant continued thereafter to pay all taxes on the lands up to and subsequent to the bankruptcy of Paxson. The foregoing receipt recites:

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

"It is understood that balance will be struck and amount owing ascertained on or before January 1, 1910, at which time said balance shall be payable on demand. * * *"

The defendant and the bankrupt did not make the contemplated settlement at the time mentioned, nor at all, before the bankruptcy proceeding. There is no evidence that the failure to settle as intended was on account of the fault or objection of either of them. During 1910, the bankrupt became further indebted to the defendant on account of sales of live stock and wool. In 1911, more than four months after all of these transactions had occurred, Paxson was adjudged bankrupt.

Nothing is shown to support the plaintiff's allegation of fraud. The defendant waives any interest in excess of 6 per cent. per annum, and asserts a lien against the property for the taxes paid by him and other items owing him from Paxson, on account of stock and timber.

[1] The determination of this cause depends upon whether the transactions constitute an equitable mortgage upon the bankrupt's interest in this land. The statute of frauds has not been pleaded against the mortgage or lien asserted by the defendant. This is sufficient to warrant a denial of its consideration. Moses Co. v. Stack-Gibbs Co., 56 Wash. 529, 106 Pac. 207.

[2] Notwithstanding that fact, the question will be considered.

"(c) As a general rule title to land conveyed does not revert to the grantor by the voluntary destruction, cancellation, or surrender of the instrument of conveyance, particularly when the rights of third parties have intervened, but there is some authority for the contention that a redelivery of an unrecorded deed with intent to revest title has by way of estoppel the effect intended.

"(d) It is held in England that on the deposit by a debtor of his title deeds as security for a loan an equitable mortgage arises which is not within the statute. The English doctrine has some following in the United States, but the more generally accepted American rule is to the contrary." 20 Cyc. 223.

The foregoing text but accentuates the fact that broad generalities have no place in ascertaining what equities are controlling in cases of complicated dealing. The English doctrine, that the deposit of title deeds with the intent to mortgage will effect an equitable mortgage, has been approved by the Supreme Court of the United States in Mandeville v. Welch, 5 Wheat. (18 U. S.) 277, 5 L. Ed. 87, and by the Circuit Court in Bank v. Caldwell, 4 Dill. 314, Fed. Cas. No. 4,798. The following also bear upon the question: Hutzler v. Phillips, 26 S. C. 136, 1 S. E. 502, 4 Am. St. Rep. 687; Dycus v. Hart, 2 Tex. Civ. App. 354, 21 S. W. 299; Mussey v. Holt, 24 N. H. 248, 55 Am. Dec. 410.

The English rule has been much condemned as frittering away the statute of frauds, but the reasoning upon which the English cases have been decided is thought to control the present case. In the United States the practice is to record instruments affecting real estate, and the law, generally, provides for making such records, and certified copies thereof, evidence. Consequently the preservation and possession of the original recorded deeds in this country signifies little. The English rule in part grew out of the fact that there the title deeds followed the land.

"In England, title deeds followed the land. The evidence of title lay, not only in the delivery of a deed, but in its continued possession by the grantee. When, therefore, the owner parted with his muniments of title, he parted with the means of disposing of the land. When the deposit was by way of pledge, the pledgee, by his manual possession of the deeds, had the effective power to prevent an untoward disposition of the land, either such as would defraud him, or such as would defraud others ignorant of his rights. But, under our system, it is not usual to consult, or even to inquire about, the original conveyances. They have performed their chief office when they have been recorded. Thenceforth the records become the practical evidence of title." Bloomfield State Bank v. Miller, 55 Neb. 249, 75 N. W. 571, 44 L. R. A. 387, 70 Am. St. Rep. 381.

[3] As long as the deed is unrecorded, and, without fraud on the part of the grantor, returned to him by the grantee—thus putting it in his power to destroy the same, and thereby greatly jeopardizing any evidence of rights thereunder, if not rendering it impossible for the grantee to establish his title—while the rule requiring the best evidence obtains, it appears clear that the reasoning upon which the English cases have been decided would apply and control.

Possession of an obligation by the promisor raises a presumption of payment or satisfaction of the promise. While lands are capable of possession, independent of the paper evidence of title, yet where, in a case such as the present, the lands are unoccupied, or in possession of the grantor, one of the major reasons for such rule, in cases concerning the possession of written obligations, would be present; that is, the intent implied from parting with the possession of the best evidence, the written instrument.

Section 8745, Remington & Ballinger's Code (title 143, § 1, Pierce's Code 1912) provides:

That "all conveyances of real estate or of any interest therein, and all contracts creating or evidencing any incumbrance on real estate shall be by deed."

This has been held to supersede the English statute, in so far as oral leases of real estate are concerned. Richards v. Redelsheimer, 36 Wash. 325, 78 Pac. 934. In Hart v. Pratt, 19 Wash. 560, 53 Pac. 711, it was held:

"Although a lease for a term of years may be required by the statute of frauds to be put in writing, a writing signed by the lessee and delivered to the reversioner is not necessary, in order to effect a surrender of the leasehold interest, if there are acts which are equivalent to an agreement on the part of the tenant to abandon, and on the part of the landlord to resume, possession of the demised premises."

In Lee v. Wrixon, 37 Wash. 47, 79 Pac. 489, it is said:

"Where parents outfitted their son for Alaska, he being without means and in debt, and paid off his debts, amounting to several hundred dollars, under the verbal promise that, if his venture was successful, he would, out of his first earnings, purchase and present them a farm for a permanent home, and in pursuance thereof, upon returning with $5,000, he purchased a farm, taking a deed in his own name, and placed his parents in possession, delivering them the deed, and agreeing to execute a deed to them, the transaction is not a gift, but amounts to an executed contract of sale, with the purchase price paid, and there is such a part performance as to take the case out of the operation of the statute of frauds. * * * And, this being so, it must fol-

low that the appellants [his parents] had an equitable title to the property the moment they entered into its possession, a title that the courts would change into a legal one by compelling the son to execute a deed conveying it to [the appellants]."

It is therefore considered that the surrender by the bankrupt of the unrecorded deed, with the clearly shown intention upon his part to mortgage the property to the defendant, reinforced by reason of defendant's continued possession—constructive though it was—the payment of all taxes for such length of time and the performance of those conditions, the consideration for the contract, are sufficient to take it out of the statute of frauds, and that the defendant has an equitable mortgage, not only for the taxes paid by him, for which he would, in any event, have a lien, by the doctrine of subrogation, but also for the other items of his claim, totaling, in all, $965.18. The circumstances and situation of the parties show that the inclusion in the lien of similar debts arising after the surrender of the deed and prior to settlement of the accounts was in contemplation.

Decree will be entered for the sale of the lands to satisfy defendant's lien thereon, and the costs of suit and sale; the excess over the amount thereof, if any, to be turned over to the complainant.

In re ROBISON et ux.

(District Court, W. D. Washington, N. D. July 2, 1914.)

No. 5249.

1. BANKRUPTCY (§ 396*)—EXEMPTIONS—HOMESTEAD—HOTEL BUILDING.

   Rem. & Bal. Code Wash. § 552, provides that homesteads may be selected and claimed exempt in lands and tenements, with the improvements thereon, not exceeding $2,000 in value, but that the premises must be actually intended and used for a home for the claimants, and shall not be devoted "exclusively" to any other purpose. *Held*, that where the bankrupts used the proceeds of a former homestead to purchase certain real estate improved with a building containing 24 bedrooms and a restaurant conducted by a third person, the whole used as a hotel, and the bankrupts kept five rooms for the use of their family as a home, the premises were not devoted exclusively to a purpose other than homestead, and hence the bankrupt was entitled to an exemption of $2,000 of the value thereof.

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

2. BANKRUPTCY (§ 396*)—EXEMPTIONS—"OTHER FURNITURE."

   Rem. & Bal. Code Wash. § 563, par. 3, exempts to each householder one bed and bedding, and one additional bed and bedding for each additional member of the family, and "other household goods, utensils and furniture" not exceeding $500 in value. *Held*, that "other furniture" as used in such section meant furniture other than beds and bedding.

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

In Bankruptcy. In the matter of bankruptcy proceedings of Milford H. Robison and wife. On application to review a referee's or-

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

der allowing and denying exemptions. Claim of bankrupts as to homestead, allowed, and claim for additional beds, etc., denied.

S. A. Keenan, of Seattle, Wash., for bankrupts.
McClure & McClure, of Seattle, Wash., for trustee.

NETERER, District Judge. This case is for review of an order of the referee in allowing and denying exemptions. The bankrupts are husband and wife, and have two children. They were the owners of a lot in Port Orchard, upon which stands a three-story building. There are 24 bedrooms in the building, about equally divided between the second and third stories. On the first floor is a restaurant, conducted by a third party by permission of the owners, without any charge for conducting the same, to accommodate the inmates of the building and others. The property was acquired from funds received from the sale of a homestead by the bankrupts. A homestead declaration has been filed in the auditor's office of the county in which the property is situated, under the laws of the state of Washington, claiming the property as a homestead. The bankrupts and their family occupy the premises as their home. Five rooms are thus used by the family. The other part of the building, except that part occupied by the family, is used for hotel purposes. The rooms in the building are all furnished. The real estate hotel property is scheduled as worth $2,833. The personal property is scheduled at $500, but appraised by appraisers appointed by the referee at $700. In the original schedule the personal property was not itemized, and an amended schedule was filed by permission of the referee, itemizing all of the personal property, and claiming it all as exempt. The personal property is made up of furnishings, consisting of sets of one bed, carpet, washstand, dresser, and two common chairs for each of 19 rooms, seven beds and mattresses, a stove, one bed lounge, and furnishings for one room, and other property of like character. The referee set over the real estate as exempt, but declined to set over the personal property. The trustee and the bankrupts each filed a petition for review.

The issues to be determined are: (A) Is real estate occupied by the family, the remaining portion used as a hotel, exempt? (B) Is the personal property exempt?

[1] Remington & Ballinger's Code of the state of Washington, § 552, provides:

"Homesteads may be selected and claimed in lands and tenements with the improvements thereon, not exceeding in value the sum of $2000.00. The premises thus included in the homestead must be actually intended and used for a home for the claimants, and shall not be devoted exclusively to any other purpose."

The controlling language in this section which is applicable to this case is contained in the words:

"Actually intended and used for a home for the claimants, and shall not be devoted exclusively to any other purposes."

It does not require any argument to show that the property is not devoted *exclusively* to any other purpose; it being occupied by the

family as a home as fully and as completely as it could be if the remaining portion of the premises were not used for the accommodation of the public. It further appears that the property was purchased from funds derived from the sale of the homestead. The fund which went into the property, therefore, had a special relation—it was a special fund, protected for the benefit of the family from assault by creditors. Upon the purchase of the premises the family began to occupy and has continued to occupy the premises as a home. A declaration was filed under the laws of the state of Washington, declaring the same to be and claiming it as a homestead. Thus every act was done that could be done to appropriate the property and to devote it to the purposes designated by this section of the statute.

It is contended that the greater portion of the property, being devoted to hotel purposes, should be controlling in determining the homestead rights. Such cannot be the construction intended to be placed upon the statute by the Legislature. The exemption created by this act does not limit it in area, but the limitation is placed on value. Hence the controlling feature of this section with relation to the amount or extent must be the value when the other parts of the section, so far as occupancy is concerned and the uses to which the property is devoted, is fulfilled.

The Supreme Court of the state of Washington, in Morse v. Morris, 57 Wash. 43, 106 Pac. 468, 135 Am. St. Rep. 968, says:

"We must look to the spirit and intent, as well as the words, of the statute. Homesteads are generally allowed either as a certain area, or as of a certain limited value. With the first we have no concern; for not only does our statute ignore that theory, but expressly provides that the home shall be exempt to the value of $2,000. The underlying principle is the use to which the property is put, and if it is actually put to a use consistent with the ordinary domestic affairs of the household, and taken together does not exceed in value $2,000, there can be no justification in law or reason for denying to it that character which the Legislature intended."

The California statute is not unlike the Washington statute, and provides, in substance, that the homestead, consisting of a quantity of land and a dwelling house thereon and its appurtenances, not exceeding in value the sum of $5,000 shall be exempt.

In McKay v. Gesford, 163 Cal. 243, 124 Pac. 1016, 41 L. R. A. (N. S.) 303, Ann. Cas. 1913E, 1253, the Supreme Court reversed the lower court and held exempt property used for hotel purposes. The court said:

"Under the rule of liberal construction which it has been repeatedly declared should be extended to homestead laws, in every permissible case where the premises are the bona fide home of the parties, it should be held that the business conducted within the premises is not the paramount and principal purpose; * * * that the home is the main thing not the business; that the business is conducted to enable the parties to maintain a home and not that the parties are incidentally inhabiting the premises for the purpose of maintaining the business."

The Supreme Court of Michigan, in King v. Welborn, 83 Mich. 195, 47 N. W. 106, 9 L. R. A. 803, uses this language:

"But it is insisted that this building was occupied by petitioner and his family for the sole purpose of conducting a hotel, and that therefore no home-

stead right attached. We cannot agree with this contention. The adoption of this doctrine would be in plain defiance of the statute, and render it nugatory as to those engaged in the business of hotel keeping. The benefits of this statute are to be secured to all owners of land which they occupy with their families, and who have no other home. There is no intent apparent anywhere to exclude the families of hotel keepers from the benefits of the act."

To same effect, see Lamont v. Le Fevre, 96 Mich. 176, 55 N. W. 687; and Binzel v. Grogan, 67 Wis. 147, 29 N. W. 895.

The Supreme Court of Idaho, in Kiesel v. Clemens, 6 Idaho, 444, 56 Pac. 84, 96 Am. St. Rep. 278, says:

"There is no limitation in our statutes of Idaho on the amount of land that may be included in a homestead, so long as it is occupied as a residence and does not exceed in value the limitations prescribed by the statute."

And that:

"If other limitations are deemed requisite, they must be fixed by the Legislature, and not by the courts."

The Supreme Court of Iowa, in the case of Cass County Bank v. Weber, 83 Iowa, 63, 48 N. W. 1067, 12 L. R. A. 477, 32 Am. St. Rep. 288, held:

"The portion of property occupied partly as a homestead and partly as a hotel, which was used by them for hotel purposes and by the family of the proprietor, was not divested of its homestead character so as to be liable to execution, since the entertainment of hotel guests and boarders is not necessarily inconsistent with the occupation at the same time by the family of the apartments as part of the home."

The homestead statutes of Washington must control, and exemption statutes are liberally construed.

[2] Section 563, paragraph 3, of Remington & Ballinger's Statutes of Washington, exempts:

"To each householder, one bed and bedding, and one addition[al] bed and bedding for each additional member of the family, and other household goods, utensils and furniture not exceeding $500.00, coin, in value."

The scope of this section must depend upon the construction placed upon the words, "other household goods, utensils and furniture." It does not provide for additional household goods, etc., but *other furniture*. The bankrupts would read that "*other*, etc., furniture," "*additional*, etc., furniture."

The statute names specific personal property, "One bed and bedding, and one additional bed and bedding for each additional member of the family," as exempt, and gives to the debtor the right to select from his *other* household goods and utensils and furniture. This provision is definite and specific, and does not need interpretation. The particular articles of property exempt, being named, excludes additional property of the same class. "Expressio unius exclusio alterius" applies with cogent effect. Arthur v. Cumming, 91 U. S. 362, 23 L. Ed. 438; American Wellworks v. Rivers (C. C.) 36 Fed. 880; Johnson v. Southern Pac. Co., 117 Fed. 466, 54 C. C. A. 508.

The purpose of the statute is manifest. The Legislature knew that the householder should have one bed and bedding and an additional bed and bedding for each additional member of his family, for the

comfort of the home. It also knew that the home required more goods, utensils, and furniture, but believed that the householder could better designate the necessities of the dining room, the kitchen, and other necessary furniture, and delegated the further selection to the head of the family, but limited the amount in value. The household goods may consist of many articles of necessity, and these articles might vary in the minds of different individuals. The home is the paramount consideration. Hence the discretion was given to the debtor to make the additional selection.

A court cannot say, in view of the express provisions of the statute setting aside one bed to each member of the household, that 30 beds should be set aside, or that 7 stoves are necessary.

The bankrupt in this case is entitled to a homestead to the value of $2,000 and to four beds and bedding, and to other household goods, utensils, and furniture not exceeding $500 in value; but, in the selection of this additional property, no other beds are to be included. It appearing that the property is scheduled at $2,833, it is ordered that this matter be referred to the referee, with instructions that if more than $2,000 can be obtained for the property, that $2,000 be paid to the bankrupts, and the overplus to the trustee, and if it cannot be sold for more than $2,000, it be set over to the bankrupts, and that there be set aside to the bankrupts four beds and bedding, and other household goods, utensils, and furniture not to exceed $500 in value, as indicated in this opinion.

In re JOHNSON.

(District Court, D. Connecticut. July 8, 1914.)

No. 2726.

BANKRUPTCY (§ 184*)—PREFERENCES—CONDITIONAL SALES—ACKNOWLEDGMENT—STATUTES—CONSTRUCTION.

Gen. St. Conn. 1902, §§ 4864, 4865, and Pub. Acts Conn. 1905, c. 113, provide that all conditional sale contracts shall be in writing and shall be acknowledged before some competent authority and recorded within a reasonable time in the town clerk's office in the town where the vendee resides, and all such sales not conforming to such provisions shall be held to be absolute sales except as between the vendee and vendor, and the property shall be liable to attachment and execution for the vendee's debts the same as any other property not exempt by law. *Held*, that such acts require acknowledgment of conditional sale contracts by the party or parties who executed the instrument; and hence acknowledgment by the vendor's agent, who had not signed the instrument, was insufficient to make a valid contract, available against the vendee's trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275–277; Dec. Dig. § 184.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Walter R. Johnson. On petition of the Eastern Safe & Vault Company to

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

review a referee's decision denying its prayer for surrender of a safe sold to the bankrupt under a conditional sale contract, or its proceeds. Affirmed.

John Keogh and Nehemiah Candee, both of South Norwalk, Conn., for trustee.
Louis Goldschmidt, of Norwalk, Conn., for petitioner.

THOMAS, District Judge. The Eastern Safe & Vault Company has brought its petition for a review of the referee's decision, in which he denied its prayer that a certain safe forming the subject-matter of the controversy, or the proceeds of sale thereof, be delivered to the petitioner by the trustee of the bankrupt's estate. The safe was in possession of the bankrupt at the time of his adjudication in bankruptcy, and the trustee now claims it as part of the estate.

The facts disclosed by the record show that the bankrupt came into possession of the safe in the following manner:

On July 19, 1910, the bankrupt and his brother were engaged in business at New Canaan, Conn., under the firm name of W. R. Johnson & Co., and on that day a printed blank form, entitled "Memorandum of Order," supplied, and the blank form supposedly filled in by one Leo J. Carroll, a salesman for petitioner, was signed "W. R. Johnson & Co., per H. G. J." (evidently H. G. Johnson), addressed to the petitioner at New York City.

By the order the petitioner was requested to "send at once to W. R. Johnson & Co., Main street, New Canaan, Conn.," the safe in question, and by its terms W. R. Johnson & Co. were to pay the Eastern Safe & Vault Company $228 for the same, in eight installment payments, part in cash and the balance in notes drawing 6 per cent. interest. Some of the notes are still unpaid. The Eastern Safe & Vault Company was not, however, to relinquish its title to said safe, but was to remain the sole owner thereof until the whole of the purchase price was fully paid, together with interest on the notes.

It was also provided therein that in the event of the partnership's failure to make any of the cash payments required, or the note so given when the same became due, then the whole amount of the purchase price remaining unpaid should immediately, after the failure to make any of the required payments, become due, and the Eastern Safe & Vault Company might then, at its option, remove said safe without legal process. W. R. Johnson became successor to the firm of W. R. Johnson & Co.

At the extreme foot of said order, which was printed on a single sheet and has been sent up as part of the evidence, the name "Leo J. Carroll" is written opposite the printed word "Salesman" on the form, but there is nothing to show that his name (though upon the form) was intended for anything more than as indicating the salesman by or through whom the order was received. On the back of the order, however, there is a typewritten form of acknowledgment which, with the changes made therein with pen and ink, now reads as follows:

"State of New York, County of......ss.:

"Personally appeared W. R. Johnson & Co., signer and sealer of the foregoing instrument, to me personally known, and acknowledged the same to be his free act and deed.

"Witness my hand and seal of office this 15th day of September, 1910.

"Jacob A. Mittnacht, Jr., Notary Public, Kings County.

"[Signed] Leo J. Carroll."

There is attached to the back of the order a pink slip certificate of the clerk of the Supreme Court of New York, dated September 20, 1910, certifying that Mittnacht was a notary public of New York state, and duly authorized to take acknowledgments on September 15, 1910, etc.

While the whole of the contents on the face of the "Memorandum of Order" was recorded by the town clerk in volume 27, pp. 722-723, of the Public Records of New Canaan, on September 21, 1910, he did not record the said notary certificate on the back thereof, nor the said certificate of the clerk of the Supreme Court of New York attached thereto; and said Jones testified before the referee that neither the said notary certificate nor the certificate of the clerk of the Supreme Court of New York were on the said instrument when it was sent to or left with him for recording.

In view of the finding of the referee and of his refusal to honor the said prayer of the petitioner, the main question which the court is now called upon to decide is whether or not the conditional sale agreement of W. R. Johnson & Co., having been recorded before bankruptcy proceedings were commenced, was acknowledged in accordance with the law of Connecticut, for, if it was, the petitioner is entitled to possession of the safe as against the trustee of the bankrupt's estate, the trustee (by the amendment of 1910 [Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500)] to section 47a of the Bankruptcy Act [Act July 1, 1898, c. 541, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438)]) being subrogated to all the rights of attaching or lien creditors.

By the General Statutes of Connecticut, §§ 4864, 4865, and Public Acts of 1905, p. 324, c. 113, all contracts for the conditional sale of personal property, other than household furniture, musical instruments, phonographs and phonograph supplies, bicycles, or property exempt from attachment and execution, "shall be in writing, describing the property and all conditions of said sale, and shall be acknowledged before some competent authority and recorded within a reasonable time in the town clerk's office in the town where the vendee resides," and all conditional sales of personal property not made in conformity to these provisions "shall be held to be absolute sales, except as between the vendor and vendee, or their personal representatives, and all such property shall be liable to be taken by attachment and execution for the debts of the vendee in the same manner as any other property not exempted by law."

It will be noticed that, while the statute requires that the writing "shall be acknowledged before some competent authority," it does not say by whom the acknowledgment shall be made; but, if the court

will give the same interpretation to the requirements of this statute regarding the acknowledgment of conditional sale agreements as has been given by the Supreme Court of Connecticut to the statute concerning acknowledgments required in deeds of land, it must conclude that it was intended that the acknowledgment should be made by the party or parties who execute the instrument (Sanford v. Bulkley, 30 Conn. 344), and to reach such a conclusion seems the only logical solution of the main problem presented by the petition for review.

The statute should receive such a construction as will best carry out the evident purpose of its enactment, which was to prevent certain evils that had theretofore resulted to creditors and bona fide purchasers of the vendee, because of the existence, without sufficient notice to the world, of conditional sales like the one here in question. In re Wilcox & Howe, 70 Conn. 220, 39 Atl. 163; National Cash Register Co. v. Woodbury, 70 Conn. 321, 39 Atl. 168; Lambert Hoisting Engine Co. v. Carmody, 79 Conn. 419, 65 Atl. 141.

When we scrutinize Notary Mittnacht's certificate, we find the conditional sale agreement acknowledged by "W. R. Johnson & Co., signer and sealer of the foregoing instrument," whereas the petitioner now claims that, as a matter of fact, neither of the Johnsons appeared before the notary, but that Carroll, its salesman, did, and that he is the person who made the acknowledgment and whose name should have appeared in the notary's certificate, instead of "W. R. Johnson & Co." But if the court were to assume the claim now made as true, and Carroll did in fact make the acknowledgment before the notary, and that the notary's certificate was on the instrument when it was left for record with the town clerk of New Canaan, still, in view of the requirements of the law as interpreted by the court, Carroll's acknowledgment would not be sufficient to satisfy the statute's provisions, and therefore the referee's decision must be upheld. In re Faulkner (D. C.) 181 Fed. 981.

Several minor questions have been raised in the petition for review, but, in view of the conclusion herein expressed relative to the main question involved, it becomes unnecessary to now decide the minor points, and a judgment will accordingly be entered confirming the referee's decision.

Let an order to that effect be entered.

In re RUBIN & LIPMAN.

(District Court, S. D. New York. May 23, 1914.)

1. BANKRUPTCY (§ 415*)—DISCHARGE—OBJECTIONS—REFERENCE TO MASTER—HEARING.

A special master to whom specifications of objection to the bankrupt's discharge is referred for hearing and report cannot properly make a finding of fact with respect to an instrument which is not before him or with reference to which there is no appropriate secondary evidence.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 698–708, 719, 723, 724, 726, 728; Dec. Dig. § 415.*]

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

2. BANKRUPTCY (§ 415*)—DISCHARGE—OBJECTIONS—REFERENCE TO MASTER—HEARING.

Where specifications of objection to a bankrupt's discharge were referred to a master who heard the testimony but died before making his report and a second master was appointed, it was improper for him to make a report on the evidence taken before the first master without again hearing the witnesses.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 698–708, 719, 723, 724, 726, 728; Dec. Dig. § 415.*]

In Bankruptcy. In the matter of bankruptcy proceedings by Rubin & Lipman. Specifications of objection to the bankrupt's discharge having been referred to a second special master after the death of a master first appointed, questions were certified to the court before report.

Leo Oppenheimer, of New York City, for the motion.
Bogart & Bogart, of New York City, opposed.

MAYER, District Judge. In September, 1911, specifications of objections to the discharge in bankruptcy of Rubin & Lipman, individually and as copartners, were referred to Nathaniel S. Prentiss as special master, for examination, testimony, and report. Hearings proceeded before Mr. Prentiss, and, briefs having been submitted, the matter was thereupon closed. Thereafter the papers and exhibits in the case were destroyed by fire; Mr. Prentiss having had his office in the Equitable Life building. Before Mr. Prentiss was able to make his report, he died. Proceedings were thereupon referred to another special master for examination, testimony, and report in the place and stead of the deceased special master. In October, 1913, the second special master made his report recommending that the specifications be sustained and that the discharge of the bankrupt be denied. So far as appears, the special master did not have before him any of the witnesses, but he made his report solely on the record developed before the deceased special master. Before the report was filed, Rubin, one of the bankrupts, petitioned the present special master to reopen the proceeding on the grounds: (1) That the witnesses did not appear before the special master, and (2) that in passing upon the specifications the special master did not have before him all of the papers in the proceeding, particularly an important financial statement claimed to have been made by the bankrupt which it was alleged was materially false.

The two questions certified to this court by the special master are as follows:

"(1) Was it error under the rules of practice of this court, and the equity rules, for me to report upon the questions presented by the specifications of objection to the discharge, without having examined the witnesses and heard their testimony?

"(2) Was it error that I passed upon specifications based on the alleged material falsity of the financial statement, without the production before me of that statement or of a verified copy thereof?"

[1] As to the second question, it is impossible for me to understand upon what theory a special master can make a finding of fact

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

in respect of an instrument which is not before him or in regard to which there is not appropriate secondary evidence.

[2] As to the first question, I may say that I regard the presence of witnesses in a contested controversy as vital to its proper determination.

The appellate court in equity cases tried in open court, or in actions at law where the court sits without a jury, necessarily relies greatly upon the findings of fact made by the trial judge. It has long been appreciated that the trial judge has the opportunity of observing the witnesses and seeing much that cannot be adequately reflected in a printed record.

Similarly the District Court must place great reliance upon the findings of fact of special masters, because they bear substantially the same relation to the District Court that the court itself bears to the appellate courts. The District Court rarely needs the aid of special masters on questions of law, but for a prompt and efficient administration in bankruptcy their aid is of great service in settling disputed questions of fact in controversies of a kind which are usually bitterly contested and where the determination of questions of fact very often turns upon the impression made by human beings in the form of witnesses. It is mere travesty for the District Court to approve findings of fact upon the theory that witnesses have been seen and heard when, in point of fact, they have been neither seen nor heard.

The experience of little over a year with the new Supreme Court equity rules in this particular has already demonstrated that (except possibly in cases involving highly technical scientific questions) the trial of cases in open court is much more serviceable in arriving at where the truth lies than was the old system of laying a printed record before the judge.

It may as well be understood for the information of the bar that, unless in a proper case counsel stipulate otherwise, I shall not consider any contested case where the special master has not seen and heard the witnesses, and from this time on no fees will be allowed to any special master who reports on testimony in a contested case which he has not heard where any of the parties desire the personal presence of the special master during the taking of the testimony. I think it fair, however, in this particular case, that I should state that the special master doubtless concluded in good faith that he was performing his full duty because of the fact that all the testimony had been taken before the deceased special master.

An order has been entered in accordance herewith.

THEO. HAMM BREWING CO. v. CHICAGO, R. I. & P. RY. CO.

(District Court, D. Minnesota, Third Division. December 9, 1913.)

COMMERCE (§ 14*) — REGULATION — INTERSTATE COMMERCE — LIQUORS FOR PERSONAL USE—STATUTES.

The Webb-Kenyon Law (Act March 1, 1913, c. 90, 37 Stat. 699), declaring unlawful the shipment of intoxicating liquor which is intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of the state into which it is shipped, does not prevent the transportation of such liquor from one state to another, where it is intended for the personal use of the consignee, though in violation of the law of his state, in that he has not acquired a permit required by the law of his state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 30, 92; Dec. Dig. § 14.*]

Suit by the Theo. Hamm Brewing Company against the Chicago, Rock Island & Pacific Railway Company. Application by complainant for a temporary injunction restraining defendant railroad company from refusing to accept shipments of malt liquor into Iowa, intended for private consumption, and from putting into effect Circular No. 2–C, being a circular of the "Western Trunk Lines" and bearing number I. C. C. No. A–420, and in so far as the same forbids or relates to the shipment of malt liquors sold in Iowa and intended for personal use and private consumption, or their transportation from Minnesota into Iowa by defendant. Application granted on complainant filing a bond for $5,000.

Frederick W. Zollman, of St. Paul, Minn., for plaintiff.
Stringer & Seymour, of St. Paul, Minn., for defendant.

WILLARD, District Judge. The Webb-Kenyon Law declares unlawful the shipment of intoxicating liquor which "is intended by any person interested therein to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such state" into which it is shipped. The beer which Moss, a resident of Iowa, ordered from the plaintiff, whose brewery is established at St. Paul, Minn., and which was to be shipped over the defendant's line of railroad, was not intended by either Moss or the railroad company to be received, possessed, sold, or used in violation of any law of Iowa. The law of Iowa does, however, prohibit the transportation by any common carrier of intoxicating liquors, unless the person to whom the liquor is consigned has a permit. But the Webb-Kenyon Law, while it says that the liquor must not be received, possessed, sold, or used in violation of law, does not say that it shall not be transported in violation of law. If it had been the intention of Congress to prohibit the procurement from points outside of the state by a citizen of Iowa of intoxicating liquors for his own personal use, it would have been very easy to have indicated that by prohibiting the transportation of all interstate shipments.

Assuming, as I do, that the law is valid, I hold that it does not apply to this case.

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

In re DENNETT.

(Circuit Court of Appeals, Ninth Circuit. May 21, 1914.)

No. 2417.

1. MANDAMUS (§ 4*)—REMEDY BY APPEAL—DECISIONS REVIEWABLE.

After the close of the term at which they were entered, all final judgments or decrees pass beyond the control of the court, unless steps have been taken during the term, by motion or otherwise, to modify or correct them; and the action of the court in assuming to modify or set aside a judgment or decree on a motion made after the term is without jurisdiction, and reviewable by writ of error or appeal.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 9–21, 24–34; Dec. Dig. § 4.*]

2. MANDAMUS (§ 157*)—SCOPE OF REMEDY—FEDERAL COURTS.

A petition for a writ of mandamus to a District Court, and the judge thereof, to review the action of the court in attempting to modify a prior decree on a motion made after the term at which such decree was entered, *held* to raise questions of jurisdiction and practice, justifying the issuance of a rule to show cause, that they might be fully presented.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 317–323, 371; Dec. Dig. § 157.*]

At Law. Petition of John Dennett, Jr., and others, for a writ of mandamus to the District Court for the District of Arizona and the judge thereof. Rule to show cause directed.

John Dennett, Jr., and numerous others, have filed their petition in this court praying an order or rule directing the District Court of the United States for the District of Arizona, and the honorable judge thereof, to show cause why a writ of mandamus should not issue out of this court, prohibiting the said District Court and the judge thereof from exercising any jurisdiction over a certain alleged final decree, bearing date February 27, 1913, and commanding said court and the judge thereof to annul and expunge from its records a certain other decree entered of date March 12, 1914.

It appears from the petition that one Charles W. Clark, about January 15, 1912, instituted a suit in said District Court against the Arizona Mutual Savings & Loan Association and the Arizona Trust Company, to be called herein respectively the Loan Association and the Trust Company, in his own behalf as a stockholder in the Loan Association, and in behalf of all other stockholders similarly situated. Clark is a citizen of California, and defendants are citizens of Arizona, and the amount involved is sufficient to give the court jurisdiction.

Prior to April, 1911, the Loan Association became and was insolvent, and the officers thereof, as alleged, organized the Trust Company, and thereafter unlawfully transferred to the Trust Company assets of the Loan Association of the approximate value of $130,000, and about 90 per cent. of the stockholders in the latter association exchanged their stock for stock in the Trust Company; the plaintiff Clark being one who refused to make an exchange of stock. The bill contains, among others, the following averments setting forth the unlawful transfer of the assets:

"That the defendant Trust Company, with full knowledge of all the facts herein set forth, and with full knowledge of the fact that in April, 1911, due to the insolvency of the defendant Loan Association, the officers and directors thereof became and were trustees for the benefit of your orator and other stockholders similarly situated, and that the assets and property of the said defendant Loan Association were thereupon and thereafter impressed and charged with the trust for the benefit of your said orator and other stockholders in said defendant Loan Association similarly situated, and notwith-

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

standing the fact that the said defendant Loan Association had no other debts or obligations than those which it owed to your orator and other stockholders therein similarly situated, the said defendant Trust Company, with full knowledge of all of the matters herein set forth, took over the said assets and property of the said defendant Loan Association."

And, further, that "all of the assets and property of the defendant Loan Association have been used by the defendant Trust Company in the exploitation of various speculative enterprises, in which said defendant Trust Company has engaged, and that in connection with said enterprises the assets of the defendant Loan Association have been used by the said defendant Trust Company and the officers thereof, and that the said assets have been used and have become mingled with certain other assets of the defendant Trust Company subsequently acquired by it, and that by reason thereof your orator and other stockholders in the said defendant Loan Association have acquired equities and rights in connection with said after-acquired property of the said defendant Trust Company, but that it is difficult now to separate and to segregate the assets which have at all times belonged to the said defendant Loan Association, and possession of which was acquired by the defendant Trust Company, as aforesaid, from such, if any, assets as have been acquired subsequently by the defendant Trust Company."

And it is eventually averred that the suit is instituted "to the end that the transactions herein set forth as heretofore made between the defendants above named be annulled and declared void and held for naught, and to the end that an accounting may be had between the two defendants above named, and between the defendant Loan Association and your orator and others similarly situated, and to the end that the property and assets of the defendant Loan Association, in which your orator and others similarly situated has and have respectively an interest, may be conserved and protected, and that a receiver of the defendant Loan Association may be forthwith appointed, with full powers to acquire and take possession of and to marshal the assets of the defendant Loan Association, in whosesoever hands the said assets and properties may be, and to ascertain the amounts due and owing from the said defendant Loan Association to your said orator and other stockholders thereof similarly situated, and that such sums of money, if any, as may be due and owing to the defendant Loan Association, be ascertained and determined, and that your orator and others similarly situated who may desire to intervene herein in support of this bill of complaint may be permitted to do so, and that your orator and such persons as may intervene, as aforesaid, may be awarded such other relief as to a court of equity may seem proper."

The prayer of the bill is for an annulment of the transactions had between the defendants and a restitution of the assets of the Loan Association by the Trust Company to the Association, for an accounting between the defendants, and between the Loan Association and the complainant and other stockholders similarly situated, for the appointment of a receiver with authority to reduce to possession all of the assets of the defendant Loan Association wheresoever found, for a winding up of the affairs of the Loan Association, and for such other and further relief in the premises as the nature and circumstances of the case may require.

Subsequently to the filing of the bill there were four petitions of intervention filed by persons who were original stockholders of the Loan Association, but many of whom had exchanged their stock for stock in the Trust Company. By the petitions it is shown that those who had exchanged their stock had been induced to do so through the fraudulent contrivance and misrepresentations made to them by the defendants in said cause.

The prayer of the interveners is that they be permitted to intervene, and as to the intervening stockholders in the Trust Company that the transactions whereby their stock in the Loan Association was exchanged for stock in the Trust Company be rescinded and set aside, and they be reinstated to their title in the stock of the Loan Association, and that the Trust Company be required to make restitution of the properties and assets to the Loan Association, and that a receiver be appointed to take over all the assets of both said defendants, that an accounting be had between the defendant companies,

as well as between such companies and their stockholders, that a master be appointed to take proofs, and that the affairs of both companies be wound up, and their assets marshaled and distributed to whomsoever may be entitled thereto, and for such other and different relief as to the court may seem proper.

The defendants jointly answered the bill, and, among other things, set out that certain plans were devised whereby preferred shares of the Trust Company stock might be exchanged at par for the stock of the Loan Association, and that, in pursuance of such plans, exchanges of stock have taken place to the extent that the Trust Company is now the owner of about 90 per cent. of the entire outstanding stock of the Loan Association, and as such owner of said stock is and has been the equitable owner of a like proportion of all the assets of the Loan Association.

A reply having been filed, trial was had, and on February 27, 1913, the court made and entered its decree, whereby it was adjudged and decreed:

First. That certain interveners, naming them, were still stockholders in the Trust Association.

Second. That certain other interveners were stockholders in the Trust Company, who had exchanged Loan Association stock for such holdings.

Third. That about March, 1911, those in control of the Loan Association, the Association being at the time insolvent, caused the Trust Company to be organized, for the purpose of taking over the assets of the Association and engaging in business.

Fourth. That as to the interveners who had never exchanged their stock the said proposed transfer of assets was unlawful and invalid.

Fifth. That pursuant to the purpose of the Trust Company's organization all of the assets and properties of the Loan Association were transferred to the former company, since which time said company and its officers had so dealt with such assets and properties of the Loan Association as that they have become confused and inseparably commingled with the assets and properties of the Trust Company; and that at this time it is impracticable and impossible, in justice to the parties to the litigation, to direct and enforce a retransfer of all the original properties and assets so secured by the Trust Company and profits therein from the Loan Association.

Sixth. That the interveners known as "exchanging stockholders" were induced through fraud and deceit to exchange their stock, and it was decreed that they be permitted to rescind the agreements whereby such exchanges were made.

"Seventh. And to the end that the rights of all of the interveners herein and of the outstanding stockholders in the defendant Loan Association who never exchanged their stock therein for stock in the defendant Trust Company may be adequately preserved and protected, the Court hereby confirms the sale and transfer of all of the assets of the defendant Loan Association to the defendant Trust Company, and adjudges that complete title is vested in the defendant Trust Company of, in, and to all of the assets and properties of whatsoever kind or nature heretofore owned by the defendant Loan Association, subject only to the lien and charges hereinafter specified.

"Eighth. And for the further protection of the rights of the said interveners and the said stockholders in the defendant Loan Association who never exchanged their stock therein for stock in the defendant Trust Company, the court adjudges and determines that all of the assets and properties now or hereafter owned or acquired by the defendant Trust Company be, and they hereby are, impressed with the trust and lien in favor of each of the said interveners named herein to the extent and amount set opposite the names of each, and in favor of the stockholders in the defendant Loan Association who never exchanged their stock therein for stock in the Trust Company for the amounts heretofore paid in by such last-named persons in the following names and amounts."

Ninth. That the account of Christy, as receiver of the Loan Association, be approved, and he be discharged.

Tenth. That Sims Ely, Esq., be appointed permanent receiver of the Loan Association and the Trust Company; that he sell so much of the whole of

the assets and properties of the defendant Trust Company as may be necessary, first, to pay and discharge the costs of administration of the Loan Association estate; second, the costs and expenses incident to the administration of the Trust Company's estate; and that thereafter he pay pro rata and in equal shares to each and all the interveners herein and to the stockholders of the Loan Association named in the preceding eighth paragraph of this decree such sums of money as may be received by such permanent receiver until the said interveners and the said nonexchanging Loan Association stockholders named in the preceding eighth paragraph are paid in full the amounts set opposite their respective names; and that the receiver pay the balance remaining, if any, in his hands to the defendant Trust Company for the benefit of such persons as may be lawfully entitled thereto.

The eleventh and twelfth paragraphs deal with the title of the receiver and injunction against disposing of the property of the defendant companies.

The term of court expired of its own limitations April 5, 1913. On that day, but after the adjournment of the court for the term, J. L. Warring and others filed a motion to intervene and an intervening petition in said cause. The motion was not continued over the term or called to the attention of the court until April 14, 1913, when a demurrer was sustained to the petition. Thereafter, on or about July 15, 1913, J. L. Warring and others filed another motion in court, and a petition praying that they be permitted to intervene, to the end that the decree of February 27, 1913, be set aside, and for such other and further relief as to the court might seem appropriate.

The petition for intervention sets forth the filing of the original bill, the decree of February 27, 1913; that the petitioners, except one, are stockholders of the Trust Company; that they adopt the allegations of the bill in so far as applicable; that each of them were formerly owners of stock in the Loan Association, and through fraudulent representations of the defendants were induced to exchange such stock for stock in the Trust Company; that petitioners had no knowledge of the appointment of receivers of either of the defendant companies until some time in February, 1913; and that they had no notice of the pendency of the suit which resulted in said final decree; that the decree is inaccurate, in that the names of several of the stockholders are duplicated in some instances, and larger amounts are decreed than the amounts paid in by the said stockholders; and that both defendant companies are insolvent and unable to pay their just debts and obligations. Other allegations are made attacking the action of the receiver, but they are not material to the present controversy. The prayer of the intervening petitioners is that they be permitted to intervene; that the decree of February 27, 1913, be set aside; that the transaction whereby the petitioners exchanged their Loan Association stock for Trust Company stock be declared fraudulent and void, and that petitioners be reinstated in their former holdings; that an accounting be had; and for general relief.

Thereafter, on March 12, 1914, the court allowed the intervention and modified the decree of February 27, 1913, in that it was decreed that the Trust Company restore to the Loan Association all properties and assets of the latter; that the Trust Company deliver to the receiver all properties of every kind and nature that it received from the Loan Association; and that the cause be referred to the standing master for report touching certain specified conditions.

William M. Seabury, of Phœnix, Ariz., for petitioners.

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

PER CURIAM. [1] It is a rule of law long established that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps have been taken during the term by motion or otherwise to modify or correct them. Bronson v. Schulten,

104 U. S. 410, 415, 26 L. Ed. 797; Sibbald v. United States, 12 Pet. 487, 491, 9 L. Ed. 1167.

A court, in assuming to modify, annul, or set aside a judgment or decree after the term in which it is rendered, is in general parlance considered to have exceeded its jurisdiction. Such excess of jurisdiction is, no doubt, the subject of review by writ of error or appeal. In a case of that kind, it was said by the Supreme Court:

'If, on the other hand, the order made was without jurisdiction on the part of the court making it then it is a proceeding which must be the subject of review by an appellate court." Phillips v. Negley, 117 U. S. 665, 671, 672, 6 Sup. Ct. 901, 903 (29 L. Ed. 1013).

As a general rule mandamus will not lie where there exists an adequate legal remedy; that is, if the legal remedy is as specific, prompt, and competent to afford relief upon the very subject of controversy as mandamus. Under federal practice the writ may be employed in aid of appellate jurisdiction, and the Circuit Court of Appeals is authorized to invoke its assistance in appropriate cases. The writ so employed extends to jurisdiction which might otherwise be defeated by the unauthorized action of the lower court, as well as to jurisdiction actually acquired. McClellan v. Carland, 217 U. S. 268, 279, 280, 30 Sup. Ct. 501, 54 L. Ed. 762.

Or, putting it in another way, the test of jurisdiction in aid of which the appellate court may issue writs of mandamus is not the actual prior exercise of the right by appeal or writ of error, but the existence of the right to review by a challenge to the final decisions or otherwise of the cases or proceeding to which the applications for the writ relate. Barber Asphalt Pav. Co. v. Morris, 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761.

Mandamus will issue, therefore, by appellate jurisdiction to annul the acts of an inferior court, where such inferior court has acted wholly without its jurisdiction. Such a case is Ex parte Bradley, 7 Wall. 364, 377 (19 L. Ed. 214), the court saying:

"The ground of our decision upon this branch of the case is that the court below had no jurisdiction to disbar the relator for a contempt committed before another court. * * * No amount of judicial discretion * * * can supply a defect or want of jurisdiction in the case. The subject-matter is not before it; the proceeding is coram non judice and void."

The principle has been applied in cases where the inferior federal courts have assumed jurisdiction of removal causes, and acted beyond their power and judicial authority in so doing. Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667; Virginia v. Paul, 148 U. S. 107, 13 Sup. Ct. 536, 37 L. Ed. 386; In re Winn, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873. In the first of those cases the court says of the writ:

"Its use has been very much extended in modern times, and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty, and by virtue of their office, bound to do. It does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds."

In the last case cited the same principle is invoked, the court being careful at the same time to state the limitations governing the issuance of the writ in the following language:

"Mandamus, it is true, never lies where the party praying for it has another adequate remedy. The writ of mandamus was introduced to supplement the existing jurisdiction of the courts and to afford relief in extraordinary cases where the law presents no adequate remedy. * * * In these cases writs of mandamus must not be permitted to usurp the functions of writs of error or appeals, or to take their place where they offer an adequate remedy to the aggrieved party. It is only in cases where the record makes it clear, as a matter of law, that the Circuit Court was without jurisdiction to take any action whatever, that the writ of mandamus lies."

In Ex parte Harding, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392, the doctrine as applied in this case (The Winn Case), and other similar cases, was limited in its proper application to causes where the record presents a total absence of jurisdiction involving no element of discretion. In that case the court goes into an elaborate and comprehensive review of the cases, such as Ex parte Hoard, 105 U. S. 578, 26 L. Ed. 1176, apparently holding a contrary view to the Winn Case, and other like cases, and criticises and limits in some respects the expressions of the court touching the province and application of the writ of mandamus, but still holds that all of the latter line of cases were rightly decided, upon the principle of a total absence of jurisdiction and involving no element of discretion.

In another removal cause (In re Metropolitan Trust Co., 218 U. S. 321, 31 Sup. Ct. 20, 54 L. Ed. 1051), decided shortly prior to Ex parte Harding, but not mentioned in that case, in its review of the seemingly conflicting holdings of the court on the subject, the court awarded mandamus as an appropriate remedy. And the particular feature which seems to render it pertinent here is that the court exercised its authority to set aside a judgment rendered upon demurrer, after the term at which it was rendered, upon the erroneous idea that it was without jurisdiction in the first instance to sustain the removal, a motion having been interposed to remand. In its disposition of the case the court, speaking through Justice Hughes, says:

"Nor could the court exercise the general power which it possesses to modify or set aside its orders or decrees prior to the expiration of the term at which the final decree is entered; for in this case that term had ended before the motion was made"

—citing cases, and among them Ex parte Sibbald and Bronson v. Schulten, supra, and concludes:

"When the motion was made, the court was without jurisdiction to vacate the decree. As the court, in granting the motion, exceeded its power, mandamus is the appropriate remedy."

There are two aspects upon which the court may have predicated lack of jurisdiction in the Circuit Court: First, in its want of power to act at all, the matter being within its discretion in the first instance whether to retain or remand the cause; and, second, in its want of authority to annul a judgment or decree after the term in which it was rendered. The court having taken the pains, however, to state the rule, in the course of the disposal of the case, which limits the power

of the court to set aside its own decree to the term in which it was rendered, we assume that by so emphasizing the doctrine it based its decision largely, if not wholly, upon the lack of power in the Circuit Court after the term had ended, and hence held that in such a case mandamus was the proper remedy. The holding must have been so made, notwithstanding the rule announced in Phillips v. Negley, supra, that such a judgment was subject to review on appeal or writ of error.

[2] Based upon this case and the previous authorities cited, and the discussions as to when the remedy by mandamus in aid of appellate jurisdiction is available, we are impressed that where a court has attempted, subsequent to the term at which a judgment or decree is rendered, to set aside or annul such judgment or decree, it presents a case where the court has acted wholly without jurisdiction or power in the premises, and its act in that respect is void, and that mandamus will lie to correct the error. But as this is one of the controlling questions in the case, and the cause having been presented ex parte, we withhold our final judgment touching it until opposing counsel can be heard on a rule to show cause.

The District Court was of the view that the decree of February 27, 1913, was entered without jurisdiction, because outside of and beyond the issues made in the pleadings in the original cause. Of this we express no opinion; neither do we indicate any opinion as to whether the cause was still in the breast of the court when the order or decree of March 12, 1914, was rendered.

Upon the showing made, however, we are of the view that the order to show cause should be issued as prayed. All parties can then be heard, and the matter fully presented.

JOHNSON v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. April 14, 1914. On Rehearing, June 9, 1914.)

No. 2017.

1. PROSTITUTION (§ 4*)—WHITE SLAVE ACT—EVIDENCE.

In a prosecution for violating the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [U. S. Comp. St. Supp. 1911, p. 1343]), evidence *held* sufficient to sustain a conviction of accused for causing a woman to be transported, in interstate commerce, for the purpose of having sexual intercourse with her, but insufficient to sustain counts for causing the same woman to be transported for purposes of prostitution.

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

2. STATUTES (§ 217*)—CONSTRUCTION—EXTRANEOUS REFERENCES.

In the absence of ambiguity apparent on the face of the statute, extraneous references to public debates, as indicating the author's intent in the introduction of a statute, are inadmissible and cannot be considered,

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

but the meaning is to be determined exclusively from the text, with the words taken in their ordinary and usual meanings.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 293; Dec. Dig. § 217.*]

3. PROSTITUTION (§ 1*) — WHITE SLAVE ACT — "PROSTITUTION" — "OTHER IMMORAL PURPOSE."

The White Slave Act makes it a felony for any one knowingly to transport, or cause to be transported or aid or assist in obtaining transportation for, or in transporting in interstate or foreign commerce, any woman or girl for the purpose of prostitution or debauchery, or any other immoral purpose. *Held*, that while the term "prostitution" involves the financial element and signifies commercialized vice, the words "other immoral purpose" as used in the statute are not limited to kindred offenses involving the sharing of profits by the hire of the woman's body, and hence their meaning was fulfilled by sexual debauchery between the female and the defendant involving no financial element.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 6, pp. 5740, 5741.]

4. COMMERCE (§ 16*) — WHITE SLAVE ACT — POWER OF CONGRESS — COMMERCE CLAUSE.

Since the term "commerce" as used in the federal Constitution (article 1, § 8, cl. 3) granting to Congress the right to legislate with reference to interstate and foreign commerce, is not limited to traffic in or an exchange of commodities, but extends as well to the transportation of persons, and includes navigation and intercourse, giving to Congress not only the right to regulate, but actually to prohibit transportation in the interest of the general welfare, Congress had complete power to pass the White Slave Traffic Act, making it a felony to transport or cause to be transported any woman or girl for prostitution, or any other immoral purpose, though the statute be construed as extending beyond commercialized vice to include transportation in interstate commerce of a female for the purpose of mere unlawful sexual intercourse with defendant.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 2; Dec. Dig. § 16.*

For other definitions, see Words and Phrases, vol. 2, pp. 1287–1298; vol. 8, pp. 7606, 7607.]

5. CRIMINAL LAW (§ 84*)—PLACE OF TRIAL—WHITE SLAVE ACT.

Since the violation of the White Slave Act is an abuse of interstate transportation, Congress was entitled to provide, as it did, that the offense should be cognizable in any district from, through, or into which the transportation led.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 115–124; Dec. Dig. § 84.*]

On Rehearing.

6. CRIMINAL LAW (§ 703*)—DUTY OF DISTRICT ATTORNEY.

Where the District Attorney, in a prosecution for violating the White Slave Act, in good faith stated to the jury that one of defendant's purposes in transporting the female in question was to compel her to commit the crime against nature upon his body, but the attorney subsequently discovered that he could not prove such statement, it was his duty at once to withdraw the same.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1659; Dec. Dig. § 703.*]

7. WITNESSES (§ 401*)—CROSS-EXAMINATION—CONCLUSIVENESS OF ANSWER—COLLATERAL MATTERS.

Where, in a prosecution for violating the White Slave Act, defendant testified in his own behalf, and on cross-examination was asked if he

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

had not beaten a certain woman with his fist, and answered in the negative, the government could not introduce evidence to show the contrary, under the rule that a cross-examiner, to show the character of the party from his own admission, may go into collateral matters, but he is bound by the answers he obtains.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1270; Dec. Dig. § 401.*]

8. Criminal Law (§ 878*)—Separate Counts—Partial Invalidity.

The rule that if a criminal act is charged in several ways, and sentences run concurrently, one good count, supported by competent evidence, will sustain a general verdict of guilty does not apply, where the elements involved in the two sets of counts are not identical, and the trial judge in fact assessed the punishment on the basis that defendant was guilty of both offenses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2098–2101; Dec. Dig. § 878.*]

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

John Arthur Johnson was convicted of violating the White Slave Act, and he brings error. Reversed for resentence on the sexual intercourse count, and for retrial on the prostitution count.

Benjamin C. Bachrach, of Chicago, Ill., for plaintiff in error.

James H. Wilkerson and Harry A. Parkin, both of Chicago, Ill., for the United States.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

BAKER, Circuit Judge. Plaintiff in error, defendant below, was convicted of violating the White Slave Traffic Act, which makes it a felony for any one knowingly to—

"transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, any woman or girl for the purpose of prostitution or debauchery or any other immoral purpose."

One group of counts on which defendant was held charged that he procured the transportation of a girl from Pittsburgh to Chicago for the immoral purpose of having sexual intercourse with her. In another group the purpose laid was prostitution.

[1] Respecting the first group the evidence showed: That the girl, in financial straits at Pittsburgh, endeavored to reach defendant by long-distance telephone. That an employé of defendant answered, and to him she told her plight. That the next day she received a telegram, signed "Jack," asking what she needed for expenses. That in reply to her answer she received a telegram reading: "I am sending you $75. Go to Chicago at Graham's and wait until I get there. Jack." That she drew the $75 from the Postal Telegraph Company, purchased therefrom a ticket to Chicago, and traveled to that city on the Pennsylvania Railroad, and that defendant shortly thereafter had sexual intercourse with this girl in Chicago.

No direct evidence was adduced to establish the authenticity of the

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

telegrams. But from defendant's statement on the witness stand that he would not say that he had or had not sent them, from the fact that defendant on his arrival in Chicago called the girl by telephone at Graham's, and from the fact as testified to by the girl that defendant at their first meeting inquired, "Did you receive the $75 I sent you?" the jury were warranted in finding that defendant was the author of the messages and the furnisher of the money for the girl's transportation.

On the evidence thus far cited, a suspicion might be entertained that the purpose of the transportation was sexual intercourse. This evidence also is consistent with the theory that defendant had no sexual intent at the time he aided the girl in her travels. And the presumption of innocence would require the adoption of this theory if here the evidence stopped. But the record further establishes that before aiding this girl defendant habitually indulged in promiscuous sexual intercourse; that this girl was a prostitute; that defendant first met her several years before in a brothel; that throughout the period of their acquaintance they maintained sexual relations; and that frequently defendant in his journeys about the country took the girl with him, or had her travel to meet him, and always for the purpose of sexual intercourse. This additional evidence furnished a basis from which the jury could justifiably draw the inference of fact that when defendant furnished the transportation he did so for the purpose of having sexual intercourse with the girl after their arrival in Chicago, just as a jury may reject a defendant's protestation of innocence in passing counterfeit when the evidence shows that prior to the act in question he had habitually or frequently passed other similar counterfeits.

But a different situation affects the prostitution counts. Telephone and telegraph messages contained no suggestion of prostitution. The only fact is that several days after the girl's arrival in Chicago defendant supplied the money to enable her to open and conduct a brothel. This fact might lead to a suspicion that defendant when providing transportation had the intent to aid her subsequently in her profession. But criminal convictions cannot be allowed to rest on suspicion. And there were no supplementary facts like those that support the sexual intercourse counts—no proof that defendant had ever been connected with or interested in brothels, or that prior to the act in Chicago he had ever aided this or any other girl to engage in prostitution.

[2] Against upholding the conviction on the sexual intercourse counts defendant's first insistence is that the intention of Congress was otherwise. By noting current history we may be aware that the act, when applied to merely unlawful sexual intercourse, has been used as an instrument for blackmail or other oppressions; but that has nothing to do with a judicial ascertainment of the meaning and constitutionality of the act when it was adopted. Reference is made to public debates as indicative of the author's intent. But the writer of a bill may explain his purpose to his fellow members, and they may vote for it solely because in their judgment it has a wider or narrower

scope than he states. This is one of the considerations that ages ago led to the adoption of the universal primary canon of interpretation that in the absence of ambiguity apparent upon the face of a document extraneous references are not permissible, and the meaning is to be gathered exclusively from the text with the words taken in their ordinary and usual meanings.

[3] A further urge is that the words "prostitution or debauchery or other immoral purpose" do not cover sexual intercourse that is merely unlawful. "Other immoral purpose" are words of such generality that a criminal conviction thereunder could not be tolerated for acts whose purpose was any and every sort of immorality. They must be limited to that genus of which the preceding descriptions are species. Defendant contends that the nexus, the attribute in common, is "commercialized vice"; that a defendant cannot be guilty unless it be shown that he is fiancially concerned in "the traffic in women." Prostitution, the first species, involves the financial element. But there is no condition in the statute that the furnisher of transportation shall be guiltless unless he shares in or somehow profits by the hire of the woman's body. And in Hoke's Case, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905, a conviction for transporting a woman "for the purpose of prostitution" was upheld without proof that the woman was a "white slave," an article of barter in "the traffic in women," or that the defendant was interested in her earnings. Debauchery, the other named species, is restricted by its association with the first species to sexual debauchery, a leading of a chaste girl into unchastity. No financial element is necessarily involved in sexual debauchery; the statute introduces no such condition; and Athanasaw's Case, 227 U. S. 326, 33 Sup. Ct. 285, 57 L. Ed. 528, Ann. Cas. 1913E, 911, teaches that the providing of interstate transportation for the mere purpose of attempting to lead a chaste girl into unchastity is a felony without proof that the defendant intended to be the debaucher, or that he expected to profit by the girl's hire if she should become a prostitute. So it becomes apparent that "commercialized vice" or "the traffic in women for gain" is not the common ground, that the nexus indicative of the genus is sexual immorality, and that fornication and adultery are species of that genus. This conclusion is fortified by United States v. Bitty, 208 U. S. 393, 28 Sup. Ct. 396, 52 L. Ed. 543, where in construing the prohibition of the immigration act against the importation of alien women "for the purpose of prostitution or any other immoral purpose," the latter phrase was held to mean unlawful sexual intercourse regardless of financial considerations. See, also, United States v. Flaspoller (D. C.) 205 Fed. 1006, in reference to the White Slave Traffic Act.

[4] Lawful power in Congress to pass an act of this scope is challenged. There was a time when it would have been interesting to examine the contention that the word "commerce" in the commerce clause of the Constitution means only "traffic in or an exchange of commodities." But when the ultimate tribunal long ago definitely decided that the term also includes "navigation and intercourse," that "transportation of persons" in and of itself is "commerce," and that

"commerce" may not only be "regulated," but actually prohibited, in the interest of the general welfare, no room was left for profitable discussion. Passenger Cases, 7 How. 283, 12 L. Ed. 702; Gloucester Ferry Case, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158; Rahrer's Case, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572; Covington Bridge Case, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962; Addyston Pipe Case, 175 U. S. 226, 20 Sup. Ct. 96, 44 L. Ed. 136; Lottery Case, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492; Hoke's and Athanasaw's Cases, supra. Whole ranges of acts, like those regulating carriers, safety appliances, employers' liability for injuries to interstate trainmen, hours of dispatchers' work, 28-hour confinement of live stock, movements of diseased persons or animals, pure food, etc., are upheld only on the basis that "transportation is commerce." Nothing remains but to say that the present act obviously is concerned with the interstate transportation of persons. How far and with what governmental purposes the undoubted power shall be exercised must be determined by the legislative, not the judicial, department of government.

[5] Defendant questions the right of the government to try him in the Northern District of Illinois. But inasmuch as the trial is for an abuse of interstate transportation, we are of the opinion that Congress had a clear right to provide, as it did, that the offense should be cognizable in any district from, through, or into which the transportation led.

Minor objections to the course of the trial have been brought to our attention. Suffice it to say that we have carefully examined the entire record and find nothing substantial of which defendant may justifiably complain except the submission of the prostitution counts.

Inasmuch as the sentence is based on the two sets of counts jointly, the judgment is reversed for resentence on the sexual intercourse counts and for retrial of the prostitution counts if the government has additional evidence to support them.

On Rehearing.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

BAKER, Circuit Judge. In its petition for rehearing the government calls attention to an overlooked item of evidence to support the submission of the prostitution counts. Not only was the state of the evidence as given in the opinion unquestioned in the government's briefs and at the oral argument, but the position was taken that the prostitution counts were sufficiently sustained by proof that the prosecuting witness was a confirmed prostitute, and that defendant had sexual intercourse with her. We held and now hold that this position is unsound. The unlawful intercourse feature of the statute can be established only by evidence that transportation was furnished for the purpose of enabling the defendant to have sexual intercourse with the woman or girl, and whether she was previously moral or immoral is immaterial. The prostitution feature of the statute can be established only by evidence that the transportation was furnished for the purpose of the defendant's aiding or abetting the woman or girl in submitting

her body promiscuously for hire, and whether the defendant himself had sexual intercourse with her or not is immaterial.

In the testimony of the prosecuting witness appears an account of a trip from Pittsburgh to Atlantic City, to Chicago, to Cleveland, to Detroit, to Buffalo, to Toronto, to Montreal, and back to Pittsburgh. For each move the transportation was furnished by defendant, and at each place the unlawful relations were maintained. This testimony was taken by us as supportive only of the unlawful sexual intercourse counts, and our attention was not attracted to a conversation at Atlantic City, which occurred about 2½ months prior to the transportation counted on in the indictment, and which may be given an interpretation bearing on the prostitution counts. She testified that defendant there said to her that if she was sporting she might as well make the money for herself as for others, and that she should look for an apartment at Chicago; that at Chicago she looked for an apartment, but failed to find one; that defendant paid her way to Chicago, and there maintained the same relations with her as at the other cities. Whether her statement of defendant's remark should be accepted over defendant's denial, whether the remark should be considered as merely casual advice for her independent action, or as evidencing an intent to aid or abet her in prostitution, whether the furnishing of transportation from Atlantic City to Chicago was for purposes of unlawful sexual intercourse, or for prostitution, or for both, we recognize as questions for the jury. But the contrast between the states of the evidence in support of the two sets of counts is very marked. Against conviction on the sexual intercourse counts defendant's main reliance was on points of law, which we denied. The evidence was overwhelming. And we continue to believe that we were right in upholding the conviction on those counts against complaints of acts by the government's attorney and erroneous admission of evidence, because the record demonstrates that, no matter how improperly the prejudices of jurors may have been aroused, no other verdict could properly have been reached. But the evidence tending to support the prostitution counts is so slight and dubious that, when we see that these counts were carried along by the clearly established sexual intercourse counts, we are of opinion that the matters above referred to become material.

[6] In his opening statement the government's attorney said:

"Another immoral purpose is one too obscene to mention, the purpose being for defendant to compel these women to commit the crime against nature upon his body. We will demonstrate that beyond any reasonable doubt to you, gentlemen, before the close of this case."

We must assume that the government's attorney, when he made the statement, believed he could produce the evidence. But at some time before he closed he knew that the picture he had drawn of the negro pugilist could not be verified. Yet not until after defendant's attorney had made a motion to that effect after the close of the government's case were the crime against nature counts withdrawn from the consideration of the jury. A desire, if not a duty, to be fair should have led the government's attorney to withdraw that heinous charge the moment he knew it could not be substantiated.

Similarly with respect to the unsupported statement:

"It will further appear that from time to time as he had the three women with him about the country, because of their differences and other reasons, he would drop one of them off and put her into a sporting house temporarily, to relieve himself of the necessity of spending money carrying her about the country while he had the others."

Defendant took the witness stand in his own behalf. On direct examination his testimony was limited to matters directly pertinent to the indictment. On cross-examination:

"Q. As a matter of fact that sickness [of a woman called Etta] was caused by blows from your hands, wasn't it?
"A. No.
"Q. Well, it was caused by blow or blows from your hands?
"A. No, no.
"Q. Was it not caused by blows received by Etta in Pekin Theater here in Chicago at your hands?
"A. No.
"Q. Did you not carry her out or have her carried out and put in the automobile and taken to the Washington Park Hospital after you had beaten her up?
"A. No, no.

* * * * * * * * *

"Q. Hattie was in the hospital while you were there, was she?
"A. Not that I know of.
"Q. Did you have any difficulty with her about putting her in a hospital?
"A. No.
"Q. Did you have any similar difficulty with Belle—fisticuff difficulty?
"A. What is that?
"Q. You had struck Belle on various occasions?
"A. Never in my life.
"Q. Do you remember using an automobile tool on her?
"A. Never in my life.
"Q. You never did that?
"A. Never.
"Q. You say you did not?
"A. I say no, emphatically no.
"Q. And bruised her side until it was black and blue?"

[7] A cross-examiner, for the purpose of showing the character of the party on the stand from his own admissions, may go into collateral matters, but he is bound by the answers he obtains. What becomes of the rule if the cross-examiner, after obtaining a direct answer, is permitted to persist in repeating insinuating questions with the obvious object of having his innuendoes taken in preference to the sworn answer? If this negro pugilist had admitted that he had "beaten up" white women he might well have been characterized as "a brute." The last four questions, and many of the others, were of the most pernicious type.

These matters might not of themselves lead to a reversal. They have been given to show the atmosphere of prejudice that pervades the record. They afford the setting in which must be viewed an erroneous admission of evidence. One witness was called on rebuttal. He was asked:

"Q. State the conversation you had on Christmas Eve, 1910, with defendant respecting Etta.
"A. He asked me to go to the hospital with him to call upon her. He told me he had had a fight with her at Bob Mott's Café on State street."

The giving of this testimony was duly objected to. We find nothing in the record to justify the injection into the case of the collateral question whether defendant exercised his fighting abilities upon women. When the situation thus improperly created is measured against the doubtfully sustainable prostitution counts, we are all convinced that defendant did not have a fair trial of that issue.

[8] It is urged that the assessment of punishment should be allowed to rest on the sexual intercourse counts. If one criminal act is charged in several ways, one good count, supported by competent evidence, will sustain a general verdict of guilty. If several criminal acts are charged, and if the sentences are made to run concurrently, the same rule applies. But here, as already pointed out, the elements involved in the two sets of counts are not identical. The trial judge in fact assessed the punishment on the basis that defendant was guilty of both offenses. The government loses nothing as to the one offense, when the conviction therefor is upheld and the trial judge is permitted to exercise his discretion anew.

The former judgment and mandate of this court should be re-entered; and it is so ordered.

NORFOLK & W. RY. CO. v. HOLBROOK.

(Circuit Court of Appeals, Fourth Circuit. May 5, 1914.)

No. 1230.

1. Exceptions, Bill of (§ 7*)—Form—Separate Bills.

   Though each matter occurring at the trial on which error is assigned must be brought up and preserved by bill of exceptions, it is not necessary to prepare separate bills for each separate matter, but all the alleged errors may be incorporated in one bill.

   [Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 9; Dec. Dig. § 7.*]

2. Exceptions, Bill of (§ 1*)—Purposes—Assignments of Error.

   The sole purpose of bills of exception and assignments of error is to bring separately and clearly the matter complained of before the trial judge, so that he may have an opportunity to grant relief if he thinks proper, and so that defendant in error and the appellate court may know the precise points to be decided.

   [Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. Exceptions, Bill of (§ 13*)—Evidence—Identification.

   A bill of exceptions was made up with a slip pinned in the proper place, containing a direction, "Here insert all the evidence, beginning with the words, 'And the plaintiff,' on page 8, and concluding with the end of the testimony for both plaintiff and defendant on page 531," referring to the transcript. By inadvertence the typewritten copy of the evidence having the paging indicated was not actually inserted, but was separately filed. *Held*, that in the absence of an attack made on the correctness of the copy, the evidence appearing in the printed record being that covered by the certificate of the district judge, it was sufficiently identified so as to become a part of the bill of exceptions.

   [Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 13; Dec. Dig. § 13.*]

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

4. MASTER AND SERVANT (§ 286*)—DEATH OF SERVANT—RAILROAD EMPLOYÉS—SAFETY PRECAUTION.

In an action for death of a railroad employé under federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65, as amended by Act April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1324), by being struck by a train while decedent was working on a bridge, evidence *held* to require submission to the jury of the railroad company's negligence in failing to keep a proper lookout and to warn decedent of the danger.

[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.*]

5. MASTER AND SERVANT (§ 291*)—INJURIES TO SERVANT—INSTRUCTIONS—CONSTRUCTION.

Where the court charged that the verdict should be for plaintiff if the jury found that decedent's death was due to the negligence of "other agents or employés," the clause quoted referred to agents or employés other than decedent and excluded decedent and included decedent's foreman, by whose negligence it was claimed decedent was killed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136–1146; Dec. Dig. § 291.*]

6. DEATH (§ 104*)—DAMAGES—EMPLOYERS' LIABILITY ACT.

Since in an action for wrongful death of a railroad employé under federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65, as amended by Act April 5, 1910, c. 143, 36 Stat. 291 (U. S. Comp. St. Supp. 1911, p. 1324), the jury in determining the damages may properly consider the character of his family, the court, in an action for death of an employé leaving a wife and infant children, properly charged that, while plaintiff could only recover the pecuniary injury sustained, yet such injury would be greater where the beneficiaries were the widow and infant children of the decedent than where they were other relatives who might be dependent on him.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 142–148; Dec. Dig. § 104.*]

In Error to the District Court of the United States for the Western District of Virginia, at Roanoke; Henry Clay McDowell, Judge.

Action by Sarah E. Holbrook, as administratrix of W. T. Holbrook, deceased, against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Writ of error to Supreme Court allowed, 215 Fed. 1007.

Roy B. Smith and Marshall McCormick, both of Roanoke, Va., and F. Markoe Rivinus, of Philadelphia, Pa. (McCormick & Smith, of Roanoke, Va., and Theodore W. Reath, of Philadelphia, Pa., on the brief), for plaintiff in error.

William H. Werth, of Tazewell, Va., for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. W. T. Holbrook, a bridge carpenter, was killed in January, 1913, on one of defendant's railroad bridges by a passenger train, known as No. 15. The plaintiff, his widow, as administratrix of his estate, suing for the benefit of herself and his five infant children under the act of Congress of 1908 as amended in 1910, recovered judgment for damages in the District Court for the Western

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

District of Virginia, under the allegation that her intestate's death was caused by the negligence of the defendant.

[1] The motion to dismiss the appeal must be refused. The first ground for the motion presented at the argument that every matter charged as error should be brought up by a separate bill of exceptions is disposed of by this language of Mr. Justice Brewer in Lees v. United States, 150 U. S. 482, 14 Sup. Ct. 165, 37 L. Ed. 1150:

"It is well settled that, instead of preparing separate bills for each separate matter, all the alleged errors of a trial may be incorporated into one bill of exceptions."

[2] The principle cannot be too strongly emphasized that the sole purpose of bills of exceptions and assignments of error is to bring separately and clearly the matters complained of before the trial judge so that he may have the opportunity to grant relief if he thinks proper, before counsel for defendant in error, so that he may be advised of the precise points to be met in argument, and before the appellate court, so that it may readily perceive the points to be decided and the portions of the record on which they depend. Repetition not necessary to these ends should not incumber the record.

[3] The second ground for the motion is that the evidence is not incorporated in the exceptions so as to be sufficiently identified. The only assignment of error requiring any particular reference to the evidence is that alleging that on the whole evidence the District Judge should have directed a verdict for the defendant. The record shows clearly that it was the intention of counsel and the District Judge to incorporate the entire testimony in the bill of exceptions. To that end at the proper place a slip of paper was pinned, on which was typewritten:

"(Here insert all the evidence, beginning with the words 'And the plaintiff,' on page 8, and concluding with the end of the testimony for both plaintiff and defendant on page 531.)"

By inadvertence the typewritten copy of the evidence, having this paging indicated, was not actually inserted, but was separately filed. No attack is made on the correctness of the copy, and it appears in the printed record as the evidence covered by the certificate of the District Judge; but it is said nevertheless not to be identified. It would be applying technicality beyond all reason to hold that testimony identified by the paging, unquestioned as a matter of fact, and relating on its face to the cause, was not the testimony which the District Judge meant to certify. The facts leave the case entirely outside of the principle, laid down in 2 Foster on Fed. Prac. (5th Ed.) 1594, and a number of cases, that documents or other evidence referred to in the bill will be excluded from consideration if not properly identified.

[4] 2. On the merits it is contended that the District Judge should have directed a verdict for the defendant on the ground that the evidence was insufficient to warrant the inference of negligence on the part of the defendant as a proximate cause of the death of Holbrook.

When Holbrook was killed he, in company with five other men under the directions of the Foreman Carbaugh, was putting down guard rails on the west-bound track of a double-tracked bridge 228 feet long.

Within 50 feet of the west approach of the bridge there is a curved tunnel, and near the east approach there is another curve in a cut. Trains passed frequently, and those coming from the west through the tunnel drew the smoke over the bridge. These conditions made the place of work one of great danger, requiring on the part of the defendant corresponding care in the protection of its men. Recognizing this duty in such conditions the railroad company required of its foremen the observance of these rules:

"Foremen or others in charge of employés working on or about the tracks must instruct their men to be alert, watchful, and to keep out of danger; and will take all reasonable precautions to see that all men working under their immediate supervision receive warnings of approaching trains in time to reach a place of safety.

"When working on tracks in places where approaching trains cannot readily be seen because of permanent obstructions to the view, or temporary obstructions, such, for instance, as fog, storms, snow or engines or cars, extra precautions must be taken to warn the men of approaching trains.

"As an extra precaution, when necessary to place a watchman at some distance from the men at work on the tracks, or in such location that his signals may not be understood, additional watchmen should be placed so that the signals can be passed to the men at work and return signals obtained. In case return signals are not received, and understood, the watchman must signal the train to stop."

Carbaugh, the foreman, took no other precautions than to stand on the east-bound track and call "railroad" or "clear up" on observing the approach of a train. In this situation west-bound passenger train 15 passed, with signals that another section was to follow. Several hours afterwards east-bound freight train 92, carrying about 40 cars, came through the tunnel pulling smoke over the bridge. Before all the cars had cleared the bridge, the second section of west-bound passenger train 15 approached from the curve on the east side on the track where Holbrook was working, and killed him. Carbaugh's range of vision on the track towards this train was not more than 300 or 400 feet, which would be run by a train going 30 miles an hour in not exceeding 10 seconds. When the foreman made the call for train 92, Holbrook and the witness Walters were engaged in framing a new guard rail on the west-bound track, and between that call and the approach of train 15, it was necessary for Holbrook and Walters to take the timbers off the track and get to a place of safety on the girders or floor beams beyond the track. No witness saw Holbrook when he was struck, and there is some conflict in the evidence as to his situation when train 15 was about to reach his position, but the conflict is not material. Taken together, the evidence leaves no doubt that Holbrook was struck either while he was in the act of removing a piece of timber from the track or immediately after removing it and before he reached a place of safety.

This short statement of the admitted conditions and the precautions taken by Carbaugh is enough to show clearly that there was good ground for the jury to infer that the precautions were not such as due care required, and that in anticipation of the danger to which the workmen would be subjected from the contingency of two trains approaching the bridge at the same time from opposite directions, Car-

baugh should have protected them by flags. The motion to direct a verdict was therefore properly refused.

[5] 3. The defendant charges error in an instruction that the verdict should be for the plaintiff if the jury found that Holbrook's death was due to the negligence of any of defendant's servants other than Carbaugh, when there was no evidence of negligence of any other employé. The expression, "other agents or employés" used in the charge clearly meant agents or employés other than Holbrook himself, and therefore was proper, since it excluded Holbrook and included Carbaugh.

[6] 4. After charging the jury that the recovery, if any, was to be measured by the pecuniary loss suffered by the widow and children as the direct result of the death of the husband and father, and that damages for sorrow and loss of love or other purely sentimental injury could not be allowed, the District Judge gave the following instruction, which is assigned as error:

> "However, the court instructs you that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next of kin, so that the relation existing between deceased and the infant beneficiaries prior to his death is a factor in fixing the amount of the merely pecuniary damages."

In construing the statute of 1885 applicable to the District of Columbia, the Supreme Court of the United States said as to the measure of damages:

> "Under such a statute, it is entirely proper that the jury should take into consideration the age of the deceased, his health, strength, capacity to earn money, and family. The injury done to a family consisting of a widow and helpless young children, who depended for support entirely upon the labor of a husband and father whose death was caused by the wrongful act of others, is much greater than would be done to any 'next of kin' able to maintain themselves, and who have never depended, and had no right to depend, upon the labor or exertions of the deceased for their maintenance." Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624.

In the course of full discussion of the subject in Michigan, etc., R. Co. v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, the court, after emphasizing the rule that the recovery must be limited to pecuniary loss from the death, continues:

> "The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, 'according as the action is brought for the benefit of the husband, wife, minor child, or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled.' Tiffany, Death by Wrongful Act, §§ 158, 160, 161, 162."

Difference in the value of prospective support, and intellectual, moral and physical training to be expected from a father or mother, and from any other benefactor, inheres in the nature of social relations. While no compensation can be given for the loss of love, yet in estimating the pecuniary value of expected maintenance and training, the fact

cannot be ignored that it will be increased in proportion to the intelligent solicitude which prompts the service, and that therefore maintenance of a wife by her husband, and maintenance and training of children by their father, will, as a rule, be of greater value than like service from other kindred. This difference is clearly implied in the case last cited. In recognition of the principle it has been held that in estimating damages for the death of a husband the legal obligation to support is not the sole factor, and that alienation of affection, separation, strained relations, and contemplated divorce proceedings might be proved and should be considered by the jury in favor of the defendant. Fogarty v. Northern Pacific Ry. Co., 74 Wash. 397, 133 Pac. 609; Farley v. New York, N. H. & H. R. Co., 87 Conn. 328, 87 Atl. 990.

But not only this reasonable expectation of greater voluntary service, but the legal obligation of a husband and father to support his wife and children makes his life of greater pecuniary value to them than the life of any other upon whom they might be dependent. In view of the general principle applied to the undisputed evidence in this case that the deceased was a capable and industrious workman, devoted to his family and assiduous in the discharge of his domestic obligations, it cannot be said that there was error of law in the instruction that the pecuniary injury to a wife and infant children from the death of the husband and father would be much greater than from the death of any other relative upon whom they might be dependent.

Affirmed.

SEARCHLIGHT GAS CO. v. PREST-O-LITE CO.

(Circuit Court of Appeals, Seventh Circuit, April 14, 1914. Rehearing Denied July 15, 1914.)

No. 2030.

1. TRADE-MARKS AND TRADE-NAMES (§ 24*)—RIGHTS PROTECTED—RIGHT OF SERVICE.

While service is not trade in articles of commerce and while trademarks as such must actually be put on articles of commerce or their containers, a trade-mark may cover, not only the physical article sold, but also the incorporeal right to render further service in connection with it.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 27; Dec. Dig. § 24.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 97*)—INFRINGEMENT—INJUNCTION.

Complainant for years sold steel tanks equipped with regulating valves and containing acetylene gas dissolved in acetone for lighting automobiles. The gas packages were patented, and complainant had a license to make and sell the same for automobile use, while the patentee sold them for other purposes. Complainant for its own product used the word "Prest-O-Lite" as a trade-mark, which was stamped into the metal of its tanks, and continued to use the same after the patent expired. It sold the tanks, charged, for $25 each, and furnished the customer with new charged tanks in exchange for those in which the contents had been exhausted for $2.50 each. *Held*, that the trade-mark covered and protected, not only the original package, but the right to refill the same, and that a deliberate infringer was properly enjoined from recharging such

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

tanks for users "without completely removing and permanently obliterating from the said tanks the said trade-mark Prest-O-Lite."

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. § 97.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 32*)—PATENTED ARTICLES—EFFECT OF EXPIRATION OF PATENT.

A licensee under a patent who has adopted and used a distinctive trade-mark for the special form of the patented article made and sold by him, different from that used by the patentee upon such articles made for different purposes, does not lose his right to such trade-mark on the expiration of the patent.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 36; Dec. Dig. § 32.*]

4. MONOPOLIES (§ 21*)—VIOLATION OF ANTI-TRUST LAW—DEFENSE TO SUIT FOR INFRINGEMENT OF TRADE-MARK.

That a complainant may conduct its business in a manner in violation of the anti-trust law is no defense to a suit for infringement of a trade-mark.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 15; Dec. Dig. § 21.*]

5. JUDGMENT (§ 704*)—BAR BY FORMER ADJUDICATION—IDENTITY OF PARTIES.

The decree, in a former suit by complainant and another against defendant and another for infringement of a patent, *held* not a bar to a suit by complainant alone for infringement of a trade-mark, in which its co-complainant in the former suit had no interest.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1229; Dec. Dig. § 704.*]

Appeal from the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Suit in equity by the Prest-O-Lite Company against the Searchlight Gas Company. Decree for complainant, and defendant appeals. Affirmed.

Appellant seeks a reversal or modification of the following decree: "That a writ of injunction be issued herein, pursuant to the prayer of said bill of complaint, against said defendant, perpetually restraining and enjoining it, its officers, agents, servants, attorneys, and employés, and all others acting in aid or assistance of it, or claiming or holding under or through it, from hereafter directly or indirectly filling or refilling, charging or recharging, or procuring any person or persons, other than complainant, the Prest-O-Lite Company, to fill or refill, charge, or recharge, any of the said cylinders bearing the trade-mark Prest-O-Lite thereon, with acetylene gas and acetone, or any mixture whatever, and from purchasing any such tanks or holding possession thereof for sale or exchange to the trade, and from selling, exchanging, or in any way dealing in the said cylinders or gas tanks, when so filled or refilled, charged or recharged by the defendant or persons other than the complainant, the Prest-O-Lite Company, without, in every case, completely removing and permanently obliterating from the said cylinders or tanks the said trade-mark Prest-O-Lite, and from in any way using the word 'Prest-O-Lite' to sell or deal in the said gas packages so prepared by it, and from infringing, or offering to infringe, or inducing others to infringe upon the said trade-mark Prest-O-Lite, or the rights of said complainant in and to the trade-mark Prest-O-Lite for illuminating gas in portable tanks in any way whatever."

Similar suits have been sustained in the Northern District of New York (Prest-O-Lite Co. v. Avery Lighting Co. [C. C.] 161 Fed. 648); in the District of Connecticut (Prest-O-Lite Co. v. Post & Lester Co. [C. C.] 163 Fed.

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

63); in the Southern District of California (Prest-O-Lite Co. v. Bogen [C. C.] 209 Fed. 915, and Prest-O-Lite Co. v. Searchlight Gas Co. [D. C.] no opinion filed); in the District of South Carolina (Prest-O-Lite Co. v. Jenkins, [D. C.] no opinion filed); in the Eastern District of Pennsylvania (Prest-O-Lite Co. v. Auto Equipment Co. [D. C.] no opinion rendered); and in the Southern District of Ohio (Prest-O-Lite Co. v. Davis [D. C.] 209 Fed. 917).

Robert H. Parkinson, of Chicago, Ill., for appellant.
Keyes Winter, of New York City, for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge (after stating the facts as above). A reading of the decree gives a general understanding of the purpose of the suit, but the propriety of the terms of the injunction can best be seen against the background of the record facts respecting the nature of appellee's trade and property rights and the character of appellant's trespasses.

For use on automobiles at night appellee many years ago began to sell steel bottles or tanks, equipped with regulatory outlet valves, and containing acetylene gas dissolved in acetone. Empty bottles were never sold by appellee to be filled and used by purchasers, like thermos bottles or lamps are filled and used. Appellee bought steel bottles from steelmakers, just as manufacturing chemists buy glass bottles from glassmakers; and appellee's knowledge and skill, like the chemists', were employed in preparing and preserving the contents. What was offered to users was a unitary gas package. Upon the package was displayed the trade-mark, Prest-O-Lite. And in accepting packages so marked hundreds of thousands of users came to expect and rely on appellee's skill in furnishing them a certain high quality and a reliable quantity of acetylene gas.

Appellant's acts of gathering up empty bottles so marked, filling them with its own mixture, and palming them off upon unsuspecting automobilists as appellee's genuine gas packages, were the plainest sort of infringement. Evans v. Von Laer (C. C.) 32 Fed. 153; Hostetter v. Becker (C. C.) 73 Fed. 297; Hostetter v. Sommers (C. C.) 84 Fed. 333; Pontefact v. Isenberger (C. C.) 106 Fed. 499; Hostetter v. Martinoni (C. C.) 110 Fed. 524; Van Hoboken v. Mohns (C. C.) 112 Fed. 528; General Electric Co. v. Re-New Lamp Co. (C. C.) 128 Fed. 154; Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720, 119 C. C. A. 164; Notaseme Hosiery Co. v. Straus, 201 Fed. 99, 119 C. C. A. 134; Prest-O-Lite Co. v. Davis (D. C.) 209 Fed. 917; Eckhart v. Consolidated Milling Co., 72 Ill. App. 70; Barnett v. Leuchars, 13 L. T. (N. S.) 495; Richards v. Williamson, 30 L. T. (N. S.) 746; Rose v. Loftus, 38 L. T. (N. S.) 409; Thwaites v. McEvilly, 1 Irish Rep. (1904) 310; Wood v. Burgess, 24 Q. B. D. 162.

Against the part of the decree that ends such piracy there is virtually no defense beyond certain collateral contentions that will be noticed after the consideration of the real merits of the controversy between these parties has been finished.

But appellee has property rights beyond its strict trade-mark rights. A consumer of ordinary articles of trade goes to his local merchant for a fresh supply, or has it sent to his home. A Chicago automobilist,

starting for seashore or mountains and extending his travel into the night, may exhaust his supply of acetylene gas hundreds of miles from home. With such contingencies in mind appellee established a system of service. By an expenditure of over $1,000,000 appellee enabled more than 600,000 users of Prest-O-Lite to get a new supply in every city and town and nearly in every village in our land. For an original Prest-O-Lite gas package the customer paid $25; for each subsequent package, $2.50 and the surrender of the empty steel bottle. This system might be likened to a nation-wide circulating library, to which a customer paid $1.50 for the first book together with the privilege of exchanging it for a new one for 15 cents at any local agency. In all its advertisements appellee offered this service to its customers; and the record shows that they accepted the offer and expected to and did receive the service as part of what was paid for by the original $25. To serve 600,000 customers it was necessary for appellee to keep 675,000 bottles in circulation, empties coming in and charged ones going out. If an empty was unfit for further service, a new bottle was supplied as part of the upkeep cost of the system. Before an empty was permitted to go out again into the stream of service, valves had to be repaired or replaced, acetone replenished or supplied anew, and fresh acetylene gas put into the solvent.

So it is apparent that something more is involved here than the question of rights flowing from the sale and purchase of original Prest-O-Lite gas packages. That something more is an incorporeal right that may best be called service, the right to serve and be served without interference from outsiders. Such a right, as a species of property, has been recognized and upheld. Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031; National Telegraph & News Co. v. Western U. Tel. Co., 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805; Illinois Commission Co. v. Cleveland Tel. Co., 119 Fed. 301, 56 C. C. A. 205; Board of Trade v. L. A. Kinsey Co., 130 Fed. 507, 64 C. C. A. 669, 69 L. R. A. 59; and the Sperry & Hutchinson trading-stamps cases in 137 Fed. 992, in 128 Fed. 800, 833, and 1016, and in 161 Fed. 219.

[1] While service is not trade in articles of commerce, and while trade-marks, as such, must actually be put upon articles of commerce or their containers, we see no reason why an intending servitor may not offer his service under an arbitrary name or sign as well as under his real name. And the ultimate fact of importance is that in the automobile world Prest-O-Lite came to stand, not only for the physical article, but also for the incorporeal right to serve and be served.

Appellant of course was at liberty to establish and conduct an independent and competitive system of service. If appellant had really desired to enter a race of competition on the merits, it would undoubtedly have refrained from feeding on appellee's service, and would also have adopted, on the trade-mark feature of the case, distinctive gas packages and unambiguous labels. Its fraudulent intent to prey on appellee's system of service is abundantly proven. One item will sufficiently illustrate: In letters to seduce Prest-O-Lite dealers appellant suggested that there is "a great deal more money in it

for a Searchlight dealer than any other, as he has the advantage of having two fields to work in." And acts accorded with intent.

[2] This brings us to the biting part of the decree. Appellant is enjoined from recharging Prest-O-Lite tanks "without completely removing and permanently obliterating from the said tanks the said trade-mark, Prest-O-Lite." Appellee stamps the mark into the metal so that appellant finds great difficulty in obliterating the mark completely and permanently without danger of making the tank unusable. What appellant is principally fighting for is a modification that will permit it to recharge Prest-O-Lite tanks and supply them to automobilists without obliterating appellee's marks, but simply by covering them over with its own labels. Appellant has been pasting on Prest-O-Lite tanks a paper label announcing that: "This refilled tank contains acetylene gas made by the Searchlight Gas Co." This label, the record proves, has not been effective to prevent deception of customers demanding and expecting to receive genuine Prest-O-Lite gas packages. The wording is ambiguous; the paster may come off; and if it does not, inasmuch as exchanges are frequently made at night without the driver's getting out of the car, the deceived is likely to be miles away from the deceiver before noticing the paster. But deception of appellee's customers is not the point on this branch of the case. We assume that appellant might be willing to adopt any wording we might suggest, to emboss it indestructibly upon a metal plate, and to solder or otherwise securely affix the plate to the Prest-O-Lite tank, so that appellee's customers could not be deceived. But so long as appellant, without the deception and even with the connivance of appellee's customers, may, by using labels or plates, put Prest-O-Lite tanks into the Searchlight exchange service and use them there until acetone needs to be replenished, valves to be repaired, and possibly the tanks themselves to be replaced, and then by removing the labels or plates restore the appearance of genuine Prest-O-Lite tanks and thereby deceive appellant into accepting and treating them as legitimate parts of its own exchange service, appellee is rightly given the protection of that part of the decree now under consideration. The limit was reached in permitting appellant under any circumstances to make over Prest-O-Lite tanks into Searchlight tanks, and that permission can stand only on condition that the alteration be complete and permanent. Appellee is entitled to have its lifeblood saved from leeches and its nest from cuckoos.

[3] Singer Co. v. June Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, has no application. Acetylene gas packages were patented, and the patent has expired. Appellee had a license to make gas packages for automobile use, and affixed to its packages the trade-mark, Prest-O-Lite. At the same time the patentee made gas packages for use in lighting buoys and railroad cars, and distinguished its packages by other names or marks. We do not understand the Singer Case to hold that at the expiration of a patent all the marks and names used by licensees become public property as the one generic name of the patented article. In this case, furthermore, Prest-O-Lite meant more than the particular article made for automobile use.

[4] Appellant's contention that appellee's exchange stations are not in the hands of appellee's agents, but belong to dealers with whom appellee has made contracts that are violative of the Sherman law, needs no discussion. Board of Trade v. L. A. Kinsey Co., 130 Fed. 507, 64 C. C. A. 669, 69 L. R. A. 59; Coca-Cola Co. v. Gay-Ola Co., 200 Fed. 720, 119 C. C. A. 164; Prest-O-Lite Co. v. Davis (D. C.) 209 Fed. 917.

[5] In Commercial Acetylene Co. v. Schroeder et al., 203 Fed. 276, 121 C. C. A. 474, the present appellee as holder of a license was a co-complainant with the owner of the gas package patent in a suit for infringement against Schroeder and the present appellant. It is true that appellant's acts in recharging and selling Prest-O-Lite tanks were counted on and proven; but they were relied on by the joint complainants therein as infringements of the patent. Against the patent the defenses of noninfringement and expiration of the patent were made, and these defenses were sustained by this court. To hold and assert the franchise to exclude others does not require the patentee to trade in the patented articles, or in any articles. Not only was no issue presented respecting the trade and property rights of appellee that are relied on herein, but, as the patentee never had any joint interest with appellee in its sales or its system of service, no such issue could properly have been considered. Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195; Walker v. Powers, 104 U. S. 245, 26 L. Ed. 729; Waterman v. Mackenzie, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923.

The decree is affirmed.

In re BALKIND & JOSEPH.

Appeal of HARMON & CO.

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

No. 110–149.

BANKRUPTCY (§ 115*)—RECLAMATION PROCEEDINGS—BAILMENT OR SALE—EVIDENCE.

In proceedings to reclaim certain goods from the receiver of an alleged bankrupt, evidence *held* insufficient to warrant a master's finding that the goods were consigned to the bankrupt and not sold.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 165; Dec. Dig. § 115.*]

Petitions to Revise and Appeal from Orders of the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from an order of the District Court, Southern District of New York, denying a petition in reclamation proceedings. Consolidated with this record is a petition to revise an order of Judge Holt confirming a composition offered by the alleged bankrupts.

The following is the opinion of Hand, District Judge, in the court below:

This is a motion to confirm the report of a special master appointed upon motion to reclaim certain chattels in the possession of the bankruptcy re-

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

ceiver. On April 24, 1913, a petition in bankruptcy was filed against the alleged bankrupts, and on the same day Judge Hazel appointed two receivers, who came into possession, among other assets, of 14 cases of rain coats and other garments, and three cases of piece goods. On April 30, 1913, the petitioner herein, Harmon & Co., procured an order to show cause from Judge Hazel for the return of this property upon a petition which alleged that "the goods were delivered to said alleged bankrupts on consignment, and accepted by them on the terms set forth in a letter of which the following is a copy." The letter is contained in the report of the master herein. To this the receivers replied on March 2, 1913, by an affidavit of Balkind, one of the alleged bankrupts, who swore that the letter in question, which bore date April 14, 1913, had not been typewritten or delivered until April 24th, and that the petitioner had, on April 14th, delivered the goods to him for sale; the terms being $2,000 in cash, and the balance upon notes at varying periods. He likewise swore that on April 24th he had advised the petitioner's president of his financial difficulty, and had signed the letter in question so as to give the color of a consignment to the transaction. He supported his affidavit with that of Lena Taxier, his stenographer. The petitioner's president replied by an affidavit of May 6th in which he said that the agreement of April 14th was as Balkind asserted, that is, a sale with the cash payment of $2,000, and notes at 30 and 60 days, except that the notes were to be secured by the assignment of good accounts. He likewise swore that on April 17th or 18th Balkind sent him a check for $2,000, and called upon him on the 19th or 21st to say that he did not wish to assign his accounts; that thereupon Harmon told him that he would take the goods back, to which Balkind suggested that the bankrupts hold them on consignment, and be paid a commission. To this Harmon says he agreed, the $2,000 already received to be considered as an advance upon the consigned goods. Later, on the 24th, when Harmon learned Balkind's financial difficulty, the letter in question was prepared between them.

On this showing Judge Holt referred the case to a special master, who has heard the testimony and reported in favor of the petitioner's version of the transaction. It is this report which comes up for confirmation.

Were it not for the report of the master in this case I should have no trouble in dismissing the petition, but it is always an embarrassing question to know at just what point the findings of the master should override the judge's conclusions upon reading the testimony. Both sides admit that the original transaction was a sale; both sides admit that the transaction of April 24th was after Harmon had learned of the bankruptcy or its immediate imminence; both sides also admit that on April 21st Harmon did not have any knowledge of the bankrupt's financial condition. Therefore the issue is narrowed down to the single question whether on April 21st the interview took place as Harmon asserts and as Balkind denies. The letter of the 24th is concededly a fabrication, and Harmon tried in his first showing to the court to make it appear that it stated the whole facts. His allegation that the goods were delivered in accordance with the terms of the letter of April 14th could only mean that the letter was actually written at its date and represented the original transaction. His explanation of this is that he supposed the change of April 21st, which he suppressed, related back to the outset. That was none the less most insincere, and I believe that at that time he expected Balkind to stand true to the agreement which they had made on April 24th, that the transaction should take the form of a consignment as of April 14th. Even if I were to believe that the transaction of April 21st actually occurred, yet Harmon intended to conceal the true facts, and have the matter slip through as a consignment from the outset. Now this affects very seriously Harmon's general credibility, for courts have, with justice, always regarded the falsification of documents as a matter of the greatest probative significance, and this was a very bald case, both in its origin and in Harmon's subsequent concealment of it.

The probabilities of the story are also strongly in favor of the receiver. Balkind was on the verge of bankruptcy on the 19th. It is most unlikely that he would, at such a time, have permitted $2,000 in cash to remain in Harmon's hands until he could sell enough goods, without getting any power to

dispose of them or any right to use the proceeds; at least unless he planned a fraud on Harmon. Of the greatest significance, too, is it that Balkind, on the 24th or 25th, sent Harmon a check for $100, the proceeds of his first sale of the rain coats, while by hypothesis he already had a credit of $2,000. There was absolutely no ground for doing this, if Harmon had title to the goods, as he says, but good reason for it, if, as Balkind says, he was frankly trying to prefer Harmon. It is true that the delivery of such a check in any event contradicted the story they had agreed upon on the 24th; yet that story might not stand, and in such a case Harmon would at least have the cash. The real importance of this incident is that it is wholly inconsistent with any honest belief that the goods were on consignment with a credit of $2,000, in itself a most unusual transaction even with a solvent man.

Again, why should Harmon have insisted upon security for the notes, when dealing with a man whose credit was as ample as he thought Balkind's? Of course, he might require it, but business usage is generally otherwise. And why, when Balkind refused to go on, did he assent to the change, when he had had other offers, and could not tell at what prices Balkind would sell? His more probable course was either to hold his solvent purchaser or to retake the goods for resale. Or, if we suppose it not unreasonable, which, perhaps, it was not, that he might assent, why not at that time in his own office, get from Balkind some document showing the change, and why not then give him the necessary billheads? All these things, small in themselves, have some cumulative force, when put together in the scale.

The whole story seems to me contradicted by all the circumstances, and by Harmon's own conduct, his petition, his actions on the 24th, and especially his retention of the check of $100. It is true that Balkind's testimony is weak; not only is he discredited in the falsification of testimony along with Harmon, but it was asserted at the bar and without contradiction, that he is now concerned in an effort to make a compromise with his creditors in which the retention of these goods is to be a part. I do not bear much on his story, nor upon the somewhat trivial contradiction raised by the stenographer's testimony as to who directed her to destroy her stenographic notes; for it is of small consequence who did. They were both concerned in a fraud of which this was a trifling incident. I do bear upon the circumstances which I have detailed, together with the fact that the petitioner has the burden of proof. These compel me to differ from the report and direct a denial of the petition.

W. D. Gaillard, of New York City, for petitioners.

Seldon Bacon and H. Francis Dyruff, both of New York City, for respondents.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The facts are set forth quite fully in Judge Hand's opinion. The Harmon Company, a banking company, originally owned the goods in question. Its president, Harmon, testified: That on April 14, 1913, he sold them to Balkind's concern for $2,000 cash and notes for $7,625 to be given and secured by assignment of accounts. That on the next day the goods were delivered, that on April 21st Balkind refused to give secured notes—it does not appear why—whereupon the contract of sale was canceled and a contract of consignment agreed to. That on April 24th Balkind called him on the telephone and asked to come to his store, which he did, whereupon he was informed that Balkind was on the edge of bankruptcy. That a letter was then written and signed by Balkind, dated back April 14th and stating that "as per conversation had with your Mr. Harmon we agreed to accept these goods on consignment." This was a manifest falsehood, as the witness himself concedes that no conversation arranging for a "consignment" was had before April 21st. Balkind contra-

dicted Harmon's testimony specifically and positively. The special master credited Harmon's narrative, but the District Judge reached a different conclusion.

We are persuaded, as was the District Judge, to a conclusion adverse to Harmon's narrative by the many suspicious circumstances which characterize it. The falsely dated letter is not the only one. The alleged agreement to take the goods on consignment contains no provision as to what commission should be paid or what should be done about the $2,000 already in Harmon's hands; it is difficult to conceive that Balkind on the brink of bankruptcy would have failed to make some effort to get back the large sum or have some definite understanding that it should be repaid out of the first proceeds of the goods he might sell. The alleged agreement, too, was very vague as to the prices at which the goods were to be sold; the goods were old and shop-worn, Harmon had been trying for some time to sell them, and the best offer he could get was 50 per cent. of invoice price. According to Harmon's narrative, although he had had trouble before with loans made to Balkind on assigned accounts, he agreed on April 14th to take notes secured by assigned accounts without any provision as to the character of such accounts. As he states his first contract Balkind might have carried out its terms by assigning old accounts which he had got tired of trying to collect. Harmon lets a week pass without getting the notes and then accepts Balkind's repudiation of his contract without question or objection. He says that on the 21st he had no idea that Balkind's firm was not entirely solvent, nevertheless although he had disposed of a lot of "hard sellers" at a price 5 per cent. better than he could obtain elsewhere and had $2,000 cash in hand on account of the purchase, it seems not to have occurred to him that he was in a position to make himself whole for the breach of the original contract.

When in addition to all this he undertakes in his first application to the court to convince it that there was an agreement to deliver goods on consignment made April 14th by submitting a letter falsely dated as of that day—and it subsequently appears on his own admission that there was not even a suggestion of delivery on commission before April 21st—his narrative of the whole transaction cannot be taken at its face value.

The order is affirmed.

It is unnecessary to discuss the order approving compromise; it is also affirmed.

THE ARCIDUCA STEFANO.

THE JAMES J. McGUIRL.

(Circuit Court of Appeals, Second Circuit. July 15, 1914.)

No. 222.

COLLISION (§ 95*)—TOW AND STEAMSHIP MEETING—FAULT OF TUG.

A collision between a barge in tow alongside of a tug and a meeting steamship in Buttermilk Channel *held* due to the fault of the tug in keeping in too close to the steamship and stopping and backing when she should have gone ahead in conformity to the signals.

[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.

This cause comes here upon appeal from a final decree of the District Court of the United States for the Southern District of New York, entered on October 16, 1913, holding the steam tug James J. McGuirl solely responsible for the collision between the steamship Arciduca Stefano and a barge in tow of the McGuirl, which occurred November 3, 1911, in Buttermilk Channel in the port of New York.

Carpenter & Park, of New York City, for appellant.

James J. Macklin, of New York City (Lorenzo Ullo, of New York City, of counsel), for appellees.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This libel was filed by the Staples Brick Company as owner of the brick barge Mary L. Nickerson and of the cargo of brick laden thereon, in tow of the steam tug McGuirl against the steamship Stefano and the steamship brought in the tugboat by petition under the Fifty-Ninth rule. The steamship Stefano was an Australian steamship 340 feet in length and 46 feet beam and was laden with 3,000 tons of cargo and drawing about 21 feet. The barge Nickerson was about 100 feet in length and 29 feet beam and drawing from 10 to 11 feet of water. She was made fast to the port side of the steamtug McGuirl. There were two tugboats made fast to the Stefano, one upon her starboard bow and one upon her port stern. The collision occurred in clear weather between 2 and 3 o'clock in the afternoon. The court below dismissed the libel against the Stefano, and decreed that the libelant recover against the steam tug the sum of $2,262.19, with interest and costs, making in all the sum of $2,544.30.

The testimony shows that the Stefano left the Bush Docks, Forty-Fifth street, South Brooklyn, about 2 p. m. on November 3d, intending to proceed north up the Buttermilk Channel to the Refinery wharf in Long Island City, with the tugs made fast to her in the manner above stated. The barge McGuirl left pier 29, South Brooklyn, intending to proceed down the Buttermilk Channel around Red Hook to the foot of

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

Twenty-Fifth Street, Brooklyn. While rounding the Red Hook Point the Stefano sighted the tug and tow about 1,000 feet distant coming down the Buttermilk Channel somewhere beyond the middle of the channel towards Governors Island. As soon as sighted, the steamship blew one whistle, which was answered, and kept rounding the Red Hook Point, hugging the Brooklyn shore close to the docks, and changed her engines from half speed to slow. The tug and tow did not change their relative position to the steamer, and kept coming towards the Stefano. The latter then blew a second signal of one whistle which was also answered. But the tug and tow continued to approach the steamship. Thereupon the Stefano backed and reversed and dropped anchor, not daring to go further toward the Brooklyn shore to avoid the collision. Although the steamship had nearly stopped she struck the barge amidship the port side, which at that time laid across the channel.

The reason why the tug and tow were not discovered by the Stefano earlier was that the steamship was at the time turning Red Hook. At that time the tug and tow were in the middle of the channel two or three degrees on the port bow of the steamship. The testimony is substantially uncontroverted that the two vessels sighted each other at a sufficient distance to have taken the requisite precautions for passing safely on their respective courses. The Stefano at the time the vessels came in sight was making a speed of about five knots an hour, or half speed, and the McGuirl was making about four knots an hour. The Stefano was about 200 feet from shore and was acting under port helm and gave the first signal, one whistle, indicating that the vessels should pass the port side of each other, and that the tug should port his helm and go to starboard.

The testimony makes it plain that in the position in which the boats were approaching each other if the signal had been observed the boats would have safely passed port to port.

The libelant alleges that after the exchange of signals of one whistle the wheel of the steam tug was ported in conformity with the signal, but that the steamship continued on its course and when nearing the steam tug and barge suddenly sheered to port occasioning the collision.

The steamship alleges that after the exchange of signals the steam tug did not turn to starboard in accordance with the signals, and that the tug and tow kept right ahead of the steamer. The chief allegation of fault made by the steamship against the tug is that he did not turn to starboard "so as to pass each other on the port side of each other."

The allegation made by the steam tug against the steamship is that the steamship after the exchange of the signals of one whistle kept on her course and did not sheer to starboard, as indicated by her single blast of one whistle.

Whatever difficulties are presented in this case grow out of the uncertainties as to the facts and the somewhat conflicting testimony we find in the record.

The court below was of opinion that at the time when the vessels first sighted each other they were on parallel and not on crossing courses, and the court also found that the boats were not approaching head and head. Our examination of the testimony has convinced us

that the conclusion at which the court arrived on these two important points was justified.

That the libelant is entitled to damages is not disputed. The question is whether recovery is to be had from the steamship or from the steam tug or from both.

At the time these vessels sighted each other the Stefano had the McGuirl on her starboard bow and did not port her helm more than enough to round Red Hook until in extremis when she ported and threw out her starboard anchor and ordered the starboard tug to back. And at no time had she starboarded out of her course and into the waters of the McGuirl. We fail to find that the Stefano was in fault in what she did. Counsel claim that she was at fault in that she did not put to port after she gave the first signal of one whistle. This it would have been her duty to have done if the boats had been approaching head on. The America, 92 U. S. 432, 23 L. Ed. 724. But at the time the first signal was given they were not approaching head on, and the rule relied upon was not applicable to the situation as it then existed.

The master of the McGuirl testified that when within about 200 feet of the steamship he stopped his boat and "set her backing, which I continued until where the collision occurred." When asked how far back he went, he said:

"I didn't go astern at all, I just merely stopped the way of our boat—we couldn't back that barge—we would have slewed her right around."

There is testimony in the record to show that if the tug had gone straight on instead of backing, the boats would have gone clear of each other. The collision we think was due to the backing and to the fact that the McGuirl had shaved in too close upon the Stefano.

Decree affirmed.

In re PITTSBURG-BIG MUDDY COAL CO.

GOODMAN MFG. CO. v. SKAGGS et al.

(Circuit Court of Appeals, Seventh Circuit. May 11, 1914.)

No. 2083.

1. BANKRUPTCY (§ 184*)—RECLAMATION OF PROPERTY—INVALID MORTGAGE—RIGHTS OF TRUSTEE.

Under Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438]) § 47, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), providing that as to all property in the custody or coming into the custody of the bankruptcy court the trustee shall be vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, a trustee in bankruptcy was entitled to hold property subject to a chattel mortgage to secure a portion of the price which was valid as between the mortgagor and mortgagee, but invalid as against the mortgagee's lien creditors because of a failure to file affidavits required by the state statutes to keep it alive, though there was no creditor of the bankrupt holding a lien on the mortgaged chattels.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275–277; Dec. Dig. § 184.*]

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

2. BANKRUPTCY (§ 258*)—CREDITORS—NOVATION—ASSUMED DEBT.

Where claimant sold certain machinery to the S. company, taking a chattel mortgage to secure part of the purchase price, and the buyer sold the machinery to the bankrupt subject to the mortgage, claimant, in the absence of novation or assumption of the debt by the bankrupt, could not become a creditor of the bankrupt so as to entitle it to object to the order directing a sale of the property as a unit free from liens.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 358, 359, 362; Dec. Dig. § 258.*]

Appeal from the District Court of the United States for the Eastern District of Illinois; Francis M. Wright, Judge.

In the matter of bankruptcy proceedings of the Pittsburg-Big Muddy Coal Company. Petition by the Goodman Manufacturing Company for the recovery of certain machinery covered by a chattel mortgage to secure a portion of the purchase price, sold to the St. Louis Company, and by it sold to the bankrupt, subject to the mortgage. From a decree dismissing the petition for want of equity, petitioner appeals. Affirmed.

George W. Brown, of Chicago, Ill., for appellant.

William H. Warder, of Marion, Ill., for appellee.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

BAKER, Circuit Judge. Appellant sold machinery in 1911 to the St. Louis Coal Company, and took a chattel mortgage thereon to secure part of the purchase price. This machinery was afterwards sold by the St. Louis Company to the Big Muddy Company (bankrupt herein) subject to the mortgage. Before the petition in bankruptcy was filed, appellant's mortgage, by reason of extensions and changes in the notes without filing the affidavits required by the Illinois statute respecting the recordation of chattel mortgages, though remaining valid between mortgagor and mortgagee, became subject to avoidance by lien creditors. But there were no creditors with liens when bankruptcy intervened. Appellant thereupon filed its petition against appellee for reclamation of the machinery. This appeal is from the decree of dismissal for want of equity.

[1] According to the doctrine of York Mfg. Co. v. Cassel, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, and other cases holding that a chattel mortgage that is good against the bankrupt is good against the trustee, appellant would be entitled to prevail. But by the act of June 25, 1910 (36 Stat. 840), the following addition was made to the powers of trustees in section 47a(2):

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

Whether this addition to the Bankruptcy Act might more appropriately have appeared in section 64, relating to priorities, or in section 67, relating to liens, or in section 70, relating to the trustee's title, or in an independent section, we deem immaterial, for the act must always be considered as a whole, and when so read the elder sections

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

must be construed so as not to detract from this latest expression of the legislative will.

Appellant's contention that the trustee, under the amendment of 1910, cannot defend against a voidable chattel mortgage unless there be in fact "a creditor holding a lien" on the chattels, is supported by the cases of In re Lausman (D. C., W. D. Ky) 183 Fed. 647, and In re Flatland (C. C. A. 9th Cir.) 196 Fed. 310, 116 C. C. A. 130.

But we hold that under the amendment the filing of a petition in bankruptcy constitutes an equitable levy and a caveat to the world, for the following reasons: (1) The plain and natural reading of the words gives the trustee the same right to attack or resist secret liens that judgment creditors would have had if bankruptcy had not intervened, no matter whether there are or are not any such creditors when the petition in bankruptcy is filed. (2) If the amendment were to be construed so as to limit the power of the trustee to cases in which there are lien creditors, virtually nothing would be added to the original act, for under section 67c and 67f liens created within four months prior to the filing of the petition may be used by the trustee for the benefit of the estate. (3) Although extraneous matter cannot properly be looked to in aid of the interpretation of a clear and unambiguous statute (for such a statute carries its own means of interpretation), yet it may not be amiss, as against a contention that this amendment is not unambiguous, to note that it was the intention of the committee in charge of the measure that the rule announced in York Mfg. Co. v. Cassel should be changed. 3 Remington, 331; Cong. Rec., 61st Cong., 2d Sess., pp. 2552–2554. (4) Numerous decisions in the District and Appellate Courts directly or impliedly support this construction.[1]

[1] Arctic Ice Machine Co. v. Armstrong County Trust Co. (C. C. A., 3d Cir.) 192 Fed. 114, 112 C. C. A. 458; Holt v. Henley (C. C. A., 4th Cir.) 193 Fed. 1020, 113 C. C. A. 87; In re Morris (C. C. A., 2d Cir.) 204 Fed. 770, 123 C. C. A. 220; Clark v. Snelling (C. C. A., 1st Cir.) 205 Fed. 240, 123 C. C. A. 430; Pacific State Bank v. Coats (C. C. A., 9th Cir.) 205 Fed. 618, 123 C. C. A. 634, Ann. Cas. 1913E, 846; Big Four Implement Co. v. Wright (C. C. A., 8th Cir) 207 Fed. 535, 125 C. C. A. 577, 47 L. R. A. (N. S.) 1223; In re Gold (C. C. A., 7th Cir.) 210 Fed. 410; In re Gartman (D. C., E. D. Pa.) 186 Fed. 349; In re Franklin Lumber Company (D. C., E. D. Pa.) 187 Fed. 281; In re Hammond (D. C., N. D. Ohio) 188 Fed. 1020; In re Bazemore (D. C., N. D. Ala.) 189 Fed. 236; In re Calhoun Supply Co. (D. C., N. D. Ala.) 189 Fed. 537; In re Hartdagen (D. C., M. D. Pa.) 189 Fed. 546; In re Williamsburg Knitting Mill (D. C., E. D. Va.) 190 Fed. 871; In re Nelson (D. C., S. D. So. Dak.) 191 Fed. 233; In re Waite-Robbins Motor Co. (D. C., D. Mass.) 192 Fed. 47; In re Geiver (D. C., S. D. So. Dak.) 193 Fed. 128; In re Dunn & Co. (D. C., E. D. Ark.) 193 Fed. 212; In re Farmers' Supply Co. (D. C., N. D. Ga.) 196 Fed. 990; In re Appel Suit Co. (D. C., D. Colo.) 198 Fed. 322; In re Dancy Hardware & Furniture Co. (D. C., N. D. Ala.) 198 Fed. 336; In re Smith (D. C., E. D. Wis.) 198 Fed. 876; In re Kreuger (D. C., E. D. Ky) 199 Fed. 367; Sattler v. Slonimsky (D. C., E. D. Pa.) 199 Fed. 592; In re Gaglione (D. C., M. D. Pa.) 200 Fed. 81; In re Nuckols (D. C., E. D. Tenn.) 201 Fed. 437; In re Snelling (D. C., D. Mass.) 202 Fed. 259; In re East End Mantel Co. (D. C., W. D. Pa.) 202 Fed. 275; In re Farmers' Co-operative Company (D. C., D. N. Dak.) 202 Fed. 1008; In re Codori (D. C., M. D. Pa.) 207 Fed. 784; In re Stern (D. C., N. D. Ohio) 208 Fed. 488; In re Superior Drop Forge Co. (D. C., N. D. Ohio) 208 Fed. 813; In re Phillips (D. C., W. D. Wash.) 209 Fed. 490; In re Lane Lumber Co. (D. C., D. Idaho) 210 Fed. 82.

This record also contains an order of the court that the property be sold as a unit and free from liens. Appellant challenges this order as inimical to the interests of the general creditors.

[2] In the referee's report is a statement that appellant is a general creditor of the bankrupt estate. But appellant never filed or presented a claim as a general creditor of the bankrupt. The only issue made by the pleadings and involved in the evidence was the validity of the chattel mortgage. Without novation or assumption the debt of the St. Louis Company to appellant could not become the debt of the Big Muddy Company. As there was neither pleading nor proof respecting such an issue, the purported finding of the referee must be disregarded. And so appellant is left without any standing to question the order of sale.

The decree and the order are severally affirmed.

KAMPER v. CITY OF CHICAGO.

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

No. 2094.

1. EMINENT DOMAIN (§ 293*)—REMEDIES OF OWNERS—PLEADING.

A bill by an owner of land to restrain a continuous trespass, which began while the land was in the possession of a former owner, was defective for failure to allege that the latter, after the original entry without his knowledge or consent, remained in ignorance of the trespass and had not settled with defendant for taking his property.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 797–802; Dec. Dig. § 293.*]

2. EMINENT DOMAIN (§ 293*)—REMEDIES OF OWNERS—PLEADING.

Where defendant constructed a water tunnel under complainant's property without his knowledge and without condemning the right to do so, and complainant sued to compel the removal of the tunnel and the restoration of his lots to their original condition, an allegation in the bill that the construction was inferior and defective was immaterial.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 797–802; Dec. Dig. § 293.*]

3. EMINENT DOMAIN (§ 273*)—TAKING LAND FOR PUBLIC USE—EQUITABLE RELIEF—DAMAGES.

Where a city constructed a water tunnel across complainant's property 70 feet below the surface as part of a city system for taking water from Lake Michigan and supplying it for pay to its inhabitants, complainant was not entitled to maintain a suit to compel the city to remove the tunnel and restore his lots to their former condition, though the city had not condemned the right to maintain the tunnel, but, the city's work being of a public character and the land having been appropriated to a public use, complainant was limited to his right to recover damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 743–749, 752, 754–764; Dec. Dig. § 273.*]

4. EMINENT DOMAIN (§ 288*)—REMEDIES OF OWNERS—LIMITATIONS.

Where defendant city without condemnation appropriated a portion of complainant's property for a water tunnel 70 feet below the surface and complainant did not sue for an injunction to compel the removal of the tunnel and a restoration of the lots to their original condition for 15

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

years after the work had been done, the bill could not be properly retained for an assessment of damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 783-788; Dec. Dig. § 288.*]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; George A. Carpenter, Judge.

Action by John Kamper against the City of Chicago. Judgment for defendant, and complainant appeals. Affirmed.

Thomas J. Sutherland, of Chicago, Ill., for appellant.

William Dillon, of Chicago, Ill., for appellee.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

BAKER, Circuit Judge. Appellant's bill, at appellee's motion, was dismissed on the ground that the facts alleged were not sufficient to entitle appellant to equitable relief.

In brief the allegations are these: Prior to 1897 one Mauland was the owner of two lots in Chicago, on which he had erected an apartment building. Without Mauland's knowledge or consent, without proceedings to assess the just compensation, and without paying any compensation to Mauland, appellee in 1897 constructed a water tunnel across the lots, 70 feet below the surface. This tunnel is a part of appellee's system for taking water from Lake Michigan and supplying it for pay to the inhabitants. In 1907 Mauland conveyed the lots and improvements to Romano, who during his ownership had no knowledge of appellee's trespass. Romano conveyed the property in 1908 to appellant, who was ignorant of the trespass until one month before bringing this suit. By maintaining and using the tunnel appellee is committing a continuing trespass upon appellant's property. On account of weak and inferior construction the tunnel is liable to crumble to pieces at any time, and so is a constant menace to the safety of appellant's building. The location of the tunnel is such as to interfere with appellant's operations if he should attempt to erect a larger structure requiring deeper foundations. Appellant has annually paid to the public authorities taxes upon the property, including that part seized and held by appellee.

The prayer is for a mandatory injunction to compel appellee to remove the tunnel and restore the lots to their original condition.

[1] Affirmance of the decree might be rested on the bill's failure to aver that Mauland, after the original entry without his knowledge or consent, remained in ignorance of the trespass, and had not settled with appellee for the taking of his property; but nevertheless we will consider appellant's real contention.

[2] Another preliminary matter requires some notice. Appellant charged that the construction of the tunnel was inferior and defective. But inasmuch as appellant carefully refrained from asking that appellee be required to put the tunnel in safe condition (which would be an affirmance of appellee's possession on condition of making the tunnel safe and paying just compensation if appellant should be entitled

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

to it), we regard the allegation as immaterial for any purpose except to strengthen appellant's one demand that the tunnel be removed.

[3] And the answer to that demand seems to us quite clear and simple. When a public or quasi public corporation, having the delegated power of eminent domain, without condemnation proceedings enters upon land (which the owner would be powerless to hold against appropriation for public use) and thereupon completes a public work and is using it in public service, the landowner will not be permitted, by ejectment or mandatory injunction, to retake possession and thus break in two a railroad or a water tunnel or other work which is being used as an entirety for the public good. This is so, not because equity refuses to frown upon the unlawful seizure, but because equity will not tolerate a possessory demand being turned into a means of oppression and extortion, and because a consideration of the rights and convenience of the public outweighs the qualified possessory right of the owner—a right he could not have absolutely maintained even initially as against the public use. And equity sufficiently indicates its disapproval of the wrongful taking by pointing the owner to the law courts, where his right to compensation can be determined. Osborne v. Missouri Pacific Railway Co., 147 U S. 248, 13 Sup Ct. 299, 37 L. Ed. 155; New York City v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820; McCullough v. City of Denver et al. (C. C.) 39 Fed. 307; McCarthy et al. v. Bunker Hill & Sullivan Mining & Concentrating Co. et al., 164 Fed. 927, 92 C. C. A. 259; Whittlesey v. Hartford, Providence & Fishkill R. Co., 23 Conn. 421; Leonard D. Fisk et al. v. City of Hartford, 70 Conn. 720, 40 Atl. 906, 66 Am. St. Rep. 147; Doane v. Lake Street El. R. R. Co., 165 Ill. 510, 46 N. E. 520, 36 L. R. A. 97, 56 Am. St. Rep. 265; Johnson v. United Rys. Co. of St. Louis et al., 227 Mo. 423, 127 S. W. 63; Higbee & Riggs v. Camden & Amboy Railroad & Transportation Company, 20 N. J. Eq. 435; Grey, Attorney General, ex rel. Simmons v. Paterson, 60 N. J. Eq. 385, 45 Atl. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642; Lake Drummond Canal & Water Co. v. Burnham et al., 147 N. C. 41, 60 S. E. 650, 17 L. R. A. (N. S.) 945, 125 Am. St. Rep. 527; Griffin v. Southern Ry. Co., 150 N C. 312, 64 S. E. 16.

[4] In New York City v. Pine, supra, the bill to enjoin the city from diverting water from complainant's premises was filed before any diversion had occurred. And so the bill appealed to equity's jurisdiction to prevent a threatened trespass. But even so the mandatory injunction of the Circuit Court was reversed for the purpose of restricting complainant to an assessment of damages either in an action at law or in the pending suit wherein the jurisdiction in equity had been seasonably invoked. Here, however, the bill was not filed until the public work had been devoted to public use for 15 years; and so the bill cannot properly be retained for any purpose.

The decree is affirmed.

BORNN HAT CO. v. UNITED STATES.

UNITED STATES v. CALHOUN.

(Circuit Court of Appeals, Second Circuit. May 14, 1914.)

No. 2-3.

1. CUSTOMS DUTIES (§ 81*)—ADMINISTRATIVE ACT—CONSTRUCTION.

While a collector may reliquidate duties within one year, as limited by Act June 22, 1874, c. 391, § 21, 18 Stat. 190 (U. S. Comp. St. 1901, p. 1986), and may to that end examine the importer under the provisions of Tariff Act Aug. 5, 1909, c. 6, § 28, subsec. 15, 36 Stat. 100 (U. S. Comp. St. Supp. 1911, p. 919), under subsections 13-16 of the latter chapter, which make the appraisal in case of no appeal "final and conclusive," where merchandise has been appraised, the time for appeal has expired, the duties have been paid and the goods surrendered, the collector has no power, on an examination of the importer under said subsection 15, to examine into the question of valuation.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 197; Dec. Dig. § 81.*]

2. CUSTOMS DUTIES (§ 81*)—RELIQUIDATION OF DUTIES—CITATION OF IMPORTER FOR EXAMINATION.

A collector may, under his power to reliquidate duties, cite an importer to appear for examination as provided by Tariff Act Aug. 5, 1909, c. 6, § 28, subsec. 15, 36 Stat. 100 (U. S. Comp. St. Supp. 1911, p. 919), and for his failure to appear he is subject to the penalty imposed by subsection 16.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 197; Dec. Dig. § 81.*]

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

On writs of error to review judgments entered upon verdicts directed by the court in favor of the United States and against the Bornn Hat Company in the first of the above-entitled actions, and in favor of David Calhoun the defendant in the second of the said actions. No question of fact is involved in either action, and in each both parties asked for the direction of a verdict. Each action was brought to recover the penalty of $100.00 imposed by the Customs Administrative Act as amended by subsection 16 of section 28 of the Tariff Act of August 5, 1909 (36 Stat. L. 100), for failure to testify pursuant to citations issued to the defendants below.

The opinion of the District Court is reported in 184 Fed. 499.

H. Snowden Marshall, U. S. Atty., and Addison S. Pratt, Asst. U. S. Atty., both of New York City.

John Gibbon Duffy, of New York City, for David Calhoun.

James, Schell & Elkus, of New York City, for the Bornn Hat Company.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The majority of the court is of the opinion that this controversy was correctly decided in the District Court. The in-

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

terpretation of the statute by the District Judge seems to us to provide a fair, reasonable, and consistent method of procedure.

[1] At ports where appraisers are located it seems logical, and in the interests of an orderly administration of the law, that their action shall be final. This, in our opinion, is the clear meaning of the following language quoted from subsection 16:

"And if such person be the owner, importer, or consignee, the appraisement which the General Appraiser, or Board of General Appraisers or local appraiser or collector, where there is no appraiser, may make of the merchandise shall be final and conclusive."

[2] In the Calhoun Case the appraisement had been made, the time to appeal had expired, the duties had been paid, and the merchandise surrendered. Calhoun appeared and answered all questions as to classification, but refused to answer questions relating to dutiable value, upon the ground that the collector had no power to examine into that question, when the appraisal had been fully and legally made by the appraisers and the time in which to review their action had expired. In other words, that their action upon the question of value was "final and conclusive." We think the powers of the collector under section 21 of the act of 1874 relate to classification and reliquidation, and not to valuation, which latter subject is confided to the appraisers.

In the Bornn Hat Case no one answered the citation, and default was made. There were several subjects relating to reliquidation upon which the collector might have lawfully interrogated the witness or witnesses, had they appeared with the books of the corporation as called for.

It is unnecessary to add further to the clear discussion of the questions involved to be found in the opinion of Judge Hand.

In each case the judgment is affirmed.

LEWIS v. MOWINCKEL et al.

(Circuit Court of Appeals, Second Circuit. May 14, 1914.)

No. 178.

SHIPPING (§ 43*)—CHARTERS—EXCUSABLE FAILURE TO DELIVER VESSEL.

A vessel under charter, to begin at the expiration of a present charter, was stranded before that time, and was not released and in condition for service until a year later. *Held*, that the owner, having been relieved from the obligation to deliver her by a peril of the sea excepted by the charter, could not be required to deliver her thereunder a year later.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 165-168; Dec. Dig. § 43.*]

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 dismissing the libel filed by the charterer of the steamship Moldegaard to recover damages from her owners for failure to perform a charter party dated September 16, 1911. The charter

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

was for about one year, beginning from the time of her delivery to the charterer upon the completion of an existing charter to the Munson Line. Both charters were in the usual form, the flat period of the Munson charter was to expire January 7, 1912. On November 24, 1911, the Moldegaard stranded on one of the Bahama Islands, and was not again ready for service till February, 1913.

Convers & Kirlin, J. Parker Kirlin, and Mark W. Maclay, Jr., all of New York City, for appellant.

Charles S. Haight and Clarence Bishop Smith, both of New York City, for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

PER CURIAM. The stranding of the Moldegaard on November 24, 1911, made it impossible for her owners to deliver her to the charterer at the expiration of the Munson charter in January, 1912. At that time she was lying hard aground on Cat Island, and remained there for six months, when she was floated and taken to New York for repairs, which were not completed until February, 1913. There can be no pretense that the owners did not do all that they were required to do, and all that it was possible to do to float the ship. After this was accomplished the repairs were commenced and proceeded to completion as repidly as possible in the circumstances. It is conceded that the stranding put it out of the owner's power to deliver the ship at the expiration of the Munson charter, but the libelant contends that she should have been rechartered to him a year later when she was again able to go to sea. There is no ground for the contention that she was not salved and repaired as rapidly as possible, and we are convinced that a year was fairly required after the stranding before she could have been made ready for service.

The delay was caused by a peril of the sea excepted in both charters, and the owner was therefore relieved. Certainly it was not contemplated by the parties that they were entering into a charter which could be interpreted to begin a year after the expiration of the Munson charter. We agree with the District Court in thinking that the stranding of the steamer, in such circumstances as to induce her owners to believe that she would become a total loss and in any event to make her employment impossible for many months, released them from liability under the charter. It excused both parties, but did not make a new contract.

The attempt to show that a delivery of the steamer in July was contemplated originally, completely failed, especially on the production of the correspondence. Only a reasonable overlap was contemplated, and a year was, in our opinion, not such an overlap.

Decree affirmed.

FARMERS' LOAN & TRUST CO. v. NEW YORK RYS. CO. et al.

(Circuit Court of Appeals, Second Circuit. May 26, 1914.)

No. 235.

RAILROADS (§ 199*)—FORECLOSURE OF MORTGAGES—COUNSEL FEES.

Where the property of a railroad company sold on foreclosure realized a surplus above the mortgage debt, the court properly refused to award counsel for a holder of the bonds which, as trustee, held a subordinate lien thereon and was interested with complainant, a fee out of the fund generally which would require the company to pay it, but left him to his statutory lien on that portion of the fund belonging to his clients.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 664; Dec. Dig. § 199.*]

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

Suit in equity by the Farmers' Loan & Trust Company against the New York Railways Company and the Central Park, North & East River Railroad Company and others. Appeal from an order relating to counsel fees. Affirmed.

See, also, 181 Fed. 595.

J. O. Nichols, of New York City, for appellant.

Chase Mellen, of New York City, for receiver Central Park, N. & E. R. R. Co.

Henry L. Stimson, of New York City, for Bronson Winthrop.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. This is a proceeding to determine whether the fee of Bronson Winthrop, Esq., for legal services in connection with the foreclosure of the Central Park, North & East River Railroad Company shall be paid by the bondholders or out of the surplus proceeds going to the receiver of the railroad company.

The very unusual situation is presented of a surplus upon foreclosure of a railroad mortgage. Mr. Winthrop was not acting for the complainant, but for the Morton Trust Company, which as trustee was the holder of all the bonds secured by the mortgage which the complainant was seeking to foreclose. The interest of the Morton Trust Company was, like that of the complainant, to defeat the efforts of the Central Park Company to prevent foreclosure. It was a defendant not as owner of the bonds but by virtue of holding a subordinate lien. Mr. Taylor, the special master awarded Mr. Winthrop a fee of $500 out of the fund for his services on the practice side of filing an answer and aiding the machinery of foreclosure. He fixed the sum of $20,000 as compensation for his general services, but held that they must be paid by his client, that is, out of the share coming to the bond holders. This was giving effect to his lien as an attorney upon the proceeds of his client's cause of action in the hands of the court. Such a lien is conferred by the state of New York, Judiciary Law (Consol.

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

Laws, c. 30), § 475. Although there was no special agreement of employment, the Morton Trust Company was perfectly aware of the services rendered, and took the benefit of them, which is quite as effective. When Mr. Winthrop said in his letter of March 11, 1912, to the chairman of the joint committee on reorganization that the compensation then agreed on did "not include such allowances as may be awarded to me by the court for my services in that [the foreclosure] action," he was contemplating the property selling for less than the mortgage, which may be said to be universally the case in railroad foreclosures. If in such a case the court had awarded him a fee out of the fund, it would have been paid by the bondholders because the whole fund would go to them. There being a surplus, we think it would be inequitable to charge the fee on the fund, because the effect of so doing would be to make the Central Park Company pay it.

The order is affirmed.

NORTHWESTERN CONSOL. MILLING CO. v. GALBRAITH. †

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

No. 4061.

Appeal from the District Court of the United States for the District of Minnesota; Charles A. Willard, Judge.

Two actions by John P. Galbraith, as trustee in bankruptcy of Frank A. Witzig, against the Northwestern Consolidated Milling Company and George C. Christian & Company, respectively. Judgment for plaintiff in each case, and the defendants appeal. Reversed, and complaint dismissed.

William Furst, of Minneapolis, Minn., for appellant.

Walter H. Newton, of Minneapolis, Minn. (Frank Nye and W. W. Todd, both of Minneapolis, Minn., on the brief), for appellee.

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

SANBORN, Circuit Judge. The trustee in bankruptcy of the estate of Frank A. Witzig recovered a decree and judgment for $502.10 and costs against the Northwestern Consolidated Milling Company, a corporation, on the ground that within four months from the filing of the petition in bankruptcy the company, which was a creditor of Witzig, received money and property of Witzig in payment of its claim against him when he was insolvent, that the transfer made by Witzig wrought a voidable preference, and that the company had reasonable cause to believe that it was intended thereby to give a preference. The trustee also recovered a decree and judgment for $299.39 and costs against George C. Christian & Co., a copartnership, on the same ground, and the alleged causes of action in these cases arose out of the same transaction. The defendants appealed.

† Rehearing denied October 12, 1914.

At the argument of the cases in this court counsel for all the parties conceded that the cases presented these two questions: Does the evidence in the record sustain the finding of the court below that Witzig was insolvent at the time he made the transfer to the defendants? Does the evidence in the record sustain the finding of the court below that either of these defendants, or any of their agents, at that time had reasonable cause to believe that it was intended by the transfer to give a preference? The evidence has been carefully read, digested, and considered, and the court is unanimous in the opinion that the first question should be answered in the affirmative and the second in the negative. The law governing these cases is free from doubt. The facts and circumstances proved are peculiar to these lawsuits, not likely to form a precedent for subsequent decisions, and the court refrains from burdening the reports with their recital. Other questions were presented and argued, but the conclusion announced renders them immaterial to the decision of the cases, and their discussion is therefore omitted.

Let the decrees and judgments below be reversed, and let the complaints be dismissed.

UNIVERSAL TOBACCO MACH. CO. v. BORGFELDT STRIPPING MACH. CO.

(Circuit Court of Appeals, Second Circuit. June 9, 1914.)

No. 282.

1. PATENTS (§ 328*)—VALIDITY AND INVENTION—TOBACCO STRIPPING MACHINE.
The Deiller patent, No. 985,984, for a tobacco stripping and booking machine, claim 11, was not anticipated, covers a meritorious invention, and is valid; also *held* infringed.

2. PATENTS (§ 124*)—VALIDITY—MISSTATEMENTS IN SPECIFICATION.
That the specification makes exaggerated or unwarranted statements as to the capabilities of the invention, even conceding that an infringer can interpose that as a defense, does not render the patent invalid, unless the statements were made fraudulently, and the patentee was a party thereto.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 176; Dec. Dig. § 124.*]

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

Appeal by defendant below from an interlocutory decree of the District Court, Southern District of New York, holding valid and infringed claim 11 of United States letters patent No. 985,984, dated March 7, 1911, granted to Martin and Eugene M. Deiller for a tobacco stripping and booking machine. Two suits were originally brought, which by order were duly consolidated.

T. H. Anderson, of New York City, for appellant.

Park Benjamin, of New York City, for appellee.

Before ROGERS, Circuit Judge, and VEEDER and MAYER, District Judges.

MAYER, District Judge. Nine claims were declared on, but the sole controversy now is as to claim 11, which reads as follows:

"11. A tobacco stemming machine comprising a rotatable drum, two circumferential flanges thereon having cutting edges, a rotary cutter coacting with said flanges to divide the leaf longitudinally on opposite sides of said stem, two transversely flexible belts passing around a portion of the drum periphery and having their inner edges in proximity to the outer faces of said flanges and supporting rollers for said belts; one of said rollers being located directly in front of said cutter."

The defenses remaining in the case are (1) noninvention; (2) noninfringement; and (3) fraud in the procuring of the patent.

[1] The invention has to do with a machine for stripping a tobacco leaf, so as to remove the midrib or stem with no membrane adhering thereto, and thus to leave the two wing portions of the leaf as nearly unimpaired as possible. The stem is, of course, unfit for smoking purposes and must be removed; but, to avoid waste, it is desirable that no particles of the resultant leaves be attached to the stem and thereby rendered useless. While the adherent portion in an inefficient opera-

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

tion may be very small in each case, the aggregate to be saved in leaf tonnage is very large, and represents a substantial commercial elimination of waste.

At first these stems were removed by hand, and later practical men and inventors turned their attention to devising machines to accomplish the desired result. The industry appreciated the importance of the problem, as is reflected by the large number of United States patents issued from 1870 down to the time of the patent in suit. But the task was not easy. The tobacco leaf is very delicate. The stem is of woody fiber, and tapers from the butt end of the leaf to the point. When the leaf is prepared for stripping, it must be moistened; and, being tender, it is easily torn, and thus the line of division is liable to be irregular. The device of the patent is a fascinating piece of machinery, which acts with almost human movement.

The elements of claim 11 are (1) the rotatable drum; (2) the two circumferential flanges; (3) the rotary cutter; (4) two transversely flexible belts; (5) supporting rollers for the belts, one of which is to be situated directly in front of the cutter. This supporting roller is obviously a feed roller (shown by No. 38 in sheet 1 of the patent drawings).

The operator introduces the leaf, usually point foremost, under the feed roller, hence under the belts, so that the stem lies in the gap between the drum sections, and the wing portions extend over the flanges. As soon as the moving leaf meets the belts, they press these wing portions down until they meet the drum periphery. Then they are grasped between the belts and the drum and carried onward as the drum rotates; that is to say, during the period in which the leaf is traveling from feed roller to drum periphery, its wing portions are being pressed downwardly by the belts which extend in a straight line from feed roller to drum on each side of the drum flanges. The transverse strain due to the pressure of the belts tautens or stretches the leaf across the gap between the flanges, so that, when it reaches the rotary cutter, two smooth, even cuts on opposite sides of the stem will be produced.

Each of the operations requires the greatest accuracy and care, and the result attained justifies the assertion of appellee that the combined elements operate to feed the leaf and control its movement longitudinally, to tauten the membrane over the sharp flange edges by very delicate elastic pressure, to control the strain by the implacement of the belts in respect of the drum flanges, so that that strain cannot exceed a predetermined limit, to regulate the moment of cutting, so as to take place at any desired period during the rise of the strain, and, while the leaf is under this control, to cut it before there is any opportunity for escape of the stem from between the flanges.

The practicability and usefulness of the machine were demonstrated by the fact that in less than two years deliveries were made and orders obtained representing in money an aggregate of over $300,000. In January, 1912, less than a year after the patent became known, defendant company was organized to engage in the business of making and letting of tobacco stripping machines, and defendant's advertisements

show a full appreciation of the commercial value of such machines. The proof leaves no doubt that acts of infringement were committed, if defendant's machines are infringements.

As to the prior art: Of the patents cited, only two need be referred to: (1) No. 813,868, dated February 27, 1906, to Deiller, one of the joint patentees of the patent in suit; and (2) No. 717,317, dated December 30, 1902, to Baechlin. The Deiller, No. 813,868, does not describe an operative machine, and there is no reason to doubt the statement in the file wrapper of the patent in suit that "the contrivance wholly failed" and that certain parts of the mechanism tore the leaf "to pieces." In the Baechlin patent there is no transverse stretching action exerted by the belts upon the part of the leaf which extends over the flanges, and the leaf is not pressed down over the flanges with elastic pressure before the cutting operation occurs. There is no immediate cutting of the leaf as soon as stretched, and there is an interval over which there is nothing to keep the stem from rising out of the spaces between the flanges.

As to prior uses: Only two similar machines (known in the case as Exhibits U and V) need be considered. Without describing in detail the operation of these machines, there are at least two features in which they differ, in substantial respects, from the machine of the patent: (1) The leaf is not fed and its movement controlled in a longitudinal direction by belts and drum flanges, but by fingers, which drag the leaf positively along; (2) the leaf is not cut immediately while under control and before the stem has had time to escape between the flanges, but, on the contrary, the only control of the leaf is the pulling along by the fingers and flattening by rollers, the stem being kept in the flanges by an added middle disk.

Exhibits U and V differ from the machine of the Baechlin patent, which does not show gripping fingers, loose pressing disks, and a middle disk for holding down the stem. As the District Judge pointed out, these exhibits embody the elements of claim 11, but they do not operate in the same way, nor do they accomplish the almost perfect result of the machine of the patent.

But extended technical discussion is unnecessary, because this is one of those instances where "actions speak louder than words." Richard Borgfeldt, president of defendant company, was thoroughly familiar with Exhibit U, and testified that he had seen it in operation when he first met Baechlin, now fully 10 years ago and Nicholas H. Borgfeldt, Richard's father, stated that he saw this machine in 1904.

A man as familiar with the art as Richard Borgfeldt, and as keenly appreciative of the commercial necessity and possibilities of a successful machine, would not have permitted the right device to be relegated to the storeroom of abandoned experiments. This is not the case of an inventor with little or no means, who cannot convince capital of the merit of his invention, and the result of whose labor is stolen by another. On the contrary, the case is one where a prior device failed in the hands of practical and hardheaded business men, because it did not accomplish the result which was vital to success; and, as has often been pointed out, if either the Baechlin patent or Exhibit U is all that

is claimed for it, the appellant is at liberty to manufacture and sell such machines to the fullest extent.

Our view is that the history of the art demonstrates that the patent in suit is for a meritorious invention, which has accomplished the stripping of tobácco with the nearest elimination of waste thus far known. We think there is no merit in the contentions as to noninfringement.

Whether the drum drives the belts, or the belts drive the drum, if a difference, is of no consequence; nor is it material whether the cutter in on machine is set at some distance back of the feed roll, while in the other the roller is directly in front of the cutter. Likewise, in view of the expression of the claim, "belts * * * having their inner edges in *proximity* to the outer faces of said flanges and two supporting rollers for such belts," there is no force in the argument that, because the belts in defendant's machine "are located and positively positioned quite a distance from the outer surface of the flanges," they are not "proximate" thereto. In brief, such changes are the obvious illustrations of efforts to escape infringement.

[2] Finally, it is claimed that the patent is void because the specification was fraudulent and deceptive in respect of statements as to the ability of the machine to stretch the leaf laterally to expand the stem. There is no doubt that the machine cannot accomplish this result. It would seem that only the United States can raise this point (Western Glass Co. v. Schmertz Wire Glass Co., 185 Fed. 788, 109 C. C. A. 1; Eastern Paper Bag Co. v. Continental Paper Bag Co. [C. C.] 142 Fed. 479); but, irrespective of the question as to whether appellant can interpose this defense, there is no evidence that the patentees, Martin and Eugene M. Deiller, were parties to the fraud, if such it were.

Our conclusion is that claim 11 is valid and infringed, and therefore that the interlocutory decree should be affirmed, with costs.

GENERAL MANIFOLD & PRINTING CO. v. CARBONIZED PAPER CO. et al.

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

No. 2056.

PATENTS (§ 328*) — INFRINGEMENT — MACHINE FOR COATING PAPER WITH CARBON.

The Weeks patent No. 665,648, for a machine for coating paper with carbon, construed, and *held* not infringed by a machine in which the rolls are heated.

Appeal from the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Suit in equity by the General Manifold & Printing Company against the Carbonized Paper Company and Thomas T. Butler. Decree for defendants, and complainant appeals. Affirmed.

Taylor E. Brown and Clarence E. Mehlhope, both of Chicago, Ill., for appellant.

Joseph A. Minturn, of Indianapolis, Ind., for appellees.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

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

MACK, Circuit Judge. On this appeal from the decree of the District Court, dismissing for want of equity appellant's bill of complaint alleging the infringement of Weeks patent No. 665,648, it is necessary for us to consider but one of the several defenses relied upon by the appellees, viz., that of noninfringement.

The patent in question relates to a machine for coating paper with carbon and similar materials, a machine designed to produce paper carboned on one side but, unlike the ordinary interleafing carbon paper, available on the other side for writing or printing. The ordinary carbon paper in common use, like typewriter carbons, has a comparatively thick layer of soft carbon, so that, inserted between two sheets of paper, it may be used over and over again to reproduce on the bottom sheet what is written on the top sheet. The top side of the carbon paper is unavailable for writing upon either because it, too, is carboned or because, the paper being thin, the carbon shows through.

Weeks appreciated the commercial possibilities of utilizing the back of ordinary writing or printing paper as the transfer medium, especially if only one or two reproductions were needed, as for books of sales slips. The difficulties to be overcome were the smudgy character of the soft carbon, which would tend to spoil the writing side of the paper when the two sides were necessarily brought into contact on being wound in rolls, the spreading or infusing nature of a liquid or liquified carbon, which would tend to cause the fiber of the paper to be so thoroughly permeated as to color and impregnate the opposite side of the sheet, thereby rendering it practically useless for writing or printing, and the economic waste of a thick layer of carbon when designed for use in only one transaction.

Weeks endeavored to meet these difficulties by substituting a practically-hard carbon for the liquid theretofore commonly employed. The claims in this patent as finally allowed, contrary to their first and rejected form, specifically characterized the carbon to be supplied by this machine to sheets of paper, as "practically hard."

The claims charged to be infringed are as follows:

"1. In a machine for supplying practically-hard carbon to sheets of paper, the combination of means for initially supplying practically-hard carbon to a sheet of paper, and devices for spreading and devices for affixing the carbon on the surface of the paper, substantially as described."

"9. In a machine of the class described, the combination of a roll receiving a supply of carbon contacting on one side with the carbon and on the opposite side with a sheet of paper for transferring and rolling onto the paper a coating of carbon, a second roll beneath the transferring-roll for the passage of the paper between the rolls to be contacted by the transferring-roll and means operating on the paper after it leaves the carbon-roll for uniformly and evenly spreading and permanently affixing the carbon on the paper, substantially as described.

"10. In a machine of the class described, the combination of a roll receiving a supply of carbon contacting on one side with the carbon and on the opposite side with a sheet of paper for transferring and rolling onto the paper a coating of carbon, a second roll beneath the transferring-roll for the passage of the paper between the rolls to be contacted by the transferring-roll, means operating on the paper after it leaves the carbon-roll for uniformly and evenly spreading and permanently affixing the carbon on the paper, and means for polishing and hardening the carbon surface of the paper after it leaves the spreading and affixing means, substantially as described."

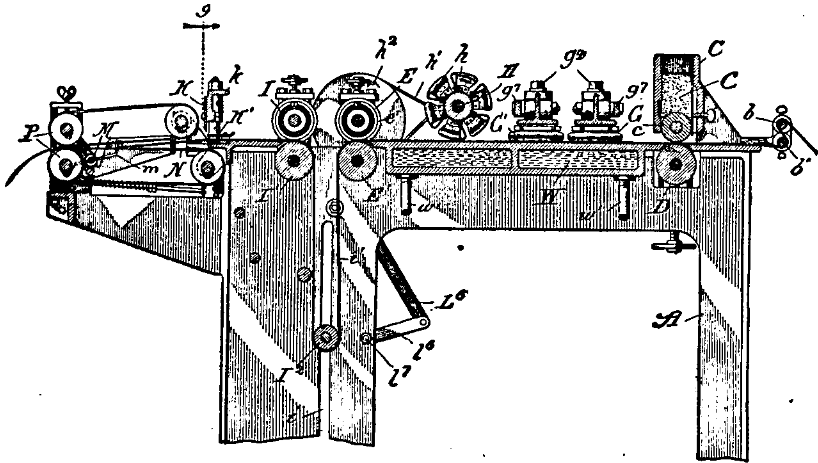
"28. In a machine for supplying practically-hard carbon to a sheet of paper the combination of means for initially applying the carbon to the surface of the paper, and devices for spreading and affixing the carbon on the surface of the paper.

"29. In a machine for supplying practically-hard carbon to the surface only of the sheet of paper, the combination of means for initially applying the carbon to the surface of the paper, means for spreading the carbon evenly over the surface, and means for affixing the carbon to the surface so that a practically-hard carbon surface will be formed on the surface only of the paper.

"30. A machine for forming a practically-hard carbon surface on paper, comprising means for initially supplying carbon to the surface of the paper, and means for affixing the carbon on the sheet to form a practically-hard surface.

"31. A machine for making hard carbon surfaced paper, comprising a paper feed, means for applying a practically-hard carbon to one surface of the paper and a device for affixing the carbon to the paper to form a hard carbon-coated surface, substantially as described."

Figure 3 of complainant's patent drawings is as follows:



In the specifications, the invention is thus described:

"The cake of carbon is arranged, preferably, in a pocket, *C'*, in such position that it may be fed onto the paper as it enters the machine by means of a friction supplying-roll, *c*. This carbon-supplying roll during its rotations contacts the lower surface of the cake of carbon, and transfers or carries a certain amount of it to the paper and rolls it onto the surface. This roll, however, may be dispensed with and the cake of carbon be held in such a manner that it may be contacted directly with the surface of the paper, and its or an additional weight, spring, or other desirable means be used to hold it in contact with the paper for the purpose of regulating the supply. Arranged directly under this carbon-supplying roll is a second roll *D*, which rotates with the carbon-supplying roll and is adjustably mounted in bearings *d*, so that its position or the space between it and the carbon-roll may be regulated.

* * * * * * * * * *

"Describing the distributing mechanism, it consists of two sets of rubbers, *G* and *G'*, which are made in a shape resembling the ordinary blackboard-eraser and which are provided with a cover *g*, of flannel, chamois, or similar material. These rubbers are moved back and forth transversely across the

paper while it is passing through the machine by means of reciprocating rods

* * * * * * * * * *

"Describing the polishing or hardening mechanism, I provide a rotating shaft *H* and mount it in suitable adjustable bearings on the bed of the machine. This rotating shaft carries a set of wings *h*, extending radially therefrom and arranged diagonally with relation to the axis of the shaft in such a manner as to meet at or near the center and form obtuse angles.

* * * * * * * * * *

"These wing polishers are coated or covered with flannel, chamois, or similar material, and are revolved at a high rate of speed in such a manner as to permanently affix or harden the exposed surface of the carbon coating, so as to minimize the danger of disfiguring the adjacent sheets of paper.

* * * * * * * * * *

"During the operation of rubbing and polishing, and owing to the friction force exerted on the paper the paper is liable to become heated and, as a consequence, ruptured or destroyd, and the heat also interferes with the coating of the carbon. In order to remove this objection, I provide the bed of the machine with a water-jacket, *W*, and provide it with supply and exhaust pipes, *w* and *w'*, so that a constant circulation of water may be had whenever it is desirable or necessary, and thus keep the temperature of the paper as uniform as possible."

While the parties are agreed that all of the claims in question are for substantially the same subject-matter, a combination of carbon-applying means, carbon-spreading means, and carbon-affixing means, they disagree as to the condition in which, and therefore the devices by which, the practically-hard carbon must be applied, spread, and affixed under the patent in question. Complainant contends that while the carbon must be initially hard, like a cake of soap, the patent is broad enough to cover means and devices for softening it or keeping it soft while removing the necessary portion from the cake and affixing, spreading, or polishing it on the paper, that is, that the devices may be either solid cold rollers or hollow rollers supplied with steam heat. The basis of this contention is that the cooling water-jacket, as described, has no connection with the first element in the combination, the means for originally supplying the carbon to the paper, that, moreover, it is only a preferential, but not an essential, attachment to the distributing and polishing devices, and that, therefore, the invention does not necessarily contemplate counteracting the heat, with its consequent softening of the hard carbon, produced by friction in the very process of separating it from the cake and transferring it to the paper.

The evidence demonstrates that the art of coating only one side of paper or other goods is old, that commonly this coating material was a liquid, and that in the earlier machines, if wax, paraffin, or other nonliquid material was to be used, either it or the goods, or both, were heated during the transferring and affixing process.

The file wrapper and contents show that the applicant, in answer to references cited by the examiner, distinguished his machine on several occasions from earlier inventions by the assertion that the latter, unlike his device, utilized steam heat to make or keep the coating material liquid.

The board of examiners in chief said, in regard to the MacBrair patent No. 532,172, relied upon by the examiner but rejected by them on appellant's appeal:

"The calendar rolls, which are presumably heated rolls, revolve in the wrong direction. * * * The heat, as it is stated, would be detrimental to the process, even though the rolls rotated in the proper direction."

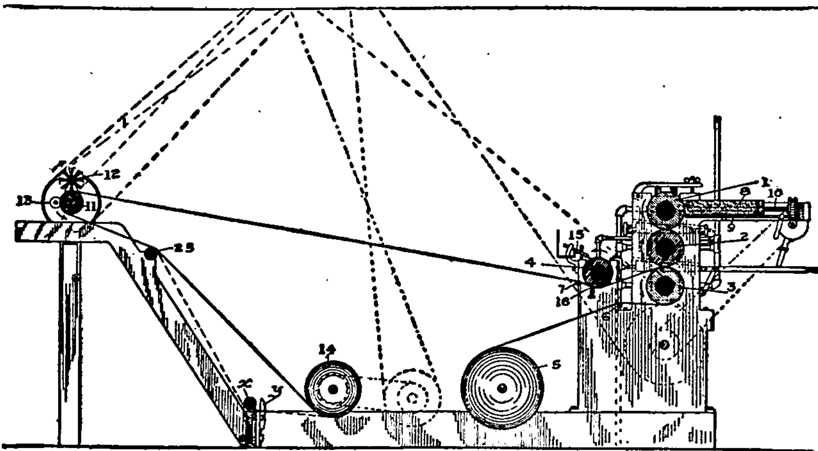
It is apparent that in their opinion Weeks' invention was for a machine designed to transfer to paper carbon that was not only initially practically hard, but that remained in this condition during the entire operation of supplying, distributing, and polishing it.

In our judgment, both the language of the patent and the history of the claims in the Patent Office indicate clearly that the means and devices covered thereby are only such as will produce this result without steam or other heat, and that the applicant intended so to limit his invention in order to avoid the charge of anticipation.

Whether or not such a machine, designed to prevent the carbon permeating the reverse side of the paper by supplying, spreading, and rubbing it in in a cold, hard state instead of in a warm, soft condition, could be successfully operated is not the question now before us; if it were, the fact that no witness has testified to seeing a machine constructed in accordance with the patent in suit, and that the machine actually used by complainant is heated, would be significant. It becomes unnecessary, too, to inquire into the validity of the claims if they were given the broad construction contended for.

We come to a consideration of defendant's machine, in order to determine whether or not it infringes on the patent in suit. While Weeks obtained, on the very same day on which the patent in question was issued, letters patent covering the carbon paper, this latter patent is not in any manner in question in this case, and, so far as the patent in suit is concerned, defendants were free to make a noninfringing machine designed to produce the identical paper.

Their machine is shown in the exhibit as follows:



It is described by defendants' expert in these words:

"There are three heated rollers arranged with their axis in a vertical plane. These are represented by *1*, *2*, and *3* at the right of the diagram. There is a fourth roller, marked '*4*,' a short distance to the left of the rollers *1*, *2*, and *3*, and there is a roller, *11*, at the left of the machine as shown in the diagram. Above this latter roller is a brush, *12*, revolving in the direction of the motion of the paper and acting in conjunction with the roller *11* to draw the paper through the machine. There is a roll of paper, *5*, from which the paper is fed and a roll, *14*, upon which the coated paper is wound. The paper passes from the roll *5* around the lower roll *3* and under the roll *2*, contacting something over 180 degrees of the periphery of the roll *3*. It then passes under the roll *4* over the roll *11* and down to the roll *14*, upon which the coated paper is wound. The carbon is applied to the surface of the upper roll *1*, and is conveyed by that roll and the roll *2* to the paper surface between the roll *2* and the roll *3*. The heat of the rolls melts the carbon so that it is applied to the paper in a liquid form. The roll *4* revolves in the opposite direction to the motion of the paper under it, and its surface takes up the excess of carbon deposited on the paper by the roll *2* and carries it upward. Above the roll *4* is a knife or scraper, *15*, which extends along and in contact with the surface of the roll *4* at the top of the roll. By this knife the carbon taken up from the paper by the surface of the roll is scraped off. This scraper takes off almost all of the carbon, but, owing to imperfections of workmanship, a little passes under the scraper and is deposited on the surface of the paper loosely beyond the roll. The brush *12* removes this loosely deposited carbon that passes under the edge of the knife *15*."

The essential differences, in our judgment, between the machine actually used by defendants and the machine protected by complainant's patent are these: While each of them starts with a cake of practically-hard carbon, defendants cause this carbon to be supplied to the paper in a hot, and therefore liquified form; complainant in a cold, hard form. So far as the first element of the combination is concerned, the means for supplying practically-hard carbon to the paper, complainant's patent contemplates a cold roller to remove "a certain amount" of it, "the correct amount," as its expert testifies, and to transfer this in the same hard, cold condition to cold paper; defendants, on the other hand, use a steam-heated roller to melt off an excess supply of it and to transfer it in a liquid form to paper heated by passing over a hot roller.

Complainant's second element, the means of spreading the carbon evenly over the paper, is essential to produce the desired result because of the very hardness of the cold carbon and its resulting failure, in the first operation, to spread itself evenly. Defendants' second element, as indicated by the samples of paper introduced in evidence, showing the condition of the carbon after each of the separate stages in its passage through the machine, is not a spreading or distributing device, but a device, a fourth roller with a scraping knife attachment, for removing the excess liquified carbon and removing it quickly enough after the initial application to obviate the danger of its permeating both sides of the sheet. It may be that the roller also tends to spread the carbon more evenly, but, in our judgment, its essential function is to take up the excess carbon, which the scraping knife then detaches from it on each revolution. This roller in the defendants' machine is also heated in order to keep the carbon liquified whereas, not only is complainant's spread-

ing or distributing means or device cold, but even the friction-produced heat is counteracted by the water jacket.

The third element in complainant's combination, the hardening and polishing means, has for its function the hardening and polishing of the carbon as stated in the specifications, and in no sense, as now claimed, the brushing away of loose particles of carbon. There is no intimation in the patent itself or in the file wrapper that this third element includes or was intended to include means for brushing away loose carbon as well as for thoroughly hardening and polishing the thin layer of carbon as spread out and distributed by the second element.

Defendants' machine, on the other hand, has not a buffer or polisher but a brush with hard bristles, designed to remove such loose particles of carbon as may have passed over the fourth roller and not have been completely removed therefrom by the scraping knife. These amounted to a quart and a half in a 10-hour run, coating 100,000 lineal feet of paper. The evidence shows that in the working of the apparatus the ends of the bristles of this brush gather nodules of hard carbon upon them. This in itself would demonstrate that this bristle brush was not adapted primarily to harden or polish, and that any such effect is merely incidental.

Without, therefore, in any manner considering the defenses of invalidity because of anticipation, aggregation, and functional character of the claims, and confining ourselves solely to the defense of noninfringement, we are of the opinion that this defense has been successfully maintained, and that the decree must therefore be affirmed.

PETERS v. CHICAGO BISCUIT CO. et al.

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

No. 1984.

PATENTS (§ 328*)—NOVELTY—CARTON FOR BISCUITS.

The Peters patent, No. 621,974, for a carton for containing biscuit, crackers, and like articles, and the method of making the same, is void for lack of patentable novelty in view of the prior art.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Christian C. Kohlsaat, Judge.

Suit in equity by Frank M. Peters against the Chicago Biscuit Company and others. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 200 Fed. 774.

Charles K. Offield, of Chicago, Ill., for appellant.

Paul Bakewell, of St. Louis, Mo., and P. C. Dyrenforth, of Chicago, Ill., for appellees.

Cornelius W. Wickersham, of New York City, amicus curiæ.

Before BAKER and MACK, Circuit Judges, and ANDERSON, District Judge.

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

ANDERSON, District Judge. This is a suit for the infringement of United States letters patent No. 621,974, granted to the appellant, Frank M. Peters, March 28, 1899, for an improvement in a carton for containing crackers, etc., with an inner lining, and the method of making the same. The defenses interposed are want of invention and noninfringement. The principal arguments in the brief and upon the hearing were addressed to the first defense, and it will not be necessary in the disposition of this appeal to consider the second.

Peters, in his specifications, says:

"This invention relates to an improved method of and means for packing biscuits, crackers, and other articles, and has for its object to provide an inexpensive package whereby bakery goods of this description may be kept fresh and in proper condition for consumption by effectually excluding moisture therefrom and whereby the goods will be firmly packed and held and thereby prevented from rattling and breaking in the package.

"Heretofore substantially air-tight and moisture-proof metallic cases or boxes have been employed for the purpose of preserving the freshness of biscuit or the like; but the use of these cases involves considerable expense, and they have only been employed in conjunction with the highest priced goods, their cost being too great to permit their use with less expensive goods. It has been customary heretofore to pack these less expensive goods in cartons or paper boxes, and in some cases these cartons or boxes have been provided with a lining of what is known as 'waxed' or 'paraffined' paper; but in such packages as heretofore constructed this lining has not been so disposed as to close the openings or folds of the box and has itself presented openings through which the moisture has had direct access to the contents of the package. By reason of these facts such comparatively inexpensive packages have failed to protect the goods from moisture, and they have quickly lost their freshness.

"It is the primary object of my invention to obviate these difficulties and to provide a package which at an expense practically no greater than that of the ordinary lined carton package will effectually protect the goods and preserve their freshness."

The claims of the patent, four in number, are as follows:

"1. The herein described method of packing biscuit, crackers, or the like, which consists in completely enveloping the same in an uncut or continuous lining or protective sheet and an outer sheet or blank of heavier but flexible material provided with marginal flaps, by superposing the lining or protective sheet upon the blank and then simultaneously folding both said sheet and said blank by the aid of a suitable former into the form of a box or carton, overlapping and tucking said flaps during said folding and thereby interfolding the marginal portions of the lining or protective sheet with the flaps of the blank, and securing the flaps to hold the package closed, substantially as described.

"2. The herein described box or carton for crackers, biscuit, or the like, comprising an internal lining composed of a sheet of protective paper completely enveloping the contents, and an outer sheet of heavier but flexible material having overlapping and interlocking flaps with which the marginal portions of the lining-sheet are interfolded, substantially as described.

"3. The herein described box or carton for biscuit, crackers, or the like, comprising an internal protective lining composed of a single continuous or unbroken sheet of material such as waxed paper and an external covering of heavier but flexible material suitably cut and scored to provide overlapping and tucking flaps, said sheets being adapted to be simultaneously folded while one is superposed upon the other and said flaps being overlapped and tucked, and the marginal portions of the lining interfolded therewith and the package thereby secured without extraneous fastening means or perforating the lining, substantially as described.

"4. The herein described box or carton comprising an internal protective lining composed of a single continuous or unbroken sheet of material, such as waxed paper, and an external covering of heavier material suitably cut and scored to provide overlapping and tucking flaps, and said lining-sheet being of such dimensions as to provide a top fold adapted when folded to afford a triangular flap of greater length than the width of the box, and to be engaged by the top flap of the external covering and pass therewith into the space between the edges of the front of the covering and the lining-sheet, said flaps being overlapped and tucked and the marginal portions of the lining interfolded therewith and the package thereby secured without extraneous fastening means or perforating the lining, substantially as described."

As stated in the opinion of the court below:

"The patent covers the method of packing biscuit, etc., in a carton formed by imposing upon any of the well-known suitable forms for a folding box, including a top or cover, an uncut, flexible sheet of wax or paraffine paper, and then interfolding the form and uncut sheet together in the usual manner of folding cartons, so that the wax or paraffine paper will form a complete and unbroken lining to the carton, and the two become a unitary packing-box."

And as further stated in the opinion of the court below:

"It is not claimed that a package formed with a wax or paraffine paper lining is new, but it is insisted by complainant that the combination of such a lining with and adjusted to the forms or blanks prepared for use in constructing completely inclosed cartons in such a manner that the lining shall interfold with the slits, tongues, and flaps of the form, notwithstanding it be itself uncut, is new."

The patent in suit was before the Circuit Court of Appeals of the Eighth Circuit in 1903, in the case of Union Biscuit Company et al. v. Peters, and was by that court held invalid for lack of patentable novelty. The decision is reported in 125 Fed. 601, 60 C. C. A. 337. Much of the argument upon the hearing and in the briefs was addressed to the question as to how much weight this court should give to the decision of the Circuit Court of Appeals of the Eighth Circuit. It is insisted by the appellant that this court is not bound to follow the decision of that court, but that he is entitled to our independent judgment. To this we agree, and we have given the questions involved in this case our own investigation, and have come to our own conclusions independently of the decision mentioned.

The prior art is very fully set forth in the opinion in that case, but it is sufficient for the purposes of this case to refer to but two of the prior patents—the Smith patent, No. 257,522, issued May 9, 1882, and the Albert patent, No. 355,496, issued January 4, 1887.

The Smith patent discloses an outer blank, cut and scored; it also discloses a lining-sheet, consisting of a single unbroken piece of water-tight material which is superimposed over the cut and scored outer wrapper of heavier material. The lining-sheet and the wrapper are then interfolded together, resulting in a receptacle illustrated in the figures of the patent. This patent of the prior art discloses the idea of providing an outer blank, suitably cut and scored, superposing thereon a waterproof lining sheet and interfolding these two elements together, so as to form a unitary structure. In the Smith patent the outer wrapper and the inner lining sheet do not completely envelop the contents, because in that case the patentee was only concerned

with providing a suitable box or bucket for carrying ice cream, or the like, without danger of leakage.

The Albert patent discloses a strawboard blank, suitably cut and scored, and a thin waterproof lining sheet of a size corresponding to the extreme dimensions of the cut and scored blank. This lining sheet is superimposed upon the cut and scored blank. The lining sheet is required to be equal, both in width and length, to the extreme dimensions of the blank. In the specifications, the Albert patent describes how, after the lining has been superimposed on the cut and scored blank, the lining is then folded and lapped in between the flap sections of the blank, thus being interfolded with the latter, as illustrated in that patent. The result is a box or basket forming a unitary structure, composed of the outer cut and scored blank and the superimposed lining sheet, the two being folded together, substantially as in the appellant's carton.

Peters is presumed to have known the prior art as developed by the Smith and Albert patents, and the disclosures of these two patents taught him just how to make the carton described in his claims and specifications. True, the Smith and Albert patents were designed to produce baskets or pails, but the forms of both boxes and pails were old, and it did not involve invention to add to the outer wrapper or to the inner lining, or both, sufficient material to make the covering and thus turn a pail into a box.

In addition to our own investigation of the questions in the case at bar, we have carefully considered the opinion in the case of Biscuit Co. v. Peters, supra, and are fully satisfied with the reasoning and conclusion there reached.

The decree of the court below should be affirmed; and it is so ordered.

ADRIAN WIRE FENCE CO. v. MILWAUKEE WIRE FENCE CO.

(District Court, E. D. Wisconsin. December 4, 1913.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—WIRE FENCE TIE.
   The Williams patent, No. 533,403, for a tie for binding together the longitudinal and vertical wires of a wire structure, such as a fence, claim 1, in view of the prior art, is void for lack of invention; also, construed narrowly and limited to the precise construction shown, as it must be if conceded validity, *held* not infringed.

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—DIE FOR FORMING WIRE FENCE TIES.
   The Tiffany patent, No. 755,187, for a die for forming a knot or tie for binding crossing fence wires *held* void for lack of invention in view of the prior art.

In Equity. Suit by the Adrian Wire Fence Company against the Milwaukee Wire Fence Company. On final hearing. Decree for defendant.

Complainant has filed its bill charging infringement of two patents, No. 533,403, issued to Williams, relating to the tie or knot for securing

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

longitudinal or strand, and vertical or stay wires at points of intersection; also No. 755,187, issued to complainant, assignee of Tiffany, relating to the dies for forming and applying the knot or tie referred to. Alleged infringement of the Williams patent will be first considered. The claims embodied in such patent are:

"(1) The combination in a wire structure, the crossed wires, one of which is bowed to receive the other, with a tie consisting in a staple engaging with its bend, the said bowed wire with its legs crossing the other wire and its points bent around the bowed wire from opposite sides, substantially as described.

"(2) A staple adapted for use as a tie for wire structures, the said staple being longitudinally curved, one member having a greater curvature than the other, whereby the members are decidedly out of alignment at their extremities, the same members being likewise beveled at their extremities upon opposite faces, substantially as and for the purpose specified."

The defendant as a manufacturer of wire fences, uses what in general may be termed a staple fastener on the intersecting wires of its structure. As will be seen, the first claim above covers, in combination, the crossed wires bowed to receive each other with a staple tie; while the second claim is specifically limited to the described form of staple. The defendant in its structure uses a type of staple not subject to the terms of such claim, and hence complainant does not charge infringement thereof.

The defenses are, invalidity and noninfringement.

Rector, Hibben & Davis, of Chicago, Ill., for plaintiff.

Walter H. Chamberlin, of Chicago, Ill., for defendant.

GEIGER, District Judge (after stating the facts as above). [1] The combination presented in claim 1 is expressly declared to contain the elements: (1) The wires, longitudinal and strand, bowed or crimped to engage at the intersecting point; (2) a staple tie whose bend engages the one, and with its legs crossing the other of the wires and bent around the former on opposite sides. Respecting the first of these—while the idea of bowing the wires in *opposite* directions is not embodied in the Caldwell patent, No. 372,060, that inventor clearly had in mind the precise construction here involved, for he expresses his preference thus:

"I prefer to make the bends or crimps * * * of both longitudinal and vertical wires deflect in the same direction, as I am thereby enabled to make the staples or clamps * * * clasp the joint tighter than if they deflect in opposite directions."

Therefore it would seem that, not only was the idea of crimping or deflecting—*one way or another*—the intersecting wires of a structure, known or disclosed, but it was known and disclosed as an element in fastening such wires by means of a staple tie; and thus the situation is advanced to the inquiry whether this element is used in combination with another element which, if new, or if old, embodies in either case, invention.

The use of the staple as a means of effecting a knot or tie, being recognized in the prior art, the narrow question is presented whether the particular form of tie which here consists of a staple "engaging with its bend the bowed wire with its legs crossing the other wire and

its points bent around the bowed wire from opposite sides" is an advance upon the prior art to be ascribed to invention or to mechanical skill. Now the Caldwell patent, referred to, does not suggest the type of tie or knot brought forth by Williams, but does recognize a rather advanced state of the art. The later patent, 495,029, to Depew, does, however, approach the structure of the patent in suit in these very particulars: A staple, or clip as it is there called, whose bend engages the vertical wire (corresponding to the "bowed" wire) "with its legs crossing the other wires and its points bent"—in the patent in suit—"around the bowed wire on opposite sides"—in the Depew patent—to re-engage and perfect the tie by twisting upon each other. That is to say, in the Depew tie, the legs, instead of engaging the vertical wire and bending around it, re-engage and form the knot by twisting around each other. Up to the point, therefore, where the legs of the staple, after bending around the longitudinal wire, and are required either to re-engage the vertical wire, or each other, the two structures embody the same idea. In completing the knot, or tie, it seems to me that the re-engagement of the vertical wire, as indicated in the Williams structure, rather than re-engaging the legs to form a knot by twisting each upon the other, involves really a matter of choice to be exercised upon the promptings of mechanical skill and not inventive faculty. It may be true, as pointed out by complainant, that because of the light wire contemplated to be used in the Depew structure, it is of less efficiency than complainant's structure. But that does not gainsay that it embodies, to the extent just indicated, just what Williams sought to introduce as a form of *locking* intersecting wires. The possible inefficiency of the structure, due to the lightness of the wire and its consequent lack of firmness, obviously suggests that greater efficiency and firmness would result from the use of heavier and less ductile wire; and it would seem evident that the degree of engagement—the amount of knotting, as it were—is wholly dictated by the character of the material used. Thus, in the Depew structure, if a heavy wire were used, sufficient firmness would result from a small amount of twisting, as compared with that necessary in the use of a lighter wire; and, as I view it, the completion of the locking, by merely bringing the legs together without re-engagement, would, if the wire be of sufficient stiffness, involve no other new principle of forming a lock. Although the patents, No. 434,794, to Leggett, and No. 482,908 to Staples, cover structures from which, to the structure in suit, there is a "far cry," as stated by complainant's expert, nevertheless they disclose that by continuing the wire which engages the intersecting wires around, so that it formed a circle or loop, a lock was created which, with tempered or stiff wire, approached, to some degree of effectiveness, the actual tying of a knot. Now this is important only to show that the notion of completing the knot by a lesser degree of engagement than that shown in the Depew structure was not new in the art of fastening intersecting wires, no matter what the structure may be. Indeed, when once given intersecting wires, and the staple with the known methods of engaging such wires with such staple, it is difficult to see why every change in the form or configuration of the knot should be attributed to the exercise of in-

vention. In this aspect, it would seem that the situation is no different than if the inventor were given the intersecting wires and a piece of cord and approached the problem of choosing from the numberless forms of knots that which he deemed most efficient. Thus, where cord of one type is used, a double knot, with another type, a single knot might suffice; so with light and ductile wire, as before remarked, a complex or twisted knot might be deemed necessary, whereas, with tempered or heavy wire, the result might be accomplished by lessening the degree of engagement until practically a link or loop form of tie has been reached.

I conclude that claim 1 contains no elements which singly, or in combination, disclose patentable novelty. This of course renders unnecessary consideration of the defense of noninfringement. From what has been said respecting the state of the art, claim 1, if valid, could in no event be of great breadth; and, if sustainable at all, in my judgment, must be limited to the precise form of *sharp-pointed* staple configured as exhibited in the drawings. This the defendant does not infringe.

[2] Upon the other branch of the case, the alleged infringement of the Tiffany die patent, the only defense is invalidity for want of novelty. If the claims are valid, defendant infringes. At the date of application for the patent, June 19, 1903, the art of die making had reached a high state of development. The reference to patents to Lamb, No. 628,986; to Hoxie, No. 641,699; to Lamb & Hoxie, No. 646,435, to Lamb & Hoxie, No. 646,497—all issued during the years 1899 and 1900, disclose dies for making knots or ties of simple and complex forms. One of them, 646,497, to Lamb & Hoxie (sheet 3), exhibits a loop knot substantially like the Williams tie which we have considered; and in this connection we may note the testimony given by Tiffany, which strongly tends to show that, although a patent was issued to him, he originally had no thought of having invented a die, but a new form of *knot*, and was evidently deterred from claiming such knot to be patentably novel because of the Williams patent. In other words, he regarded his activities in respect of the die he was making, as being within the field of mechanical skill and judgment.

But aside from this, the ideas of two part dies with channels for receiving the crossed wires, the employment of staples to make a knot, the possibilities of many forms of knots made by variations in the grooves or recesses of the dies into which the staples were driven, were well known; and, as pointed out respecting the Williams patent, it cannot be that, with each change in the form of the channels, grooves, or recesses, with no substantial change in function, with no different result except of configuration, the inventive faculty, and not mechanical skill or judgment, was exercised.

I am of opinion that the advance, if any, made in the Tiffany over the prior art dies, was not due to invention, and the patent is void.

A decree may be entered dismissing the bill.

MEAD MORRISON MFG. CO. v. EXETER MACH. WORKS.

(District Court, M. D. Pennsylvania. July 20, 1914.)

No. 122.

1. PATENTS (§§ 25, 26*)—"COMBINATION"—CO-OPERATIVE ACTION OF ELEMENTS —"AGGREGATION."

To constitute a combination, it is essential that there should be some joint operation, performed by the elements producing a result due to their joint and co-operating action, while in an "aggregation" there is a mere adding together of separate contributions, each operating independently of the others.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. §§ 25, 26.*

For other definitions, see Words and Phrases, vol. 2, pp. 1275, 1276.]

2. PATENTS (§ 328*)—INVENTION—HOISTING APPARATUS.

The Norris patent No. 722,613, for a hoisting apparatus for use in coal towers, in which one of the two engines used is superimposed on the other to economize space, but without changing their separate action, does not embody a combination, and is void for lack of patentable invention.

In Equity. Suit by the Mead Morrison Manufacturing Company against the Exeter Machine Works. On final hearing. Decree for defendant.

See, also, 196 Fed. 789.

Emery, Booth, Janney & Varney, of Boston, Mass., for plaintiff.

E. G. Siggers, of Washington, D. C., and A. L. Williams, of Wilkes-barre, Pa., for defendant.

WITMER, District Judge. In this suit, by bill in equity, the Mead Morrison Manufacturing Company charges the Exeter Machine Works with infringement of letters patent of the United States numbered 722,613, granted March 10, 1903, upon the application of Almon E. Norris, filed May 3, 1902, and assigned to the complainant.

The invention relates to an improvement in hoisting apparatus, and the particular act of infringement charged is the construction and installation, March, 1911, of a pair of superimposed engines in the tower of the Eastern Coal Company, located at the Dyer Street Wharf, at Providence, R. I. That the so-called infringing structure embodies the features and functions embraced within the terms of claims 1, 2, 3, 4, 5, 6, 7, 8, and 10 of the patent cannot be successfully disputed. The case rests chiefly upon the validity of the patent and the laches charged against the complainant in not faithfully and diligently asserting its alleged rights under the grant.

Regarding the nature of the invention the patentee says:

"This invention relates to hoisting apparatus, and especially to what are known as 'coal towers.' These towers as usually constructed are mounted upon a suitable elevated track and carry a boom, on which travels a carrier or trolley, a bucket or other hoisting device being suspended from the carrier. Usually the tower carries two engines, which are located in different places in the housing carried by the tower, and one of which operates the bucket and the other of which operates to move the carrier back and forth upon the track." Page 1, lines 11 to 23.

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

After thus setting forth the state of the art, the patentee discloses his contribution by further stating:

"In place of these two separately situated engines I substitute a single structure having a trolley operating engine and a hoisting engine."

The novel features of this substituted structure the patentee continues are as follows:

"My engine mechanism comprises a horizontally arranged bucket hoisting engine, upon the frame of which is a carrier or trolley operating engine, and preferably one of said engines will be adapted to operate the driving gearing for the tower, and will also have connected to its crank shaft a winch head, by means of which the boom may be raised and lowered. By this arrangement of engine I economize room in the tower and, what is more important, am enabled to place all the levers of the engine mechanism within easy reach of a single operator." Page 1, lines 30 to 42.

"The hoisting engine and the trolley operating engine are capable of operation independently, by placing one on top of the other, as illustrated, provide a form of engine which has many advantages when employed in combination with a coal handling tower." Page 2, lines 17 and 23.

Having described his invention as consisting of an arrangement of the engines heretofore located separately in the housing of the tower by placing one on top of the other, capable of operation independently as before, the patentee makes his claim in form as typified by claim 2:

"In a hoisting apparatus, a carrier movable on a track, a hoisting bucket suspended from the carrier, a hoisting engine to operate the bucket, said engine comprising two cylinders, the pistons of which are operatively connected to opposite ends of a hoisting drum shaft, and a carrier operating engine supported on the frame of the hoisting engine and situated between the cylinders thereof."

It is the contention of the complainant that the claims of the patent are combination claims, combining the usual elements of a coal hoisting plant with the novel features of engine construction. As exemplified from the defendant's structure, involving the placing of the trolley engine upon the hoisting engine, it does not effect a combination of elements. The two engines continue to operate successively or independently of each other, and there is no change necessitated by the adjustment either in the valves, foot, and hand levers or other equipment to control or operate them. Mr. Bramhall says that:

"In installing the defendant's superimposed engines in the tower of the Dyer Street Wharf the same levers were used, which had previously been employed in the separately situated engines in use there and that no change was made necessary by the exchange of engines."

Furthermore the placing of the trolley engine upon the frame of the hoisting engine does not result in any different operations shifting the carrier or trolley along the track upon the boom, or in hoisting, opening, and closing the bucket suspended from the carrier. These operations are all the usual type whether performed by this superimposed engine or by the old type of engine arranged in separate parts of the tower. Referring to this subject, the defendant's expert very aptly says:

"But this location of the trolley engine did not in any way change the mode or character of the operation of the old combination of elements, which,

as a combination presented absolutely nothing of novelty. As an aggregation, the structure did have the novelty of the trolley engine supported on and above the frame of the hoisting engine. But this novel location of the trolley engine in no way affected the operation of the complete combination, which operates just the same with the trolley engine on top of the hoisting engine as it does with it in front of the hoisting engine or at one side thereof."

Comparing the operation of a set of direct acting engines located side by side, or in tandem, with the same engines superimposed, as in the patent, I discover no difference, nor the accomplishment of any new useful results. It must be conceded that by mounting the smaller engine upon the larger some space is economized, but this does not affect the functions of the structures or their effectiveness.

As was said by Judge Gray, in the case of James Spear Stove & Heating Co. v. Kelsey Heating Co., 158 Fed. 622, 85 C. C. A. 444:

"The aggregation of these several old elements in one structure may have produced, and doubtless did produce, a hot air furnace that was some improvement upon the prior art, in the respect that it may have been stronger, mort durable, or easy of construction. But these results were due to the function of each old element acting independently and by itself, without coaction with other elements. * * * Each of these elements contributed its own function and attribute, which was in no wise dependent upon the others, or affected thereby. We are compelled, therefore, to think that claim 5 sets forth a mere aggregation of old elements, and not a new combination involving patentable invention."

[1, 2] To constitute a combination it is essential that there should be some joint operation performed by the elements, producing a result due to their joint and co-operating action, while in an aggregation there is a mere adding together of separate contributions, each operating independently of the other. Am. C. M. Co. v. Helmstetter, 142 Fed. 978, 74 C. C. A. 240; L. A. Thompson Scenic R. Co. v. Chestnut Hill Casino Co., 127 Fed. 698, 62 C. C. A. 454; Osgood Dredge Co. v. Metropolitan Dredging Co., 75 Fed. 670, 21 C. C. A. 491. Unless the combined action produces a new result the patent is invalid for want of patentability. Applying the test employed in Safety Car Heating & Lighting Co. v. Consolidated Car Heating Co., 174 Fed. 658, 98 C. C. A. 412:

"Do the engines act independently or jointly? If they act independently it is an aggregation; if they act jointly and a new and useful result is produced, it is a combination."

It is not doubted that the superimposed direct acting engines are more efficient, in many ways, than the separately situated geared engines, and can be operated with less vibration and expense incident thereto; however, it is equally well settled that such is not due to the mounting of the direct acting engines, but to the very character or construction of the engines in whatever position they are operated.

Then again if the arrangement of the engines would be regarded as improving the combined efficiency of them, the combination of the two engines clearly involved only ordinary mechanical skill. The state of the art in coal hoisting towers shows that it was common, prior to the alleged invention of the patent in suit, to employ two separately situated engines, each mounted on the floor of the engine room of the coal tower, one alongside of the other with a passageway between. It was

also old in the art to employ direct-acting engines. It is a well-known fact that the engine room of a coal hoisting tower is made as large as the conditions will permit, but as a general thing the room is quite small. To make the room any larger it would be necessary to enlarge the whole tower. As long as the small-sized geared engines were satisfactory to the owners of the coal towers, there was no occasion to alter the separate relation of the two engines, and because of the size of the geared engines it was entirely practicable to mount them on the floor of the engine room; but when it became necessary to increase the output of coal hoisting towers, it was found advisable by some engineers to substitute a direct-acting engine for the geared engine, and this necessitated a change in the relative positions of the engines. A direct-acting engine is a much larger engine than a geared engine designed to handle the same amount of coal. A direct-acting hoisting engine could not be placed in the same space occupied by a geared hoisting engine; neither could a direct-acting trolley engine be used in the same space as the geared trolley engine. It was, therefore, necessary to make some provision to receive the direct-acting hoisting and trolley engines. It was not practicable to increase the size of the engine room, for this would necessitate an increase in the size of the whole tower. Therefore, the only thing to be done was to superimpose the smaller, i. e., the trolley engine, on the frame of the hoisting engine. This was easy of accomplishment, because the legs of the direct-acting hoisting engine were spaced apart sufficiently to accommodate the legs of the framework of the direct-acting trolley engine. After placing the trolley engine upon the hoisting engine, it was a simple matter to employ a few bolts to connect the two frames together. The solution of the problem was obvious, and the expedient of connecting the two engines in superimposed relation purely a mechanical one. To this effect is the testimony of the defendant's expert; and the complainant's expert also stated that:

"The direct-acting engines of the patent in suit are peculiarly fitted for such union and give it the capacity by the combining or the unification of these two engines without any modification. The direct-acting engines, in other words, offer one of the characteristics of engines which is better adapted for the bringing together or the combination as pointed out in the specifications and drawings of the patent."

Continuing, he says:

"In the first place they (the direct-acting engines) have in their construction a space between the cylinders and a space between the cylinders and the front of the engine which would be sufficient to take in the trolley engine."

The superimposed direct-acting engine of the type patented was but the natural and reasonable outgrowth of the gradual development of the coal hoisting apparatus. When the increasing coal shipments made necessary the use of a different type of engine, it naturally and spontaneously occurred to the engineers having charge of these plants to employ the large, direct-acting engines, and since these engines could not be separately situated in the limited space then occupied by the separately situated smaller and slow, though powerful geared, engines, it was necessary to superimpose them. To bring about this superimposition no change or modification of either engine was requir-

ed, and the step was obvious to a man of usual skill, and is not patentable.

As was said by Justice Bradley in Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438:

"To grant to a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle and injurious in its consequences."

Without commenting on the many cases in which this doctrine has been applied the following may be consulted as sufficient authority for the conclusion reached: Aron v. Manhattan Railway Co., 132 U. S. 84, 10 Sup. Ct. 24, 33 L. Ed. 272; Morris v. McMillin, 112 U. S. 244, 5 Sup. Ct. 218, 28 L. Ed. 702; Pennsylvania Railroad Co. v. Locomotive Truck Co., 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222; Hollister v. Benedict, 113 U. S. 59, 5 Sup. Ct. 717, 28 L. Ed. 901; Ryan Car Co. v. Live Poultry Trans. Co., 195 Fed. 525, 115 C. C. A. 435; Dunbar v. Eastern Elevator Co., 81 Fed. 201, 26 C. C. A. 330.

The doctrine of commercial success, like the presumption of the grant, it is true, as, argued by complainant, raises a presumption favoring the validity of the patent, which in doubtful cases turn the scale in favor of invention, nevertheless, where, as in the present case nothing more was accomplished than the mounting of one well-known engine upon the frame of another peculiarily fitted for the purpose, so that the same could be accomplished by the most ordinary mechanic without materially changing engines or frames, does not leave room for doubt.

The bill is dismissed at the cost of the complainant.

BALDWIN et al. v. GRIER BROS. CO.

(District Court, W. D. Pennsylvania. July 7, 1914.)

No. 26.

1. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNFAIR COMPETITION—MINER'S LAMP.
   A defendant *held* chargeable with unfair competition in making and selling a miner's acetylene lamp in imitation of complainant's, which was the first of its kind in the market, defendant's being very similar in appearance, packed and sold in similar boxes, and having practically the same attachments and reading matter inclosed.

   [Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—MINER'S ACETYLENE LAMP.
   The Baldwin reissue patent, No. 13,542 (original No. 821,580), for a miner's acetylene lamp, claim 4, as made more specific by the reissue to conform more closely to the original specification, was not anticipated, and discloses patentable invention; also *held* infringed.

In Equity. Suit by Frederick E. Baldwin and the John Simmons Company against the Grier Bros. Company. On final hearing. Decree for complainant.

See, also, 210 Fed. 560.

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

Wesley G. Carr, of Pittsburgh, Pa. (James Q. Rice, of New York City, of counsel), for plaintiffs.

Jos. M. Nesbit and Brown & Stewart, all of Pittsburgh, Pa., for defendant.

ORR, District Judge. The plaintiffs by their bill charge the defendant with infringement of reissue patent of the United States, No. 13,542, issued to Frederick E. Baldwin for an acetylene gas generating lamp under date of March 11, 1913, and have also charged the defendant with unfair competition in trade in marketing an unfair copy of a portable miner's acetylene lamp known as the "Baldwin" lamp. The defendant has denied the validity of the patent, upon the ground, as it alleges in the answer, that the said reissue patent and the original patent No. 821,580 were fully anticipated in the prior art, and defendant denies that it has been at all unfair in its competition with the plaintiff in marketing a portable miner's acetylene lamp manufactured by it.

[1] Taking up first the question of unfair competition, the court has reached the conclusion that the facts and law are with the plaintiff. This branch of the case was before the late Judge Young upon a motion for a preliminary injunction, which motion was sustained in an opinion filed by him on January 3, 1914. That the conclusions reached by that learned judge were correct appears clearly from the evidence produced at the trial. Some time prior to January 21, 1906, on which date there appeared in the Engineering and Mining Journal a description of the Baldwin lamp, the plaintiff, Frederick E. Baldwin, began to put out a miner's acetylene cap lamp substantially like the lamp of the plaintiffs. At or about that time he entered into business relations with the other plaintiff, whereby the latter acquired the sole right to manufacture the said lamp in consideration of a royalty upon each lamp paid and to be paid to the former. There was difficulty in introducing the lamp to the intended users. Miners were not familiar with acetylene, and had to be taught its uses. Miners supply stores did not carry calcium carbid. The carbid on the market was usually in lumps too large for use in a cap lamp, and in some states mining inspectors would not permit the use of acetylene lamps in the mines. These difficulties, however, appear to have been largely, if not wholly, overcome in mines where safety lamps are not required, and the plaintiffs have sold the Baldwin lamp to the number of 900,000 or thereabouts. The Baldwin lamp was packed in a pasteboard box with an extra carbid container to be substituted for the container on the lamp when the carbid therein would be exhausted, and equipped also with a wire for the purpose of cleaning the small opening of the gas burner, which wire was attached to a flat piece of metal of singular shape with a hole through it which could be hung upon any one of certain metal hooks or braces with which the lamp was equipped and intended to be used for suspending and steadying the lamp against the cap. In the box with the lamp and the extra carbid container and the cleanser was a circular, containing printed instructions to users in four or five different languages. Some time in the early part or in the middle of the year 1913, the defendant began the manufacture and sale of its

lamp, called herein the "Grier" lamp. That lamp was designed to imitate the Baldwin lamp. This conclusion cannot be resisted from a careful consideration of the testimony and of the exhibits. It is similar in design. It was packed in a similar box. It contained the extra carbid container. It contained the cleanser, even with the piece of metal attached thereto, with a hole in it, and it contained an almost verbatim copy of the circular which accompanied the Baldwin lamps. It is a fact that the box containing the Grier lamp has not the same printing upon it the Baldwin box had, and it is true that there appears stamped in the brass which forms part of the top of the Grier lamp the name "Grier Brothers, Pittsburgh, Pa.," with a star, yet such stamping is on the same part of the lamp as the stamping of the Baldwin lamp. These variations are not sufficient to relieve the defendant from the charge of unfair competition. The defendant also has attached to the reflector of its lamp a small apparatus called a sparker, which will throw a spark and light the lamp. But this sparker is a removable adjunct to the lamp, and does not give sufficient identity to the defendant's lamp to avoid deception. Defendant says that its lamp is sold, not because of its imitation of the Baldwin lamp, but because of the addition of the sparker. The fact is found to be that the sparker, while it may be a factor in inducing the purchase of the Grier lamp, yet it is not the chief cause. It is the general similarity of the Grier lamp to the Baldwin lamp, in connection with a knowledge of and experience with the Baldwin lamp, prior to the introduction of the Grier lamp, that is the factor in making the sales of the defendant's product. Defendant insists that the reasons for the similarity of appearance are inherent in the nature of the article, or in the necessary, convenient, or mechanical methods and processes of manufacture. I cannot so find the fact to be. The mere facts that a miner's lamp must be light enough to be carried upon the cap of the miner; that it must be short enough to escape the roof of the mine; that brass is a light material and resists the action of the mine waters; that a reflector will more easily fit in against the side of an inverted cone than against some other shape, are not sufficient to destroy the plaintiffs' rights to the fruits of their labor, in the introduction of their lamp.

Defendant offered the record of a suit instituted by the said Baldwin against one Jacob Bleser in the Circuit Court of the United States for the Southern District of Illinois, wherein the question of unfair competition, as well as the validity of patent No. 821,580, were both involved, and in which there was a decision that the defendant Bleser had not been guilty of unfair competition, and defendant offered evidence of the similarity of Bleser's lamp with the lamp of the plaintiffs in the case at bar. This case will be referred to later in the consideration of the question of infringement. As the court regards it, however, it has no bearing upon the question of unfair competition in the case at bar. Even if Bleser was not guilty of unfair competition, and even if his acts were the same as those of the defendant in the case at bar, yet Bleser's release from liability would not afford protection to the defendant here. However, it does not appear that Bleser was guilty of the same acts of which the defendant has been shown to be guilty

in this case. The charge of unfair competition in that case, although raised, may not have been sufficiently pressed. In every aspect of the case at bar, after a careful consideration of the evidence and arguments, the court finds as a fact that the defendant has been and is guilty of unfair competition and should be restrained by injunction.

[2] The other questions in the case are not without difficulty. There is nothing new in the use of acetylene gas as an illuminant in portable or stationary burners. As is well known, it is a gas liberated by the addition of water and calcium carbid. The difficulty in the art has always been to regulate the flow of water to the carbid so that there will not be a greater amount of gas liberated by the chemical action than is required for use. In portable lamps especially it is evident that there must be due consideration given to the weight of the lamp with its contents and as well some proper relation between the amount of water and carbid to insure a flame sufficiently long to make the lamp of practical use. In a miner's lamp especially, because it is attached to the cap of the miner, especial consideration must be given to its size and weight. From the foregoing, it is apparent, without reference to the prior art, that there must be in every portable lamp a water chamber, a carbid container, and a means for controlling the flow of water from the former to the latter, just as surely as there must be the generation of gas and the flame. The greatest difficulty in the art, so far as appears in the record of this case, has been to regulate the flow of water. Such regulation appears to have been most successfully accomplished by means of a tube through which the water flows, in connection with which, or adjacent to an end of which, some means have been adopted for restraining the flow. This regulation has usually been accomplished by means of a valve which could be pressed against an end of the tube. This appears in United States patent to Handshy, No. 591,132, wherein the valve closes the tube automatically as the pressure of the gas beneath the water retort raised the diaphragm separating the two, thereby cutting off the flow of water until the use of the gas in the retort so diminished the pressure as to permit the diaphragm to fall and allow more water to enter the carbid. In some patents the valve was operated by hand, so that as the flame increased too much the operator would seat the valve in the opening in the tube, thereby shutting off the water until the flame had become reduced, and when the flame became too low, the valve could be slightly lifted from its seat and water allowed to flow through the tube into the carbid. This is seen in United States patent to Frederick E. Baldwin, No. 656,874, dated August 28, 1900. In most of the prior patents a wire or rod extended through the tube, and upon this rod the valve was fastened. This rod in many of the lamps of the prior art was capable of being moved up and down, and as well in some cases rotated for the purpose of removing from the tube articles that might have passed therein from the water or the small particles of slaked carbid that might have gotten into the tube in the generation of gas.

The plaintiff, Frederick E. Baldwin, on the 15th of July, 1903, applied for a patent for an acetylene gas generating lamp, and was awarded one by the United States on May 22, 1906, the same being numbered

821,580. It is the reissue of this patent that is in suit. In the original patent the inventor, after reciting the difficulties of regulating the flow of water and the methods adopted in the prior art, states his method to be as follows:

"The method which I have invented for securing the proper feed under all circumstances without the above objectionable features is to make the bore of the duct of comparatively large size and then restrict it by means of a wire or rod preferably centrally located therein to leave a channel of the proper size. This arrangement is simple; but in a long experience it has been found to be entirely successful. It is possible to secure the correct drop-by-drop feed with a duct of considerable size, since the friction of the water on the large area of the tube-wall and wire reduces its flow. This retarding-friction may be regulated by varying the size of wire used. The duct does not become choked, since if foreign particles are deposited therein the water can take a zigzag course around it without the supply being appreciably affected. If it is at any time necessary to clean the tube, the wire is simply reciprocated and rotated a few times from the outside of the lamp without disturbing the position of other parts. This nice regulation of the flow enables me to entirely dispense with the troublesome adjustment of the valve. If a valve is used at all, it is employed to shut off the flow entirely and not to regulate it."

The special feature set forth in that quotation from the specifications is not made prominent in any of the claims of the patent. As we propose to deal entirely with the fourth claim of the patent in suit, the fourth claim of the original patent is set forth as follows:

"4. In a lamp of the kind described, the combination with a water-reservoir, and a receptacle for calcium carbid, of a water-tube extending from the former a considerable distance into the latter and adapted to be embedded in the mass of carbid in the receptacle, and a rod extending through the water-tube and constituting a stirrer to break up slaked carbid around the outlet of the water-tube, as set forth."

The words "as set forth," at the close of that claim would seem to be a reference to the special feature in the specifications as disclosed. This special feature does not appear to have been fully considered in the case of Bleser v. Baldwin, 199 Fed. 133, 117 C. C. A. 615, wherein there was an adjudication adverse to the plaintiff as to claim 4 of patent No. 821,580. That case, so far as claim 4 is concerned, seems to have dealt principally with the rod as a stirrer and not as a factor in creating retarding friction in the water-tube. The patent to Bleser, as found by the court in that case, "calls for a needle fitting loosely into the tube and other hollow parts of which it constitutes the core. Its function is 'to clean the tube 4 and remove any obstruction from the end thereof.'" After the decision in Bleser v. Baldwin, supra, the plaintiff Baldwin applied for a reissue of his patent No. 821,580. He changed that portion of his specifications which has been above quoted by adding the underscored words in the following quotation:

"The method which I have invented for securing the proper feed under all circumstances without the above objectionable features is to make the bore of the duct of comparatively large size *extend the tube which forms the duct downward so that its end will be always embedded in the carbid*, and then restrict the duct by means of a wire or rod preferably centrally located therein to leave a channel of the proper size. This arrangement is simple; but in a long experience it has been found to be entirely successful. It is possible to secure the correct drop-by-drop feed with a duct of considerable

size, since the friction of the water on the large area of the tube-wall and wire reduces its flow. This retarding-friction may be regulated by varying the size of the wire used. The duct does not become choked, since if foreign particles are deposited therein the water can take a zigzag course around it without the supply being appreciably affected. If it is at any time necessary to clean the tube, the wire is simply reciprocated and rotated a few times from the outside of the lamp without disturbing the position of other parts. This nice regulation of the flow enables me to entirely dispense with the troublesome adjustment of the valve. If a valve is used at all, it is employed to shut off the flow entirely and not to regulate it."

He also inserted the following in the specifications:

"It will be understood from what has been said that the function of the stirrer is to break up, pierce, or disturb the particles of the slaked carbid mass which, when the lamp is in use, forms at the delivery end of the tube. This slaked carbid mass tends to solidify and either shuts the water off altogether or restricts it so that less water is delivered from the water tube than the lamp demands for efficient operation. As it is sufficient, under certain circumstances, to insure the requisite water flow by so manipulating the stirrer as to pierce, break up, or loosen the slaked carbid mass immediately around or at the mouth of the tube, it is obvious that the stirrer need not always be formed with a bent end, or so as to extend radially from the mouth of the tube."

He also rewrote claim 4 by adding the words underscored in the following reprint:

"4. In a lamp of the kind described, the combination with a water-reservoir, and a receptacle for calcium carbid, of a water-tube extending from the former a considerable distance into the latter and adapted to be embedded in the mass of carbid in the receptacle, and a rod extending through the water-tube, and constituting a stirrer to break up slaked carbid around the outlet of the water-tube. *the rod operating to restrict and thus control the flow of water to the carbid,* as set forth."

Thus it will be seen that what this court believes to have been the special feature of the original patent is more clearly and definitely set forth in the reissue. It is made plain that the tube must be of such length as to be always embedded in the carbid, and that the rod extending through the same must be such as would operate to restrict and control the flow of water. The large-sized area of the tube, and as well the length of the tube in relation to the rod placed therein, has the effect of increasing the friction of the water and thereby retarding its flow. There is no suggestion in any of the prior patents that the flow of water may be regulated in this way. All the other elements of the fourth claim are old, but the combination of such old elements with the rod of a proper size for the restriction and control of the flow of the water is new. That it was useful appears from the extended use to which it has been and is being put. Plaintiffs are therefore entitled to be protected because the patent discloses invention.

But it is said that the plaintiff Baldwin was not entitled to the reissue because the claim is broadened and not narrowed. Claim 4 of the original patent was an exceedingly broad claim when read without reference to the special feature of the specifications found in the excerpt above quoted. The rod called for by the claim might have been any kind of a rod, provided it extended through the water-tube and could be used to break up slaked carbid around the edge of the tube.

In the claim of the reissue patent it cannot be any kind of a rod, but is limited to a rod of such size with respect to the tube that it will restrict and control the flow of water through the same.

The defendant has invoked the doctrine of intervening rights as a defense to the suit upon the reissue. The final decision of the Bleser Case appears to have been entered April 23, 1912. The application for reissue was filed February 5, 1913. As above stated, claim 4 of the patent was narrowed by the reissue. The reissue in the light of the Bleser Case was perhaps reasonably necessary and proper. The court is unable to find from the testimony that there were any intervening rights. The reissue, therefore, in so far as claim 4 is concerned, is valid. Because the lamp of the defendant possesses all the elements found in claim 4, and especially because it has a water-tube extending a considerable distance into the calcium carbid and adapted to be embedded in the mass of carbid, and a rod extending through the water-tube, not only constituting a means of breaking up slaked carbid around the outlet of the tube, but operating to restrict and control the flow of water to the carbid, the defendant has infringed plaintiffs' rights under the patent, and an injunction should issue to restrain further infringement thereof.

In thus disposing of this case, the court has limited itself to a consideration of the principal questions, without going into details, which are readily found from a large mass of testimony and numerous exhibits. Further elaboration seems wholly unnecessary.

Let a decree be presented in accordance with this opinion.

GILCHRIST CO. v. ERIE SPECIALTY CO.

(District Court, W. D. Pennsylvania. July 17, 1914.)

No. 206.

PATENTS (§ 327*)—PRIORITY OF INVENTION—RES JUDICATA.

Where the question of priority of invention between two patentees was actually litigated and decided in a suit to which the owners of both patents in effect became parties, by stipulation admitting their participation in the expense, the decision is conclusive, and a bar to a subsequent suit in another jurisdiction, between the owners of such patents, and involving the same question.

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

In Equity. Suit by the Gilchrist Company against the Erie Specialty Company. On motion by defendant to limit the issue and testimony. Motion granted.

J. C. & H. M. Sturgeon, of Erie, Pa., for the motion.
Fred Gerlach, of Chicago, Ill., opposed.

ORR, District Judge. This matter comes before the court upon a motion ex parte defendant to limit the testimony in the case, for the reason that the plaintiff is estopped from raising the question of prior-

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

ity of invention between the Olmstead patent, No. 819,373, and the Neilson patent, No. 833,620, in this case, for the reasons set forth in clause 14 of the defendant's amended answer, and for the further reason that under the rule of comity of decision the existing decision of Judge Ray is binding upon both parties.

The suit in which the above motion is made is the ordinary patent suit in equity. The plaintiff avers title in it to letters patent of the United States, No. 833,620, issued on October 16, 1905, to Rasmus Neilson, for an ice cream spoon. It avers priority of invention in the said Neilson, and charges the defendant with the infringement of certain claims of said patent. The fourteenth clause of the answer, to which reference is made in the motion now before the court, avers substantially that said Neilson surreptitiously obtained his patent on an invention, which he knew had been invented by one Albert P. Olmstead, which appears in certain proceedings in equity in the Circuit Court of the United States for the Northern District of New York, instituted by Edwin Walker, John W. Dorman, Edward J. Dorman, and Mary L. Rexford against Henry G. Giles, and Kathryn Nielson (No. 7263, in Equity, 207 Fed. 825), in which a certain patent to said Olmstead, being United States patent No. 819,373, was involved; that a question in dispute in the New York case was priority of invention as between the said Neilson and the said Olmstead with respect to the respective patents above named; that a final decree was entered in the said proceedings in the said New York case, adjudging that Olmstead was the original and first inventor of the ice cream dipper mentioned in his said patent; and that the ice cream dippers which were made by the defendants in said New York case under the said Neilson patent were an infringement of claim 1 of the Olmstead patent.

The motion in this case was argued at length before the late Judge Young and because of his death has been reargued. While the question raised by the motion could have been properly raised at the time of the trial of the suit, yet it was deemed best by the parties interested that the question raised by the motion should be disposed of in limine, and to that end the defendant, in support of its motion and without objection on the part of the plaintiff, furnished to the court an exemplification of the record, including the bill, answer, the opinion of Judge Ray, and the final decree entered by him, and as well also a copy of the testimony, in the said New York case. From the bill and answer it was found that the question of priority of invention was raised in that case. From the testimony it is found that evidence at length upon that question was given by the parties to said suit. From the opinion of the court it is also found that the question was at issue and that evidence was given, and from the decree of the court it is found that the question was determined in favor of the plaintiffs in that litigation and against the defendants, and that the court found as a fact that, as between Olmstead and Neilson, Olmstead was the original and first inventor of the ice cream dipper described in his said patent, and that the ice cream dippers made by the defendants under and in accordance with the Neilson patent were an infringement of claim 1 of the said Olmstead patent. It further appears from the certified copy of the record that a stipulation was entered into by the parties to

the present litigation, and was filed in the records of the former case, which stipulation in brief contained the provisions that the Gilchrist Company is the owner of the Neilson patent and that the defendants in the New York case were licensees thereunder, and that the Gilchrist Company was participating in the defense of the New York case and sharing the expense of such defense, and further that the Erie Specialty Company and Edwin Walker were participating in and sharing the expenses of conducting the New York case. By that stipulation as thus certified it must be held that both of the parties thereto submitted themselves to the jurisdiction of the federal court in the Northern district of New York and became bound by the decree in said court, with the same effect as the parties named in the record would be bound. That stipulation was filed in the New York case before the testimony was completed. The relation of the Erie Specialty Company to the litigation became known to the defendants therein at the beginning of the cross-examination of the first witness for the defendant, who was Edwin Walker, president of the Erie Specialty Company.

No question is raised on the part of the Gilchrist Company that the stipulation should have any other than its legal effect. Notwithstanding the same, the Gilchrist Company has filed its present bill, in which the question of priority of invention between the said Neilson and the said Olmstead, which has already been determined between them, is again made the subject of litigation. In Walker on Patents, § 468, it is stated:

"It is a requirement of public policy and private peace that each particular litigation shall duly come to an end, and that, when once ended, it shall not be revived. The law therefore properly requires that things adjudicated shall not again be drawn in question between the same parties, or between any person whose connection with the adjudication is such that it ought to bind them all."

It has already appeared that the relations of the parties in the present case to each other in the New York case were equally well known, and it already appears that the question of priority of invention was actually litigated and decided in the prior case. We are therefore of the opinion that the decree of the court upon that litigated question is conclusive upon the plaintiff in the present action. The question, in so far as it relates to litigation generally, was considered in Southern Pacific R. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, and the conclusion is well stated in the following from the syllabus:

"A right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

With respect to patent litigation the case of Penfield v. Potts, 126 Fed. 475, 480, 61 C. C. A. 371, 376, is illuminating. Mr. Justice Lurton, while Circuit Judge, delivering the opinion of the Court of Appeals for the Sixth Circuit, states:

"The doctrine is well settled that one who for his own interest joins in the defense of a suit to which he is not a party of record is as much concluded by the judgment as if he had been a party thereto, provided his conduct in that respect was open and avowed or otherwise well known to the opposite party."

It is not necessary to cite other cases in support of this doctrine. The plaintiff, therefore, is estopped from raising in this case the question of priority of invention between the Olmstead patent, No. 819,373, and the Neilson patent, No. 833,620, and testimony as to that issue should not be taken.

It is unnecessary to consider what bearing any rule of comity may have upon the issues in this case. Let an order be drawn, if one be deemed necessary.

OREGON WOODENWARE MFG. CO. v. MURRAY.

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

No. 22.

1. PATENTS (§ 312*)—INFRINGEMENT—PRESUMPTION.
   While the presumption is that a patented device does not infringe an earlier patent, it is not conclusive.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544–549; Dec. Dig. § 312.*]

2. PATENTS (§ 165*)—INFRINGEMENT—CONSTRUCTION OF CLAIMS.
   The claims of a patent are to be construed separately to ascertain whether there is an infringement, even where one is broader and more general than others, which more specific claims may be included in the more general.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. § 165.*]

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—IRONING BOARD.
   The Springer patent, No. 1,012,468, for an ironing board, discloses invention and utility; also *held* infringed.

In Equity. Suit by the Oregon Woodenware Manufacturing Company against Gilbert V. Murray, doing business as the Eureka Woodenware Company. On final hearing. Decree for complainant.

William R. Litzenberg, of Portland, Or., for complainant.

John P. Hartman and Arthur E. Nafe, both of Seattle, Wash., for defendant.

CUSHMAN, District Judge. Suit is brought by complainant, holding, by assignment, the Aaron M. Springer patent No. 1,012,468, issued December 19, 1911, for a certain folding ironing board. Complainant alleges infringement by defendant, who has answered, assailing the validity of complainant's patent, denying infringement, and averring that the ironing board made by him is in conformity with letters patent No. 1,036,887, issued to him August 27, 1912.

The evidence shows invention, novelty, and utility in the Springer

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

patent, independently of the presumption arising from the issuance of the patent. It is therefore unnecessary to consider the question of whether defendant is estopped to deny their existence.

The Springer patent is of a secondary nature, as the advance of the art has been gradual. The claims thereunder should therefore be strictly construed.

There are certain minor changes in the Springer board, as now made, not covered by the patent, but these are mere improvements that have been evolved in the course of manufacture, do not affect the mechanical principles involved, and do not constitute abandonment. These changes and their effect may show an increased utility in the board, but they do not establish that the board, without them, was wanting in utility. In the Springer board, a pair of substantially vertical legs are pivotally connected to the ironing board itself, near one end thereof. The most striking difference between the Springer board and those which preceded it in the art is the fact that to these legs all of the other major members of the structure are pivotally connected, by which means other members found in the prior art are eliminated, simplifying the structure. While all of the separate elements were known to the prior art, the combination was new, and possessed obvious advantages, entitling it to patent. This arrangement is one form of truss structure. The truss structure will be found frequently used in the prior art, but not in this combination. Rigidity, compactness, facility in folding, and lightness, with sufficient strength for practical use, together with other advantages, were accomplished in the Springer board. A portion of these advantages over the former art were undoubtedly accomplished by the exercise of ordinary mechanical skill, as in the selection and use of lighter materials in better proportion; but not all were so accomplished. A part is the result of invention.

This result was brought about generally by the arrangement above noticed, and particularly by means of a brace member which, when the board is in use, holds the inclined leg, which is pivotally connected to the top of the substantially vertical legs, in place, with its foot resting under the clear end of the board. This brace member, not only holds the inclined leg in position with relation to the vertical legs, but, by being pivotally connected to the vertical legs at the point where the thrust of a brace, detachably connected to the lower side of the table top towards its clear end, exerts the force derived from the weight of the table top and the ironing operations thereon, and transfers such force and the weight derived therefrom in due proportion to the foot of the inclined leg. This brace member, attached to the inclined leg, is composed of two parts connected so as to permit the whole structure to be folded compactly.

[1] The ironing boards shown to have been made by the defendant are in accordance with his letters patent. While the presumption is that he is not infringing complainant's patent, it is not conclusive. Holliday v. Pickhardt (C. C.) 12 Fed. 147; Brainard v. Cramme (C. C.) 12 Fed. 621; Holly v. Vergennes Mach. Co. (C. C.) 4 Fed. 74, 18 Blatchf. 327; Cochrane v. Deener, 94 U. S. 780, 24 L. Ed. 139; Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017.

There are two claims in the Springer patent. In the first claim, this brace member is described as:

"Said last-mentioned brace being formed of two relatively movable sections and serving to limit the spreading apart of the lower ends of said legs."

And in the second claim as:

"Said last-mentioned brace being formed of two pivotally connected sections and serving to limit the spreading apart of the lower ends of said legs."

In the manufacture of the boards under the Springer patent, no other connection between the parts of this brace than pivotal has been used.

In the Murray patent, in the first claim, this brace member is described as:

"A pair of tie rods connecting said upright legs with said arm."

And in the second claim as:

"A pair of tie rods, connecting said upright legs with said arm, said tie rods being each formed of two slidably connected parts."

In the manufacture of the boards by defendant, the two sections of this brace, or tie rod, instead of being pivotally connected and "buckling" when the board is folded, as the Springer board is made in compliance with the second claim of claimant's patent, they slide together upon themselves, being prevented from pulling apart, or extending beyond the desired point, by each section having a luglike inner end. It is not claimed that this arrangement is an infringement under complainant's second claim, but that it is of the first, wherein the brace is described as being "formed of two relatively movable sections." It is clear that the two parts, sliding upon one another, are relatively movable. In order for them to slide upon one another, each must move in relation to the other one, both might retain the same relative position to the rest of the structure, and, in regard to it, be described as immovable, but, in sliding one upon the other, their relation to each other is changed, as the parts of each approach and recede from the other, and they are therefore relatively movable. That such is the case is shown by the following from defendant's brief:

"The bottom brace of the alleged infringing device is seen to consist in a pair of tie rods each comprised of two members, *16* and *17*, connected at one of their ends with the vertical legs and the inclined leg, respectively, and which are coupled together at their opposite ends in slidable relation by means of a plate extremity, *18*, upon each which are each provided with a rectangular lug through which the other rod member is slidably engaged. Said plates abut together to limit the extension of said tie rods and a separation of the lower extremities of the table legs. When the legs are folded together, however, the rod members slide past each other and permit of the closing of the board.

"The construction of such tie rods are thus seen to consist of two relatively movable members, that is to say, members which are slidably movable, but not pivotally movable, the construction and mode of operation being widely different from that embodied in the Springer board and disclosed in the patent in suit."

The end of the tie rod in the Murray board is not attached directly to the inclined leg, but to a locking device which, in turn, is directly attached to the inclined leg. This device enables the operator to in-

crease the tension of the rod and bind and hold the structure more securely together; but it does not essentially change the function, or differentiate the "tie rod" in the Murray patent from the "brace of two relatively movable sections" in the Springer patent. It is an added element, and the defendant is doubtless entitled to protection from its infringement, but this added element does not give the defendant the right to use plaintiff's invention. Western Elec. Co. v. La Rue, 139 U. S. 607, 11 Sup. Ct. 670, 35 L. Ed. 294; Carr v. Rice, 1 Fish. Pat. Cas. 209, Fed. Cas. No. 2,440; Roemer v. Simon (C. C.) 20 Fed. 197; Filley v. Stove Co. (C. C.) 30 Fed. 434; Williames v. Barnard (C. C.) 41 Fed. 358; Cochrane v. Deener, 94 U. S. 786, 24 L. Ed. 139; Brislin v. Carnegie Steel Co. (C. C.) 118 Fed. 597.

[2] The claims made in the patent are to be construed separately to ascertain whether there is an infringement. Pope Mfg. Co. v. Gormully & Jeffery Mfg. Co. (C. C.) 34 Fed. 893, 894; United Nickel Co. v. Cal. Elec. Wks. (C. C.) 25 Fed. 475-479; 30 Cyc. 975b. This rule obtains, even where one claim is broader and more general than others, which more specific claims may be included in the more general. Bresnahan v. Tripp Giant L. Co., 102 Fed. 899, 43 C. C. A. 48; 30 Cyc. 886, 887.

[3] Nothing is found in the specifications or proceedings in the Patent Office to indicate, either that the description of the brace, as consisting of "relatively movable sections," was considered too vague, or that the patentee intended to limit his claim to that form of relative movement constituting a pivotal connection.

Complainant is entitled to the injunction prayed.

FIRESTONE TIRE & RUBBER CO. v. DIENTENFASS.

(District Court, E. D. Pennsylvania. July 28, 1914.)

No. 1211.

PATENTS (§ 301*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

A motion for preliminary injunction to restrain infringement denied, where it seemed that the case should be nearly ready for final hearing, and that defendant was a dealer only, and no necessity existed for passing upon the questions at issue in advance.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 489-495; Dec. Dig. § 301.*]

In Equity. Suit by the Firestone Tire & Rubber Company against Samuel Dientenfass, doing business as the Central Tire Company. On application for preliminary injunction. Motion denied.

Dwight M. Lowrey, of Philadelphia, Pa., for plaintiff.

Thomas A. Mullen, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. A decree on this application has been withheld at the request of counsel to enable them to file additional affidavits and submit briefs supplemental to the oral argument at bar.

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

These affidavits and briefs have now been filed. After a careful consideration of all of them, we find no reason to change the opinion tentatively formed at the hearing of the application. The case has been argued before us precisely as if it were being heard on final decree. Whatever judgment is reached can therefore best be reached after final hearing. It can then be heard after fuller consideration, and a hearing which each side would doubtless regard as fairer and more satisfactory.

The present case is, moreover, one between the plaintiff and a dealer in automobile tires, not between the rival manufacturers. Such a case, it would seem, is now about ripe for hearing, and affords the best means of presenting the conflicting claims of right of the real parties to the controversy. The plaintiff is now asking, not for an adjudication of its rights, for such an application would be premature, but for the awarding to it of an extraordinary remedy. This in a proper case should not be withheld. The mere opportunity of deciding the questions involved in plaintiff's favor, however, does not in itself carry with it the duty of according this out of the ordinary remedy.

We do not see that any other purpose would be accomplished by awarding an injunction now than to give to the plaintiff a ruling in its favor. Its right to the relief prayed for is denied by the answer. Upon the issue thus raised the parties are entitled to a hearing. The argument for the plaintiff as now presented, if accepted as convincing, would only support the conclusion that on final hearing the plaintiff will be entitled to a decree. There is nothing disclosed by the affidavits to indicate that the withholding of a decree now will work harm to the plaintiff, or that the awarding of the writ will serve any purpose which a final decree will not reach.

The application for a preliminary injunction is therefore now denied, with leave to plaintiff to renew the application, and costs to await the further order of the court.

In re JOHNSON.

(District Court, E. D. Pennsylvania. May 29, 1914.)

No. 4847.

BANKRUPTCY (§ 414*)—RIGHT TO DISCHARGE—BURDEN OF PROOF.

Where a bankrupt schedules existing debts but no assets, the burden is on the creditors to establish one of the specific grounds specified in the act for denial of the discharge in order to justify such denial.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 720-722; Dec. Dig. § 414.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Joshua M. Johnson. On report of a referee recommending the bankrupt's discharge. Affirmed.

Albert L. Moise, of Philadelphia, Pa., for bankrupt.

John S. Freeman, of Philadelphia, Pa., for exceptants.

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

DICKINSON, District Judge. This application for discharge on its special facts presents no questions of any difficulty. The case on its general facts is, however, typical.

The applicant for discharge was adjudged a bankrupt on his own petition. He accompanies it with a schedule of debts but none of assets. To grant him a discharge is therefore to take from his creditors their property existing in the form of the legal obligation of the debtor to pay his debts. Whatever practical value this species of property may have in a particular case, the legal right is everywhere regarded as a valuable one, of such importance indeed that the creditor cannot be shorn of this right even by the might of the sovereign states of the Union. The Congress of the United States alone has power to relieve the debtor of this burden of debt which he must otherwise carry for the benefit of his creditors. It follows therefore, upon every principle of legal right and legal justice, that no creditor should be forced by law to give up this or any other form of property or any legal right until his right conflicts with the countervailing right of the debtor to relief. The policy of the law; as declared by the Constitution and by the acts of Congress, which have been passed from time to time, in according to the debtor this superior right, is one whose wisdom could, if such vindication were called for, be easily vindicated. Notwithstanding the Bankruptcy Acts, however, enough of right remains in the creditors as that they should not lose this property unless and until the debtor is entitled under the law to a discharge. In passing upon this latter question a distinction on general principles should be made between voluntary and involuntary bankrupts. If a man be dragged by his creditors into the bankruptcy court and all control over his means of paying his debts be taken away from him by thus surrendering all he has to his creditors, he has prima facie paid the full price for his discharge. A different case is presented, however, when the debtor is himself the mover. Then a direct attack is made upon the right of the creditor, and if the bankrupt is without assets the creditor loses his legal right to payment and gets nothing. It does not follow from this that the debtor who has nothing is not entitled to a discharge. His very poverty may in fact supply the soundest reason for giving him relief It does follow, however, that on general principles he should not have his discharge unless that discharge is his legal right. This brings us to the question of prima facies. On whom is the burden, the bankrupt or the objecting creditors? Right here comes in another distinction that between principles of law which are merely principles or rules of procedure adopted to facilitate, or for the more orderly administration of, legal justice and principles of substantive right. Mere rules of procedure, however, may themselves be made the basis of substantive rights, and they then become principles of right themselves in the sense that the legal right arises out of them. In this sense the merest formality may rise to this importance that the legal right cannot exist until or unless there has been a compliance with the formality.

Applying these abstract principles practically to the facts of this case, we are confronted with the general question upon the answer to which

depends the action of the court in granting or withholding the discharge asked for. The question is this: Must the bankrupt satisfy the court that he has performed everything which the law requires of him to do and is guilty of none of the things which the law condemns, or is he entitled to his discharge as a legal right unless the objecting creditors fasten upon him the guilt of some act of commission or omission?

To answer this question we must turn to the act of Congress.

The pertinent provisions of the law are to the effect that:

(1) The judge shall hear the application and whatever may be urged in opposition, and shall investigate the merits of the application.

(2) The judge "shall discharge the applicant unless he has committed" certain specifically defined acts.

The facility with which discharges are obtained through bankruptcy courts presents the temptation to the weak and affords the opportunity to the unscrupulous to commit frauds. These frauds are so frequent and so notorious as to constitute a public scandal. If, however, the bankrupt has the legal right to a discharge, no judge can deprive him of a legal right or refuse to accord to him a legal due merely because the judge regrets that such legal right has been so lightly conferred. The provisions of the bankruptcy acts compel the conclusion that it is the will of Congress that bankrupts be discharged unless objections based upon the specific grounds set forth in the acts of Congress are made good. This narrows the inquiry to the question of whether the applicant for discharge has committed any of the prohibited acts.

Respecting this bankrupt, the referee has so fully considered and fairly discussed all the considerations which enter into the discussion of the points involved that nothing more is required than to give approval to his findings and to direct the order to be made which the referee recommends.

Let the applicant be discharged.

GUTH CHOCOLATE CO. v. GUTH.

(District Court, D. Maryland. June 2, 1914.)

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

Although a man may have long been engaged in the production and sale of a particular kind of wares which have acquired a widespread and valuable reputation in connection with his name, so that any goods sold under that name will be taken for his, another having the same surname may lawfully use it in the same business and in connection with similar goods, provided he does nothing unnecessarily to increase the difficulty of distinguishing his goods from those of his competitor, but he may be further required to take reasonable precautions to prevent their confusion.

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

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

2. TRADE-MARKS AND TRADE-NAMES (§ 33*)—UNFAIR COMPETITION—RIGHT TO USE OF NAME.

A man, whose name has become so identified with his goods as to give it a secondary meaning, may sell the exclusive right to its use in connection with a sale of his business, and such a contract is enforceable, although it will not readily be presumed but must be clearly shown.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 37; Dec. Dig. § 33.*]

3. TRADE-MARKS AND TRADE-NAMES (§ 35*)—CONVEYANCE WITH SALE OF BUSINESS.

The exclusive right to a trade-mark can be secured only by affixing it to the goods to be designated or to the packages in which they are sold, and the transfer by a man of the right to use his name as a trade-mark does not preclude him from subsequently using it himself in his own business otherwise than by so affixing it to his goods as a trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 39, 40; Dec. Dig. § 35.*]

4. TRADE-MARKS AND TRADE-NAMES (§ 35*)—UNFAIR COMPETITION—USE OF NAME.

Complainant, Guth Chocolate Company, was organized by defendant, Guth, to succeed to the business of a similarly named corporation which had failed. Defendant bought from the receivers of the old company its plant, boxes, labels, and good will, and conveyed the same, together with "the use of the name 'Guth,' for the purpose of manufacturing and selling candies under the Guth label." Defendant became the largest stockholder and president of complainant. Both complainant and its predecessor made the name "Guth" the prominent feature in their advertising and on their packages, and by it their products became known to the retail trade throughout the country. Defendant signed many of the advertising circulars and letters with his full name, as president of complainant. He afterward sold his stock, retired from the management of the company, and organized a new company under the name of the Chocolate Products Company. Through circulars he informed the trade of the change, but the packages in which his products were sold to retail customers were marked only "Chocolates by Charles G. Guth," with the statement that none were genuine without such full signature. *Held* that, while defendant did not by his conveyance deprive himself of the right to use his name in the business of the new company, he was not entitled to use the name "Guth" on the packages or labels of its goods either alone or in connection with other words.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 39, 40; Dec. Dig. § 35.*]

In Equity. Suit by the Guth Chocolate Company against Charles G. Guth. On final hearing. Decree for complainant.

Emery, Booth, Janney & Varney, of Boston, Mass., and City of New York, Laurence A. Janney, of Boston, Mass., and Marbury, Gosnell & Williams and George Weems Williams, all of Baltimore, Md., for plaintiff.

Richard B. Tippett, E. Walton Brewington, and George W. Lindsay, all of Baltimore, Md., for defendant.

ROSE, District Judge. Plaintiff asks that the defendant be restrained from using the name "Guth" in the sale of candies and from doing in his competition with it certain other things which it says are unfair.

It is a Delaware corporation; the defendant a Maryland citizen. Since he was 14 he has been a maker of candy. Until 1899 he was

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

employed in various candy factories, presumably in subordinate positions. About that time he started in business for himself in Trenton, N. J. His capital was limited. His venture was on a very small scale. It soon came to grief. He moved to this city. He believes that up to that time chocolate candy had not been manufactured in Baltimore. He says that he succeeded in convincing others that it could be here profitably made. He organized, or helped to organize, the Headley Chocolate Company. It speedily built up a large business which it apparently still retains. After the great fire in Baltimore in February, 1904, he severed his connection with it. With the financial assistance of other persons, he organized a new corporation under the laws of Maryland. From that time on he appears to have done his best to make his surname prominent in the candy trade. He called the new company the "Guth Chocolate Company of Baltimore City." He determined that "Guth" should be the trade-mark of the new business. An expert in such matters was commissioned to prepare an artistic and striking embodiment of that word. A comparison of this design with the ordinary signature of the defendant shows that the former was suggested by the latter. There are many differences in detail. Nevertheless, unmistakably the one was kept steadily before the eye of the designer of the other. He did for a somewhat work-a-day signature what a portrait painter who knows his business usually does for a commonplace countenance. You can see the likeness. Nevertheless, if you are a candid critic, you can point out the respects in which the artist has greatly improved upon the original. The design as made and accepted was used in every way in which the family pride and the advertising instinct of the defendant could find opportunity to employ it. The company made some candies for jobbers who each had his own brand. These of course were labeled as their owners directed. The bulk of the company's products were sold as its own. On every package of them the word "Guth" was imprinted or embossed. On each piece of the more expensive kinds of chocolate made by it the name was impressed, and it was displayed on the little paper cups in which each individual chocolate was packed. It appeared on the company's stationery and in all its advertising literature. The defendant says his idea was to have the public recognize the brand of goods by that name in the characteristic script. The company spent $100,000 in advertising. It built up a large business. It started retail stores in Baltimore and in several other cities. The defendant says that he or it, for he does not instinctively distinguish between the individual and corporate personality, was the first to put out candies to be retailed at $1 a pound. His judgment, he thinks, has found vindication in the fact that there is now a demand for candies selling as high as $1.50. He is not unnaturally proud of his accurate forecast of the possibilities of the market. Some of those who are embarrassed by the high cost of living may not be grateful to him for creating a taste for so expensive a luxury. The circumstance has here significance merely because it shows how generally and favorably the name "Guth" became known to the sellers and consumers of candy. In spite of, or perhaps because of, the rapid extension of its business, it

put a greater strain upon its financial resources than they could bear. A state court receivership followed. For a while it was supposed that its difficulties would be but temporary, and that its creditors would lose little. As time went on it was found that this hope was illusory. The company had much money invested in its plant and machinery. These were installed in a rented building. If they were moved, a large part of their value would be destroyed. It had on hand candy boxes, stationery, etc., which the defendant says cost it $20,000. If it had continued in business they would have been worth that sum to it. All of them, however, bore the name "Guth." They were valueless to any one who did not want to use that word as one of the trade-marks or trade-names of his business. It became obvious that the only possible purchaser was some one who wished to continue to sell candies as Guth's.

The defendant arranged for the organization of a new company—the complainant. The phrase "of Baltimore City," which the Maryland corporation law, as it then stood, had required to be a part of the corporate title of the old concern, was in ordinary speech omitted. It had been universally known as the Guth Chocolate Company. The new venture was to bear the same title. The first company had been organized under the laws of Maryland. The second was formed under those of Delaware. In March, 1909, plans for the transfer of the business from the old to the new corporation were consummated. The latter was incorporated. The defendant offered the receivers $16,000 in cash and a release of his $4,000 claim for salary for the "factory, machinery, fixtures, and equipment located at 30 South Calvert street, Baltimore, together with all boxes, labels, trade-marks, good will, name of the company, raw material, and manufactured goods on hand." With the approval of the court, the receivers accepted the proposal. The sale was duly ratified on March 25, 1909. At a later hour on the same day the complainant's directors held their first meeting. To them the defendant, acting, as he stated, for himself and his associates, proposed in writing to sell "the factory and all the machinery and equipment contained in the building 30 South Calvert street, Baltimore, Md., together with all labels, boxes, packing material, manufactured goods, and appurtenances necessary and now contained in said factory as per schedule attached hereto, together with the good will and the use of the name 'Guth' for the purpose of manufacturing and selling candies under the Guth label; also the complete formulas for manufacturing the Guth chocolates, bonbons, and fancy candies, together with any improvements or changes that might be made from time to time in said formulas. Said offer to include all the property, rights, and privileges lately acquired from the receivers of the Guth Chocolate Company of Baltimore." All that he bought from the receivers he expressly sold to the plaintiff. His counsel suggest that he sold nothing else. If they are right, he obtained for a salary claim of $4,000 against the old concern $1,000 in cash and $83,000 of the common stock of the company. The plaintiff gave him in money $17,000, or $1,000 more than his cash payment to the receivers. He gave the

latter nothing else except the release of the salary claim. He received from the plaintiff $83,000 of its stock.

Individuals or groups of individuals often act as mere conductors through which property instantaneously passes from one party to another. Not infrequently they make on paper at least even greater profits than those obtained by the defendant. Such transactions are so common that they usually give occasion for nothing more than a passing comment. They are, however, worthy of that notice. In this case what was done would have deserved that much attention even if the facts were as the defendant's counsel supposed them to have been.

Unquestionably defendant did undertake to sell all that he had bought. His offer was expressly "to include all the property, rights, and privileges" he acquired from the receivers. Quite as clearly he did not attempt to transfer any tangible property other than that which the judicial sale had given him. From the receivers he obtained "the factory, machinery, fixtures, and equipment located at 30 South Calvert street, Baltimore, together with all boxes, labels, * * * raw material, and manufactured goods on hand." He conveyed to the plaintiff "the factory and all of the machinery and equipment contained in the building 30 South Calvert street, Baltimore, Md., together with all labels, boxes, packing material, manufactured goods, and appurtenances necessary and now contained in said factory, as per schedule attached."

The phraseology differs somewhat. The things conveyed are the same. Did he in like manner restrict the intangible rights he assumed to sell to those which he had bought? The receivers gave him the good will of the old business. That, in so many words, he passed over to the plaintiff. They sold him the "trade-marks" and "name of the company." He did not specifically mention these in his assignment to the plaintiff. They passed under the general clause by which he conveyed all that he had obtained from the receivers. The new company was apparently not content to let its rights rest entirely upon more or less vague language. In his proposal to it he offered "the use of the name 'Guth' for the purpose of manufacturing and selling candies under the Guth label." The products of the old company had been sold as Guth candies. Whatever other trade-marks it once had were of minor value, even if any of them were at that time still in use. It was as Guth's that its goods were known in the market. The organizers of the plaintiff might well have questioned whether a conveyance of the trade-marks of the old concern would give them the desired rights in the vitally necessary name.

Had the first company acquired a valid trade-mark in it? Surnames are ordinarily not subject to exclusive appropriation as trade-marks. This had not been used as such for ten years next preceding the enactment of the Trade-Mark Act of 1905 (Act Feb. 20, 1905, c. 592, 33 Stat. 724 [U. S. Comp. St. Supp. 1911, p. 1459]). Even if it had been, the Supreme Court had not then handed down its opinion in Davids Mfg. Co. v. Davids, 233 U. S. 461, 34 Sup. Ct. 648, 58 L. Ed. 1046. In so important a matter there was no reason to take any chances. All

that the receivers had sold to the defendant the new company took. It was dealing, however, with him. In the name "Guth" he might have an individual property. The new company wanted all the rights that the old or the defendant, or both combined, could confer upon it to the "use of the name 'Guth' for the purpose of manufacturing and selling candies under the Guth label." It desired something else. It needed the formulas used in making Guth chocolates, bonbons, and fancy candies. Perhaps the old company owned them; perhaps it did not. There is no evidence on the subject. In the transfer from the receivers nothing had been said about them. In any event, the defendant knew them. It was highly desirable from the plaintiff's standpoint that it should acquire the right to appropriate any improvements which he might subsequently make in them. He undertook to transfer all of such formulas "together with any improvements or changes that might be made from time to time" in them.

It is clear that, while the defendant was a conduit through which much of the property of the old company passed from it to the new, he was something more. He gave to his new creation more than he had received from its predecessor.

Defendant in his answer says that the word "Guth" was used in the candy business by others than either the defendant or the plaintiff and its predecessor. The old company had owned and operated retail stores in Baltimore and in other cities. It organized a subsidiary company under the laws of Illinois. In accordance with the fixed policy of defendant and of the old company, the stores were called by his name. The Illinois corporation was the Guth Incorporated Company. All these concerns sold, under the Guth label, chocolates made by the Maryland corporation. Defendant did not buy either these stores or the stock of the Illinois subsidiary. The receivers sold them to other parties. When the answer was prepared, defendant seems to have thought that the purchasers had acquired the right to use the name "Guth." He has offered no evidence to sustain such contention. The testimony seems to show that none of them asked for or obtained any other right than to continue to call their stores Guth and to use that name on other candies made by them so long as they purchased all their chocolates from the plaintiff. It will be unnecessary to take further notice of this defense.

The defendant was the first president of the plaintiff. He held that office until the 28th of July, 1913. During that period of some four years and four months its business was actively pushed. He took personal charge of the preparation and circulation of its advertising literature. He wrote most, if not all, of it. What was not of his own composition received his approval before it was issued. He identified himself with the company, or it would be more accurate to say he identified the company with himself. Thus, at the plaintiff's expense, there was issued at more or less regular intervals a sheet called the "Guth Chocolate Man." It stated that it was published by Charles G. Guth, president of the Guth Chocolate Company, Guth Building, Baltimore, Md. In it are to be found such phrases as these:

"Most novel offer *I* ever made you."
"*I* spend more time, money and real labor," etc.
"*I* do not offer same old thing."
"This Easter *my* selection," etc.
"The famous House of Guth guarantees each piece."

The first page of the issue for March 1, 1912, is taken up with

"Easter Greetings.
"To *My* Friends—The Druggists."

In it he tells them:

"But you and *I* have a reputation to maintain and to build. *I* have put into this offer *my* best thought and knowledge of the druggists' candy problems. *I* know them from personal experience and from personal first-hand knowledge of druggists just like you all over this broad land. *I* am proud of every box of candy that bears the name of Guth. *I* am proud of the druggists who sell *my* candy. Druggists who sell Guth candies are steady customers, because they have steady customers. Neither they nor *I* worry about mere price competition."

To this is appended a facsimile of the defendant's full signature "Charles G. Guth" as it now appears on the boxes of candy which plaintiff says infringe upon its rights.

Defendant freely used the facsimile of his signature in the plaintiff's advertisements, which he spread broadcast over the land. From them it seemed that the defendant bore to the plaintiff the same relation which Louis XIV thought he did to France. Defendant is now competing with the plaintiff. The advertising methods used while the former was managing the latter make it hard to keep the buyers of candy from confusing the goods of the one with those of the other.

Apparently plaintiff had at no time, since defendant's connection with it, attempted to sell its products to all or even to many of the retailers of candy in any particular town. It preferred to get one, or at most a very few, establishments in each place to take what it called Guth agencies. The so-called agent bought his candies outright, but, so long as he ordered what seemed to the plaintiff a reasonable quantity, it would not sell to any other storekeeper in his city or town. In most places the purveyors of its candies were druggists. The bulk of its trade was in 80-cent and $1 chocolates; that is, in relatively high-priced candies. The demand for these was in most cases largest among the patrons of the more prominent drug stores. Its effort, therefore, was to get the leading druggists, or one of the leading druggists, in each city or town to handle its goods. In this it appears to have had a fair measure of success.

The plaintiff had both preferred and common stock. The former had no voting powers. There were outstanding 1,000 shares of common stock of the par value of $100 each. Eight hundred and thirty of these were at its organization issued to the defendant in part payment of the property and rights he then transferred to it. He says that at that time he retained only 100 of them for his own use. He subsequently acquired others. By the beginning of 1913, if not before, he held a majority of all the plaintiff's common stock and was in undisputed control of it. At that time the United Drug Company, a Massa-

chusetts corporation, appeared upon the scene. It had sought to sell some of its stock to a prominent druggist in each city and town in the country. If he bought, he was given in that place the exclusive agency for the company's products. Some thousands of druggists scattered all over the land were among its stockholders. It so happened that an appreciable number of these were also agents or customers of the plaintiff. For that or other reasons it early last year sought to obtain all the common stock of the latter. In February, 1913, it made an agreement to buy defendant's. He undertook to procure for it, in addition to his own shares, 44 of those then held by some other persons. About the same time it bought the stock of the only other holder. It became the owner of all the common stock of the plaintiff. In the final form in which the transactions between the defendant and the United Drug Company took, he sold it 553 shares of the plaintiff's common stock held personally by him for $65,000 in cash and the transfer to him of 350 shares of the plaintiff's preferred stock. He turned over to the purchaser 44 shares of plaintiff's common stock which he had obtained from other persons at the price at which he paid for them, viz., $100 per share, or $4,400 in all. At the time both parties doubtless assumed that the plaintiff's preferred stock was worth par. The United Drug Company therefore supposed it was paying the defendant $104,400 for 597 shares of common stock, or at the rate of $174.80 a share. He says that, after severing his connection with the plaintiff, he found it necessary to realize upon its preferred stock, and he was able to obtain only $65 a share for it.

Taking the preferred stock at the time of the transfer to have been worth only what he subsequently obtained for it, the United Drug Company paid for the common stock $154.35 a share. At that time the book value of such stock was $130.19 a share. Forty-nine dollars and sixty-nine cents a share of this was represented by the value at which the trade-marks, formulas, etc., were then carried on the plaintiff's books. The defendant says that the large earnings of the plaintiff, rather than the supposed worth of its property, induced the United Drug Company to pay the price it did. However that may be, the defendant received about twice as much as his proportion of the tangible assets of the plaintiff were worth.

The United Drug Company, though it owns all the common stock of the plaintiff, is not a party to this suit, and perhaps could not become one. It still remains true that, when it was bargaining with the defendant for his stock, he furnished it with a statement of the plaintiff's financial condition. If the price he asked and received tends to show that he then by what he did, if not by what he said, represented the plaintiff to be the owner of something else than its chattels and choses in action, it may be material. It would, however, not be safe to infer much from what was then done.

In the language of Lord Macnaghten in Reddaway v. Banham, Law Reports (1896) Appeal Cases, 7, "cases of this sort must depend upon their particular circumstances. The facts of one case are little or no guide to the determination of another." Not much harm will be done if the trial judge recites facts which may be ultimately held immaterial.

A good deal may be caused by his omission of something which an appellate court might, if brought to its attention, consider significant.

It was not the intention of the parties that by the sale of his stock defendant should sever his connection with the plaintiff. He retained its presidency. He continued by circulars, letters, and other ways to push the sale of its products. The drug stores which were conducted by the stockholders of the United Drug Company were called Rexall Stores. Their proprietors Rexallites. Under date of May 16, 1913, he sent a circular letter to each of the some thousands of such proprietors. To this letter he appended the facsimile of the same signature which he has now adopted as the trade-mark of his new business. The circular is in style like the others from which quotations have been made. In it his personality and that of the company are made almost interchangeable. Relations between him and the representatives of the new owners of the plaintiff's stock soon became somewhat strained. There had been friction even before the purchase was consummated. The agreement between the defendant and the United Drug Company was made in February, 1913. It claimed that it dealt upon the assumption of the accuracy of a statement of the financial condition of the plaintiff then shown it by him. The facts which subsequently came to its knowledge it said showed that in material respects this statement was erroneous. The dispute was adjusted by his abating $40,000 of the price which by the February agreement he was to receive. The consideration paid him was thus reduced to the figures heretofore stated. It is probable that some natural dislike, if not distrust, resulted. This might have been lived down. The defendant had, however, been used to a very free hand in the management of the business. He had acted as he thought best. It was in the nature of things that strangers, who had at a large price acquired all the stock of the company, should expect to be consulted as to what was being done with it. It was equally inevitable that any limitation on the freedom he had heretofore enjoyed should prove irksome to him. On July 28, 1913, he resigned as president of the company and left its employ. He subsequently sold his holdings of its preferred stock and severed his connection with it. He at once began arrangements to go again into the candy business. Some five weeks after his resignation he was the principal figure in organizing another Delaware corporation under the name of the Chocolate Products Company. He holds something more than three-fourths of its stock. Some of its advertising literature has been introduced into the record. It indicates that in this latest company he is, as he was in the complainant and its predecessor, the principal, and indeed the only, personality in evidence. It appears to have begun the business of making and selling chocolates as early as November 1, 1913, for on the 19th of that month it filed an application for the registration of the autograph signature of the defendant as its trade-mark. The defendant then made affidavit that the mark in question had been continuously used in its business since the first of the month. The defendant says that none of the chocolates manufactured by the Chocolate Products Company were made according to the formulas

which had been used by the complainant. He says that he invented new recipes therefor. During the past winter defendant prepared and caused the Chocolate Products Company to issue 50,000 copies of a circular. In it, among other things, it was said:

"That our president, Mr. Charles G. Guth, is acknowledged the greatest chocolate expert in the world and devotes his entire time to the manufacture of our goods. Mr. Guth for the past ten years was president and general manager of the Guth Chocolate Company and originated the famous Guth chocolates which are now sold all over the world at $1 a pound."

He prepared another circular letter to be addressed to an individual in each city or town in which he desired to establish an agency for the sale of the candies. It bears date March 9th last. In it he said:

"I am about to place on the market the finest line of 80-cent per pound chocolates," etc. "These will be put out under my individual name as chocolates by Charles G. Guth. I am using my full individual name in order that the public may not confuse my products with those of the Guth Chocolate Company, as I have sold all my interest in that company and have no connection whatsoever with the same. I am about to appoint one agent in every town for the sale of chocolates by Charles G. Guth. My reputation will stand behind every box that is sold, and, if you desire to have the agency for the sale of chocolates by Charles G. Guth for the city of ——, please advise me at once."

Only some 500 of these were sent out before the filing of the bill in this case. Some 5,000 of another circular addressed to buyers of candy and signed "Charles G. Guth, President," were issued. This circular, among other things, said, "Here are the best candy values I ever made." From Dun's and Bradstreet's he took a list of all the druggists, fancy groceries, department stores, and jobbing confectioners with satisfactory ratings. They numbered in all about 40,000. He sent circulars to all of them.

The larger part of plaintiff's business has always been the manufacture and sale of chocolates which retail at 80 cents and $1 a pound, respectively. Upon the packages containing the former, the word "Guth" appears. On those in which the latter was offered for sale, the word "Guth" was preceded by the preposition "by" in its French form of "Au." This word, as it appeared on the boxes in which the candy was contained, was in the same form of script in which the word "Guth" was exhibited; that is to say, the packages of $1 chocolates were marked "Au Guth." A number of the witnesses refer to those chocolates as "Au Guth" candies. The defendant is not now offering any $1 a pound chocolates. The plaintiff complains of the way in which he is putting on the market chocolates which are to be sold at 80 cents a pound. Their candies had long been known as Guth chocolates. On the outside of his packages appears in the facsimile of his own writing "Chocolates by Charles G. Guth." Upon them also appears a crest. These boxes of "Au Guth" chocolates are similarly adorned. The color scheme of the two crests are not unlike. In each of the crests the colors used are red, green, and gold. They would not seem similar to an heraldic expert, except that from his standpoint neither would in all probability be in accordance with the rules of heraldry. No one having the two side by side

would for a moment confuse them. Crests are common adornments of boxes of high-grade candies. All that can be said is that plaintiff and defendant both use crests. The combination of colors is about the same. A purchaser, who would otherwise be likely to confuse the two packages, will not be kept straight by the difference in the crests.

The chocolates defendant puts out under his name are manufactured by the Chocolate Products Company. He has told that fact to the trade. The packages are the only things which usually come before the eye of the ultimate purchaser. There is on them absolutely nothing to indicate that there is or ever was any such concern as the Chocolate Products Company. The defendant's own name, Charles G. Guth, is all that appears. It is used at least four, if not six, times on or in every box. On the top of the package is "Chocolates by Charles G. Guth." When the box is opened, the same words appear impressed upon a piece of tin foil covering the top layer of candies. On the inside of the top is to be found the statement:

"I guarantee these delicious chocolate confections to be the purest and finest that can possibly be produced regardless of price."

Then follows a facsimile of his signature "Charles G. Guth," and below that the statement:

"None genuine without the full facsimile signature of Charles G. Guth, Baltimore, Md., U. S. A."

Sometimes the boxes are covered with transparent paraffin paper, which is kept in place by one or more seals, on each of which appears "Chocolates by Charles G. Guth" in a diminutive facsimile of his handwriting. Defendant says that no appreciable number of persons would confuse his package with the package of the plaintiff. He produces various witnesses who so testify. All of them have had considerable experience in candy selling, some of them a great deal. They say that the difference in shape between the plaintiff's and defendant's boxes will sufficiently distinguish the goods. The box in which, until recently, plaintiff has marketed his chocolates is a third shorter than defendant's; defendant's is only two-thirds as high as plaintiff's. This evidence would be more persuasive if plaintiff had always used the same shape of box for all its products. It has not done so. Defendant himself, while in control of the plaintiff, prepared a circular which he called "The Sweetest Story Ever Told." It was intended for circulation among consumers of candy. He says about a million copies of it were distributed. It contained cuts of packages used by the plaintiff. They are shown in widely different shapes and sizes. The one thing which they have in common is that each and all have the word "Guth" in its characteristic script. Until the summer of 1913 it is true that ordinarily the plaintiff's chocolates were sold in boxes of the size and shape of which defendant's witnesses speak. It is equally well established that before the defendant left plaintiff's employ it had begun to put out chocolates in a box which was slightly longer and slightly lower than that which defendant uses. Defendant's box is in shape, therefore, nearer to

either plaintiff's old box or to plaintiff's new box than either of them is to the other. At the time plaintiff made up its mind to use another style of box it does not appear that either defendant or any one else supposed that the change would injuriously affect its trade. It has been customary for the plaintiff to have on its boxes of 80-cent chocolates a blue label of attractive design upon which the word "Guth" in the usual form and the word "chocolates" appear. Defendant's witnesses say that the absence of this label will at once attract attention. The plaintiff put out other boxes of other kinds of candies which either did not contain any label at all or a label of another color.

Plaintiff has its experts also. It puts on the stand such witnesses who swear that the buyer of candy will inevitably confuse defendant's chocolates with those of plaintiff's. They say that unscrupulous retailers will have little difficulty in selling one for the other. These witnesses have also sold much candy at retail. One of them emphasizes his conviction by the statement that 80 per cent. of the expensive candies are sold to men. From the depth of his experience he adds, "Women are the shrewdest shoppers, and men are the most easily buncoed."

For one set of experts to swear against another is common enough. In such cases the court is usually very little helped by anything which they came on the stand to tell. Occasionally, accidentally, or incidentally something comes out which does throw light on some issue to be decided. Defendant himself tells a story which shows that, if such an article of candy once becomes known to the purchasing public by such a name as "Guth," no difference in the style, appearance, or legends upon the package will prevent confusion.

The first Guth Chocolate Company, the Maryland corporation, which subsequently went into receivers' hands, put out 60-cent chocolates. These it called "Guth Gold Medal Chocolates." The words "Guth Gold Medal Chocolates" were prominently displayed on the box in which the candy was offered for sale. They were inclosed in an oval made up of representations alternately of the obverse and reverse side of medals of the color and of about the diameter of a gold dollar. The appearance of these boxes differed widely from that of those in which the 80-cent goods were sold. The distinction was further accentuated. An actual metallic disc or medal was fastened to the 60-cent chocolates and sold with it. Nevertheless purchasers so confused the two kinds that the company was forced to abandon altogether the sale of the gold medal variety.

Plaintiff's 80-cent and $1 chocolates have always been dipped by hand. This has heretofore been true of all the high-grade chocolates. The cheaper grades have been machine dipped, as are defendant's. He says that they are all the more wholesome for that. They, however, show some of the characteristic signs of machine-made goods. To the extent they do they resemble the poorer qualities which have heretofore been marketed. Purchasers who buy the candies for those of plaintiff may be led to suppose that the latter is not now making as fine goods as it formerly did.

There is some testimony that defendant's goods have already been confused with those of plaintiff's. There is not a great deal of it. Plaintiff filed its bill before much of defendant's candy had been offered for sale at retail. In so doing it acted in accordance with the view of Lord Blackburn, when he observed that:

"Plaintiffs judged it necessary to proceed without waiting until actual deceit was proved, and I think they judged rightly, for, as Lord Justice James said (13 Chancery Division, 464), the very life of a trade-mark depends upon the promptitude with which it is vindicated." Johnston v. Ewing, Law Reports, House of Lords, 7 Appeal Cases, 219.

The wisdom of so acting has been illustrated in this case. Defendant hardly denies that plaintiff is entitled to some relief. He admits that perhaps in some respects he has not been as careful as he might have been so to exercise his rights as not unnecessarily to infringe upon those of plaintiff. He says that, if such be the case, he has gone astray through carelessness and inadvertence and not with evil intent. The temporary restraining order has been interposed before much harm has been done to the plaintiff and before such an order could damage defendant, as it would if he had already built up a large trade in goods presented to the public in a guise which he was subsequently forced to abandon. To use a phrase of late on many tongues, the plaintiff has sought and obtained the assistance of the court before the eggs had been scrambled, perhaps before they had been even badly cracked.

Yet there is evidence that defendant has caused confusion. He has told the trade that he is no longer in the employ of the plaintiff. He has clearly stated to the retailers that his chocolates are now made by the Chocolate Products Company, and that such company has no connection with the plaintiff. It is hard to get people to understand. It appears that even proprietors and clerks of some stores which had been in the habit of selling plaintiff's candies did not yet appreciate that defendant's were not plaintiff's. Many who do know the situation will not feel that they are doing anything very wrong or perhaps anything wrong at all if they hand a customer who asks for Guth's chocolates a package of defendant's. The latter they would say is Guth's. One who speaks of the administration of Adams may have in mind either that of the second or of the sixth President. One of the plaintiff's witnesses in each of two southwestern cities sent into a drug store for a pound of Guth's chocolates. In each case he received a box of defendant's. Retailers have a strong inducement to sell defendant's goods instead of plaintiff's. They can get them at least 10 per cent. cheaper. They both retail at 80 cents.

It further appears from the testimony of one of defendant's own salesmen, when he was examined as a witness for him, that he usually tried, before going elsewhere, to get the man who sold plaintiff's candies to undertake the selling of defendant's. Whenever such efforts were successful, many of the ultimate consumers would inevitably obtain defendant's goods without learning that they were not the same they had frequently bought.

In considering how serious may be the possibility of confusion, the nature of the article dealt in must be borne in mind. Those who are minded to buy pianos, steam boilers, safes, typewriters, sewing machines, or farm wagons are likely to make some more or less careful inquiry as to what they are getting. The matter is important enough to make it highly probable that they will read and understand anything which may appear upon the article or in the circulars or advertisements in which it is habitually offered for sale. The case is different with comparatively cheap products, such as of food or drink, which perish in the using. It was one of such, viz., ales, that Lord Macnaghten spoke. He said that if, in the case before the House of Lords, the defendant had been required to distinguish his ales from those of the plaintiff, he "could not have used the term 'Stone Ales' at all. It would have been impossible for him to have called his ale Stone Ale and to have distinguished his ales from those of the plaintiff. Any attempt to distinguish the two, even if honestly meant, would have been perfectly idle. Thirsty folk want beer, not explanations. If the public get the thing they want, or something near it, and get it under the old name, the name with which they are familiar, they are likely to be supremely indifferent to the character and conduct of the brewer and the equitable rights of rival traders." Montgomery v. Thompson, Law Reports (1891) Appeal Cases, 217.

To be of any use, the explanation must be made when and as each sale takes place. Unless it appears upon the goods or upon the packages in which they are sold, it will seldom be made at all. Defendant's boxes tell nothing as to his changed relations. On them Charles G. Guth takes the place of Guth. That is all. To most purchasers such a substitution suggests nothing. It is possible, rather than probable, that some may suppose that it has significance. What, they cannot tell. On defendant's boxes his name is the only identifying word. Those who want candy are not likely to remember his Christian name, much less to repeat it. They will call his candies Guth's, because there is nothing else they can call them. The harm done the plaintiff will not stop here. Defendant's candies are so put upon the market that many who want plaintiff's will suppose that the only way to be sure of getting them is to buy what will in fact be defendant's. The statement in his boxes that "none are genuine" without his full facsimile signature suggests that his alone are the original, the plaintiff's imitations.

In most trade-mark cases both parties have equal right to make, if they choose, the same goods in the same way. Such is not the case here. It is true that neither plaintiff's candies nor its ways of making them are patented. They are made according to secret recipes. Defendant sold these formulas to the plaintiff. Any one who can, without breach of personal faith, find out how to make them may do so without plaintiff's leave or license. Defendant may not. He sold those formulas to the plaintiff. Fowle v. Park, 131 U. S. 88, 9 Sup. Ct. 658, 33 L. Ed. 67. He says he does not make them. In his assignment to the plaintiff he included all improvements which might thereafter be made in the formulas transferred. He explains that he now makes no use whatever of them, whether in their original form or in any improve-

ments thereon. His candies, he states, are made by entirely new recipes of his recent invention. He claims they are better than any he ever made for the plaintiff or that the plaintiff ever made for itself. If so, the more sharply his goods are distinguished from those of the plaintiff, the better for him. He is an unquestioned authority on candies. Still, taste is a peculiar thing. It may be that a considerable proportion of candy eaters may not think his goods are more toothsome. They have rights. When they are asked to buy defendant's candies, they should be told they are not getting what they have long known and liked and that they are asked to give their money for something else, although they do not know whether they will like it or not.

Defendant professes that his wish was and is to make clear the distinction between himself and the plaintiff, between his goods and its. He appears to have had the same bad luck which has often attended his predecessors in like ventures. Many judges have commented upon the strange fate which so frequently overtakes the second comer into an already well occupied market. He always wants to let every one know that he is offering something other than that which the other concern has sold. In some way or other every effort he makes to distinguish confuses. Persons so situated have been before compared to inexperienced bicycle riders who are prone to run into obstacles they are desperately striving to avoid. Some such psychological tendency may justify a charitable explanation of what otherwise appears to be an attempt to filch another man's trade.

Courts cannot look into the secret of human hearts. They can only judge the intention of responsible and experienced men by the natural outcome of their acts. If what they do will, in the ordinary course of events, tend to confuse their goods with those of others, the courts must assume that they purposed to bring about that result. This rule is of special applicability to the case at hand. There is in this record much advertising literature of defendant's composition. He appears to be an expert in that line of endeavor. If he wishes to create a particular impression on the public mind, he knows better than most how to do it. It follows that the defendant must be held to have gone beyond the line of fair competition. The plaintiff is entitled to some relief. What its measure should be is the seriously controverted question.

Defendant at the hearing tendered himself ready to consent to any decree which will, first, permit him to display prominently in some form the name Charles G. Guth on his candy boxes, and, second, will leave him free to offer his candy in attractive packages. Plaintiff insists that it will suffer if defendant's name appears in any way either upon the boxes in which his candy is sold or upon any poster, circular, or other advertisement of it.

From what has been already said, it follows that defendant's name on candy boxes will do the plaintiff serious injury. It is possible that some harm will result to it if that name, though not exhibited on the boxes themselves, is conspicuously displayed upon his advertising literature. Conceding so much to be true in fact, what legal consequences follow?

Every man who has not voluntarily imposed limitations upon himself may engage in any lawful business and may in it use his name in all ordinary ways. No man may lawfully sell his goods as those of another. Each of these principles is almost self-evident. They are each of universal, or well-night universal, application. Ordinarily they do not come into conflict. Sometimes in fact or in seeming they do. Many cases deal with some aspect or another of a real or alleged confusion which has resulted from the way in which two persons with a like surname have used it in competition with each other. In some of them emphasis has been laid on one of the two general doctrines above stated, while in others the reverse has been true. In what has actually been decided there is not much conflict. There are cases and of high authority which cannot be reconciled. Considering the difficulty of the subject, they are surprisingly few. A statement of the law as it now appears to be well settled will show that the decision to be here made must, after all, turn on what may appear to be a very narrow point.

[1] One man may have long been engaged in the production and sale of a particular kind of wares. He may have been the only person of that name who made or sold them. They may have acquired a widespread and valuable reputation. Any goods with which a like surname may be used will be taken for his. Nevertheless any man who has that surname may go into the same business and offer the like goods for sale. A good deal of confusion will necessarily follow. The first comer will suffer from it. If the second does nothing unnecessarily to increase the difficulty of distinguishing his goods from those of his predecessor, the latter will not be heard to complain. Brown Chemical Co. v. Meyer, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247; Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972; Burgess v. Burgess, 17 Eng. Law & Equity, 257.

The reputation of the old concern may have had its part in leading the new man to go into the same business. Even so, he is within his rights. He must not purposely do anything to confuse his products with those of his rival. He may be called on to take reasonable precautions to prevent the purchasing public from mistaking the one for the other. He cannot be required to that end to do anything which will disparage his own goods or advertise those of his competitor. Walter Baker & Co., Ltd., v. Gray, 192 Fed. 921, 113 C. C. A. 117; Wm. Rogers Mfg. Co. v. Rogers (C. C.) 84 Fed. 639. The right to use one's name in all ordinarily legitimate ways is absolute in the absence of contract, fraud, or estoppel. Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972.

When two men with the same surname are competitors, there are usually many things which one of them may easily do to lead those who want his rival's goods and who think they are getting them to take his. He often yields to the temptation. For the purpose of undoing what he has done, and to guard against the consequences of any repetition of it, he may be compelled to take precautions which otherwise would not have been required of him. Herring-Hall-Marvin Safe Co. v.

Hall Safe Co., 208 U. S. 554, 28 Sup. Ct. 350, 52 L. Ed. 616; Walter Baker & Co., Ltd., v. Baker (C. C.) 77 Fed. 181; Croft v. Day, 7 Beav. 88; David E. Foutz Co. v. S. A. Foutz Stock Food Co. (C. C.) 163 Fed. 408; Russia Cement Co. v. Le Page, 157 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685. Where he has greatly offended, he may be strictly restrained. He may be even prohibited from using his name in ways which ordinarily would be freely open to him. Herring-Hall-Marvin Safe Co. v. Hall Safe Co., 208 U. S. 554, 28 Sup. Ct. 350, 52 L. Ed. 616; Garrett v. T. H. Garrett & Co., 78 Fed. 472, 24 C. C. A. 173; Pillsbury v. Pillsbury-Washburn Flour Mills Co., 64 Fed. 841, 12 C. C. A. 432; Stuart v. F. G. Stewart Co., 91 Fed. 243, 33 C. C. A. 480; Sykes v. Sykes, 3 Barnewall & Cresswell, 541; Van Stan's Stratena Co. v. Van Stan, 209 Pa. 564, 58 Atl. 1064, 103 Am. St. Rep. 1018.

In such cases the unrestricted use of his name is no longer his. He has lost it as the result of what he did, but, nevertheless, he has not willingly parted with it. If it may be taken from him because of his wrongdoing, he may as certainly, and perhaps even more completely, part voluntarily with it.

Plaintiff says the defendant now at this bar is bound by his contract not to use his name in the sale of candy, and that, even if that were not so, he has put his name to such tortious ends that the court must place bounds on the ways in which he may hereafter employ it. He sold the good will of his business to the plaintiff. Quite clearly such a sale does not amount to an undertaking not to re-enter the same calling. Trego v. Hunt, Law Reports (1896) Appeal Cases, 7, 20.

[2] A man may so identify his name with his goods as to give it a secondary meaning. He may want to sell his business. In order to do so, it may be necessary for him to transfer the exclusive right to the use of his name in connection therewith. Even such a contract will leave him free to go into the same kind of business, though he may not employ his name to push the sale of his wares. Frazer v. Frazer Lubricator Co., 18 Ill. App. 450; same case on further appeal, 121 Ill. 147, 13 N. E. 639, 2 Am. St. Rep. 73; Le Page v. Russia Cement Co., 51 Fed. 941, 2 C. C. A. 555, 17 L. R. A. 354.

In Howe Scale Co. v. Wyckoff, Seamans & Benedict, supra, the Supreme Court impliedly recognized that such a sale may be valid. That it is and will be judicially enforced has been decided in a number of cases, some of them of high authority. Russia Cement Co. v. Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685; Le Page v. Russia Cement Co., supra; Frazer v. Frazer Lubricator Co., supra; Brewer v. Lamar, 69 Ga. 656, 47 Am. Rep. 766; Grow v. Seligman, 47 Mich. 607, 11 N. W. 404, 41 Am. St. Rep. 737; Shaver v. Shaver, 54 Iowa, 208, 6 N. W. 188, 37 Am. Rep. 194; Spieker v. Lash, 102 Cal. 38, 36 Pac. 362; Symonds v. Jones, 82 Me. 302, 19 Atl. 820, 8 L. R. A. 570, 17 Am. St. Rep. 485.

But, while the right of a man to use his name in his own business is not inalienable, it is fundamental. An intention entirely to divest himself of it and transfer it to another will not readily be presumed but must be clearly shown. Hazelton Boiler Co. v. Hazelton Tripod Boil-

er Co., 142 Ill. 494, 30 N. E. 339. The application of this rule to the facts of the case at bar requires denial of at least a part of the relief for which the plaintiff asks.

Two of the questions to be passed upon are whether such conveyance does not estop the defendant, first, to deny that the surname "Guth" had become a true trade-mark; and, second, to assert any right to use that name as a trade-mark whether with or without any additions in any way likely to confuse his goods with those of the plaintiff. No matter how they may be answered, they are obviously relevant solely to the use of a name as a trade-mark.

[3] A trade-mark must in some way be affixed or attached to the goods to be designated by it or to the packages in which they are sold. The exclusive right to it can be secured in no other way. Singer Mfg. Co. v. Wilson, Law Reports, 2 Chancery Div. 434; Oakes v. St. Louis Candy Co., 146 Mo. 391, 48 S. W. 467; Hazelton Boiler Co. v. Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339.

It follows that the mere assignment by the defendant to the plaintiff of the trade-mark of the Guth Chocolate Company of Baltimore City did not give it any right to require him to refrain from the use of his name in his business otherwise than by actually or constructively affixing that name to the candies or to the packages in which candies were sold.

[4] In addition to conveying to the plaintiff the trade-marks of the former company, defendant sold it "the use of the name 'Guth' for the purpose of manufacturing and selling candies under the Guth label."

Had the parties wished that the defendant should not thereafter be free to use his name at all in the candy business, the words "under the Guth label" would have been superfluous. The defendant, of course, intended that the plaintiff should continue to call itself by the name which he had given it. It might freely advertise its goods by that name, which was the name he expressly authorized it to use upon them. His participation in its organization, his conveyance to it of the trade-marks of its predecessor, would have given it that much without any other express grant. But neither the grant of one nor the other or of both combined would have taken from him the right to use his name in the same business. If he bargained that right away, it must have been by the conveyance of the right to use the name "Guth" for the purpose of manufacturing and selling candies under the Guth label. That language, however, is restricted to a particular kind of use of that name.

In view of the rule of law which requires an intention to convey an exclusive right to the use of one's own name to be clearly shown, it must be held that the defendant has not deprived himself of the right to employ his name in the candy business otherwise than on the candies themselves or upon the packages in which they are offered for sale. The right to use one's own name, however absolute and fundamental, does not authorize its employment for the purpose and with the intent of doing unnecessary mischief to others. One competitor in business may so use his name as to induce purchasers to buy his goods when they wanted those of his rival. If he does, he may be required thereafter in his advertising literature to add to his name such explanatory

matter as will render such confusion difficult, if not impossible. Stix, Baer & Fuller Dry Goods Co. v. American Piano Co., 211 Fed. 271, 127 C. C. A. 639.

In view of all the facts and circumstances heretofore cited, the defendant may be properly required to give notice upon all literature, posters, etc., in which his name is used and which are intended to come under the eye of the ultimate consumers of his candies, that they are made by the Chocolate Products Company and not by the older Guth Chocolate Company, and that they are compounded under different formulas. This notice should be as conspicuous as his own name. He will be free to make whatever comparisons he may think just, and if need be can justify, between the products he is now making and those which the plaintiff offers for sale.

The most difficult problem still remains. Has defendant parted with the right to use his name on candies and on the containers of candies? To the parties that is the vitally important question. While a bargain to shut one's self out of the right to use one's own name for any legitimate purpose will not be presumed, but must be proved, such proof may doubtless be made in various ways. In determining whether such an agreement has been entered into, all the facts and circumstances of each particular case must be taken into consideration. Much depends upon the nature of the business conducted and of the wares dealt in. It may sometimes be clear, as it is here, that the right to use defendant's surname has been given to plaintiff. If such right will be of little worth if not exclusive, the courts will be somewhat more ready to find in the words used an intent on the part of the grantor to part with all right to the use of his name than they will where the two parties may simultaneously use that name with relatively little inconvenience.

In this case, as has already been pointed out, the character of the wares dealt in is such that the use of the same surname on candy boxes will lead to continual and serious confusion.

At the time the defendant made the sale to the plaintiff, he was thoroughly familiar with the nature of the candy business. Whatever he did or said was done or said with reference to the conditions prevailing in that trade. So much cannot be seriously disputed. Even so, the parties are in direct opposition as to the legal consequences which should follow. As might have been expected, each of them has been able to marshal, in support of its contention, apt quotations from opinions of courts of high reputation for sound judgment and broad legal learning. As is not uncommon, what was said in those cases is in far sharper contrast than that which was done.

This opinion is already far too long. A detailed discussion of many of these cases would greatly extend it without corresponding profit. Among them are two which in many of their facts are very similar to those now before the court. It so happens that one of them is the principal reliance of the plaintiff; the other of the defendant. An examination of them will afford sufficient opportunity to make clear the legal considerations which are thought to be here controlling. It will be most convenient to speak first of the case cited by the defendant.

It was decided some eight years ago by the Supreme Court of Pennsylvania. The defendant in it had begun the business of manufacturing chocolate chips, which were sold as Trowbridge's Chocolate Chips. He formed a copartnership to carry on the business. Subsequently he withdrew from the firm. He made a written agreement with his partners. It recited that the partnership had been formed especially for the manufacture and sale of the quality of confectionery known by the trade-mark of Trowbridge's Original Chocolate Chips. By it the defendant sold all his "right, title, interest, property, and claim" to and in all the partnership business, rights, and property. Among the things specifically assigned was the good will of the business. He shortly resumed business in his own name and town. He, too, manufactured and sold chocolate chips. He put his name "W. S. Trowbridge" on the packages in which he offered them for sale. In other respects there were striking differences in the markings of his goods from those of the copartnership. The latter sought an injunction against him. They alleged that by the transfer of his interest in the good will of the business he was precluded from entering into a similar one in the same town and prosecuting it in competition with them. This contention was naturally held wholly untenable. Under all the circumstances, the court thought that what the plaintiff feared was not that the public would be deceived, but that, if the fact became known that the defendant was engaged in the same business, the public would purposely purchase the goods made by him because he was the first person who ever made them. It thought that the plaintiff wanted protection from the business competition of the defendant carried on openly and frankly by him under his own name. It found nothing in the agreement to show that he had ever intended to put himself under such bonds.

The plaintiff claims that Le Page v. Russia Cement Co., 51 Fed. 941, 2 C. C. A. 555, 17 L. R. A. 354, cannot be distinguished from the case now at bar. It was decided by the Circuit Court of Appeals for the First Circuit. The opinion is from the pen of Judge Putnam. It is learned and able. Mr. Justice Gray sat in the case and united in the opinion. It was decided in 1892. White v. Trowbridge, 216 Pa. 11, 64 Atl. 862, not until 1906. It is somewhat curious that in the opinion of the latter no reference is made to the former. Le Page had been in the glue business. He extensively advertised his glues as Le Page's and sold them as such. He and one Brooks formed a partnership. They traded as the Russia Cement Company. In 1882 they incorporated under the same name. Le Page and his partner by bill of sale transferred the business and property of the firm to the corporation. A copy of such bill of sale has been offered in evidence in this case. In it the parties conveyed to the corporation "the good will of the business and the right to use the trade-marks belonging to or in use by said copartnership." Subsequently Le Page severed his connection with the company and formed another which he called by his own name. Upon its packages appeared the words "Manufactured by the Le Page Company." It was held that in so labeling them he had infringed upon the rights of his grantee. It was pointed out that the

Russia Cement Company had a threefold right to recover. First, it had become the owner of whatever trade-marks were owned by Le Page or by the partnership. The plaintiff now before this court has all the trade-marks which prior to March, 1909, belonged either to the defendant or to the Guth Chocolate Company of Baltimore City. Second, the Russia Cement Company had acquired, both by express contract and by implication of law, the good will which accompanied the trade-marks of the business. In this case the defendant expressly conveyed to the plaintiff the good will of the previous business. Third, independently of all questions of trade-marks or good will, the Russia Cement Company, in common with every manufacturer and trader, had the fundamental common-law right to be protected against those who offer to the public products or merchandise simulating its. To such right the present plaintiff may lay equal claim. The court was careful to show that its ruling was not oppressive to those who had built up profitable businesses under their own surnames. On the contrary, in the long run it would greatly advantage a majority of them. Such a person should have the privilege of realizing the fruits of his labor by transmitting to purchasers his business and establishment with the reputation which has attached to them. The more exclusive the title he can convey the better the price he may command. It was said that there is a great difference between dealing with a local community understanding all the circumstances and dealing with the great public scattered throughout the United States with no opportunities of information except what is communicated to them by the word "Le Page" in combination with the word "glue."

Plaintiff's goods are sold in every state of the Union. Defendant has by his circulars solicited customers over an equally extensive territory. The purchasers of candy, equally with the purchasers of glue, are without any other opportunities of information except what is communicated to them by the word "Guth" in combination with the word "chocolates."

It was regarded as a significant circumstance that the Russia Cement Company sold its products to customers and subcustomers to the amount of more than $60,000 annually. The sales of the plaintiff under the Guth label are at least four or five times as great. Glues, on account of their very peculiar character, go into the hands of many hundreds of thousands of persons nearly all ignorant of the circumstances connected with their origin except what is suggested by the word Le Page. Candies go into the hands of at least an equal number of people whose ignorance on the subject of their origin is quite as profound.

The Circuit Court of Appeals did not think that "the shape of the packages, the color of the labels, or the peculiar adornments put upon them, or any arbitrary designations, form essential parts of what was left behind him by Le Page when he withdrew from the plaintiff corporation, or of what was transferred to it by the partnership."

There is nothing in this record to suggest that any such features formed the really essential part of what the plaintiff bought from the defendant.

In the First Circuit it was held that the essential thing was the Russia Cement Company's "right to inform the public that it is in the exclusive possession of all the advantages coming to it as the legitimate successor of the original formulator of Le Page's glue and is alone entitled to put on the market that product, supposed to be composed or manufactured with special skill and known to come from the original and long-established concern."

In the instant case the essential thing assigned by the defendant to the plaintiff was the right to tell the public that it is in the exclusive possession of all the advantages coming to it as the legitimate successor of the original formulator of Guth's chocolates, and that it is alone entitled to put them on the market.

Judge Putnam further held that, in view of the nature of the busi ness and of the kind of products dealt in and the character of the persons who bought and used them, there was no essential difference between the words "Le Page's Glue" and the words "Glue made by Le Page" or "Glue made by the Le Page Company." He added:

> "It would be mere self-stultification for this court to assume not to see, what every practical person of intelligence must see, that for the innumerable persons dealing with this class of merchandise, or with such merchandise as the Day and Martin Blacking, covered by Croft v. Day, 7 Beav. 84, the words 'Le Page's Glue,' and 'Glue Manufactured by Le Page,' or the words 'Day and Martin's Blacking,' and 'Blacking Manufactured by Day and Martin,' mean, or soon come to mean, one and the same thing, and that both will inevitably be soon styled alike in the market."

There can be no question that "Chocolates by Charles G. Guth" will be known to the public as "Guth's Chocolates."

The opinion in the Le Page Case has been so fully reviewed and such extensive quotations have been made from it in order to demonstrate that it is impossible to distinguish the facts of that controversy from those of the one now to be determined. Defendant, it is true, attempts to do so. Judge Putnam states that the opinion in the Russia Cement Company v. Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685, contains an accurate statement of facts. Defendant says that it appears both from Judge Putnam's opinion and from that of the Supreme Judicial Court of Massachusetts that both of them thought that Le Page had purposely sought to mislead the ultimate purchasers of glues. The defendant here contends that he did not. What he has done has been heretofore fully set forth. The legal interpretation which must be put upon his acts has been already stated. It follows that the distinction he seeks to make has no foundation in fact. It is, however, quite doubtful whether the ruling in either of the cases would have been different had Le Page been held altogether free from any wish to deceive. The rights of the Russia Cement Company were expressly held to be based on his contract rather than on his tort. The important question in the end resolves itself into the query whether this court should accept and apply the doctrine laid down by the Circuit Court of Appeals for the First Circuit. It does not appear that in any of the subsequent federal cases in the Supreme, or in any of the inferior courts of the United States, its reasoning has been unfavorably criticised or its authority in any wise shaken. It is true that

much which was said in White v. Trowbridge is not in harmony with Judge Putnam's argument. Whether Judge Potter, who spoke for the Supreme Court of Pennsylvania, had considered the Le Page Case does not appear. Technically neither decision is binding on this court. Doubtless in a District Court of the United States the utterances of a Circuit Court of Appeals of another circuit are entitled to somewhat more weight than are those of a state court of another state, no matter how great and how deserved may be the reputation of the latter. Apart, however, from any such technical considerations, the opinion in the case in the federal court seems more persuasive when applied to the facts of the particular case now under consideration.

The defendant must be enjoined from putting the name "Guth" with or without a prefix or suffix upon any candy or in or upon packages in which he offers candy for sale. It consequently becomes unnecessary to consider any of the questions as to the shape or color of the packages or of the crests or other adornments upon them.

GINN & CO. v. APOLLO PUB. CO.

(District Court, E. D. Pennsylvania. July 28, 1914.)

No. 1069.

1. COPYRIGHTS (§ 56*)—UNLAWFUL COMPETITION—SECONDHAND BOOKS—RENOVATION—REBINDING—SALE.

While a publisher of copyright books is entitled to protection against unfair competition, in that no other publication shall be palmed off on intending purchasers as those of complainant, the purchasers of such books are entitled to resell, renovate, clean, and rebind them, either by themselves or through another, and hence the original publisher could not restrain a dealer in secondhand books from purchasing, renovating, cleaning, and rebinding complainant's publications and reselling them for what they were.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 52; Dec. Dig. § 56.*]

2. COPYRIGHTS (§ 55*) — INFRINGEMENT — SECONDHAND BOOKS — REBINDING OMITTED PARTS.

Where defendant, a secondhand book dealer, purchased from the public certain of complainant's secondhand copyrighted schoolbooks, and not only renovated, cleaned, and rebound them, but also reprinted and inserted missing parts, selling the reproduced copies as copies of complainant's books, such reprinting and reproduction constituted an infringement of complainant's copyright.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 52; Dec. Dig. § 55.*]

In Equity. Suit by Ginn & Co. against the Apollo Publishing Company. On bill, answer, and proof. Decree for complainant.

See, also, 209 Fed. 713.

The following are the findings of fact and conclusions of law:

Findings of Fact.

The court finds the following conclusions of fact in the above case:

(1) The plaintiffs are as set forth in paragraph 1 of the bill filed in this case as amended by the agreed amendment to the bill in this respect.

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

(2) The defendant, Apollo Publishing Company, is a citizen of the state of Delaware, and has a corporate existence under the laws of that state, as set forth in paragraph 1 of the bill and the agreed amendment thereto.

(3) The plaintiffs are some of them citizens of the state of Massachusetts, some of the state of New York, some of the State of Illinois, and some of the state of California, as set forth in paragraph 1 of the original bill and the agreed amendment thereto.

(4) The case arises under the laws of the United States relating to copyrights in part and in part is a suit in equity between citizens of different states, and is a case where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, as set forth in the bill filed in the case and in the agreed amendment thereto.

(5) So far as they are questions of fact the required jurisdictional facts are found to exist in this case.

(6) The plaintiffs are the proprietors as authors, publishers, and owners of the different publications as set forth in the original bill and the agreed amendment thereto, and have complied with all the statutory requirements conferring upon them copyrights under the acts of Congress, as set forth in the bill.

(7) The firm of Ginn & Co., one of the plaintiffs, is and for many years has been a publisher of schoolbooks, making, compiling, publishing, and selling them in nearly all parts of the United States.

(8) The defendant is and has been during the time referred to in the bill of complaint engaged primarily in the business of rebinding of old or secondhand books. It is the owner of a new and useful form of binding, which is patented under the laws of the United States. As incidental to its main business of the rebinding of old books for the owners thereof, it also purchases old or secondhand books, and, after cleaning, renovating, and rebinding such books, resells them as secondhand books. All the books thus rebound and sold by them are plainly marked, "Rebound by the Apollo Publishing Company, Reading, Penna."

(9) During the time complained of in the plaintiffs' bill the defendant has purchased old or secondhand book copies of the plaintiffs' publications, and has cleaned, renovated, rebound, and resold them as old or secondhand books, plainly marked on the cover as books rebound by the defendant.

(10) The defendant has in like manner cleaned, renovated, and rebound old or secondhand books of the plaintiffs' publications for others, and has delivered such secondhand books to the owners thereof as such rebound books.

(11) Some of the books thus improved and resold have been imperfect copies of the original publications, in that parts thereof, consisting in some instances of the title page, in others the page of the book containing the plaintiffs' copyright notice, and the page containing the name of the author, being missing. All the instances in which this was done, however, it was done in cases in which the books were rebound for others in the condition in which they were when delivered to the defendant for rebinding, or when done in cases of a purchase and resale of the secondhand books by the defendant on its own account, the sending out of the imperfect books was due to the neglect or inadvertence of defendant's employés, and was not done by its direction or with its knowledge, the purpose and effort of the defendant having been not to sell on its own account imperfect copies of the books sold.

(12) The defendant has at times supplied parts of secondhand books purchased which had been torn out or were otherwise missing, so as to reproduce in substance the parts missing. This supply of missing parts has, in some instances, consisted of a reproduction of the original maps in geographies which were bound in with and were part of the original publication, and at other times consisted of reprinted pages of text which had been torn out, or were otherwise missing from the secondhand copies purchased and resold by the defendant. There was no effort or attempt in the supply of these missing parts to produce any deceptive imitations of the plaintiffs' publication. The omitted parts were supplied in each instance wholly for the purpose of giving to purchasers of the resold books substantial reproductions of the missing

parts, and parts supplied were substitutions for and not imitations of the parts of the original publication which were thus missing. There was no attempt at identity or similitude in the style of type from which the printing was done. The matter, however, copied was the same, and textually the copies were accurate so far as it was practicable to make them so.

(13) The secondhand books of plaintiffs' publications which were thus renovated and rebound by the defendant company, either for the owners thereof or which were purchased by the defendant and thus treated and resold on its own account, were all copies of books which had been regularly sold by the plaintiffs to the original purchasers, and from them passed immediately or mediately to the defendant company by resale, and in every instance the plaintiffs received the full benefit and advantage of the exclusive right conferred upon them by the copyright laws.

(14) In none of the instances of a resale of the plaintiffs' publications or a sale of the secondhand copies thereof was there any attempt by the defendant to palm off the books sold by it as new or original publications of the plaintiffs, nor were these books sold or attempted to be sold in competition with the plaintiffs in the sale of their copyrighted books as new publications.

(15) So far as the same is involved in a finding of fact the defendant has not been guilty of any unfair competition or in any practices involving unfair competition with the plaintiffs in their trade or business as publishers of the books referred to in the plaintiffs' bill, nor has the defendant been guilty of any unfair trade or practices involving unfair trade in this respect.

(16) So far as the same is a finding of fact the defendant has been guilty of an infringement of the copyright of the plaintiffs, in that the defendant has, after the recording of the titles of the books set forth in plaintiffs' bill, and within the term limited within which the plaintiffs have the exclusive right to print and sell the same, and within two years last past, printed and printed, published, and sold parts of the books, the titles of which were so recorded by the plaintiffs, by incorporating such copies and reprinted portions of the plaintiffs' publications with old, secondhand, or sold copies thereof, and selling the same as old or secondhand copies of the plaintiffs' publications.

Conclusions of Law.

The court finds the following conclusions of law:

1. So far as the same is a conclusion of law the facts necessary to give the court jurisdiction of the parties to this suit and of the subject-matter of the controversy between them exist, and the court has jurisdiction to grant the relief prayed for in the bill.

2. So far as the same is a question of law the defendant has been guilty of no unfair competition with the plaintiffs or of unfair trade in the respect of the publication or sale of its books as the publications of books of the plaintiffs.

3. So far as the same is a question of law the plaintiffs are the proprietors and possess the exclusive right to print, publish, and sell the books and publications referred to in their bill, under the acts of Congress in such case made and provided relating to copyrights.

4. So far as the same is a question of law the defendant has been guilty of an infringement of the copyright of the plaintiffs in that it has printed and has printed, published, and resold parts of the copyrighted books and publications of the plaintiffs by incorporating such reproduced and reprinted portions with the original publications and printed books of the plaintiffs and reselling them as old or secondhand books published by the plaintiffs.

5. The plaintiffs are entitled to a decree restraining the defendant from printing, publishing, or selling any portion of the copyrighted books and publications of the plaintiffs, as set forth in the bill, and from incorporating such reprinted portions in old or secondhand books or publications of the plaintiffs and selling the same as plaintiffs' books and publications.

6. Plaintiffs are entitled to a decree against the defendant forfeiting to the plaintiffs all the plates on which said printed portions of plaintiffs' copyrighted publications have been copied and every sheet thereof kept or printed,

and to a decree of accounting for the damages sustained by said plaintiffs in its behalf.

7. The plaintiffs are entitled to a decree in their favor and against the defendant for costs.

W. K. Stevens, of Reading, Pa., and G. W. Anderson, of Boston, Mass., for plaintiff.

E. Hayward Fairbanks, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The specific findings of fact and conclusions of law involved in the trial of this case are filed herewith. A very general statement of the facts will suffice to disclose the real questions involved. The plaintiffs complain of two injuries of the commission of which they accuse the defendant. The one is that the plaintiffs are the victims of unfair competition, and the other is that their proprietary copyright has been infringed by the defendant. The plaintiffs are the authors and copyright proprietors and publishers of schoolbooks. The books may be described in general terms as Frye's Geographies, Smith's Arithmetics and Cyr's Readers. The firm of Ginn & Co., one of the plaintiffs, conduct a large publishing house by which these books are printed, published, and sold. All the publications are duly copyrighted. This publishing house sells only new books, the sales being necessarily confined entirely or almost entirely to the boards of education throughout the country who supply books of this character to the pupils in the public schools. The defendant is primarily engaged in the business of bookbinding, and its business is largely, if not wholly, confined to the rebinding of old books. It owns the patent for an improved binding. The merit claimed for this binding is that, owing to its strength and flexibility and consequent durability, it is especially adapted to stand the rough usage with which books meet in the hands of children. A good part of the business carried on by the defendant consists of cleaning, renovating, and rebinding old books for the owners. They do, however, an additional, if more or less incidental, business in the way of purchasing old or secondhand books and reselling them in an improved condition for use. They are in no proper sense publishers. All the reissued books of the defendant are marked "Rebound by the Apollo Publishing Company, Reading, Penna."

The particular complaints of the plaintiffs, under their general complaint of unfair competition, are that the defendant is publishing, or at least reselling, the publications of the plaintiffs in an imperfect, mutilated, and deceptive form, in that it sometimes reissues the books with, in some instances, the title missing, in others, with the copyright notice omitted, again with maps and portions of the original text of the books gone, and at times the name of another than the real author of the book named as the author. The particular complaint, under the general complaint of an infringement of plaintiffs' copyrights, is that the defendant has purchased old books with missing maps and parts of the text gone, and has supplied these by copying the plaintiffs' maps and reprinting portions of the text to supply the missing parts, has incorporated these reproduced parts with the old books, and has sold them as the publications of the plaintiffs.

The dual character of this general complaint calls for an inquiry into two questions: First, whether the defendant has been guilty of unfair competition; and, secondly, whether it has infringed upon the proprietary rights of the plaintiffs accorded them under the copyright laws.

A statement of the general rights of both parties to this controversy will be helpful as a starting point from which to discuss the points at which their respective claims of right clash.

[1] The plaintiffs are entitled to the full protection of the law from having the trade which they would otherwise be able to command diverted to the defendant by any methods so unfair as to come within the ban of the law. In its most general statement this right is that no other publications shall be palmed off upon intending purchasers as the publications of the plaintiffs. If an intending purchaser of books has the purpose in mind to buy the publications of the plaintiffs, and he is deceived into buying other publications thinking he is buying those of the plaintiffs, an injury is done to the plaintiffs which the law can and should redress. In order "to promote the progress of science and the useful arts," and to encourage authors and publishers to develop their talents and to undergo the labor and expense of producing original works which will be of value because of the benefit and advantage thereby accruing to the people, the law has granted an exclusive proprietary right to authors and publishers to all such publications. In the assertion of this right they should, at all times, receive full and adequate assistance from the law. Out of these rights, however, and indeed in order to give them full expression, grow the rights of the purchasers of such publications. One of these rights is the right to resell a book when once purchased. This right should likewise be full and untrammeled. Another right incidental to it is the right to care for and keep in good condition the books thus purchased. This necessarily gives the right to renovate, clean, and rebind. What they can do for themselves they can rightfully secure the services of others to do for them. This in turn involves a right of another kind, which is to purchase secondhand books and to do with them what the original purchaser had the right to do, one of which things is the right to vend them without or after renovation. While it is doubtless true that the part of the purchasing public which is thus supplied with secondhand books is withdrawn from the market for the purchase of new publications, a publisher of books and a secondhand dealer in books (where there is no attempt to pass off the one for the other) cannot be said in any proper sense of the term to be in competition. Where there is no competition there can be no unfair competition, and it would seem to follow, therefore, that as the plaintiffs, so far as they are dealers, deal wholly in new publications, and the defendant, so far as it is a dealer, deals wholly in secondhand books, they are not in competition the one with the other. The charge of unfair competition must therefore fall.

[2] The claim of infringement of copyright stands, however, upon a different footing. This is what may be termed a conventional and artificial right. It is a right conferred by the law in pursuance of a

policy of its own, and may therefore and does extend so far as the law has decreed it shall extend in the promotion of its policy. It is manifest that this law must be futile and fail in its purpose if the publication of one who has put his talents, his time, and his labor to the production of a book can be met with a book of another which is a mere copy of his own, the cost of which to the second publisher has been reduced by the saving of all the expense of the publication, except what might be termed the merely mechanical part. If, therefore, the plaintiffs and the defendant were in competition in the sale of books, the test of whether there had been any infringement of the right of the plaintiffs would be whether any forbidden use had been made of the plaintiffs' publications.

One obstacle in the way of the mind yielding assent to the argument for the plaintiffs is that it seems to lead to a conclusion which cannot be accepted. In other words, it proves too much. If the right of a purchaser of the plaintiffs' publications is, as it would seem must be conceded, to resell a book purchased by him, after his use of it had ended, the one argument of the plaintiffs being that the sale of the book with any of its parts missing is an infringement of the plaintiffs' right because it is unfair competition, and the other argument being that the sale of the book with the missing parts supplied is a legal injury to the plaintiffs because it is an infringement of their copyright, then the conclusion is inevitable that a purchaser loses the right of resale altogether unless the book which he resells is perfect in all its parts. This would be to restrict and limit the rights of the purchaser to an extent which would be unfair to him and be a deprivation of a right which he is conceded to possess. The soundness of the second argument adduced, however, is not necessarily impaired by the finding of the first to be unsound. This, therefore, resolves the whole question into this: Is the copying into a secondhand book of a map or a small portion of the text of the original publication which may be missing and the selling of the book with its replaced parts as a secondhand book an infringement of the plaintiffs' copyright? This is a question which must be determined by a fair construction of the acts of Congress on the subject of copyrights as interpreted in the light of the decided cases. Upon this question, the cases which deal with new publications which have had incorporated in them portions of a copyrighted work afford us some general aid. It would seem at first sight that the two acts are not the same either in purpose or in the thing done, except in the particular that in each case a part of the copyrighted publication has been reproduced. In the one case the intention and purpose is to sell a secondhand copyrighted book for what it is and to perfect it by supplying the missing parts. In the other, the intention and purpose of the offending publisher is to make a market for his publication by availing himself of some of the labors of the publisher whose previous work has been copyrighted, and to this extent to sell the product of the labor of the first publisher as his own and to reap the profits. The gravamen of each offense, however, is the same. Each has the right to sell that which is his. Neither has the right to make his own property more valuable or more salable by in-

corporating with it any part of the property of another. The man who is the purchaser of a copyrighted book may resell it for what it is without any infringement of the copyright laws. Doan et al. v. American Book Co., 105 Fed. 772, 45 C. C. A. 42. He may rebind or otherwise improve its condition or appearance for the purposes of a resale without being guilty of unfair trade, provided he does not palm it off as the publication of the original publishers. Id. The other man unquestionably has the right to sell his own publication without the pirated parts.

There does not seem to be any adjudged case in which the precise point here presented has been raised. If, however, it would have been an infringement of the plaintiffs' copyright to have incorporated in an original publication as much of the copyrighted books as was added to the secondhand books to supply the missing parts, then the doing of this would be a like infringement. There are many cases of new publications to serve us as illustrations, but the precise point to be ruled here must be decided without any decided case which is on all fours with this to guide us.

This point of the present case must therefore of necessity be disposed of as one of "the first impressions." The purpose and intent of the copyright law is "to give to authors the exclusive right to" the productions of their brains when reduced to the form of writings, and to this end they are given by the acts of Congress "the sole liberty of printing, reprinting, publishing, completing, copying" and of "vending the same." The right thus given is further defined by Congress as an "exclusive right." It is by other provisions of the law forbidden to others than the author to print, publish, or sell a copy of any such work. It must be that the proprietary right thus given to the author in the whole likewise extends to all its parts. When a copyrighted book is published and sold, however, something is necessarily given to the purchaser and acquired by the general public. One thing acquired is the fact that the author has expressed certain thoughts. This is a fact in literature of which any one is free to avail himself as he is of any fact made public. It can be commented upon and discussed and the author's work reproduced so far as to make the comments intelligible. The purchaser of a particular copy, as we have seen, acquires the right to resell it or to preserve and renovate it. Out of these acquired rights from the author, and out also of the doctrine of de minimis which doubtless also applies, grows the necessity of drawing the line between the lawful and the forbidden use of copyrighted publications. There would surely be difficulty and doubtless danger in the attempt to define that line. "Omnis definitio in lege periculosa est." It is not so difficult to draw the line in particular cases of original publications. Black v. Allen (C. C.) 42 Fed. 618, 9 L. R. A. 433, gives us one illustration. Cobbett v. Woodward Law Rep., 14 Eq. 407, Bradbury v. Hotten Law Rep., 8 Exch. 1, Kelly v. Hooper, 4 Jur. 21, Whittingham v. Wooler, 2 Swans. 428, and Mawman v. Tegg, 3 Eng. Ch., 385, are cited to us as other illustrations. Any digest of copyright cases will afford many more.

It is neither so easy nor are we favored with as many illustrations in cases of the renovation and reselling of secondhand copies of the protected publication. The bare right to resell is made clear. The right to recover, rebind, and to replace a title page has been decided, but this is at least in part upon a halting accord to the author of including the cover, binding, or title page in his copyright. The expression which comes the nearest to being a statement of the rights of the author in this respect is to be found in the dictum in Harrison v. Maynard, 61 Fed. 689, 10 C. C. A. 17. It is to this effect: After ruling that "the right to restrain the sale of a particular copy of the book by virtue of the copyright statutes has gone when the owner of the copyright and of that copy has parted with all his title to it, and has conferred an absolute title to the copy upon a purchaser," and that "the exclusive right to vend the particular copy no longer remains in the owner of the copyright," the opinion is expressed that "the new purchaser cannot reprint the copy. He cannot print or publish a new edition of the book." This would seem to be in accord with a sound view of the copyright law. It would seem further to follow that as he cannot reprint the book, he cannot reprint any material part of it. This brings us pretty close to the acceptance of the republication cases as analogues.

Another line of cases which might seem to furnish further illustrations will be found not to supply true analogues. These are the cases arising under the patent laws. There the right to repair, to improve, and to replace broken or missing parts has in some instances been permitted to the purchaser. If the right of the purchaser there had been extended somewhat further than it has, the cases might be considered analogous but under the restrictions imposed they are not. The right given to authors and publishers should be so guarded and protected as to give them the practical benefits the law meant them to receive. This certainly calls upon us, if they are to be protected against a reproduction of the whole of their works, to protect them against a reproduction of any part where the reproduction of that part means to take from them the exclusive right to make a sale which otherwise would have been made by them. Such is the case when the work reproduced and sold is the same work which they alone have the right to produce and sell.

We have therefore reached the conclusion that in reprinting parts of the plaintiffs' books and incorporating such reprinted parts with parts of sold copies of the same works and selling the reproduced copies as copies (as they then are) of the plaintiffs' books, the defendant has infringed upon the proprietary rights given to the plaintiffs under the copyright laws, and to this extent the plaintiffs are entitled to a decree in their favor, with costs.

A decree in accordance with this opinion, and the findings of facts and conclusions of law filed herewith, may be prepared and submitted by counsel.

THE ROANOKE.

(District Court, D. Oregon. June 29, 1914.)

No. 5929.

SEAMEN (§ 29*)—INJURY IN SERVICE—LIABILITY OF VESSEL—DELAY IN OBTAINING MEDICAL TREATMENT.

Libelant, a seaman on a steamship, was thrown down by a heavy sea, which struck the vessel just after she crossed the bar passing out of the Columbia river, and both bones of one leg near the foot were broken, and his leg was severely lacerated by striking against an iron obstruction. The captain, being of the opinion that he probably could not get back over the bar for some hours, proceeded to San Francisco; a mate and the stewardess, who was a nurse, in the meantime treating the injuries. On arrival at San Francisco two days later, libelant was taken to the hospital for treatment, but it became necessary to amputate the leg. On the trial of the case the testimony of neither of the two surgeons who treated the injury in San Francisco was taken, and the description of the injury by libelant and the others who were on the vessel was not such as to enable physicians called as experts to express a satisfactory opinion as to whether or not the leg could have been saved if given surgical treatment sooner. *Held* that, in such condition of the evidence, the court was not warranted in finding that libelant would not have lost his leg and suffered as badly if given earlier treatment, and in holding the ship liable because it was not given.

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

In Admiralty. Suit by Henrik A. Dahl against the steamship Roanoke. Decree for respondent.

H. Daniel and H. H. Riddell, both of Portland, Or., for libelant.

Carey & Kerr and C. A. Hart, all of Portland, Or., for respondent.

WOLVERTON, District Judge. This is a libel to recover damages against the steamship Roanoke, on account of personal injury received by the libelant while aboard ship, and especially for alleged negligence of her master and officers in failing to secure surgical and medical attention sooner than was done.

The Roanoke is an iron ship of about 2,500 tons register, 275 feet in length, and drawing about 18 feet of water. On the morning of the 28th of December, 1911, at 7:45 o'clock, while she was passing over the bar outward at the mouth of the Columbia river, she encountered a heavy sea, and a wave broke over her, and libelant, being on deck about the cabin, where he had been engaged in closing the doors and shutters, was struck and carried to the rear of the ship, and was injured by coming in contact with the legs of an iron seat. Both bones in his right leg were broken above the ankle, and he received a severe injury below the knee; the flesh being cut and torn and the bone and arteries exposed. The ship was bound for San Francisco and ports south of there. The captain did not return to Astoria because the sea was rough and squally, and he believed it would be unsafe to pass back over the bar at the time, and that in all probability he would not be able to get in before the next morning. In this emergency he con-

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

cluded it would be best to pursue his course to San Francisco, but with a view of stopping at Eureka to procure medical assistance for libelant if the sea and bar would permit. He is corroborated in his judgment touching the unsafe condition of the Columbia bar for passage inbound by Capt. Maland, of the steamship Tamalpais, who sighted the Roanoke as she was passing out. Maland, although in charge of a much lighter ship, was unable to get in over the bar until 1:55 o'clock in the afternoon. The captain was further of the view that his vessel could have gone in at almost any stage of the tide if the condition of the sea was favorable, but that it was problematical whether he would have been able to get back before the following morning, if even then.

As it relates to the nature of the injury received by Dahl he testifies that both bones of the leg were broken right above the ankle; that there was a big wound underneath the knee, about two inches (two or three inches, around there); that it came on both sides and in front, only the heavy flesh was not cut. Using the language of the witness, he says:

"And it was from the knee about even around, three parts of it was cut and one part left. Two-thirds cut."

Further on he testifies that the bone was exposed a little in front. Being asked how deep the cut was, he answered:

"It was quite a deep cut. * * * It must have been right in the bone, on the front. * * * The cut was mostly on the front and sides."

Dahl was taken into the social hall of the ship, and the stewardess, who was a practical nurse, assisted by the second mate, dressed the wound, and as best she could put the limb in splints and bound it so as to keep the foot in place until he could be taken to the hospital. As a precaution, in order to be ready in case of extreme hemorrhage, she put a bandage about the limb above the knee, but did not draw it tight, being able to put her hand, or a part of her hand, under the bandage, which indicated that it was not tight enough to stop circulation, although it might have impeded it slightly. There was considerable hemorrhage from the wound, but the endeavor to stop this was by the use of antiseptic gauze and cotton. As to the bandage, Dahl testifies that it was a tight one, very tight above the knee; that it hurt him for a few hours afterwards, but knocked off hurting in the afternoon; that he does not know whether the bandage was tight enough to stop the blood flowing, but supposes that was what they put it on for, because they were afraid he would bleed to death. In the afternoon his ribs were hurting him, and a bandage was put around his person, which, together with the bandages on the limb, remained on until Friday about midnight. Feeling much pain from the bandages, Dahl loosened both of them; that is, the bandage about his person and the one upon his leg. After doing this he feared he was bleeding, and called the stewardess and second mate to his assistance, but it turned out that there was no unusual hemorrhage.

When the vessel arrived in San Francisco, which was on the morning of December 30th, about 6:30 or 7 o'clock, he was taken first to the Harbor Emergency Hospital, and after that to the Marine Hospital.

An X-ray was taken of the fracture. His limb was placed in a box, and a weight put on it to resist the contraction of the muscles, and the wound was treated by the surgeons at the hospital. During the treatment pieces of flesh were cut from the wound. Sometimes Dahl would feel the knife and at other times not, and on Thursday, the 4th of January, it became necessary to amputate the limb, which was done.

Based upon the testimony alone of Dahl as to the nature of his injury and the manner of its treatment by the stewardess and the surgeons at San Francisco while in the hospital, hypothetical questions were propounded to two physicians, emphasis being placed upon the manner in which the limb was bandaged, the statement in one case being that "He was taken into a room and a bandage was placed around his leg above the knee and tightened sufficiently tight to restrict the bleeding and to stop the flow of blood," and in the other "tight enough to prevent bleeding," and it was the opinion of the physicians that, if the bandage was put on tight enough to constrict any severe hemorrhage that might have occurred, the treatment might have caused gangrene, and hence would result in amputation. One of the surgeons testified that:

"So far as your (counsel's) description goes, there is nothing about the injury that you mention which would make it unlikely that the limb would survive or recover."

But on cross-examination, being asked:

"Can you, or can any practitioner, say from the bare statement given you by counsel here, can you undertake to give a definite opinion as to whether or not that leg could have been saved by earlier treatment?"

He answered:

"Oh, no. One could not tell what the condition was by the description I have. It is not sufficiently definite."

The other surgeon was asked a similar question, and answered:

"I could not say without knowing more of the extent of the injury and the case itself."

The testimony of the stewardess and the second mate would seem to indicate that the wound was more severe than as represented by Dahl, and that the bandage above the knee was not put on as tight as he seemed to think. The stewardess testifies:

"To me it seemed a terrible wound. It was badly lacerated. The bones seemed to be exposed quite a bit, and he was bleeding profusely. I then took this sterilized gauze, after washing it out with the cotton, and kind of pressed it into the wound to keep it as clean as possible until we could remove him to some place where he was a little more comfortable. * * * It seemed to me at the time that there must have been a piece of flesh removed about the size of my hand."

She further says the arteries were exposed, and the tissues seemed to be bruised terribly, and there was a fracture of both bones of the leg above the ankle. As to the treatment, she says:

"We were very much afraid of a hemorrhage. We got some boards to kind of fit in so that his leg would not move too much * * * and tied a bandage around the upper part of his leg to prevent a hemorrhage at that

time. * * * I placed the bandage around the knee for some time, and when I noticed that there was no fear of hemorrhage I put my finger underneath and showed Olson that it was not too tight to make him too uncomfortable."

She further says that Dahl complained about the bandages all along, that they were too tight; but witness knew they were not too tight at that time. When asked if they were tight enough to stop circulation, she answered, "Not to my knowledge." Being further asked if she intended to have them so tight as to stop circulation, she answered:

"No, I was afraid of the hemorrhage, and that was the reason of putting it on; but I didn't put it on so tight, because Mr. Olson remarked, 'In case it is necessary we will have to draw it tighter.'"

On cross-examination she testifies, touching the wound, that it was quite a cut; that the bone was exposed for a space of almost 2x2 (meaning two inches square); that this was in front, and the laceration went quite a way down on the inside of the leg, but was not so bad on the outside; that the whole cut would extend halfway around the leg; that it was bleeding considerably, enough to make him weak, and he was continually losing strength; that the purpose of the bandage was to stop the hemorrhage in case it should come all of a sudden, in which case she would be able to help him. About this she was further examined as follows:

"Q. And again, what was the purpose of putting on the bandage? A. The bandage was that I was afraid of a hemorrhage. Q. Well, did the bandage operate to stop the flow as you put it on? A. Not as I put it on. I put it on so that in case there was a hemorrhage I could act instantaneous. Q. So you could draw it tight? A. Draw it tight. Q. Was it so tight when you would draw it, it would hold itself? A. Well, I put a sheet about three or four times, laid it over so it would be strong enough. But I showed it to the second officer, it wasn't too tight at the time that if necessary—I just put my hand under this way. Q. Then as I understand you, as you had the bandage on it did not stop circulation? A. No, sir; it could not stop it. Q. You stopped the hemorrhage then by the use of the gauze? A. By the use of the gauze. Q. And not by the bandage? A. No. It was flowing constantly; and even the morning we reached San Francisco it was still flowing."

The stewardess is corroborated in almost every particular by Olson, the second mate. He says of the wound:

"I can't remember which side, whether it was on the inside or the outside, a piece of flesh was missing about two inches—one piece of the flesh was loose. It must have been three inches wide and an inch, say, thick, five or six inches long, as well as I remember, was loose laying down over the foot, and I took that piece up and I put it in place. I remember we took it back again afterwards to wash it off. But that piece seemed to me to be about five or six inches long. Which side of the leg I can't remember. The bones were exposed on one side."

As to the bandage he further says:

"It was placed above the knee so that in case it would start to bleed much I could have screwed it up and tightened it up like to stop the bleeding; but I said, 'That will be the last thing that we will do, I know, because I know his leg will swell up if we tighten that up.'"

The surgeons at the Marine Hospital who treated the patient were not called, although they could have been, or their depositions might

have been taken. One of the surgeons had been transferred to Washington, D. C., and his testimony might have been taken there. The case has been pending more than a year prior to trial.

Negligence upon which recovery is sought is based upon two grounds: First, unseaworthiness of the ship; and, second, the neglect of the officer to turn back to Astoria so that Dahl might have been sooner afforded relief by securing treatment from a competent surgeon.

As to the first ground, it is wholly without support under the evidence.

Upon the second ground, it may be admitted that the captain should have turned about and gone back to Astoria, getting in over the bar when he could. I am induced to believe, nevertheless, that a cause has not been proven such as will warrant the court in passing judgment for the libelant. There are two features which militate against the establishment of his cause; the first being that the prima facie case which is claimed to have been made out by the production of the testimony of libelant and the medical opinion of the two physicians is greatly weakened by the fact that libelant failed to produce the better evidence. This failure consists in not having called the physicians and surgeons at San Francisco who attended libelant after his arrival at that port. It goes without saying that they would have been able to describe the condition of the wound with much greater accuracy than it has been described even by the stewardess and the second mate. Dahl himself, as is apparent, was unable properly to describe the wound and detail its treatment so that an expert called for the purpose would be able to give a reliable opinion as to whether amputation would have been prevented had Dahl received earlier treatment. The physicians called recognized this, and practically admitted their inability to give a satisfactory opinion upon his testimony alone.

The other feature consists in the fact which I have just alluded to, that the physicians who were called did not have the full and accurate facts before them upon which to base an opinion. If the opinion had been based upon the testimony of all the witnesses concerning the nature of the wound and its treatment on the way to San Francisco, as well as the symptoms developing and its treatment there, their judgment would undoubtedly have influenced the mind of the court; but, not having that information, they could not pass a reliable opinion; a thing they themselves appreciated.

From all the testimony in the case, and from the manner in which the expert evidence comes to the court, I am unable to say that Dahl would not have lost his limb nor suffered as badly had he received earlier treatment, say within 24 hours or less time after the accident happened.

The libel should be dismissed, and such will be the order of the court.

GRAMES et al. v. CONSOLIDATED TIMBER CO. et al.

(District Court, D. Oregon. June 29, 1914.)

No. 6212.

1. VENDOR AND PURCHASER (§ 186*)—FORFEITURE OF CONTRACT FOR DEFAULT IN PAYMENT—CONTRACT FOR GOOD TITLE.

A vendor by a contract of which time was made the essence contracted to convey by a good marketable title on payment of the last installment of the purchase price. Before that time, however, the title became clouded by attachment suits, under one of which the land was sold and by a divorce suit. *Held* that, until the title was cleared so that the vendor or his successor in interest could convey by a good title, the purchaser was not in default, and that a court of equity would not declare the contract forfeited where it offered to make payment on receipt of a good title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 341, 373; Dec. Dig. § 186.*]

2. PUBLIC LANDS (§ 140*)—EXEMPTION OF HOMESTEAD FROM PRIOR DEBTS—CONSTRUCTION OF STATUTE.

The provision of the Homestead Act (Rev. St. § 2296 [U. S. Comp. St. 1901, p. 1398]), that no lands acquired thereunder shall in any event become liable for the satisfaction of any debt contracted prior to the issuing of the patent, is to be construed literally, and the exemption is not waived by the failure of the debtor to claim it before judgment or sale, but a sale on a judgment for a debt contracted before issuance of the patent, although after the final certificate, is void.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 377-382; Dec. Dig. § 140.*]

3. PUBLIC LANDS (§ 136*)—EQUITABLE MORTGAGE—DEPOSIT OF FINAL HOMESTEAD CERTIFICATE.

A deposit of the final certificate issued on a homestead entry as security for a debt is not effective to create an equitable mortgage on the land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 364-366; Dec. Dig. § 136.*]

4. MORTGAGES (§ 29*)—DEPOSIT OF CONTRACT FOR SALE OF LAND—DELIVERY WITHOUT ASSIGNMENT.

The deposit by a vendor of a contract for the sale of land as security for a loan, although without assignment, amounts to a pledge and creates a lien on the purchase money due thereon, and a grantee of the land by a quitclaim deed from the pledgor with knowledge of such prior pledge takes subject thereto.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 54; Dec. Dig. § 29.*]

In Equity. Suit by Virginia Ann Grames, E. Quackenbush, Sara Dorn, W. T. Vinton, and J. T. Wood against the Consolidated Timber Company, the Medford National Bank, and the Medford Grocery Company. Final decree.

C. W. Corby, of Portland, Or., for Grames, Vinton, and Wood.

John Van Zante and A. H. Tanner, both of Portland, Or., for Quackenbush and Dorn.

Stapleton & Sleight, of Portland, Or., for Consolidated Timber Co.

G. M. Roberts, of Medford, Or., and Latourette & Latourette, of Portland, Or., for Medford Nat. Bank.

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

WOLVERTON, District Judge. On October 3, 1910, Levi M. Grames obtained from the General Land Office a final homestead certificate, pursuant to the provisions of section 2291 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1390), to the northeast quarter of section 35, township 7 south, range 9 west of the Willamette Meridian, containing 160 acres. The patent was not issued until October 1, 1913.

On October 6, 1910, Grames and his wife, Virginia Ann Grames, entered into a contract with the Consolidated Timber Company, of Wisconsin, and G. F. Sanborn, of Portland, Oregon, whereby they agreed to sell the land to the timber company and Sanborn for the consideration of $7,000, $700 of which was to be paid upon the execution of the contract, $2,300 on or before December 1, 1910, and the balance of $4,000 on or before two years from date, with interest on deferred payments at six per cent. per annum. Upon receipt of the consideration in full as stipulated, Grames and wife were to convey, by good and sufficient deed with covenants of warranty, a "good merchantable title" to the land and premises above described. Time was made of the essence of the contract, and forfeiture provided in case of failure to make payments as agreed. The first two payments were made, but the last one of $4,000 has never been made. The timber company has succeeded to the interest of Sanborn in the contract.

In July, 1911, Virginia Ann Grames instituted a suit for divorce against her husband, Levi M. Grames, and on July 3d the plaintiff filed a notice of lis pendens in said cause. The suit resulted in a decree for plaintiff, entered October 4, 1911, granting her a divorce and an undivided one-third of the premises comprising the homestead, and it was further decreed in the alternative that, in case the contract for sale was carried into effect, Mrs. Grames should be entitled to $2,500 out of the purchase price, and the further sum of $300 as attorney's fees, and alimony during litigation.

On September 12, 1911, A. C. Gage, administrator of the estate of Abram Dorn, deceased, instituted an action in the circuit court for Lincoln county, against Levi M. Grames, to recover on account for moneys had and received from decedent between November 1, 1905, and February 1, 1911, and subsequently, on change of venue to Yamhill county, recovered judgment for the sum of $1,248.29; the judgment being rendered April 27, 1912. At the time the action was instituted an attachment was caused to be issued, and on the same day levied upon Grames' homestead, and about September 18th garnishee process was served on the timber company in Portland, Or. Upon rendition of the judgment, the attached property was ordered to be sold, and subsequently, to wit, on November 16, 1912, was sold at sheriff's sale, subject to redemption, to the plaintiff A. C. Gage, administrator of the estate of Abram Dorn, deceased. This sale was confirmed March 25, 1913, and deed executed in due course.

It appears from the administration proceedings of the estate of Abram Dorn, deceased, that his only heirs were Sara Dorn, widow, and Edward L. Dorn, a son, and that E. Quackenbush had succeeded

to the interest of Edward L. Dorn in the estate; and, upon hearing of the final account, it was decreed by the county court of Yamhill county June 20, 1913, that Mrs. Dorn and E. Quackenbush were the owners of a two-thirds interest in the Grames homestead. Prior to the date of this decree, to wit, on March 8, 1913, Levi M. Grames conveyed by quitclaim all his right, title, and interest in the claim to E. Quackenbush; the deed being recorded March 31, 1913. Still later, on October 28, 1913, Virginia Ann Grames conveyed by warranty deed to E. Quackenbush an undivided one-third interest in the homestead, which deed was recorded November 17, 1913. Quackenbush thus deraigns whatever title he has in the premises. On the same date of receipt of the deed from Mrs. Grames, Quackenbush mortgaged the undivided one-third interest to J. T. Wood, to secure payment of the sum of $1,700.

Another attachment was levied upon the homestead October 9, 1911, at the instance of the Medford Grocery Company, in an action instituted by that company against Grames, in Jackson county, Or. The grocery company, although made a party to this suit, has made no appearance, and is not now represented here.

On February 8, 1911, Grames borrowed $150 from the Medford National Bank, and gave his note for the amount, and on July 12th he borrowed an additional $700, for which he also gave his note. Both notes bear interest at 8 per cent. On the latter date Grames delivered to the bank his final homestead certificate, and also the contract with the timber company and Sanborn, but without any indorsement of either, designed as security for the loans with accumulated interest.

The plaintiffs in the present suit demand a forfeiture of the contract on the ground that the timber company has defaulted in the last payment, and that Quackenbush and Mrs. Dorn be declared to be the owners in fee of the premises comprised by the homestead, but subject, however, to the mortgage of J. T. Wood.

The defendant timber company, claiming that it has performed the contract on its part so far as it was required to do so under the conditions of the title to the homestead, and being now ready to perform in toto by paying the last installment of $4,000, prays specific performance thereof, and for such other relief as may seem meet.

[1] From the foregoing statement it is at once apparent that the title to the homestead soon became so involved that the timber company could not safely proceed under its contract; and that condition of title has continued to the present time. Equity is slow to declare a forfeiture. Grames and wife were obligated under the contract to convey by good title, on payment of the last installment of $4,000, but there never has been a time, according to the record, since the levy of the attachment in the case of Gage, Administrator, v. Grames, that Grames and wife or their successors in interest were able to fulfill their obligation. It must be admitted that the Gage attachment clouded the title, and the subsequent judgment and sale of the premises under the execution further complicated the situation. It has led to a claim on the part of Quackenbush that he has deraigned

good title to a portion of the premises, and to a claim on the part of Medford National Bank that the attachment, judgment, and consequent sale are void, and, notwithstanding Quackenbush's quitclaim from Grames, that it has a valid equitable lien upon the homestead. So that, whatever may be the merit of these conflicting contentions, they serve to render the title insecure, and the purchaser could not be expected to accept it in that condition. Further than this, there was the Medford Grocery Company's attachment, and the suit by Mrs. Grames for a divorce, all tending in a greater or less degree to cloud the title. Consequently the Grames and their successors were not in a position to perform, and could not demand payment of the purchase price, and until they could do this there could be no default on the part of the timber company in tendering or making payment of the last installment. It follows that the plaintiffs are not entitled to forfeiture as prayed.

The timber company is now in a condition to pay, and ready and willing to do so on conveyance to it of good title.

The next question of vital concern is whether the Medford National Bank has a lien on the premises such as it can enforce against the land, or against the purchase money in the hands of the timber company.

[**2**] It is first urged in this relation that the Gage attachment, judgment, and consequent sale of the homestead are void, because the attachment and judgment were obtained upon a demand that had accrued prior to the issuance of the patent to the Grames homestead; and, second, that the mere deposit of the final certificate and the contract of sale with the bank as security created (1) a lien upon the homestead, and (2) a lien upon the purchase money.

The first contention is sound. The statute (section 2296, R. S. [U. S. Comp. St. 1901, p. 1398]) provides that:

> "No lands [acquired] under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent."

This provision has received a literal construction, and comprises any debt accruing or existing prior to the date of the issuance of the patent, and, although in some cases affecting the title to the homestead, where the issuance has relation back to the issuance of the final certificate, the clause can bear no such interpretation, as it applies to the exemption designed for the benefit of the homesteader. Nor do I think that the exemption is waived by the homesteader's failure to claim it before or at the time of judgment, or the sale of the premises on execution, where the proceeding is in invitum. National Bank v. Riley, 29 Or. 289, 45 Pac. 766, 54 Am. St. Rep. 794; Dickerson v. Bridges, 147 Mo. 235, 48 S. W. 825.

[**3**] As to the second contention, the doctrine seems to obtain in England that an equitable mortgage may be created by the deposit of title deeds to real property where the same have been lodged with the creditor as a security for debt. Mandeville v. Welch, 5 Wheat. 277, 5 L. Ed. 87. But however well the doctrine has become established in English jurisprudence, it lacks the general sanction of the courts of this country. While the courts of some of the states adhere to

the English holding, the great weight of authority is opposed to it; the most potent factor controlling the decisions being perhaps the statute of frauds and the registry regulations of the several states. Without discussing the principle upon which the opposing view is sustained, it is sufficient to cite some of the cases. Gardner v. McClure, 6 Minn. 250 (Gil. 167); English v. McElroy, 62 Ga. 413; Davis v. Davis, 88 Ga. 191, 14 S. E. 194; Pierce v. Parrish et al., 111 Ga. 725, 37 S. E. 79; Hall v. McDuff, 24 Me. 311; Parker v. Bank, 53 S. C. 583, 31 S. E. 673, 69 Am. St. Rep. 888.

In this view of the law, the deposit of the final certificate was not effective to create an equitable mortgage upon the homestead.

[4] The second branch of the question is whether the deposit of the contract as security for the loan was effective to create a lien on the purchase price remaining due under the contract.

The deposit was made July 12, 1911. This was subsequent to the institution of the divorce suit by Mrs. Grames and the filing of lis pendens, and it could not therefore affect the interest of Mrs. Grames as subsequently determined by decree of the court.

It is objected that, the deposit having been made without indorsement or assignment in writing of the contract, it could not operate as a lien on the fund or purchase money. I am impressed that the transaction constituted a pledge of the contract as security for the payment of the loan, and in this view an indorsement of the contract was not essential to its operation as such, considering the nature of the document deposited. I am so impressed by analogy of a pledge of bills or notes, or of bonds or shares of stock, or insurance policies. All these become legally effective by simple delivery to the creditor without indorsement or writing of any kind. 31 Cyc. 807.

If the contract had been an ordinary bond for a deed, it would hardly be questioned that the vendor could likewise pledge the same, and in like manner, as security, and the pledge would be held valid. There can be no legal distinction between a bond for a deed and a contract for sale of real property, such as the one involved here, because both are obligations to sell and convey, and hence I conclude that the transaction between Grames and the bank was in effect a pledge of the contract as it relates to the purchase price yet due as security for the payment of the loan.

Now, when Quackenbush obtained his quitclaim deed from Grames, he had ample notice and knowledge of Grames' transaction with the bank, and took whatever title he acquired by such deed subject to the pledge of the contract by Grames to the bank, thus entitling the latter to receive payment of the purchase price remaining due above the amount decreed in the divorce suit to be paid to Mrs. Grames, to the satisfaction of its demand, before Quackenbush can recover any part of the fund. The testimony is replete to the effect that Quackenbush had such notice. Mr. C. W. Corby, who was the attorney for Quackenbush in the purchase of Mrs. Grames' interest and in procuring the quitclaim from Grames for him, received a letter from A. C. Gage, written in Portland September 23, 1911, by which Corby was informed that the sheriff's office had notified him (Gage) that

Grames had turned his contract over to a bank at Medford, Or. Subsequently, by letters from Honorable C. L. Reames, bearing date from October 6, to October 16, 1911, Corby was specifically informed that the Medford National Bank held the pledge. Further than this, Gage was himself the agent of Quackenbush in "handling the whole matter," as Corby says, and it is more than probable that Gage disclosed to him the pledge of the contract by Grames; and Quackenbush does not deny that he had the information. So I conclude that he had knowledge of the fact, and consequently took title by the quitclaim subordinate to the pledge.

In the purchase of Mrs. Grames' one-third interest in the homestead, Quackenbush was to and did pay her $2,000. This, under the agreement between them, carried the $2,500 allowed to Mrs. Grames in the decree for divorce should the contract of sale be carried into effect, but not the $300 allowed as attorney's fees. An assignment of the decree was sought so as to carry this amount also to the purchaser, but this was refused, and it is clear that Mrs. Grames did not agree to it, nor did she part with that interest in the decree.

The Wood mortgage was given to secure $1,700 of the $2,000 agreed to be given for Mrs. Grames' interest in the homestead, but is subject to the contract appertaining thereto.

Upon the whole, I conclude that the defendant the Consolidated Timber Company is entitled, upon payment of $4,000 and interest at the rate of 6 per cent. per annum from October 6, 1910, to a specific performance of the contract; that out of such sum with the accumulated interest should be paid to Wood sufficient to satisfy his mortgage; to Quackenbush the difference between the Wood demand and $2,500 and the accumulated interest thereon at the rate of 6 per cent. from the date of Mrs. Grames' decree for divorce, namely, October 4, 1911; to Mrs. Grames, as her attorney's fees in the divorce proceeding, $300 and interest at 6 per cent. per annum from the date of the decree; to the Medford National Bank $150, with interest thereon at the rate of 8 per cent. per annum from February 8, 1911, the further sum of $700, with like interest from June 12, 1911, and $100 as attorney's fee; and that the balance, if any remain, be paid to Quackenbush and Mrs. Dorn; the plaintiffs Dorn and Quackenbush to pay the costs of suit.

ALEXANDER et al. v. FIDELITY TRUST CO. et al.

(District Court, E. D. Pennsylvania. July 17, 1914.)

No. 1147.

1. TRUSTS (§ 365*)—EXPRESS TRUST—ENFORCEMENT—LACHES.
Where one holds title to property under an express declared or acknowledged trust to hold it indefinitely for another, no laches can be imputed to the beneficiary from the mere fact that he has not sued to enforce the trust until after a considerable lapse of time, but if the absolute title has been held by the alleged trustee as his own, and the beneficiary has permitted it to be so held without question for nearly 20 years, and the trustee has conveyed the property to another, equity will not sustain a bill merely alleging as a conclusion of law that the property was held in trust for him, or omitting to charge any facts to excuse the delay.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. § 365.*]

2. TRUSTS (§ 365*)—ENFORCEMENT—LAPSE OF TIME.
While lapse of time is not of itself a bar to a trust clearly established, yet where the trust is an implied or constructive one, there must have been fraudulent concealment or other cause for delay in having it found or declared, or laches will be a complete bar, since the decree is always of grace, and will be withheld where plaintiff's conduct justifies that course.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568-573; Dec. Dig. § 365.*]

3. PLEADING (§ 8*)—COMPLAINT—FACTS—CONCLUSIONS.
An averment in a suit to declare a trust that the property was "held in trust" was a mere conclusion, and not an allegation of fact.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. § 8.*]

4. EQUITY (§ 362*)—EQUITY RULES—MOTION TO DISMISS—DEMURRER.
Under Equity rules 25, 29 (198 Fed. xxv, xxvi; 115 C. C. A. xxv, xxvi), providing that the bill shall consist of a short and simple statement of the ultimate facts on which plaintiff asks relief, and that any point of law which goes to the cause of action as stated in the bill may be called up and disposed of at any time before final hearing, at the discretion of the court, the bar of laches when claimed to be presented on the face of the bill may be raised by a motion to dismiss, which is equivalent to a demurrer under the chancery practice.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 758-761; Dec. Dig. § 362.*]

In Equity. Suit by John S. Alexander and others against the Fidelity Trust Company and others. On motion to dismiss. Granted.

See, also, 214 Fed. 495.

Frank A. Harrigan, of Philadelphia, Pa., and Henry A. Wise, of New York City, for plaintiffs.

J. Lawrence Wetherill, of Philadelphia, Pa., for defendant L. H. Alexander.

H. Gordon McCouch, of Philadelphia, Pa., for defendant Fidelity Trust Co.

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

DICKINSON, District Judge. This is the second time the question now raised has been before us. The facts necessary to its decision are stated in the opinion already handed down. The record of the case was not then in such condition that a decree could be entered. The case has now been called for trial. As a preliminary, the defendants asked to have called up and disposed of the question raised by the answer which goes to the whole cause of action. This is in effect a motion to dismiss the bill. The basis of it is that the bill on its face shows a lack of equity in that gross laches in the plaintiffs appear by their own showing. Leave to so raise the question was granted, and a like leave accorded the plaintiffs to amend so as to make their bill self-supporting. This they have declined to do, standing on the averments of the bill as filed to support their equitable claim to the relief for which they pray. They asked only to amend their bill in a feature not involved in the motion to dismiss. This feature is that the bill as filed avers the trust company defendant to have acquired title to the stock, the ownership of which is in dispute, under the will of John Alexander, and is there made a defendant in its capacity as executor of and trustee under that will. The amendment avers that the title of the trust company was acquired by a deed of trust executed by the same John Alexander in his lifetime, and asks to have it made a defendant in that capacity. This amendment was allowed, and the motion was heard and is now disposed of upon the bill as thus amended.

The salient facts, so far as we are now concerned with them, and so far as they are averred in the bill, the averments of which, of course, we must on this motion accept as facts, are these:

John Alexander, in his lifetime, as far back as November 20, 1894, had in his possession certificates for certain shares of the stock of the Corn Exchange National Bank, which stood in his name as owner. How much longer than since 1894 he had so held the stock neither the original bill nor the bill as amended informs us. The amended bill avers that he transferred this stock to the Fidelity Trust Company, one of the defendants, on the date mentioned. This transfer followed a deed between the parties inter vivos, and was made to enable the grantee to carry out the trusts therein and thereby declared.

The third paragraph of the bill has now been made to aver that John Alexander had no real ownership or interest in this stock, but held it "in trust" for the plaintiffs "up until that date," to wit, November 20, 1894. John Alexander died in 1895, and letters testamentary were duly granted upon his estate. The trust company defendant has assigned this stock to Lucien H. Alexander, who has also been made a defendant.

It is to be observed that the fact upon which rests whatever equities the plaintiffs have is not averred as a fact. It appears, if at all, as implied in the statement that John Alexander held the stock "in trust." This is the statement of a legal conclusion not a fact. It is further to be observed that there is no averment other than this of the ultimate fact upon which the decision of the question now before us depends, nor of any other facts from which this ultimate fact can be inferred. We are further uninformed why the plaintiffs allowed more than 19

years to elapse before setting up in any way a claim of title to this stock. Neither do we know why they have waited until the stock had been assigned to a third party, nor why this third party should be dispossessed of whatever ownership he has in the stock. The controlling fact, on the branch of the case with which we are now concerned, is revealed by the answers to these questions: Did John Alexander hold title to this stock under an express trust, the indefinite continuance of which was consistent and in line with the terms of the trust itself? Or does the trust arise by implication out of something done or omitted to be done by John Alexander, or something done by the plaintiffs or by some one for their benefit? Is the trust one the existence of which is not in controversy or one which is denied? In the one case we are asked to enforce an existing trust. In the other, we are asked to find and declare to exist a trust the existence of which is denied.

[1] If one held the title to property under an express declared or acknowledged trust to hold it indefinitely for another, no laches could be imputed to a plaintiff from the mere fact that he had not gone into a court of equity to enforce such a trust until after a considerable lapse of time after the time the trust was created. Where, however, the absolute title to property is held by one as his own and has been permitted to be so held without question for nearly 20 years, and we do not know how much longer, without question of his title, if a court of equity is asked to grant as of grace a decree declaring that property to belong to another, the court may at least withhold the decree until the plaintiff does something more than make the bare averment that the title to the property was held in trust for him. There is, of course, and in the very nature of things cannot be any hard and fast rule on the subject, but out of the fact that a reason to refuse the decree asked for might appear from the face of the bill itself, the question has been permitted to be raised by demurrer under the old practice.

Let us apply the test inquiry in this case. The bill as amended avers that John Alexander, on July 11, 1894, "held in trust for the complainants" 60 shares of the Corn Exchange National Bank; that on that day he transferred this stock to the Fidelity Trust Company, in trust for certain expressed purposes, with which the plaintiffs are not concerned, and which are in direct conflict with the beneficial ownership of the plaintiffs in the stock, and that the trustee consistently with the terms of the expressed trust transferred the stock to Lucien H. Alexander. The court on this bare allegation is asked, by a bill filed November 25, 1913, more than 19 years after John Alexander had parted with his title, to decree that the Fidelity Trust Company shall assign this stock to the plaintiffs and account for all dividends received on it. A similar decree is asked against the Corn Exchange National Bank and likewise against Lucien H. Alexander. There is no averment or suggestion that any of the defendants even knew of the claim of ownership of the plaintiffs, and no averment that the Corn Exchange National Bank had any relation to the shares of stock other than that it was the bank which had issued the shares of stock, the ownership of which is in dispute. If these facts, and no more than these facts,

were proven, would a court of equity grant or withhold the relief asked for?

The plaintiffs, after full notice that the sufficiency of the averments of their bill was challenged and that in the judgment of the court there was this insufficiency, declined to add anything to their averments in this respect. All they have added is in effect this:

"We thought at first that the title to the stock had passed to the Fidelity Trust Company as executor of John Alexander under his will probated in 1895. We learned, on July 16, 1912, that the title was acquired in 1894 by deed from John Alexander in his lifetime."

Even this fact, it will be observed, was known to them before their bill was filed, and obviously this fact adds nothing of persuasive force to the prayers of their bill. As therefore, if they prove all that they have averred, their prayers would be denied, there is no good reason to withhold the decree until such proofs are made.

This ruling is in accord with the rulings of the courts under the practice of raising the question by demurrer.

The principles are clearly stated.

[2] 1. Lapse of time of itself is no bar to a trust clearly established. The reasons for this are obvious.

2. Where the trust is an implied or constructive trust, there must have been a fraudulent concealment or other cause for the delay in having it found or declared, or lapse of time is a complete bar.

The reasons for this are equally obvious.

3. As the decree of a chancellor is always of grace, it will be withheld where the conduct of the plaintiff justifies this course and unexplained supineness is a reason for the court refusing to be moved. Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718.

[3] The averment of "held in trust" is a legal conclusion, not a fact. The fact of whether the trust is an express or constructive trust, and, if the latter, the facts out of which the implication of a trust arises, should be stated. Metropolitan Trust Co. v. Columbus (C. C.) 93 Fed. 689, at page 692.

[4] It only remains to inquire whether the present equity rules permit the question here raised to be disposed of on a motion to dismiss or its equivalent. It is apparent that in whatever way it is raised, that way is the equivalent of a demurrer under the practice in chancery. The pertinent rules are that part of rule 25 (198 Fed. xxv, 115 C. C. A. xxv) which limits the bill to "a short and simple statement of the ultimate facts upon which the plaintiff asks relief," and that part of rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) which permits any "point of law" which goes to the "cause of action" as "stated in the bill" to be "called up and disposed of at any time before final hearing at the discretion of the court." It is clear that these rules change only the manner of raising such questions, and neither the questions themselves nor the equitable principles by which they are to be determined.

The bill of plaintiffs is therefore dismissed, with costs to defendants.

GANDY BELTING CO. OF BALTIMORE CITY v. VICTOR-BALATA & TEXTILE BELTING CO.

(District Court, E. D. Pennsylvania. August 3, 1914.)

No. 1007.

1. TRADE-MARKS AND TRADE-NAMES (§ 58*) — INFRINGEMENT — PAINTING PRODUCT.

Where complainant and defendant manufactured canvas belting and complainant adopted as a trade-mark a green line or stripe applied to one edge of the belt, directing in its advertising that consumers should "look for the green edge," such mark, if valid as a trade-mark was not infringed by defendant coloring both edges of its belting a brilliant black.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 100; Dec. Dig. § 58.*]

2. TRADE-MARKS AND TRADE-NAMES (§ 70*)—UNLAWFUL COMPETITION.

Where complainant manufactured and put out canvas belting, one edge of which was painted green as a distinguishing mark, defendant was not guilty of unlawful competition in manufacturing and selling similar belting, both edges of which were painted a brilliant black.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 115; Dec. Dig. § 70.*]

In Equity. Suit by the Gandy Belting Company against the Victor-Balata & Textile Belting Company, for infringement of an alleged trade-mark and for unlawful competition. On bill, answer, and proofs. Bill dismissed.

The following are the findings of fact and conclusions of law referred to in the opinion:

Findings of Fact.

The court in the above case finds the following facts at hearing on bill, answer, and proofs adduced at trial.

(1) The plaintiff is a citizen of the state of Maryland. The defendant is a citizen of the state of Pennsylvania. The matter in controversy exceeds in value, exclusive of interest and costs, the sum of $3,000. One of the questions involved in the case arises under the laws of the United States relating to trade-marks.

(2) So far as they are questions of fact the necessary jurisdictional facts are found to exist.

(3) The plaintiff during the times complained of in the bill and still is, and by itself and its predecessors has continuously been since the year 1880, engaged in the business of manufacturing canvas beltings.

(4) The method of making belts common to the trade is and has been to fold cotton duck into the form of a band. These folds are then fastened together by a longitudinal stitching and then treated with oil, and the surface of the material is then painted a color resembling leather. The color is called in the trade "red." The result of this application of paint is to give the edges of the belting the same color.

(5) On or about December 1, 1910, the plaintiff conceived the idea of giving to its make of belting a distinctive marking which would indicate it at a glance to be manufactured by the plaintiff. The method adopted was to color one edge of the belting green. This was to form a contrast with the appearance of other makes of belting, the edges of which were the same color as the face. In most makes this was a reddish brown. In some it was yellow, in some black, and in one or more blue.

(6) To secure to itself this distinctive marking as a trade-mark, the plaintiff made application on January 6, 1911, to have registered this trade-mark in

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

the office of the Commissioner of Patents. A certificate No. 82069 of this fact was issued to the plaintiff on May 30, 1911. The marking is described in this application as consisting "of a green line or stripe arbitrarily applied to one edge of the belt." The application is accompanied with a drawing which shows the color as applied to one margin of the belting as a band or stripe. The trade-mark is further described as applied "preferably by painting the edge of the belting."

(7) At the time this distinctive marking was adopted by the plaintiff it had in stock and in the hands of its selling agents belting which had not been so marked. The marking was applied to the part of its stock which was still in its factory, and the necessary material was supplied to its agents with instructions to apply the marking to all stock remaining on hand. This was all accomplished by September, 1911, and since that time all of plaintiff's belting has been so marked. The marking has been applied by the belting being put into the form of a roll and one end of the roll painted a green color. This resulted in a continuous green edge on one side of the belting. No other make of belting has been or is so marked.

(8) Before and since the green edge was given to plaintiff's belting its belting was further marked by a representation of a coil or roll of belting bearing the mark on the face of the word "Gandy's," and on the coiled or rolled edge the words "Gandy's Belting" and across this coiled end a further representation of a long bale of cotton marked with the words "American cotton."

(9) After the adoption of the green edge marking the plaintiff entered upon an extended and vigorous campaign of advertising its belting as the belting thus marked. Special emphasis was given to the green color as the special feature of its distinctive marking by the adoption of the "slogan" of "Look for the Green Edge." One point of the success attending this campaign has been that all the selling agents of the plaintiff and others connected with its business are known to the trade as "green-edge" men, and this marking has become identified with the plaintiff's make of belting.

(10) The defendant is likewise a manufacturer of belting of the same general kind and appearance as the make of the plaintiff. Defendant's make of belt was manufactured by the firm of C. Vollrath & Sons, of Blankenburg, Schwartzwald, Germany. This belting had the visual characteristics of the body or faces of the belting, being of this so-called red or leather color and both edges being black. The edges of the belting as manufactured under the process employed by the defendant gets a black color, due to the fact that a black mixture or preparation is worked into the canvas for the purpose of stiffening it and fortifying the edges and improving the quality of the belting in respect to its durability, and giving it also increased traction. After this preparation is applied the body or surface faces of the belting is painted a reddish brown or red leather color, termed in the trade "red." The belting then shows a dirty black appearance of the edges. To improve its appearance by giving it a finish and also for the purpose of a distinguishing mark, the edges are then painted a brilliant black. The defendant has two makes of belting which differ in name at least and perhaps in quality, and are known as "Ampere" and "Victory." Defendant's make of belting is further designated and distinguished by having stenciled in letters, nearly an inch in height, the word "Ampere" or "Victory," according to which make of belting it is. In circularizing the trade, the defendant directs attention to the black-edge marking as a distinguishing feature of this make of belting by which the make may be recognized by the trade.

(11) The distinguishing mark of having both edges of the belting black was not adopted or used by the defendant, nor was the same in use in the United States until after the plaintiff had adopted the one green edge as a trade-mark or distinguishing marking of its make of belt, nor until after the plaintiff had secured a certificate of the registration of such trade-mark in the Patent Office. Whatever prior use was made of the black-edge markings was outside of the United States, and not by the defendant corporation. The use of the belting with these markings in Germany was confined to a firm whose connection with the defendant corporation exists in the fact that the

people, or some of the people, who are connected with the German firm are also individually interested in the defendant corporation.

(12) The adoption of the two black-edge marking of defendant's make of belting was not with the intention to deceive purchasers or to injure the plaintiff or to seek to secure a trade by the belting of the defendant's make being mistaken for the belting of the plaintiff's make, nor is there such an identity or similarity in the appearance presented by the two makes of belting having these respective markings so as in fact to cause a deception or for the one to be mistaken for the other.

(13) So far as the finding is one of fact it is found that the defendant has not been guilty of unfair competition in marking its make of belting with both edges black, nor in any other of its acts.

(14) So far as the finding is one of fact the defendant has not infringed upon the trade-mark of the plaintiff, nor has it reproduced, counterfeited, copied, or colorably imitated in any way defendant's registered trade-mark, or affixed the same to merchandise of substantially the same descriptive properties as those set forth in the registration.

Conclusions of Law.

The court finds the following conclusions of law:

1. So far as the same is a legal conclusion the court finds the defendant to have been guilty of no unfair competition with the plaintiff in the manufacture or sale of the canvas belting in the business of manufacturing and selling of which the plaintiff is and has been engaged.

2. So far as it is a legal conclusion the court finds that the defendant has not infringed upon the registered trade-mark of the plaintiff referred to in the bill filed.

3. The question of the validity of the trade-mark registered by the plaintiff not being necessary to a decision of the cause under the view taken by the court, no finding in this respect is made.

4. The defendant is entitled to a decree that the bill of the plaintiff be dismissed.

5. The defendant is entitled to a decree for the allowance to it of costs.

Cyrus N. Anderson, of Philadelphia, Pa., James L. Steuart, of Baltimore, Md., and John E. Cross, of New York City, for plaintiff.

Andrew Wright Crawford, of Philadelphia, Pa., and Wm. B. Whitney and Crane & Lockwood, all of New York City, for defendant.

DICKINSON, District Judge. Specific findings of facts and conclusions of law, so far as are necessary to the ruling of the case now made, are filed herewith.

It is not altogether easy to find a phrase which will accurately present the precise points involved in a decision of this case. The facts themselves may be soon stated, and are not in serious dispute. The general questions involved relate to charges of unfair competition and infringement of a proprietary trade-mark.

The plaintiff and defendant each is a manufacturer of canvas belting as a substitute for leather. The methods of manufacture in use by all such makers are, generally speaking, the same. Cotton duck is folded in such manner as to make a strip of the required width and thickness. It is then stitched together longitudinally so as to make a band, whose ends may be fastened together to form a belt. The material is treated with oil, and then painted on the surface sides of the canvas strips. The practical result is that the edges also are colored with the paint. This treatment is functional, acting as a preservative

and also increasing the traction by imparting to the belt when in use what is termed increased "hug." One or more makers paint their belts black. Individual makers paint their different make of belts yellow and blue, but the general practice is to paint them what is called "red." The color is not a real red, but what may be termed a conventional red. It is red only in the sense in which dealers in leather distinguish it as red leather and black leather. No claim is made that this color is functional. Its use is accounted for by the statement that this "red" paint is as good as any, and is preferred for economical reasons. The real origin of its use and the original motive for its use is doubtless to be found in the fact that as the canvas belting was brought upon the market as a substitute for leather, its introduction was thought to be made easier by giving it something of the general appearance of leather. It is a further common practice among all makers to stencil upon the surface of the belting, at varying intervals of space, something to indicate the special make. The plaintiff used at first a representation of a coil of belting, laid across which was an elongated bale of cotton. On the coiled edge side of this illustration was stenciled the words "Gandy's Belting," and on the surface side the word "Gandy's" and on the cotton bale the words "American Cotton." The belting was sold by the foot, and if it happened to be cut in short lengths between these markings, the piece of belt thus cut would contain nothing to show the make. About December 1, 1910, the plaintiff conceived the idea of indicating its make of belt by a distinctive marking, consisting of the giving of a green color to the continuous edge of the belting on one side, which would sharply contrast with the surface color of the belt. The belt would thus show the make, however short, the lengths into which the belting was cut. On January 6, 1911, application was made to the Patent Office to have this designation registered as a trade-mark. Following this, arrangments were made and carried out to have all the belting then in stock in its own plant and in the hands of its agents bear this distinctive marking. By September, 1911, this had been accomplished. The plaintiff then began a vigorous campaign of advertising to associate in the minds of buyers this marking with the plaintiff's make of belts. It circularized the trade by means of pamphlets which emphasized this color scheme by showing coils of belting, the surface of which appeared as a bright red in striking contrast with the green edge. This was the banner carried by plaintiff's army of "rooters," who were also given as their battle cry the "slogan" of "Look for the Green Edge," with marked and special emphasis on the "green." The wits in the trade contributed to the success which attended this campaign by personifying this "slogan" and attaching it to the plaintiff's salesmen. They were spoken of as "green-edge men," and play upon the words was made in various other forms.

[1] As in the making of this belting in the usual way, the belting is painted, and as this painting involves the edge and colors it, no claim of a property right or trade-mark in a colored edge could successfully be set up for any one maker. In order to present the claims of the plaintiff in their clearest light let us ignore this fact, and assume that the plaintiff could have acquired this right. It might then

have made its claim to broadly cover simply a colored edge or an edge colored differently from the surface of the belt, or it might have limited its claim to an edge carrying a special color confined to one edge or embracing both edges. It chose to accentuate and emphasize its marking by limiting it to one edge and one color. There is something of an ambiguity in what it did do in one respect. It applied for a trade-mark to consist "of a green line or stripe applied to one edge of the belt." The accompanying drawing, consistently with this description, shows a border or stripe of color on the face of the belting. The coloring of merely the edge, which was in fact all the plaintiff did, scarcely fulfills this description. It is true the application incorporates the statement that "the trade-mark is applied or affixed to the goods preferably by painting the edge of the belting," but strictly this would be referable to the mode of bringing the trade-mark into visual existence not to an altered description of what it consisted.

Waiving the question of the validity of this trade-mark, and conceding it to give a proprietary right to a green color applied to one edge of the belting, the plaintiff complains of the defendant, not in that it has put one green edge on its belting, but in that it has colored both edges "a brilliant black." This brings the plaintiff up against this dilemma. It must either admit that making the two edges black is not an infringement of a one green-edge trade-mark, or it must claim this trade-mark to cover any colored, or at least black-colored, edges, thus giving it the same protection under its limited trade-mark it would have had under one in its broadest form. A claim that the coloring of both edges of a belt black is an infringement of a trade-mark which consists of "a green line or stripe," or, as the drawing shows, a band or border of green, cannot be sustained unless there is such a resemblance as to be deceptive in fact. A claim of monopoly of right, either at common law or under the trade-mark statutes, in the privilege or practice of making the edges of the belting of any color is certainly too broad.

[2] This, therefore, leaves in the plaintiff's bill only the complaint that the defendant has colored the edges of its belting black so as to facilitate the imposition of its make of belt upon intending purchasers as the make of the plaintiff. This is the complaint the plaintiff really does make, and resolves the case so far as it depends upon its facts to a case of unfair competition. Generally speaking, the acts which come within the ban of the law under this head consist of things done which are to result in the palming off of the goods of one person for the goods of another. An illustration to express this thought has been suggested which is something like this: One man sets up a wireless apparatus to serve as a receiving station. This he does by manufacturing or securing a certain kind or make of goods for which he expects, or at least hopes, to be able to create a demand. He then sets up other wireless apparatus constituting as many sending stations as possible for the use of his customers, and provides them with a code of calling signals. This he does by advertising and educating intending purchasers among the buying public in every way possible to prefer and ask for his product. After he has done all this and the messages begin to fly thick and fast, another sets up a receiving station

attuned to receive the messages intended for the first man and intercepts the messages. This the law condemns as unfair competition and prohibits it. Has the defendant been thus guilty? Against it is the fact that it is the only competitor in the trade of whom the plaintiff complains. On the other hand, this make of belting had been so marked in Germany, and is the only make which is treated with a solution before painting it. This treatment is functional. An incidental consequence or result is that the solution by capillary attraction is drawn into the material and the edges are stained a dirty black color. To improve the appearance of the belting and to distinguish the defendant's make both edges are painted a "brilliant black." Is this done for the purpose and does it have the effect of bringing about any confusion in the two products of manufacture, or aid in diverting to the defendant any trade which of right belongs to the plaintiff? This we cannot find. The effort of the plaintiff to show that the alleged functional use of the discoloring solution was a pretense by showing that the edge was wholly colored after the paint had been applied to the face of the belting, and not before, as averred by the defendant, failed. Moreover, there is no confusing resemblance. A short piece of the belting shows something of a resemblance, but it is to be kept in mind that the belting is inspected and usually sold in rolls of some size, and this brings out in bold relief the green edge feature of the plaintiff's make of belting. It is only in certain lights that the difference would not be marked and striking. Moreover, unless all the plaintiff's efforts have gone for nought, its customers look for and are guided in their purchases by the green edge. We cannot find, therefore, either a purpose to deceive or a misleading similarity of appearance in fact. The strongest appeal on behalf of the plaintiff for relief lies in the fact that white or red edges would make the difference between the defendant's and the plaintiff's goods more marked and the right of the defendant to freedom from interference on the part of the court much more clear. To restrain the defendant from the use of the black edges, however, involves a finding of its guilt, and could not but operate as a disturbing factor in its dealing with its customers. We cannot lose sight of the probability that the awarding of an injunction would be used (of which indeed there is already evidence) as a weapon of advertising warfare against the defendant which would work an injury to it.

As we are constrained to find against the plaintiff the fact of unfair competition and infringement of its trade-mark, the question of the validity of such trade-mark and plaintiff's proprietary right in the use of the green edge need not be inquired into.

The bill of the plaintiff is therefore dismissed, with costs to the defendant. Counsel may submit a form of decree in accordance with this opinion for approval.

COONEY, ECKSTEIN & CO. v. F. & J. AUDITORE CO. et al.

FLANNERY v. F. & J. AUDITORE CO.

(District Court, E. D. New York. July 10, 1914.)

SHIPPING (§ 58*)—CHARTERS—CAPSIZING OF BARGE WHILE LOADING—UNSEAWORTHINESS.

A barge, chartered to carry railroad ties, while being loaded from another vessel, showed a list, and subsequently, on receiving another draft of ties, careened in the other direction and dumped her load, also receiving some injury. She had not received all the load she would be expected to carry from her appearance and dimensions, and the evidence showed that she was unseaworthy for such load. It also indicated negligence on the part of the captain, who was the servant of the owner, and on the part of the contracting stevedores, in the manner of loading, and in not sooner observing the list and taking measures accordingly. *Held*, that the charterer was not in fault, and was entitled to recover for the ties lost from the owner and stevedores, and that the owner was entitled to half damages for the injury to the barge from the stevedores.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 233–244, 314, 327; Dec. Dig. § 58.*]

In Admiralty. Suits by Cooney, Eckstein & Co. against the F. & J. Auditore Company, with Daniel B. Flannery, impleaded, and by Daniel B. Flannery, owner of the barge Evelyn, against the F. & J. Auditore Company. Decree for Cooney, Eckstein & Co. against both other parties, and for Flannery against the F. & J. Auditore Company for half damages.

Harrington, Bigham & Englar, of New York City, for Cooney, Eckstein & Co.

James J. Macklin, of New York City, for Daniel B. Flannery.

Cass & Apfel, of New York City, for F. & J. Auditore Co.

CHATFIELD, District Judge. The Evelyn is a comparatively new barge, with a deck space between bulkheads 87 feet 5 inches long and 31 feet 2 inches wide. The bulkheads are 8 feet high. She measures 10 feet 1½ inches in depth below the deck, and is substantially 102 feet in length over all. She was chartered by her owner, Daniel B. Flannery, to the Moran Towing Company for cargo carrying around the harbor of New York, and was in turn rechartered to Cooney, Eckstein & Co. for the purpose of transporting railroad ties.

Upon the voyage in question, she was, on July 27, 1912, alongside the steamer Yaguez, from which a load of railroad ties was being taken by the F. & J. Auditore Company, contract stevedores. These ties were of two dimensions, some 8½ feet long by 9 by 7 inches, and some 8 feet long by 6 by 8 inches. Other boats had received loads of ties. One of them was lying close by waiting to be towed away. At about 9:30 a. m. the Evelyn showed a list to starboard, bringing her wearing piece down to the water, and putting her port rail or wearing piece 4 feet out of water. The captain of the barge was then making motions, or signals, to the stevedores. Another draft of ties was landed upon the deck, the boat careened in the other direction, and the

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

load was dumped. As many of the ties as could be found were salvaged by various boats, and from the computation of the entire cargo, deducting the amount taken upon other barges, the proof shows that 1,404 ties were unaccounted for, 2,678 were found upon board of the Evelyn, and 6,335 were accounted for by the salvage operations. This makes a total, if the figures be correct, of 10,417 ties upon the Evelyn at the time of her capsizing.

On December 12, 1912, Cooney, Eckstein & Co. filed a libel against the Auditore Company, charging them with the loss of the cargo through alleged negligent loading of the Evelyn. The stevedores answered, and filed a petition bringing in the owner of the boat. They alleged the fault to be that of the boat, or of the servants of the owner or charterer, and denied the charge of negligence against themselves.

On December 14, 1914, a second suit was brought by Flannery, the owner of the Evelyn, against the Auditore Company as stevedores, for damage to the Evelyn through alleged negligent loading. The Auditore Company, by petition, brought in Cooney, Eckstein & Co. in this action, and again alleged that they were given an unseaworthy or improperly ballasted boat, and that the servants of the owner or charterer were negligent.

It appeared upon the trial that the stevedores were performing their work, taking the load out in slings through the use of a winch in the ordinary manner. Men were at work upon the deck and in the hold of the Yaguez, and the draft was lowered to the barge by a signal from a man upon the deck of the steamer. He in turn received a signal from those upon the deck of the Evelyn, where some of the stevedores were distributing and piling the load, and the foreman of the stevedores' gang was overseeing all the operations. He testifies that at the time in question he thought that the Evelyn "looked funny." She began to show a list, and he went down upon her to see what was the matter. Just at that time, before they could trim her to an even keel, the descent of another draft threw her in the other direction, and she capsized. The testimony of the captain of the boat is to the same effect.

The stevedores talked Italian, and the captain of the boat was a Swede. He testifies that the Italians did not regard his suggestions and warnings, but he and the stevedores agree to the proposition that the Evelyn had not received as much load as they anticipated she would carry when the tendency to list began to appear. The captain testifies that the Evelyn should carry from 11,000 to 12,000 ties. He also said that the stevedores loaded the outside tiers of the Evelyn, which were laid thwartships, after they had reached the level of the top of the rail, by shoving out the outer end of the ties until they were even with the outside edge of the rail, and then carrying the pile up in a vertical line, instead of setting back each tier and placing a row of headers under the pile, so as to incline the load toward the center of the boat. The inside tiers of the load were laid in fore and aft, but, according to the captain, none of the layers or tiers were placed in a cross direction, so as to make a crib or to anchor the load. The captain testifies that the outside tiers were carelessly placed, so that some

of the ties projected. If the dumping had occurred through a shifting or tumbling down of these outside tiers of ties, a different question would have been presented. But the captain charges the tendency to list (that is, tenderness in carrying the load) to the extra weight thus put upon the boat, further from the amidships line than when loaded in the ordinary manner, and interfering with the stability of the boat as this extra load was carried up vertically, higher and higher above the keel.

Extra weight as far out as the rail and at a considerable level above the deck would affect the balance or equilibrium of the boat. Mere extra weight upon both sides of the boat, above and far from the keel, would of itself increase the liability to rock, but would not have the effect of establishing a list, unless some excess of weight was present or added to one side.

The captain of the Philip was catching "lemons" in the water and watching the Evelyn. He stated that she was listed for half an hour before she went over.

The testimony of the captain, to the effect that, while a list existed and before it had been corrected by trimming the load, an additional draft of ties caused the boat to upset, seemed so incredible, if the boat was capable of carrying more load with slight differences in placing, that further testimony was taken and an actual test made of the Evelyn, in the month of February, 1914, with a cargo of ties brought to the port of New York upon another steamer then in process of unloading by the Auditore Company.

The owner of the Evelyn, Mr. Flannery, superintended the method of loading and determined when the boat had a sufficient load. The work of loading the boat and making the test was done by the Auditore Company. The ties were weighed and counted, and 1,685 ties, 7 inches by 9 inches by 8½ feet, were placed upon the boat; 4,330 ties, 6 inches by 8 inches by 8 feet, were added to the load. Two small ties were tested, and found to weigh 136 and 138 pounds, while three large ties weighed 168 pounds, 191½ pounds, and 215 pounds, respectively. Averaging this weight at 137 pounds for the small ties and 191½ pounds for the large ties, we have a total of but 413 tons for the 6,015 ties, which brought the boat to within one foot of the wearing strip.

Upon the trial Mr. Flannery testified that the Evelyn would carry 725 long tons of general cargo (but not ties). Upon being recalled after the test, he testified that he had misspoken, and that "short" tons were meant. A witness, Stockham, called as an expert, estimated that the Evelyn ought to carry about 8,000 ties of the smaller size. The difference in weight in the test load, between 1,685 large ties and the same number of smaller ones, would amount to about 500 small ties. Stockham (who was present) estimated that the boat at the test might have carried 500 more, bringing her total up to 7,015, instead of the 8,000 which the expert estimated she should carry. But all of these figures are far short of the amount (over 10,000 ties) with which she was apparently loaded at the time the accident occurred.

This testimony would indicate that some error may have existed in

the total figures of the ties unloaded from the steamer, as the Evelyn was said to have had her wearing piece two feet above water shortly before the accident. But, taking also into account the snow and ice, and the difference of the weight of the ties in winter from their weight in dry weather or in summer, the conclusion must be reached that the preponderance of testimony in each case is to the effect that the accident was caused from attempting to place upon the Evelyn an overload, or excess load, and that she was not a seaworthy boat with the amount of load upon her which she was made to carry, or even with that which, according to the experts called, she apparently should carry. Mr. Auditore, the foreman of stevedores, is a man of considerable experience, and his testimony was to the effect that he expected the Evelyn to be able to carry more load than she had on, and that he had not considered her condition, as she had not reached her limit prior to the accident, in his opinion. One witness testified that she could carry from 11,000 to 12,000 ties.

It would seem from the foregong that Cooney, Eckstein & Co., as charterers, are not responsible for the accident, nor are they responsible to Mr. Flannery for failing to return the boat to him in perfect condition. Any liability that might rest upon them under their charter has been passed on to the Auditore Company, if the fault was that of the Auditore Company in improperly loading the boat; while Cooney, Eckstein & Co. would not be responsible for an accident occurring to the boat from some defect or lack of carrying capacity, which could not be ascertained by them on reasonable inspection, but which should have been known to the owner and guarded against by him, or which, if not known or reasonably ascertainable by him, would be something for which he could not hold the charterers responsible, if accident resulted therefrom.

The loading was done in the ordinary way, and the method of loading or of piling the ties was not of itself sufficient to explain the accident. It would seem that the carrying capacity of the boat differed, under actual measurement, and as figured out from her displacement and proportions, from the capacity which would be estimated from the displacement and size alone. It could not be expected that a charterer should test every vessel, to see if her carrying capacity was fully up to the customary standard. Ordinary and reasonable inspection and judgment during loading, and with respect to the kind of use, could be relied upon in determining when loading should cease. But the owner (and in this case the owner's representative upon the boat, the captain) was responsible for knowing the peculiarities and capacity of the boat, and any fault through unseaworthiness of the boat, in the sense of inability to carry an apparently normal load, would be a defect for which the owner must be held responsible, if that defect were not communicated to the charterer, or were not ascertainable by him upon reasonable use and inspection. The stevedores were bound to use the ordinary amount of care in stowing the cargo and handling and using the boat, and were also responsible for keeping watch of the general effect of their operations and the situation and condition of the boat as they went along.

In the present case some carelessness is indicated by the fact that they piled the tiers of ties in the manner in which this load was placed. The additional evidence that loading was continued while the boat was listed, and that the last draft was placed at such a point upon the boat as to affect its equilibrium, indicates that the stevedores did not use proper precaution to prevent the accident. They did not anticipate any such happening, yet it was apparently indicated, and might have been apprehended, if they had been observant of the condition of the barge, and if they had not relied entirely upon the captain of the barge to tell them when to stop loading.

There would seem to be fault on their part, and also on the part of the captain, who was in that respect the servant of the owner. The barge was unseaworthy, or not sufficiently ballasted for the particular use and for the size of load which she would reasonably be expected to carry, from her appearance and dimensions. The stevedores were careless in the management and observation of the barge when she approached the point of being fully loaded, and the damage suffered should be borne by both.

A decree for the ties lost will be awarded to Cooney, Eckstein & Co. against both Flannery and the Auditore Company, and one-half the cost of repairs of the barge will be awarded Flannery against the Auditore Company. Cooney, Eckstein & Co. may have one bill of costs, divided between the two parties.

THE MAY McGUIRL.

(District Court, E. D. New York. June 29, 1914.)

1. TOWAGE (§ 11*)—RISKS ASSUMED BY TUG—WEATHER CONDITIONS.

A tug, which starts with a tow when a strong wind is blowing, assumes the risk of injury to her tow, or to other vessels, from weather conditions which are reasonably to be expected under such circumstances.

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

2. COLLISION (§ 71*)—FAULT—LIABILITY OF TUG—INJURY TO OTHER VESSELS.

A tug started with a tow at night in a strong wind, using two hawsers, one of which parted after going a short distance. The tug was not in fault for attempting the voyage, nor in the use of the hawser, which was apparently sufficient. After it broke, the captain, in the exercise of his best judgment, chose what appeared from the evidence to have been a proper course by allowing his tow to fall back into a slip, where in the darkness in some manner it struck and injured another vessel lying there. *Held*, that the handling of the tug in this new undertaking was the proximate cause of the injury, the risk of which the captain assumed in attempting the maneuver, and that she was liable therefor.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.*]

In Admiralty. Suit by the Lehigh Valley Transportation Company against the steam tug May McGuirl. Decree for libelant.

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

Harrington, Bigham & Englar, of New York City (T. Catesby Jones, of New York City, advocate), for libelant.
Alexander & Ash, of New York City, for claimant.

CHATFIELD, District Judge. At the trial of this case upon March 13, 1914, at the close of the testimony, the following findings of fact were stated, with a reservation of determination as to the proximate cause of the accident and the legal responsibility therefor:

"The tug having gone to Fifty-Second street with the barge Fort Hamilton alongside, and failing to get another barge at that point, took the Fort Hamilton in tow with two hawsers of 20 fathoms each to proceed to the North River. The wind had been strong enough before leaving Fifty-Second street to put upon the captain the obligation of care in undertaking the trip, and also in considering the condition of his equipment. It is shown that the wind increased greatly as the tug went out of the slip and rounded Pier 1 to start up the bay. When off Pier 2 the starboard hawser parted, and the barge was immediately carried against the end of the pier. It is shown that the port hawser was a comparatively new 7-inch line and that the hawser that parted was a 5½-inch line that had had some use, but there is no evidence that it was not fit for the purpose, except that furnished by the parting, and this would seem to have been caused rather by the strength of the wind than through any defect in the line.

"The captain of the tug attempted to let the barge back in the slip south of Pier 2 until she could be moored to some boat alongside, and, according to the testimony of the master of the Fort Hamilton, she came in contact with no other boat until, having gone to the stern and having returned to the port bow and prepared a line, he concluded that he could moor the barge to a Mallory lighter which was lying alongside a derrick boat on the north of Pier 2. He succeeded in getting a line to the Mallory lighter, and also a stern line out, and then threw off his hawser. The tug moved over to the side of the pier, and the Fort Hamilton was drawn in closer at the stern towards the bow of the Mallory lighter, where it remained during the night. The captain of the Fort Hamilton says that, at about the time he passed the line to the Mallory lighter, the stern starboard corner struck the Lehighton, which was lying outside of another boat on the south side of Pier 2. The captain of the Lehighton places the point of contact on the starboard side of the Lehighton just forward of the stern corner. It appears that, after holding some conversation with the captain of the tug about loosening his lines and moving further up the pier, he found about 18 inches space between his bow and the stern of the Standard Oil boat. He could shove his boat only that distance, but later the bow of the Lehighton was chafed or injured somewhat by contact with the Standard Oil boat.

"It would appear that the Fort Hamilton did not come in contact again with the Lehighton after the first blow, and the subsequent injury was probably the result of the waves, if the Lehighton had been brought too close to the Standard Oil boat. The place of the injury on the side of the Lehighton would seem to be more accurately fixed by her captain than by the impression of the captain of the Fort Hamilton as to where he struck her, inasmuch as he was at the other end of the Fort Hamilton at the time. Those questions of fact are immaterial, because the main facts are not in dispute.

"Mr. Jones: I think that damage on the bow of the Lehighton was insignificant, if any at all.

"Mr. Alexander: The lines between the Fort Hamilton and the Mallory boat were made fast before the hawser was cast off.

"The Court: This case presents the unusual situation of an accident which, from the standpoint of the libelant, is entirely within the doctrine of res ipsa loquitur. The libelant was where he had a right to be, and did nothing whatever which in any way led up to or induced the accident. The burden of explaining the injury and the circumstances from which the injury arose was thrown upon the claimant. So far as the parting of the hawser is con-

cerned, there is no evidence to indicate negligence, and the severity of the storm was not such as to make the tug at fault for attempting the voyage. Until the Fort Hamilton struck the end of the pier, the situation would seem to be that produced by inevitable accident. And if the question were that of injury to the pier, or to the Fort Hamilton, then the doctrine of inevitable accident would directly apply. But from that time on the captain of the McGuirl had to choose between allowing his barge to be wrecked and causing other damage. In attempting to pursue the best course possible, he chose that which, according to the evidence and from the facts, was the proper thing to do, namely, to moor his barge inside of the slip, and he thereby undertook the risk involved in making the landing, in preference to the risk which the choice of another course would have involved.

"I think, therefore, that the question which is presented is one of fact, as to what was the proximate cause of the accident, and it is evident that the proximate cause was the action of the captain in undertaking to let the boat drop back in the slip in his then condition, rather than the breaking of the hawser.

"The question in the case, then, is whether the libelant can recover for an injury of the nature shown in a case where the doctrine of res ipsa loquitur applies, when that injury was inflicted by some one who, in a time of danger, chooses, with proper exercise of judgment, the lesser danger to avoid a greater.

"And the second question is whether, under such circumstances, he is responsible for the injury inflicted, and which he could not but know would be inflicted in the ordinary course of events.

"Mr. Jones: So far as I can recall, the weather when they left Fifty-Second street was the same; it was blowing a heavy gale.

"The Court: They were responsible for going out. Briefs to be submitted on the question outlined."

Briefs have now been submitted, and the matter will be determined as follows:

[1] Counsel for libelant have urged further the charge of fault on the part of the tug for undertaking the voyage from Fifty-Second street to the Hudson river against such a wind as was prevailing at the time. The pier at Fifty-Second street is very close to Piers 1 and 2 of the Bush's Docks, and the time elapsing after the boat left the pier and up to the point of accident must have been so short that the weather conditions generally were observable when the voyage was undertaken. No squall or hurricane has been shown of such magnitude and suddenness as to relieve the liability of the tug from the risks to be expected in a strong wind. Sudden strains and puffs of wind, or from changes of direction on the part of the tug, were to be anticipated. The tug was therefore liable for any risk which it should have considered, but did not. The Merida, 210 Fed. 440, 127 C. C. A. 172; The C. P. Raymond (D. C.) 26 Fed. 281; The Young America (D. C.) 25 Fed. 207; Christie & Lowe v. Fane S. S. Co., 159 Fed. 648, 86 C. C. A. 516; The Bordentown (D. C.) 40 Fed. 682; The Victoria (D. C.) 79 Fed. 122; The Nannie Lamberton (D. C.) 79 Fed. 121.

The finding of fact by the court, on the trial, that the tug was not at fault in attempting the voyage, and was not negligent in inspecting or using the substantially new hawsers with which the towing was done, disposes of this matter.

[2] The libel, however, charges that the tug was at fault (1) in failing to keep the tow clear of the barge; (2) in attempting to moor the tow in a dangerous position too near the barge; (3) in failing to take any measures to protect the canal boat after its danger was realized;

and (4) a general charge of incompetency on the part of those handling the tug.

The case on the charges of fault presents a most unusual point of law. As was indicated in the statement of facts, the doctrine of res ipsa loquitur is presented in a singularly simple manner by the facts that a boat lying at anchor was injured through the movement of another boat in tow, and that this injury was inflicted in a place where the mere infliction of injury from a moving boat would furnish a presumption of negligence, with the conditions of weather and darkness under which the maneuver was being conducted by the tug.

As has been pointed out by the claimant, however, the doctrine of res ipsa loquitur creates only a presumption of negligence. In this case the evidence has set forth all the facts, and the presumption gives way to actual determination as to the legal liability of the claimant.

The claimant has presented a long list of authorities, beginning with the celebrated Squib Case (Scott v. Shepard, 2 Wm. Blackstone, 892), and has prefaced its memorandum by the statement that no case exactly similar to the present has been found by search of the authorities. In the Squib Case, the responsibility for negligence was carried back from man to man, who acted under the doctrine of self-preservation or involuntary effort to avoid injury, until liability was placed alone upon the man who carelessly lighted and threw the squib in a place where it was likely to cause injury. See, also, Insurance Co. v. Tweed, 74 U. S. (7 Wall.) 44, 19 L. Ed. 65; Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256; Scheffer v. Railroad Co., 105 U. S. 249, 26 L. Ed. 1070.

In Insurance Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395, the limitation or further application of the doctrine of "proximate cause" is stated in fixing the liability for the accident. The court says:

"The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss. In Milwaukee & St. Paul Railway Co. v. Kellogg, 94 U. S. 469 [24 L. Ed. 256] we said, in considering what is the proximate and what the remote cause of an injury: 'The inquiry must always be whether there was any intermediate cause, disconnected from the primary fault, and self-operating, which produced the injury.' In the present case, the burning of the City Hall and the spread of the fire afterwards was not a new and independent cause of loss. On the contrary, it was an incident, a necessary incident and consequence, of the hostile rebel attack on the town—a military necessity caused by the attack. It was one of a continuous chain of events brought into being by the usurped military power—events so linked together as to form one continuous whole. The case is, therefore, clearly within the doctrine asserted by Emerigon, and held in Butler v. Wildman, and in the other cases we have cited. Hence it must be concluded that the fire which destroyed the plaintiffs' property took place by means of an invasion, or military or usurped power, and that it was excepted from the risk undertaken by the insurers."

This is cited with approval in The G. R. Booth, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234. In Nield v. London & Northwestern Ry. Co., L. R. 10 Ex. 4, and in The John Perkins, Fed. Cas. No. 7,360, it was held that attempts to prevent injury to one's own property or person were not themselves negligence, and that the proximate cause, as in

the Squib Case, was the original action or circumstances making protection necessary.

In The John Perkins, supra, the damage complained of was the loss of a cable and anchor, which had to be abandoned in order to save the vessel from a drifting vessel, which had itself suffered an accident, apparently without fault on its own part.

But all these cases emphasize the differences of fact presented in the case at bar. Here an accident occurred which in effect put the tug and the barge in peril. The tug, at the risk of parting the remaining hawser, and of losing its barge, or being cast ashore itself, could have endeavored to proceed against the storm, or to repair the damage, or work out of the situation in some other way. If unable to do anything, the tug or barge might actually have gone adrift. But this did not occur. A new voyage—that is, a maneuver which the tug thought would allow her to safely land her barge and seek protection—was undertaken, namely, to take the boat through the Gap into the Erie Basin. The tugboat captain was not merely avoiding accident, or acting under the stress of circumstances, from which accident inevitably resulted. He had the opportunity to determine what was the best thing to do. He chose to undertake a new and smaller risk of property loss, rather than to face the greater one which existed outside of the Gap. It is as if the driver of an automobile or team, having suffered some unavoidable accident, and realizing that the team or machine would be damaged, chose rather to smash into a fence, and then should object to restoring the fence, after thereby saving himself great loss.

The case is not that of a fire engine suddenly confronted with the emergency of killing some one or unavoidably destroying property of others, and avoiding the great injury by the necessary infliction of smaller damage. It must be held that the captain of the tugboat, from proper motives, had the opportunity and did choose to run the risk of whatever injury he might inflict in attempting to save his boat, by the trip into the Gap, rather than by running the risk of losing the boat by proceeding to some other point.

The proximate cause, therefore, of this accident, was the handling of the boat by the captain of the tug, in an attempt to take it into the Gap in the dark, and under the circumstances shown. There is nothing to indicate that the captain could not have raised some kind of an alarm, or ascertained the positions of the vessels near which, or alongside of which, he was going to moor the barge. The storm and his danger were not sufficient to make it impossible, inside of the Gap, for him to use precautions. On the contrary, he seems to have assumed that he could allow the boat to be dropped back into the Gap on one hawser, and to bump along against the boats which he knew would be lying there, until she happened upon a position where she could be moored. This was negligence sufficient to impose upon the tug responsibility for the damage done. This damage may have been much less than what would have occurred otherwise, and, if so, the responsibility should be willingly accepted by the tug, which was saved from the apparently much greater loss.

The libelant may have a decree.

In re BALLOU.

(District Court, E. D. Kentucky. August 8, 1914.)

No. 241.

1. CORPORATIONS (§ 448*)—LIABILITY ON CONTRACTS OF PROMOTERS—RATIFICATION.
While a corporation is not bound by the contracts of its promoters if nothing more appears, where, after its organization, it adopts such contract, it is bound thereby, and it does so adopt it by accepting the benefits thereof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1709, 1789–1792; Dec. Dig. § 448.*]

2. CORPORATIONS (§ 88*)—STOCK SUBSCRIPTIONS—PAYMENT IN SERVICES.
Services performed in procuring a lease for a corporation, subsequently assigned to it, under an agreement by the promoters of the corporation to have stock issued in payment for such services, were the equivalent of cash within a statute prohibiting the issuance of stock except for cash or its equivalent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 337–364, 425–428; Dec. Dig. § 88.*]

3. BANKRUPTCY (§ 225*) — COLLECTION OF ASSETS — SUMMARY PROCEEDINGS — EVIDENCE.
In a proceeding before a referee in bankruptcy to compel the delivery of property by a third person to the trustee, it was irregular to receive and hear the evidence before the trustee's petition was filed and the rule or show cause order to the third person issued.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 384; Dec. § 225.*]

4. BANKRUPTCY (§ 225*) — COLLECTION OF ASSETS — SUMMARY PROCEEDINGS — PARTIES.
A summary proceeding by a trustee in bankruptcy to compel the issuance of stock pursuant to an agreement by the promoters of a corporation, adopted by the corporation, to issue stock to the bankrupt in payment for services, should have been against the corporation and not against the promoters alone.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 384; Dec. Dig. § 225.*]

5. BANKRUPTCY (§ 224*) — COLLECTION OF ASSETS — SUMMARY PROCEEDINGS — WHEN MAINTAINABLE.
A referee in bankruptcy had no jurisdiction of a summary proceeding to compel a corporation to issue stock to the trustee pursuant to an agreement by its promoters to have stock issued to the bankrupt in payment for services, as such a proceeding is proper only to effect the transfer of the physical possession of property from the bankrupt or a third person to the trustee, and not to collect a debt or enforce performance of a contract, and the bankrupt was not the owner of anything capable of physical possession.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 383; Dec. Dig. § 224.*]

6. BANKRUPTCY (§ 228*) — COLLECTION OF ASSETS — SUMMARY PROCEEDINGS — REVIEW—QUESTIONS REVIEWABLE.
In a summary proceeding before a referee in bankruptcy to enforce performance of a contract between the bankrupt and a third party, it

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

was not too late to question the referee's jurisdiction on a petition to review his order.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*]

7. CORPORATIONS (§ 98*)—MANDAMUS (§ 126*)—STOCK—REFUSAL TO ISSUE—REMEDIES.

Where a corporation wrongfully refuses to issue a certificate of stock which it has the power and is under an obligation to issue, the party entitled thereto may compel its issuance by mandamus, sue in equity for specific performance, sue in damages for the breach of a contract, or treat the refusal as a conversion of the stock and sue in trover for damages.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 436–443; Dec. Dig. § 98;* Mandamus, Cent. Dig. § 261; Dec. Dig. § 126.*]

8. BANKRUPTCY (§ 293*)—ACTIONS BY TRUSTEE—JURISDICTION.

Under Bankruptcy Act, July 1, 1898, c. 541, § 23b, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3431) providing that suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them, unless by consent of the proposed defendant, a suit to enforce performance of a contract by a corporation to issue stock to the bankrupt could not be brought in a United States district court unless the defendant consented, or unless diversity of citizenship existed between the bankrupt and the defendant, and the amount in controversy exceeded $3,000.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. § 293.*]

9. BANKRUPTCY (§ 224*)—ACTIONS BY TRUSTEE—JURISDICTION.

Bankruptcy Act, July 1, 1898, c. 541, § 23b, 30 Stat. 552 (U. S. Comp. St. 1901, p. 3431), authorizing suits by a trustee to be brought in the courts where the bankrupt might have brought them, does not authorize the bringing of such suits in the district court sitting in bankruptcy, and hence does not give a referee in bankruptcy jurisdiction of an action to collect a debt or suit to enforce specific performance of a contract.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 383; Dec. Dig. § 224.*]

10. BANKRUPTCY (§ 224*)—ACTIONS BY TRUSTEE—JURISDICTION.

A referee in bankruptcy, having no jurisdiction of a suit by the trustee to enforce specific performance of a contract between the bankrupt and a third party, acquired no jurisdiction by the consent of the third party.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 383; Dec. Dig. § 224.*]

In Bankruptcy. In the matter of W. R. Ballou, bankrupt. On petition by the Pineville Coal Company and others for review of an order of the referee. Reversed, with directions.

W. F. Hall, of Harlan, Ky., and William Low, of Pineville, Ky., for petitioners.

N. R. Patterson, of Pineville, Ky., for trustee.

COCHRAN, District Judge. This cause is before me on a petition for review filed by the Pineville Coal Company, and R. W. Creech, Grant Mason and R. E. Lawson, president, vice president and secretary and treasurer, respectively, of that corporation, complaining of an order of the referee directing them to execute and deliver $2,000 in

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

stock of the corporation to the trustee in bankruptcy. This order was made in a summary proceeding begun by a petition filed with the referee by the trustee, and a rule or show cause order issued thereon, and was entered after hearing had on the rule or show cause order. The form of the order is to execute and deliver $2,000 in stock of the capital stock of the corporation and, in so being, it followed the form of the trustee's petition, pursuant to which it was made. Of course what was meant was that the parties named in the order should execute and deliver to the trustee a certificate for $2,000 of stock or shares of stock. Stock or shares of stock in a corporation are intangible and incapable of manual delivery. The certificate which is the evidence of ownership of stock is capable of such delivery. 2 Clark & Marshall, Corporations, p. 1142.

The trustee's petition is very general in its allegations. It merely sets forth that the bankrupt was the owner and entitled to the possession of the stock, and that the petitioners were withholding it from him. No attempt was made to state the facts constituting such ownership, and it is not certain that the facts as developed by the evidence did constitute the bankrupt the owner of the stock at the time of the filing of the petition in bankruptcy, taking them to be as the trustee would have them. It is possible that he had no more than a right to the stock. Those facts, so taking them, are these: Prior to the incorporation of the corporate petitioner the petitioners Lawson, Mason, and one Stallsworth, who were its promotors and incorporators, entered into a contract with the bankrupt, whereby they agreed that if he would assist them in procuring from W. F. Hall a mine lease of certain coal lands in Harlan county in this district for the corporate petitioner it would, after its incorporation and organization, give him $2,000 of its capital stock. Pursuant to this contract the bankrupt assisted those persons in procuring such a lease to them, and thereafter they caused the corporate petitioner to be incorporated and organized and assigned the lease to it. The referee found such to be the facts from the evidence before him. He further found that the petitioners did not really dispute the bankrupt's right to the certificate, and withheld it that it might turn it over to him at his pleasure. The evidence and the attitude of the bankrupt and the petitioners before the referee strongly favored these findings.

[1, 2] Seemingly but two grounds were urged why the referee should not make the order. One was that the corporate petitioner was a Tennessee corporation, and by the laws of that state no stock can be issued except for cash or its equivalent. The other was that the corporation was not bound by the contract of its promoters and incorporators. The latter ground seems to have been mainly insisted on. It is true that a corporation, nothing more appearing, is not bound by the contract of its promoters. But if a corporation after it is organized adopts such a contract, it is bound thereby and, if it accepts the benefits of the contract, it thereby adopts it. 1 Clark & Marshall on Corporations, pp. 302, 306, 310. And services so rendered are the equivalent of cash.

[3, 4] In their petition for review, and on the hearing thereof before me, the petitioners question the jurisdiction of the referee to hear and

determine a summary proceeding against them to compel them to issue and deliver the certificate of stock to the trustee. No such question was raised before the referee. The petitioners contented themselves with contesting on the merits the trustee's right to the issual of the stock. It is urged on behalf of the trustee that it is now too late to raise the question of jurisdiction, and that if it is not, the referee had jurisdiction, because the respondent's position was not really adverse to the trustee, but seemingly so only, in that it was acting in cahoot with him and took that position in order to save the stock for the bankrupt. Assuming that the referee had jurisdiction, there were serious irregularities in the proceeding before him. The evidence was introduced and heard before the petition of the trustee was filed and the rule or show cause order was issued. Just how its taking came about does not appear. Evidence in a case should be taken not before it is begun, but after it is begun and the issues are made up. Then, as begun, the proceeding was against the individual petitioners only. If proper at all, it should have been against the corporate petitioner only, as it alone was under any obligation to issue the certificate. But probably these irregularities were waived. The corporate petitioners, as well as the individual petitioners, responded to the rule or show cause order, thereby making itself a party to the proceeding, and it thereafter contested the trustee's right to the relief sought. It appeared at the hearing of the evidence taken before the beginning of the proceeding, and made no objection to the use of the evidence thus taken on the hearing and disposition thereof.

[5, 6] I am, however, clear that the referee had no jurisdiction of the proceeding, and that it is not now too late to raise the question. This was not a case for a summary proceeding. A summary proceeding is proper only to effect the transfer of the physical possession of property from the bankrupt or a third person to the trustee. It is not proper to enforce the performance by a third person of a contract with the bankrupt. An undisputed debt due the bankrupt cannot be collected by a summary proceeding. It can only be collected by an independent suit brought by the trustee against the debtor in a court of competent jurisdiction. In the following cases summary proceedings have been upheld by the Supreme Court, to wit: White v. Schloerb, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183; Bryant v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Clarke v. Larramore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555; Babbitt v. Dutcher, 216 U. S. 202, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969. In each of these cases the relief sought and obtained by the summary proceeding was the transfer of the physical possession of certain property of the bankrupt from a third person to the trustee. No instance can be found, I dare say, where the payment of a debt due or the specific performance of a contract with the bankrupt has been enforced in any such way.

In this case neither one of the petitioners had the physical possession of any property of the bankrupt. The bankrupt had nothing capable of physical possession. All he had was the right to have a certificate for $2,000 of stock issued to him by the corporate petitioner. That

right grew out of the contract of the promoters and incorporators of the corporate petitioner with him and its adoption of that contract by accepting the benefits thereof. And his remedy and that of the trustee to compel the issue of the certificate, apart from mandamus, was by a suit in equity for specific performance.

[7] In 2 Clark & Marshall on Corporations, p. 1336, the remedies of one who is entitled to the issue of a certificate of stock, upon refusal to issue it, are thus set forth:

"By the weight of authority if a corporation wrongfully refuses to issue a proper certificate of stock when it has the power and is under an obligation to issue the same, mandamus will lie to compel it to do so. Or it may be compelled to do so by a suit in equity for specific performance of its express or implied contract, or instead of suing to compel the issuance and delivery of a certificate, the party may maintain against the corporation an action of assumpsit on its express or implied contract, to recover damages for the breach thereof, or, if he has title to the stock, he may treat the refusal to deliver a certificate as a conversion of the stock and maintain an action of trover to recover damages."

[8] The jurisdiction of such a suit is determined by section 23b of the bankrupt act. Under that section this court has jurisdiction of such a suit with the consent of the corporate petitioner, or if the bankrupt could have brought it herein had not bankruptcy ensued, i. e., if diversity of citizenship existed between him and the corporate petitioner and the amount in controversy was in excess of $3,000. Otherwise it can only be brought in the state court.

[9] But though such a suit can be brought in this court with the consent of the corporate petitioner, it cannot be brought before the referee with such consent. The jurisdiction conferred by that section on the district courts cannot be exercised by the referee. Possibly so far as it applies to suits for the recovery of property under section 60, subdivision (b), and section 67, subdivision (e), and section 70, subdivision (e) it can. If so, it can only be because in those other sections jurisdiction is expressly conferred on the court of bankruptcy of such suits, and the referee can exercise such jurisdiction as a court of bankruptcy can. The word "courts" in section 23b does not include a court of bankruptcy. In Bardes v. First National Bank of Hawarden, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, Mr. Justice Gray said:

"But the second clause applies both to the District Courts and to the Circuit Courts of the United States, as well as to the state courts. This appears, not only by the clear words of the title of the section, but also by the use, in this clause, of the general words, 'the courts,' as contrasted with the specific words, 'the United States Circuit Courts' in the first and in the third clauses."

In so far as it applied to District Courts before the abolition of Circuit Courts, it did not apply to them sitting in bankruptcy, and hence it had no application to courts of bankruptcy. It follows that the referee has no jurisdiction of such a suit. It will hardly be maintained that a civil action at law to collect an ordinary undisputed debt or a suit in equity to enforce a specific performance of an undisputed contract can be brought and prosecuted before the referee. If, then, the referee had no jurisdiction of the only remedy which the trustee had, to wit,

an independent suit, a fortiori he did not have jurisdiction of a remedy which he did not have, to wit a summary proceeding.

[10] As then the referee did not have jurisdiction of the summary proceeding brought and prosecuted before him independently of consent of the corporate petitioner, he could not acquire jurisdiction with its consent. For it is a fundamental principle that parties cannot confer essential jurisdiction on a court of a controversy, if it does not otherwise have it. Of course this does not apply where it is expressly provided that such jurisdiction may be conferred by consent, which is done by section 23b. But the jurisdiction which under that section can be conferred by consent is jurisdiction upon this court not sitting in bankruptcy, and not upon the referee.

These positions seem to me to be so clearly sound that I have taken no pains to see how far they are supported by the authorities. Possibly they find more or less support in the following cases, to wit: In re Teschmacher & Mrazay (D. C.) 127 Fed. 728; In re Walsh Bros. (D. C.) 163 Fed. 352; Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413.

The order of the referee is reversed, with direction to dismiss the proceeding without prejudice to an independent suit.

In re TOBIAS, GREENTHAL & MENDELSON.

Ex parte MORRIS.

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

1. BANKRUPTCY (§ 242*) — EXAMINATION OF BANKRUPT — PRIVILEGE — SELF-CRIMINATION.

   While a bankrupt is privileged against self-crimination, the privilege merely extends to a suppression, and not to a perversion, of the truth, and can only be exercised after a showing of reasonable ground to suppose that answers to questions put to him would be liable to incriminate him.

   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 399-401; Dec. Dig. § 242.*]

2. BANKRUPTCY (§ 242*)—CROSS-EXAMINATION OF BANKRUPT.

   Where a bankrupt has filed schedules, he thereby asserts that he has no property other than that specified in the schedules, which is a statement of fact concerning which he cannot object to legitimate cross-examination, so long as it opens the way to no independent fact, on the ground that such cross-examination is liable to incriminate him.

   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 399-401; Dec. Dig. § 242.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Tobias, Greenthal & Mendelson. On motion of Robert C. Morris, receiver, to compel the bankrupt to answer questions on an examination under Bankr. Act, § 21a. Motion granted.

The proceedings were involuntary, but they had gone to adjudication, and the bankrupt had filed his schedules, containing, of course, a statement of his liabilities and of his property. On the examination he declined to answer any questions on the ground that they would incriminate him.

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

James N. Rosenberg, of New York City, for petitioner.
Ralph Wolf, of New York City, for bankrupt.

HAND, District Judge. [1] That a bankrupt has a privilege against self-crimination is settled in this district. Re Feldstein (D. C. N. Y.) 4 Am. Bankr. Rep. 321, 103 Fed. 260; Re Kanter & Cohen (D. C. N. Y.) 9 Am. Bankr. Rep. 104, 117 Fed. 356. Section 7 (9) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3425]) could be drawn to toll the privilege under Brown v. Walker, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819; but as it stands I think Counselman v. Hitchcock, 142 U. S. 562, 12 Sup. Ct. 195, 35 L. Ed. 1110, controls. Mackel v. Rochester (C. C. A. 9th Cir.) 4 Am. Bankr. Rep. 1, 102 Fed. 314, 42 C. C. A. 427, not being authoritative, I shall not follow it, for the reasons given in Re Walsh (D. C. S. D.) 4 Am. Bankr. Rep. 693, 104 Fed. 518.

[2] However, the privilege is to suppress, not to pervert, the truth; and when a bankrupt once files his schedules, he asserts, not only that he has the property mentioned, but that he has no more. Johnson v. United States (C. C. A. 1st Cir.) 20 Am. Bankr. Rep. 724, 163 Fed. 30, 89 C. C. A. 508, 18 L. R. A. (N. S.) 1194. That is a statement of fact as much as any other, and it should subject him to all legitimate cross-examination (Wigmore, § 2276), so long as it opens the way to no independent fact (Evans v. O'Connor, 174 Mass. 287, 54 N. E. 557, 75 Am. St. Rep. 316; Low v. Mitchell, 18 Me. 372). Such, at least, is the American rule. It is as if the bankrupt had sworn on the examination itself: "I have no property except Whiteacre." He could not stop the inquiry with that answer, but would be open to further search designed to test the truth.

United States v. Goldstein (D. C. Va.) 12 Am. Bankr. Rep. 755, 132 Fed. 789, is an opposite ruling, but not authoritative; nor, of course, is Re Henschel (D. C. N. Y.) 7 Am. Bankr. Rep. 207, the ruling of a referee. Schedules, it is true, are not testimony. Ensign v. Pennsylvania, 227 U. S. 592, 30 Am. Bankr. Rep. 408, 33 Sup. Ct. 321, 57 L. Ed. 658. They are rather in the nature of a pleading (Johnson v. United States, supra), but that makes no difference. Sworn allegations in a pleading are as much within the reason of the rule as testimony. They are assertions of fact propounded as true, and intended to be the basis of the court's action.

Moreover, the mere claim of privilege is not enough. Podolin v. Lesher Warner D. G. Co. (C. C. A. 3d Cir.) 31 Am. Bankr. Rep. 796, 210 Fed. 97. There must be some basis for the supposed fear, or the court will overrule it. No ground appears here which justifies the bankrupt's assertion of his claim. Even if there was any danger from the disclosure of his "personal outside means," he has stated his assets in his schedules, and he has waived his right as to that. As to the rest, he shows no ground at the present time to suppose that he will be incriminated by answering the other questions. At least, he must indicate what he fears the inquiry may discover, and how the answers might lead to exposure. He must, moreover, submit to full cross-examination as to his property. I think the matter had best be taken up at the first meeting of creditors before the referee upon the lines above indicated.

TOWN OF HANOVER v. BURROUGHS.

(Circuit Court of Appeals, First Circuit. July 27, 1914.)

No. 987.

HIGHWAYS (§ 198*)—STATE AID—DEFECTS—INJURIES TO TRAVELERS—TOWNSHIP LIABILITY—STATUTES.

Laws N. H. 1903, c. 54, § 6, provides that no claim shall accrue against the state and no action be maintained against any town in which a road is situated on which the work of construction is done or repairs made, in whole or in part, at the expense of the state for or on account of any injury to persons or property on any such road. Laws N. H. 1905, c. 35, § 1, declared that it was enacted to secure a more uniform system for the improvement of main highways throughout the state by the co-operation of municipalities, and provided for the appropriation of money by the state for highway construction and repair; section 8 declaring that all highways within any city or town improved by the expenditure of a joint fund created by contributions by the municipality in the state should thereafter be maintained by the municipality within which the highway was located to the satisfaction of the Governor and Council. *Held*, that where plaintiff was injured by failure of a town to provide a railing along a dangerous embankment on a road which had been designated as a continuous state highway under the act of 1905, and which had been repaired and was undergoing repairs at the partial expense of the state, it was within the description of Laws N. H. 1903, c. 54, § 6, and the town was therefore not liable for the injury.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 504–507; Dec. Dig. § 198.*]

In Error to the District Court of the United States for the District of New Hampshire; Clarence Hale, Judge.

Action by William A. Burroughs against the Town of Hanover. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Allen Hollis, of Concord, N. H. (Williams W. Thayer, of Concord, N. H., on the brief), for plaintiff in error.

Henry F. Hollis, of Concord, N. H. (Alexander Murchie and Hollis & Murchie, all of Concord, N. H., on the brief), for defendant in error.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

DODGE, Circuit Judge. Burroughs, a citizen of Vermont, recovered judgment in the New Hampshire District against the town of Hanover, in that state, for damages sustained by him on June 7, 1910, while driving on a highway within that town, because of the absence of a railing to safeguard a dangerous embankment adjoining the road. Under New Hampshire statutes, as they stood prior to 1903, towns were liable for damages to travelers by reason of dangerous embankments and defective railings, rendering a highway unsuitable for travel thereon.

The town, seeking here to reverse the judgment, has not contended that there was no evidence to warrant the jury in finding that the highway defect existed as alleged, and caused Burroughs' injuries.

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

It contends that, even if these were the facts, it cannot lawfully be held liable, because this was a "state aid" highway, in process of construction under state supervision; and the statutes of New Hampshire have not permitted recoveries against towns for injuries to persons or property on such highways since the enactment of section 6 of chapter 54 of the New Hampshire Laws of 1903.

This section reads as follows:

"Sec. 6. No claim shall accrue or exist against the state, and no action be maintained against any town in which a road is situated on which the work of construction is done or repairs made, in whole or in part, at the expense of the state, for or on account of any injury to person or property on any such road; nor shall any indictment or information be maintained against any town on account of the condition of such road."

The town asked the court to rule that it was not liable for the plaintiff's injury under New Hampshire laws, and that on all the evidence the plaintiff could not recover, as matter of law. Of the refusal so to rule, and to direct a verdict in its favor upon these grounds, it now complains as error.

There is no dispute that the road upon which Burroughs was driving when injured was a road on which work of construction was done or repairs were made, in part, at the expense of the state, in accordance with provisions contained either in the statute referred to or in other subsequent state legislation. Burroughs denies, however, that the section quoted, taken in connection with the legislation of which it forms a part, had the effect of exonerating the town from the liability in respect to the highway in question, imposed upon it by the laws of the state in force before the above act of 1903. Since 1893, those laws had made towns liable for defects of specified kinds, including dangerous embankments and defective railings, rendering their highways unsuitable for travel. And from 1786 to 1893 they had been under a statutory liability for highway defects, imposed without specific restriction.

It will be necessary, first, to examine briefly the other provisions of the act in question and their application at the time of enactment. The act is entitled:

"An act to provide for a more economical and practical expenditure of money appropriated by the state for the construction and repair of highways."

It contains 28 sections. Section 1 commits the general supervision, control, and direction of the business to which the act relates to the Governor and Council. Section 2 constitutes the counties of Coos, Carroll, and Grafton, a district for the purposes of the act (Hanover is in Grafton county). Section 3 provides that such appropriations and expenditures for construction and improvement of highways within this district, as may be made on the part of the state, shall be made with reference to a system of continuous ways adopted and constructed to facilitate and increase public travel to and from the mountain and lake region in the district. Section 4 provides for the taking and appropriation by the Governor and Council, for the purposes of the act, of public highways then in use as such, being in the routes hereinafter specified, for construction, repair, and maintenance, providing also

that no liability against the state or any town shall be created, nor any compensation become due for property rights or interests taken within the limits of highways so taken. Section 5 designates certain roads within the district established by section 2, provides that they shall be state highways and be constructed and maintained by the state, upon acquirement by assignment or appropriation of the right of way for them from owners of unappropriated lands over which they may pass, and designates the procedure for such appropriation. Then follows section 6 as above quoted.

Sections 7–23 of the act may be more briefly referred to. Sections 7–12, inclusive, require construction and repair work by the state on the highways and roads aforesaid to be done by contract after competitive bids, under the supervision of a civil engineer to be designated for the district by the Governor and Council, authorize the Governor and Council to act without competitive bids in case of emergencies, impose duties of inspection upon said engineer, fix his compensation, and authorize division of the roads mentioned in the act into sections or groups, if required for the purposes of efficiency and economy. Sections 13–19 provide for the location of a new highway within the district from the base of Mt. Washington to a point in Franconia. Section 20 provides that:

"No claim shall accrue, or exist, and no action shall be maintained against any town through which (the new highway above mentioned) * * * shall pass, nor shall any indictment or information be maintained against any town on account of the condition of said road."

Section 21 provides, upon terms like those of section 4, for the taking and appropriation of existing roads and highways then in use as public highways within the route selected for the above new highway. Sections 22 and 23, provide money to pay indebtedness already incurred by a commission, previously appointed under an act of 1901, to lay out and construct a road in said district, called the Jefferson Notch road, and for its improvement according to section 13 and other provisions of preceding sections.

Section 24, which is of rather more importance for the purposes of the questions here raised, begins as follows:

"Subject to the foregoing provisions and regulations, the following sums shall be, and are hereby appropriated for the construction and repair of the highways as hereinafter specified, viz."

Then follow 34 numbered clauses, each appropriating a specified sum for a specified road or roads. The appropriation in clause (1) is for completion of the Jefferson Notch road, and for construction of parts of the new highway provided for in sections 13–19. That in (2) is for construction, changing, and repairs of a highway in Dixville Notch, in continuation of work begun under a former act passed in 1901. That in (3) is for construction of a road in Errol "provided other parties shall contribute [a specified sum] for the same purpose." That in (4) is for construction and repair of a road in Woodstock, begun under a prior state appropriation, but not completed. That in (5) is for repairs of a highway lately built by the state in Whitefield and Dalton. That in (6) is for repairs of highways generally, in Dix-

ville. Those in clauses (7)-(15), inclusive, are each for repairs of specified roads in a specified town, location, or grant. That in (16) is for repairs of a state road in Moultonborough. Those in (17)-(31), inclusive, are each for repairs of a specified road in a specified town. That in (32) is for repairs of the roads generally, in Albany. That in (33) is for construction of a road in Bartlett, provided the town and other parties furnish an equal sum, the town thereafter to maintain the road. That in (34) is for construction of a road in Benton, provided the town and other parties contribute an equal sum.

Sections 25 and 26 contain provisions not material for the present purpose.

Section 27, subject to the provisions of sections 1-12, inclusive, so far as applicable to the localities and subjects, makes five appropriations, also in numbered clauses, for "the construction and repairs of the highways hereinafter specified, outside the district named in section 2," "which highways do, now, or will when constructed, lead to, or from, public waters." (1) is for an existing state road in Newton and Kingston. (2) is for another state road in Temple and Peterborough. (3) is for construction and extension of a new road in Sunapee, provided the town appropriates an equal sum. (4) is to aid the town of New London in the repairs of a road in that town. (5) is for construction of a road in Newbury, provided the town appropriates an equal sum.

Finally, section 28 repeals all inconsistent acts, and parts of acts, and provides that the present act take effect upon its passage.

With regard to the provisions of the above act, it is significant for the purposes of the present inquiry:

First, that while state expenditure on any road in the district established is to be with reference to the system of continuous highways, and while every road mentioned in the first 26 sections (whether a state road made such by the act, or referred to as already a state road, or a town road designated for repairs or construction) is a road within the district, there are no provisions confining the contemplated system within the limits of the district.

Second, that the first 26 sections put under state control and supervision, not only every state road within the district for which state money is appropriated for repairs or construction, but also a great many town roads within the district, being those the construction or repair whereof is provided for, in whole or in part, at the expense of the state. Thus, in Dixville and Albany (clauses 6, 32, § 24), the state money is to be spent on the town roads generally, neither town being required to contribute; in each of the more than 20 towns named in clauses (7-15), (17-31), it is to be spent on a specified town road, and without requiring the town to contribute. In Errol, Bartlett, and Benton (clauses 3, 33, 34) it is to be spent on specified town roads, on condition that the town or other parties contribute, and Bartlett is also to keep the constructed road in repair.

Lastly, that expenditure of state money is also authorized outside the district (section 27), but under the same state supervision and control, in construction of two of the five roads designated, which are al-

ready state roads (clauses 1, 2), in construction of the two roads designated in Sunapee and Newbury, respectively (clauses 3, 5), each of those towns to contribute, and in construction of a designated town road in New London (clause 4), this expenditure being expressly "to aid the town of New London."

We see no sufficient justification, in view of the above features of the act, for taking the above-quoted language of section 6 in any sense more restricted than the words used express, according to their natural and usual significance.

For injuries on state roads wholly paid for and controlled by the state, though of course lying within town limits, it was obviously just and natural to provide expressly that there should be no claim upon the state, and that no town should be liable. And if the state was to take control of the construction and repair of so many town roads, and spend its money to make or keep them, it was equally just and natural to provide expressly against the accruing of claims against the state for injuries upon such town roads. The Legislature, in the same section, and in express language, which taken by itself admits of no other construction, has also forbidden the maintenance of actions for injuries upon such town roads, against the towns wherein they lie. We think the conclusion unavoidable that it meant no less than it there said.

Towns were liable for injuries from certain kinds of highway defects, according to the legislation then in force, if the injury was sustained "upon any highway" within their limits. It will not be denied that section 6 made an effectual exception as to state highways within their limits. The reason for making the exception can only have been that a town could not justly be held liable for defects in a road never within its control, or removed from its control by the state under legislative authority, so as to leave no duty of keeping the road in condition upon it, or of providing the money therefor. The reasons which may be supposed to have prompted an exoneration of towns from liability for highway defects on state-aided roads within their limits obviously differ only in degree. Though such a road remains a town road, because the town is no longer to have the same control of its maintenance, or of the money spent thereon, as in the case of its other roads, it ought not to remain under the same responsibility for its condition. The responsibility, like the control, ought to be at least divided with the state, if either was to be liable. The extent to which responsibility should be removed from the towns was for the Legislature to decide, and it may well have preferred to eliminate the questions involved in any attempt to determine the precise limits of the responsibility to remain upon the towns, under the new system, by removing the responsibility altogether.

These considerations prevent us from yielding to the arguments in favor of a narrower construction of section 6. It is urged on Burroughs' behalf that the position of section 6, between two sections dealing only with state roads, not with state-aided roads, the express exemption of the towns concerned from liability in respect of the new Mt. Washington-Franconia road, contained in section 20 above quoted, and the express provision of section 27, bringing the roads outside the

district named in that section within the provisions of sections 1–12, and thus within section 6, forbid the supposition that the legislative intent was to make the exemption of the towns general as to state-aided roads within them, and require the conclusion that state roads only were meant. We do not find these considerations strong enough to warrant such a conclusion. Still less persuasive do we find the suggestions: (1) That the synoptical headings of the different sections of the act printed in order after the title, and repeated in the margin opposite the respective sections, amount to a contemporaneous construction of the act, and fail to attribute to section 6 the construction which we have thought its plain meaning; (2) that section 6 would have been a complete defense in Gates v. Milan, 76 N. H. 135, 80 Atl. 39, 35 L. R. A. (N. S.) 599, but is not referred to in that case. The defendant town had in the case another complete defense. It is said that such a construction of section 6 must lead to inconvenience and injustice, in view of the large proportion of town roads which have become state-aid roads; but we think the Legislature might well have believed no less injustice likely to follow if the towns were left still liable for defects in their roads caused or permitted by persons not acting under their authority or control.

If, therefore, Burroughs' injuries had been sustained on a road for which the above act provided any state aid, we should have regarded the town as exonerated by section 6. But the road whereon he was injured, though within the district which that act established, was not a road anywhere mentioned in the act; and the next inquiry is whether or not it had been brought within the provisions of section 6 by the subsequent enactments before his accident.

Within a month after the approval of the above act, the same Legislature passed chapter 133 of the Laws of 1903, "providing for a state system of highway construction and improvement, and for the appointment of highway engineers." Under this act (sections 4, 6, 7) engineers appointed by the Governor and Council were to prepare a map of —

"a system of continuous main highways which shall include every town in the state, and indicate the highway connections and relations of such towns with each other and with the system or lines of continuous main highways to be outlined as aforesaid."

From these maps the engineers were to prepare plans, under the direction of the Governor and Council—

"for the future construction and improvement of highways by state aid or state control, either with or without co-operation of the towns or cities."

The Governor and Council were then to prepare a bill for submission to the next general court, which, besides detailed provisions for inaugurating a system of state work and control in the future construction and repair of local and state highways, should also—

"have provisions governing the administration of that business as far as it may be assumed by the state, and shall designate the method by which the funds necessary for carrying out the provisions of the proposed act shall be provided, whether entirely by the state, whether in part by the state and in part by the towns, whether by current assessment and appropriation, whether

by issuance of bonds, or whether such funds shall be supplied otherwise than by the methods above indicated."

They were also to prepare and submit to the next general court a state highway law, whereby state aid to municipalities on account of special necessities, as well as state work on highways to be done independently of the local authorities, should be governed by general statutes adapted to the requirements of all localities in the state. Nothing enacted by chapter 133 was to repeal or modify any of the provisions of chapter 54, except as to the appointment of highway engineers to act within the district which chapter 54 established.

Next came chapter 35 of the Laws of 1905, section 1 whereof declares the object of the act to be—

"to secure a more uniform system for the improvement of main highways throughout the state, by the co-operation of the municipalities and the state in providing means therefor, and for the more efficient and economical expenditure of moneys appropriated for highway construction and repair, the primary object being to secure an improvement of the highways within the limits of every town in the state."

The act then vested the general control and supervision of the business to which it relates in the Governor and Council, "so far as the state is concerned," and in the local authorities having charge of highway expenditures, so far as the different municipalities are concerned, and in the county commissioners, so far as unincorporated towns or places are concerned. Municipalities were directed to set apart certain percentages of their valuations, to be used for permanent improvement of their main highways, under the advice of the state engineer. Any municipality desiring state aid for permanent improvement of its highways, in addition to improvements provided for by the amounts so set apart was to obtain it by setting apart a further sum equal to 50 per cent. of the obligatory amount, and making an application for state aid, with notice that the further sum required as above had been so set apart. For each dollar set apart by the municipality a sum ascertained according to its valuation was to be apportioned by the Governor and Council from a state fund, and the latter sum, together with the total amount set apart by the municipality, was to be expended as a joint fund upon permanent repair of the highways within the municipality, according to detailed provisions in the act. Section 8 provided:

"All highways within any city or town improved by the expenditure of said joint fund shall thereafter be maintained by the city, town or place within which it is located, at the expense of the town, and to the satisfaction of the Governor and Council, and in case any town or place shall neglect to make repairs ordered by the Governor and Council, such repairs shall be made under the direction of the Governor and Council, at the expense of the state, and the cost thereof shall be added to the state tax for that town or place for the next year."

Appropriations by the state were provided for to secure the permanent improvement of highways according to the above provisions, and so much of the amount thus appropriated as was not required for the purposes of the above provisions and the expenses of administering the act was to be used for the purposes of certain state highways specifically described in section 11, and for such other state highways as the Gov-

ernor and Council should deem best. Section 11 designated as state highways certain roads, or parts of roads, not made state highways by the earlier acts. Section 12 provides that a certain road between Conway and Chatham should be treated and regarded as a state road for the purposes of maintenance. The act was to take effect upon its passage, and all inconsistent acts, or part of acts, were repealed.

There was further legislation upon the subject in 1907. Chapters 60, 104, and 139 of the Laws of that year amended or supplemented chapter 35 of 1905 in certain particulars not important for the present purposes. The same chapter was still further amended by chapter 155 of the Laws of 1909, which next followed. The amendments made by the latter act do not require special reference, except as follows: They designated still other roads as state highways, some of the roads so designated being outside of the district established in 1903. Seven additional sections, 15–21, inclusive, were added. In these it was provided, in substance, that the Governor and Council should designate three continuous highways from the Massachusetts line northerly. The third of these was to be known as the West Side road, and was to extend along the Connecticut and Ammonoosuc Valleys to a point in Colebrook, being thus partly within and partly without the district referred to. No municipality, through which any of said roads might be designated to pass, was to receive state aid for improvements on its roads elsewhere than on the designated road, until that road should be completed within the limits of the municipality. Municipalities able to pay half were to receive half the cost of improving such roads within their limits from the state. Such roads were to be maintained at the expense of the municipalities within which they might be located, and, if any municipality neglected to make repairs ordered by the Governor and Council, they were to be made at the expense of the state, and the cost added to the state tax. Like the previous acts, this amending act took effect on its passage and repealed all prior inconsistent legislation.

There was no further legislation upon the subject prior to Burroughs' accident, which, as has been stated, was in June, 1910.

The road whereon he was injured had been duly designated on September 17, 1909, as a part of the West Side road referred to in the above act of that year. The highway apportionment of state money for the town of Hanover had been, on December 28, 1909, duly fixed at $2,444.75, the town having appropriated and set aside the requisite amount for state-aid roads within its limits, and having also so notified the Governor and Council, with its application for state aid, on April 29, 1909. On December 22, 1909, the state authorities and the duly authorized officers of the town contracted with the Lane Construction Company for the grading and construction of a section of road within the town, according to specifications which described said section as—

"a portion of the so-called West Side road in the town of Hanover, being the main road from West Lebanon to Lyme; the portion to be improved being as follows: From a point at A, Lebanon-Hanover Line to Lebanon street; B, from corner of Main and Wentworth streets, along College street north, as indicated on the plans mentioned herein, to such point as shall be determined by the state engineer."

Burroughs was injured at a point on the section of road thus described. Work on the roadbed under the above contract had been done at the point where he was injured shortly before his injury, and work under the contract was then still being done, at a point about 1,000 feet further north on the same road. Not until August, 1910, was the contractor's work finished and the road accepted as complete.

The road on which his injuries were sustained was thus at the time a road whereon work of construction had been done, and was still being done, at the state's expense. Designated, as it had been by the Governor and Council, as part of one of the three continuous highways provided for by the sections added in 1909 to chapter 35 of the Laws of 1905, the above work upon it was under the joint control and supervision of the state and town authorities, and paid for out of the joint fund composed of the money set aside by the town and that apportioned to the town and appropriated by the state, all in accordance with the chapter last referred to. The work then in progress upon the road was permanent improvement under the state engineer's advice, and, though a town road, the town was to be under no duty of maintaining it until after that work had been completed. There can be no doubt that chapter 35 of the Laws of 1905 was enacted in pursuance of the general policy, first declared and adopted by chapter 54 of the Laws of 1903, of directing the expenditure of all state money devoted to such purposes with reference to a system of continuous highways, such as section 3 of that act describes. The successive enactments which followed as above further establish and develop the same system, and follow the same plan of placing the control, both of the work and the expenditure involved, in the hands of the state rather than of the local authorities, under general laws adapted to the requirements of all parts of the state. Chapter 133 of the Laws of 1903, which is the act most fully declaring the principal features of the general policy adopted, or to be adopted, expressly provides that nothing in it shall be taken to repeal or modify chapter 54 of the same year, and this left section 6 of that chapter, on which the defendant relies, in full force as part of the general policy referred to. The acts of 1905, 1907, and 1909 are obviously founded on the legislation of 1903, and successive steps in pursuance of the same general policy. No indication is found in them of any intent to repeal or modify the provisions of section 6 above referred to. These are left to stand as part of the general law of the state; and we can see no reason to doubt that they were left effective in the sense above attributed to them, or that they were applicable at the time of Burroughs' injuries to the road and the town here concerned. We think they exonerated the town from liability, and required the rulings as to their effect which were refused at the trial.

This conclusion renders it unnecessary to consider whether or not the evidence was insufficient for recovery, upon any of the other grounds urged.

The judgment of the Circuit Court is reversed, the case is remanded to the District Court for further proceedings not inconsistent with this opinion, and the plaintiff in error recovers its costs of appeal.

BROWNING et al. v. BOSWELL et al.

(Circuit Court of Appeals, Fourth Circuit. June 9, 1914.)

No. 1217.

1. MINES AND MINERALS (§ 55*)—COAL MINING LEASE—CONSTRUCTION OF CONTRACT.

By an instrument denominated a lease, the lessor conveyed to the lessee a coal mining plant, with equipment, tools, stores, etc., with the right to mine and remove the coal from a specified vein on a tract of land described generally but not by acreage for a term of 50 years, for which the lessee was to pay the sum of $200,000 and a royalty on the coal produced, to be not less than a specified quantity annually, with a provision giving the lessor the right to forfeit and re-enter on default. The lease expressly provided that it was in gross and not by acreage. *Held*, that the contract was not one for the sale of coal in place but a mining lease; so much of the $200,000 as was in excess of the value of the plant being a bonus for the right to mine and sell the coal on payment of the royalty.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 153-165; Dec. Dig. § 55.*]

2. MINES AND MINERALS (§ 70*)—SPECIFIC PERFORMANCE (§ 64*)—MINING LEASES—REMEDY FOR BREACH.

In case of a mining lease, a court of equity has no power to decree a specific performance or an abatement of the price the lessee has contracted to pay for the right to mine and remove the mineral; the only remedy of either party for breach of the contract or for fraud being a cancellation of the lease, with perhaps a right of action for damages.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 192-197; Dec. Dig. § 70;* Specific Performance, Cent. Dig. §§ 191-195, 198; Dec. Dig. § 64.*]

3. ESTOPPEL (§ 68*)—GROUNDS—POSITION IN JUDICIAL PROCEEDINGS.

Where a corporation, which succeeded to the rights of the lessee in a coal mining lease, resisted a suit by the lessor for a forfeiture of the lease, obtained and acquiesced in a decree denying a forfeiture, referring the case to a master to compute the amount due the lessor under the terms of the lease, and making it a lien, and continued to mine and remove coal for two years with as full knowledge as the lessor as to the condition and extent of the coal underlying the property and until it became hopelessly insolvent through no fault of the lessor or failure of the mine, it is estopped to ask a cancellation of the lease or an abatement of the bonus agreed to be paid for the mining right on the alleged ground that the quantity of coal was misrepresented by the lessor.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.*]

4. MINES AND MINERALS (§ 58*)—COAL MINING LEASE—VALIDITY.

Evidence *held* insufficient to sustain the claim of a coal mining lessee that the lease was induced by fraud of the lessor.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 168, 169; Dec. Dig. § 58.*]

Woods, Circuit Judge, dissenting.

Appeals from the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry Clay McDowell, Judge.

Suit in equity by Thomas T. Boswell, Merville H. Carter, and Andrew C. Snyder against the Big Vein Pocahontas Coal Company, in which Ollie H. Browning, and James S. Browning, Jr., an infant, by

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

James S. Browning, his next friend, were interveners. Suit by the Colonial Trust Company against the Big Vein Pocahontas Coal Company. Suits consolidated. From the decree, interveners appeal. Reversed.

See, also, 126 C. C. A. 512, 209 Fed. 788.

W. J. Henson, of Roanoke, Va., and Richard B. Tippett, of Baltimore, Md. (Henson & Bowen, of Tazewell, Va., on the brief), for appellants.

W. H. DeC. Wright, of Baltimore, Md., and Geo. W. St. Clair, of Tazewell, Va. (E. P. Keech, Jr., and Charles Morris Howard, both of Baltimore, Md., on the brief), for appellees.

Before KNAPP and WOODS, Circuit Judges, and DAYTON, District Judge.

DAYTON, District Judge. This record is voluminous. It comprises more than 1,500 printed pages. A number of questions are raised touching the jurisdiction of the court and the pleadings allowed to be made. We will not undertake to discuss many of these questions, not because we have not carefully considered them, but because, in our view of the true solution of the controversy, this discussion and determination become unnecessary.

The material facts, as briefly summarized as possible, may be stated to be these: Mrs. Browning is the owner of two tracts, and, as tenant in common with her infant son, James S. Browning, of a half interest in a third tract of land situate in Tazewell county, Va. She also claims an interest in a fourth tract, known as the Hoge land, but her rights therein are disputed by adjoining landowners. These tracts adjoin each other and are partially, at least, underlaid with the well-known Pocahontas Coal seams. Prior to March 12, 1909, she had erected the necessary plant and machinery to conduct a mining operation of the vein known as No. 3 of this coal. In connection with this plant and machinery, she was conducting a store or commissary. The court below estimated that such plant, machinery, live stock used in the mining operation, and commissary were reasonably worth $25,000. The mining operation was personally conducted by Mrs. Browning, and she was the legal guardian of her infant son.

On this March 12, 1909, she in her own right and as guardian of her son, and her husband, entered into a very full, elaborate, and carefully drawn agreement of lease with Thomas T. Boswell. It will be sufficient for our purposes to call attention to the fact that: (a) It gave the lessee the exclusive right to mine and remove, within a period of 50 years, all the "Pocahontas No. 3" vein of coal underlying two of the tracts and a portion of the third lying "north of the top or summit of Laurel Ridge"; (b) that it described by metes and bounds only one of the three tracts, and in no way attempted to estimate in acres the combined boundary of the three tracts; (3) that in express terms it provided that the lease was in gross and not by acreage; (d) that it sold outright and transferred to Boswell the mining plant, commissary, machinery, etc., used and operated theretofore by Mrs. Browning; (e) that the consideration to be paid was $50,000 cash on or before April

1, 1909, and $150,000 in three equal annual payments thereafter, with interest from date until paid at the rate of 5 per centum per annum (with lien reserved upon all the property leased and sold to secure payment) and a long ton royalty of 15 cents to be paid for the coal mined and removed; (f) that this royalty should, for the first three years, amount each year to the sum of $22,500, payable in quarterly installments of $5,625, beginning on April 1, 1909, and ending on March 31, 1912, and thereafter it should amount to at least $45,000 a year, payable in quarterly installments; (g) that any failure on the part of the lessee to keep and perform its terms and conditions for a period of 30 days should, at the option of the lessors, ipso facto operate as a forfeiture of the lease with right to lessors of re-entry and possession; (h) that the lessee should have until April 1, 1909, to examine title to the property and, in case he found defects therein, to disaffirm the contract and be reimbursed the money paid by him; and (k) that, upon expiration of the lease, the lessors should have right to purchase improvements made by lessee at a price fixed by agreed arbitrators, and, if not so purchased, then lessee should have right within 90 days thereafter to remove the same.

Boswell thereupon organized the defendant corporation, the Big Vein Pocahontas Coal Company, and assigned this lease to it, it assuming his obligations thereunder; the Brownings, however, not being parties to such assignment. This corporation was organized with an authorized capital of $300,000, which it is alleged was issued and fully paid up. On May 1, 1909, it executed a deed of trust to the Colonial Trust Company, trustee, upon the property, to secure a bond issue of $400,000, of which it issued, sold, or put up as collateral security $275,000 thereof. Carter, Snyder, and Boswell became stockholders and bondholders of the company, and Boswell also became a surety of it for over $11,000 on its notes. After an operation of nearly 19 months, this company found itself in financial difficulties. It had subjected itself to demand of forfeiture of the lease by the Brownings, for that it had paid to them upon the $50,000 installment, on April 1st preceding, only the sum of $25,800 (and $15,000 of this had been paid in stock of the company), leaving $24,200 overdue and unpaid. In addition to this it was in arrears to them in the further sum of $5,625 for due and unpaid royalties. In this condition of things, Carter, Snyder, and Boswell filed their bill in the court below, setting forth the facts in detail and charging that valuable improvements in the nature of a large and superior mining plant, costing $220,000, had been made upon the property, in consequence of which, and for other causes, the company was temporarily unable to meet its obligations to the Brownings, to its working miners and others, but expressing their belief that the property and assets of the defendant company far exceeded in value the amount of its indebtedness, provided its integrity should be maintained and its operation continued and the dissipation, loss, and waste, which would inevitably result from the levying of executions upon the same, prevented. It is to be particularly noted that in this bill not the slightest assault is made upon the integrity of the lease with the Brownings, but, on the contrary, its validity, its assignment by Boswell to the company, the assumption of its fulfillment by the latter, and the

amounts of payment under it, due and to become due and payable, to the Brownings, as well as the payments actually made, are clearly and correctly set forth. The sole defendant to this bill, the Big Vein Pocahontas Coal Company, by its treasurer, with full authority conferred upon him by its stockholders to do so, filed an immediate answer, and upon such bill and answer the court below at once appointed receivers to take charge of the company's property and continue its mining operations.

Some 10 to 15 days thereafter (exact date not given in the record), the Brownings presented their petition in this cause, admitting the execution of the lease to Boswell, his assignment thereof to the company, and calling attention specifically to certain of its clauses under and by virtue of which they charged a forfeiture thereof and asserted their right and election to re-enter and take possession, and prayed the receivers be ordered to turn over the property to them. However, if the court should determine to refuse them this relief, they averred their lessee Boswell to be a nonresident of the state, financially embarrassed, and his assignee, the company, to be practically insolvent, and their only security for the balance due them to be the coal in place; in consequence they insisted that a first lien for the unpaid balance of the $200,000, and for the royalty money set forth in the lease, be decreed direct against the property, and that the receivers be not permitted to mine such coal so long as arrears of such debt and royalty remained unpaid. They alleged in this connection:

"If the receivers are unsuccessful and do a losing business, as the company seems to have done, petitioners' coal will be mined, leaving unpaid the deferred payments. In other words, the petitioners run the entire risk of a successful operation of the plant by the court's receivers, and the corpus of their property is being used for these purposes."

To this petition Boswell filed a detailed answer manifestly for the sole purpose of contesting the demand of the Brownings for a declaration of forfeiture of the lease and an order directing the receivers to turn over the property to them. To this end he denied either himself to be financially embarrassed or the company to be practically insolvent. On the contrary, he says:

"He believes that, if the orderly administration of the trust may be allowed to proceed without interference from the petitioners, then said petitioners will receive all payments properly and lawfully due unto them, and that their rights under said lease, as the same may be adjudicated by this honorable court, will be secured and protected."

Again it is to be distinctly noted that in this answer no assault is made upon the right of the Brownings to recover the full $200,000, less payments made, and the royalty provided for in the lease; in fact, their right to have the same declared a first lien as claimed by them, in case forfeiture of the lease be denied, is not contested. The sole contention is that "petitioners should not be permitted to interfere with the orderly administration of the trust" by the receivers under direction of the court.

The Big Vein Pocahontas Coal Company, Snyder, and Carter, and the Colonial Trust Company, trustee, appeared and filed answers to

this petition of the Brownings, all adopting and affirming each and every allegation set forth in Boswell's answer thereto. To these answers replications were filed by the Brownings. About this time, the last of January or first days in February, 1911 (the exact date is not set forth in the record), the court heard the cause upon this petition of the Brownings, and among other things—

"ordered, adjudged, and decreed that Ollie H. Browning, in her own right, and as guardian of James S. Browning, Jr., infant, shall have and be entitled to a first and prior lien upon the lands, real estate, property, equipment, and improvements constituting the corpus of the lease from said petitioners unto Thomas T. Boswell and in the proceedings referred to, for all the royalties due and to become due, according to the terms of said lease and for the true and lawful balance remaining unpaid upon the bonus payment of $200,000 in said lease mentioned and covenanted to be paid, and all interest due and to become due thereon; the amount of such principal and interest, respectively, to be ascertained and reported by the master appointed in these proceedings."

Such master by the decree was appointed and subsequently reported to be due upon the $200,000 claim a balance of principal and interest of $139,746.59, on July 24, 1911. Again it is to be noted that, at the time the master considered this matter, Boswell, the company, Snyder, and Carter, and the Colonial Trust Company, trustee, had made themselves parties to the proceedings by intervening and filing their answers to the petitions of the Brownings, asserting their claims and demands under the lease; that the master took the evidence necessary, ascertained the balance due, and made his report, with not a single objection made by these parties or any one of them to the claims or to his report finding this balance due thereon.

More than six months after the entry of this decree ascertaining the right of the Brownings to recover the unpaid balance of the $200,000, and declaring it a first lien upon the property (which decree never was appealed from), and nearly a year after the appointment of the receivers, and more than two years after the execution of the lease and continuous acceptance and operation thereunder, with a master's report unexcepted to by these parties filed in the cause ascertaining the unpaid balance due, Snyder and Carter, two of the original plaintiffs, and the Big Vein Pocahontas Company, the original defendant, filed a supplemental answer and cross-bill to the Brownings' petition, and subsequently Boswell did likewise. These answers and cross-bills alleged that Boswell had been induced to enter into the lease by reason of false representation made by the Brownings as to how much of the leased premises was underlaid with the No. 3 Pocahontas vein of coal, and prayed a rescission of the lease and return payment of the sums paid by Boswell or the company, including sums expended in the erection of the new plant, or, in default thereof, for an abatement of both the $200,000 and the royalty to be paid for the lease.

Defense was made to these cross-bills by demurrer and answer; the demurrer was overruled, a replication filed, and depositions taken. While the taking of the depositions was in progress, an amended cross-bill was filed, which Mrs. Browning answered, and issue was joined thereon, and further depositions were taken, and the cause heard on its merits.

The court rendered a written opinion, holding that a case for abatement of the purchase price had been made out, and that the cross-complaint had also made a case for damages by reason of the corporation having constructed an unnecessarily expensive plant, the coal acreage considered, and announced its intention to refer certain questions to a master to ascertain and report thereon. Thereupon Mrs. Browning filed two petitions, accompanied by affidavits of herself and others, asking that certain matters arising on the record be also referred to the master, to whom the cause was to be referred.

The prayer of the first petition was that the master might inquire and report the value of the Browning plant already erected and in operation at the time of the lease, including the stock of goods, mules, and timber rights that went with the lease. The other petition averred that the Big Vein Pocahontas Coal Company knew the fact that a great portion of the leased premises was not underlaid with coal prior to the erection of its plant, or a greater part thereof. Evidence to that effect having been already taken, and full affidavits filed with the petition insisting that if the corporation was entitled to any damages at all, by reason of the erection of an unnecessarily large plant, the corporation was not entitled to damages on account thereof, for any portion of the plant erected after knowledge of the facts, the court was asked to have the master take evidence and report as to matters set up in said petition. But the court overruled both petitions and declined to refer any of the matters referred to therein to the master.

The infant, James S. Browning, Jr., who had not been made a party to the proceedings, but who was a party to the lease, by his guardian, then filed an intervening petition setting forth his interests in the premises, calling attention of the court to the proceedings in Tazewell circuit court for the confirmation of the lease, and to the fact that said cause was still pending, and that all the parties were before that court; that the lease as to him was a judicial lease; that the circuit court of Tazewell county was the only court that had the jurisdiction to rescind the lease, or modify its decree of confirmation, by abatement of the purchase price, and further insisting that, if he was wrong as to this, he was certainly entitled to be made a party defendant to these proceedings so that his interests might be protected, and urged the court to require the cross-complainants to amend their bill, by making him a party defendant, in order that he might appear and protect his rights in the premises; and that the court would then appoint him a guardian ad litem to represent his interests in the cause. The prayer of this petition was overruled by the court. The court then referred the cause to a special master, to take evidence and report on the following matters:

"(a) The difference between the value to the present plant at the time the coal in No. 3 seam will be exhausted if worked out under the present lease and the value at that time of such a plant as a reasonable, prudent coal operator, having ample capital, should have installed for the best results; it having been fully known at the date of the lease that the lease included 431.4 acres of land entirely barren.

"(b) Also the difference between the value to the successors in interest of the lessee under the lease of March 12, 1909, filed with the original bill in this cause, of the plant that has been installed on the leased premises by the

Big Vein Pocahontas Coal Company and the value to it and its successors in interest of such plant as is described in paragraph (a) above. In ascertaining this item, account will be taken from the installation of the plant now on the premises to the date at which the available coal of the No. 3 bed on the premises will probably be exhausted if mined as provided for under the aforesaid lease; and also account will be taken of the provision in the lease in regard to the rights of the parties as to the plant upon the exhaustion of the No. 3 bed of coal.

"(c) If desired by counsel for either side, the said master will also take evidence concerning the report whether or not the Big Vein Pocahontas Coal Company installed an unreasonably expensive plant in view of a justifiable belief on its part that the leased premises carried approximately 647.8 acres of the No. 3 bed of coal; and if so, how much more the said plant cost than should reasonably have been expended thereon, under the belief above mentioned.

"(d) The area of the No. 3 bed of coal mined out prior to April 1, 1909.

"(e) The area of the said bed of coal rendered commercially unavailable prior to April 1, 1909.

"(f) Whether or not the Big Vein Pocahontas Coal Company or the receivers in this cause have committed waste of coal or have damaged the mines by improper mining; and if so, to what extent pecuniarily?"

"The difference between the cost of the plant which has been installed by the Big Vein Pocahontas Coal Company on the premises leased by the contract of March 12, 1912, filed with the original bill in this case, and the cost of such plant as a reasonably prudent coal operator, having ample capital, would have installed for the best results, had it been fully known at the date of the lease that the leased premises included 431.4 acres of land entirely barren of coal."

Much evidence was taken before the master, who made and filed his report, to which report Mrs. Browning filed sundry exceptions.

In the meantime, Mrs. Browning filed a petition for rehearing, contending that the principles upon which the court proposed to make the abatement, as expressed in its opinion, were entirely wrong, and suggested what, in the opinion of her counsel, was the proper principle upon which the abatement should be made, if any abatement was made at all.

The cause came on to be heard; the court declined to recede from the principles as to the abatement it had already adopted, overruled all the exceptions of Mrs. Browning to the report of the special master, and, after making the necessary calculations, abated the purchase money by $121,113.79, and rendered a decree against Mrs. Browning for the additional sum of $51,353.47, for damages. Said damages being the difference between the cost of the plant actually constructed and such a plant as in the opinion of the master and court a prudent man would have constructed, had the shortage in the coal area been known at the time.

Prior to the rendition of this last-named decree, the Big Vein Pocahontas Coal Company having made default in the payment of the interest on its bonds, the trustee, the Colonial Trust Company, filed, in the Circuit Court of the United States for the Western District of Virginia, its bill against the Big Vein Pocahontas Coal Company, praying a foreclosure of the mortgage, and that cause and the one under consideration were consolidated and heard together, and the court thereupon, at the same time it rendered its decree against Mrs. Browning, rendered a decree in this consolidated cause foreclosing the mortgage

and decreeing a sale of the premises. Mrs. Browning then filed a petition for rehearing, which was dismissed.

From the decrees abating the purchase money and decreeing the damages, Mrs. Browning has appealed to this court. From the decree denying the prayer of her petition for rehearing and dismissing the same, and from the decree rendered April 10, 1913, James S. Browning, Jr., an infant, suing by his next friend, James S. Browning, has also appealed.

A discussion of a number of questions arising as regards the regularity of these pleadings and the correctness of the rulings of the court below, set forth in the assignments of error and very ably argued by counsel upon both sides, might be interesting, but in our opinion is unnecessary. Both sides to the controversy have practically shifted their positions. The Brownings, in the beginning, insisted that the lease be declared forfeited, but after the court, by its decree entered about the 1st of February, 1910 (exact date not disclosed by the record), had adjudged the integrity of their demand for the purchase price of $200,000 and the 15 cents long ton royalty and declared them to be entitled to a first lien upon the property as security therefor, their future efforts seem to have been directed in effect toward maintaining the integrity of this decree. On the other hand, as we have seen, their opponents, comprising their lessee Boswell, Snyder, and Carter, his codefendant in the original bill, the corporation, sole defendant therein, and the trust company, its mortgage trustee, coming in by intervention, did not deny at first the Brownings' right to their full purchase money and royalty and the lien fixed therefor, but resisted the declaration of forfeiture. Subsequently, however, they joined in denying the debt of the Brownings, set up fraud in the procurement of the contract, and, because thereof, demanded either, first, rescission, or, second, abatement, of such contract debt. Had the Brownings stood squarely upon their demand for a declaration of forfeiture and their right to re-enter and have possession of the property, it is not at all certain that they would not have been entitled to it, but not having appealed from the decree denying them this right, but, on the contrary, having in effect acquiesced in the terms of this decree adjudging to them their $200,000 and 15 cents royalty, they must be held to have waived their right to forfeiture. And, having waived the forfeiture, it does not seem to us that they can deny now the jurisdiction of the court because of the interest of the infant son being under the state court's control. Mrs. Browning was undeniably the guardian of this infant, and the lease executed by her as such guardian, as well as in her own right, was approved by this state court in the infant's interest. But, if this were not so, the forfeiture waived and the institution of the second suit by the Colonial Trust Company, trustee, to foreclose and sell the property for default in payment of interest, undoubtedly conferred jurisdiction because of an independent relief sought thereby, wholly beyond the state court's power to grant under the bill and proceedings pending before it. Therefore the consolidation of these two causes by the court below enables us to sweep all technical questions aside and determine this controversy upon its merits; upon the ques-

tion of whether or not the court below was justified in abating the purchase price of the lease and awarding damages for a new plant erected at unnecessary cost, considering the amount of coal to be mined actually under the premises.

[1] I. What is this contract? It is one conferring on Boswell the right to enter upon the Brownings' land and remove all the coal underlying it of this particular seam upon certain conditions and for a fixed price to be paid for each ton to be removed. What is or was this $200,000 to be paid for? Certainly not as a price for the coal, or else the contract would have required the royalty payments of 15 cents per ton when removed and payable to be credited upon it. On the contrary, $25,000 of it was for plant and personal property sold outright at value and delivered, and the remaining $175,000 was a bonus agreed to be paid for the right to mine and remove whatever coal might underlie the land at a cost of 15 cents per ton upon the conditions and terms of payment set forth in the lease contract. In other words, this was a mining lease and not a sale of either land or coal by the acre, nor of a fixed quantity or number of tons, but, on the contrary, a right in gross, as specifically set forth in the contract to remove all the No. 3 seam of coal, much or little, underlying the land.

In mining sections of this country many such contracts, providing for the payment of bonuses for the right to bore for oil and gas and, to a lesser extent, to mine coal, have been made and are being made daily and have been universally upheld by the courts, although it has and may turn out that such mining leases are absolutely worthless by reason of no oil, gas, or coal underlying the land. Bonuses of this character are paid upon thousands of acres of land in such sections to hold the right to bore for oil and gas for fixed periods of from 30 days to 10 years, and the courts have enforced their payment. This is done upon the clean-cut distinction to be drawn between a contract which sells and conveys the property itself and one which grants the right to purchase it at a fixed price; in other words, between a sale contract and a lease contract. Such mining lease does not convey in fee the minerals in place, but only a contingent, defeasible interest therein. As said in Moore v. Sawyer (C. C.) 167 Fed. 826:

"An instrument in terms granting all the oil, gas, coal, and asphaltum under certain described land, but which was denominated a lease, had a definite term of 15 years, and provided, in addition to a cash payment of $50, for the payment of a royalty on all oil produced, held not a conveyance in fee of the minerals in place, but merely a lease."

In Backer v. Penn. Lubricating Co., 162 Fed. 627, 89 C. C. A. 419 (6th Ct. Ct. App.), it is said:

An oil lease in ordinary form, giving the lessee the exclusive right to explore for, produce, and sell oil from the land on payment of a royalty, does not vest him with title to the oil in place.

In Kansas Nat. Gas Co. v. Board, Com'rs, etc., 75 Kan. 335, 89 Pac. 750, held:

An oil and gas lease, conferring on the lessee the right to enter on, operate for, and produce oil and gas upon land described, and containing no provision indicating otherwise, grants a license to enter and explore, and, if oil

or gas is found, the right to produce and sever it. Until mineral of the kind is actually produced and severed so that it becomes personalty, the lessee has no title to any specified portion of it, but the legal title and the possession of the entire mass and volume remains in the owner of the strata in which it is confined.

See, also, Wagner v. Mallory, 169 N. Y. 501, 62 N. E. 584; Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320 (this 4th Ct.); Venture Oil Co. v. Fretts, 152 Pa. 451, 35 Atl. 732; Brown v. Fowler, 65 Ohio, 507-521, 63 N. E. 76; Steelsmith v. Gartlan, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107.

But it may be said that a coal lease is different from one for oil and gas. Only in degree and not in principle. The courts have held them to be analogous, as see Starn v. Huffman, 62 W. Va. 422, at page 426, 59 S. E. 179, at page 180, where it is said:

"It is true * * * that more diligence is required in oil and gas leases than leases for other minerals; yet the same general principles prevail."

See, also, Rorer Iron Co. v. Trout, 83 Va. 397, 2 S. E. 713, 5 Am. St. Rep. 285; Cowan v. Bradford Iron Co., 83 Va. 547, 3 S. E. 120, where the distinction between mining leases of this character and sales of mineral outright are very clearly drawn by the Supreme Court of the state from which this Browning Case comes to us. See, also, Archer on Oil and Gas, where many cases are cited and considered.

From these cases, it would seem clearly established that such mining leases at the instance of the lessor can be canceled as cloud on title by the courts for failure on the part of the lessee to promptly operate, although containing no forfeiture or re-entry clause as here, although containing no limit of time to run and no clauses fixing time to commence and defining the extent of operation as here.

[2] It follows, we think, inevitably, that, on the part of the lessee, courts can cancel in toto a lease that has been procured from him by fraud, but must deny his right to undertake to abate the payments to be made for the right to mine, agreed upon. The right to mine in such case is a right to produce and purchase and is not susceptible of division and abatement. The reason for this seems to us very apparent.

The lessee has the right to remove all the coal, but he is not required to remove it all. He is required to mine a minimum quantity each year and pay for it by the ton as taken, but, if he finds it unprofitable, he can forfeit the lease at any time, and the lessor's remedy is re-entry, and an action at law for damages possibly. If the court abates this "bonus" given for this right to mine and purchase, then there is nothing whatever to prevent the corporation lessee from mining the coal until it has reimbursed itself the balance of the unabated "bonus" and then quit. Or it, as in this case, may become insolvent and go into hands of receivers and eventual sale be directed as in this case. What can the court direct to be sold—the coal itself? Not by any means. It can sell only the right to mine and remove the coal upon terms and payments required by this mining lease. Such sale, in other words, can only, so far as the coal itself is concerned, create for the use of somebody a bonus sum to be paid for the right to mine and purchase. If

Boswell's bonus, agreed by him to be paid for this right, is abated as proposed, and it becomes necessary for Mrs. Browning to buy the right for her protection, it will in fact require her to pay a sum of money for the right to mine and sell her own property, and this in the interest of a bankrupt lessee who has wholly failed to comply with his contract to exercise that right to mine and purchase. Our conclusion, therefore, is that the right of abatement in cases of sales of mineral is clear as in all cases of real estate, where specific performance, rescission, or abatement can be decreed, but in the case of mining leases there can be no power in the courts to decree specific performance—no power to compel the lessee to mine and remove the coal—nor can a court, without making an entire new contract for the parties, divide up and abate in part an indivisible right to buy and remove the coal; the only remedy possible to either party who may have been defrauded is to have the contract canceled.

[3] II. This brings us to the question of whether this lease contract can or could be now canceled at the instance of these defendants. We think not.

First, because of their laches under the very many decisions, all uniform in tenor, illustrated by such as Grymes v. Sanders, 93 U. S. 55, 23 L. Ed. 798, where it is said:

"Where a party desires to rescind, upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be as conclusively bound by the contract as if the mistake or fraud had not occurred."

And see Shappirio v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419, where this ruling is reiterated.

In this case it is unquestionably true that defendants held this property for nearly two years after they had information, in every respect as full and complete as Mrs. Browning or any other living soul at the time could have, as to the existence of this fault, yet they refused her offer to rescind, held on to the property, mined thousands of tons of the coal, had 20 years of mining assured before them (see Judge McDowell's opinion for this statement), resisted Mrs. Browning's right to forfeit the lease, filed this bill for the purpose, insisted that the lease be enforced, acknowledged her right to the bonus, allowed a decree to go therefor and for the royalty in arrears, a reference to be made to ascertain and a report to be made ascertaining the amount without objection. Only after it was seen that bad management, the overloading of the company by bond and stock issues, and other reasons, for which they were solely responsible, it had become impossible for them to comply with their contract did they originate this idea of saving for themselves whatever they could by securing the court to make a new contract for the right to mine the coal (not for the coal itself) and to sell this right under its new contract (which Mrs. Browning never agreed to) for such sum as can be realized therefor.

Second. The decree of January, 1911, was a final one, conceded to and unappealed from by these defendants, and estopped them from subsequent inconsistent claims for relief.

[4] III. We do not deem it necessary to dwell upon the question of misrepresentations charged to have been made by Mrs. Browning, as, under the view we have taken above, any such misrepresentations become immaterial, so far as abatement can be based upon them. It is sufficient for us to say that, in selling this right to mine and her plant to Boswell for $200,000, we do not from the evidence doubt for a moment that she regarded it as fully worth that. She had consistently valued the plant and coal in fee at $1,000,000; she made no representation as to the quantity of coal underlying the land; her lease in terms stated it was not to be of a specific number of tons but in gross, much or little; she could no more tell than could Boswell or any other man as to whether a fault existed under these lands because no bore holes had been made to test it and were only afterwards made by order of the court by the receivers, paid for out of funds arising from the sale of her coal. Boswell knew this. He admitted he was mistaken as to the hill she pointed to from her porch; he had, even after signing the lease, by its terms some 20 days for examination of title and property and, if he ascertained defects, to have the contract rescinded. We cannot restrain the strongest conviction that to allow Boswell and his associates, experienced coal operators, to maintain this defense at the time and under the circumstances they have undertaken to do so would be grossly inequitable.

It is practical experience in coal mining that it takes thousands of dollars and many months of time to open up a mine where operations can be carried on profitably—the internal development has, as shown by mine maps, to be done according to a fixed plan. In short, it is like laying off a town above ground but far more difficult. Streets (called headings) have to be first mined out ordinarily by pick, and it is a slow process; counter or cross headings have to be also picked out; rooms or squares have to be thus secured, the mining out of which can be done by cutting machines; air shafts and chambers have to be dug at large expense; the work goes on slowly and costly delays are inevitable. Add to this that a mine by reason of inexperienced, reckless, unscrupulous, or unscientific operation in laying out of these headings, air shafts, and chambers, the mining out improperly of coal where pillars should be left and maintained, and otherwise, may be almost, if not quite, ruined, and it will be apparent that, when Mrs. Browning gave over the control of a mine fully developed internally, and which had been successfully operated by her for years, taking all the risks of her lessee's possible bad operation thereof, the bonus she required to be paid was not at all unreasonable.

From these and other facts disclosed by the record we are fully persuaded that the parties dealt with each other at arm's length in making this a mining lease contract; that it was one of known hazard on the part of Boswell and his associates; and that their defense of fraud and misrepresentation, if not simply an afterthought arising when they realized the receivers' management was not likely to prevent default and loss to them in their investments, has at least proven itself wholly inadequate, under well-settled legal principles, to affect a contract of this character. It follows that the decree of the court be-

low must be reversed, and these causes be remanded, with instructions to enforce in full as a first lien the demand of the Brownings regardless of the defense so asserted.

Reversed.

WOODS, Circuit Judge (dissenting). The importance of the issues involved in this appeal seem to justify a statement of my reasons for dissent.

On March 12, 1909, Mrs. Ollie H. Browning, James S. Browning, her husband, and James S. Browning, Jr., an infant son, by Mrs. Ollie H. Browning, his guardian, made a contract with Thomas T. Boswell by which they agreed to sell to Boswell coal known as the "Pocahontas" or "No. 3" seam in lands particularly described in the contract, together with machinery, live stock, and other personal property, and to lease the lands for the purpose of mining the coal for the term of 50 years. Boswell agreed to pay as a consideration $200,000, $50,000 cash, and the remainder in three installments of $50,000 each, on April 1, 1910, 1911, and 1912, and also to pay a royalty of 15 cents for every long ton of coal mined. The lease contained, among many other provisions, this stipulation:

"It is expressly understood and agreed between parties hereto that this is a lease in gross and not by the acreage."

Boswell took possession of the property on April 1, 1909, but immediately thereafter, on April 14, 1909, in pursuance of his expressed purpose when the contract was executed, he assigned all of his rights to Big Vein Pocahontas Coal Company, a corporation organized for the purpose of mining the coal. By proceedings instituted in the circuit court for Tazewell county, Va., to which Boswell and the coal company were parties, the court's sanction of the contract in behalf of the infant was obtained, and Mrs. Browning was authorized to receive his share of the payments to be made. On May 1, 1909, the coal company executed to the Colonial Trust Company a mortgage to secure bonds to the amount of $400,000, of which $275,000 have been issued. Soon after taking possession the coal company began to make extensive improvements in the mining plant, and in a little more than a year spent in this work more than $200,000. The company was not successful, and on October 28, 1910, the United States Circuit Court for the Western District of Virginia appointed E. P. Keech, Jr., and H. H. Heiner receivers under a bill filed by creditors, asking for the appointment of receivers and a sale of the property for the satisfaction of the liens. Mrs. Browning was not made a party defendant to the proceeding, but on her own behalf, and as guardian of the minor, James S. Browning, Jr., intervened and filed her petition in the cause, setting up her rights under the contract, including her right to a lien for the unpaid portion of the $200,000 purchase money and for the royalties due and to become due. In the answers of Boswell and other creditors, and of the coal company itself, made to this petition, nothing was alleged against the right of the petitioner to the enforcement of the terms of the lease. An order was made providing, among other things, that

Mrs. Browning was entitled to a lien for the unpaid portion of the purchase money, and the royalty, and referring the matter to Mr. H. Claude Pobst, as special master, to ascertain and report all the indebtedness of the company with the priorities and securities of creditors. Thereafter the master made a report finding a balance due on the $200,000 purchase money of $139,746.59 as of July 24, 1911. Mrs. Browning filed an exception on a matter of interest; and, while the report remained unconfirmed, the coal company, jointly with two of its creditors, and Thomas T. Boswell and Colonial Trust Company each filed a pleading, called a cross-bill, and supplemental answer to the petition of Mrs. Browning, alleging that the lease contract had been obtained by false and fraudulent representations made to Boswell by Mrs. Browning and her husband, James S. Browning, as to the area of the leased land underlaid by No. 3 coal. On this allegation the court was asked to annul the contract or grant a fair abatement in the price contracted for, and to require Mrs. Browning and her husband to pay the coal company the money expended for a new plant and equipment in excess of the amount which would have been expended for a smaller plant, had the true area of the coal seam been known. Amendments were allowed, alleging fraud in the additional particulars that Mrs. Browning falsely represented to Boswell that she had been offered $1,000,000 for the property, and that without the knowledge of Boswell she employed and paid John M. Ambrose to aid in making the sale and lease as her agent, when she knew that he had been employed and was relied on by Boswell to aid him in the transaction.

After the consideration of volumes of testimony, the final judgment of the court was that the contract was procured by fraud; that the coal company was entitled to an abatement of $121,113.79 from the sum which Boswell had agreed to pay; and that there should be a further deduction of $51,353.47 for the excess expended on the plant and equipment which would not have been expended but for the deception of Mrs. Browning as to the extent of the coal area. The assignments of error on collateral matters may be more shortly disposed of after discussion of the main issue of misrepresentation.

1. It is perfectly clear that there has been no adjudication of this or any other matter involved in the litigation in favor of Mrs. Browning, for the report of the master as to the amount due her has never been confirmed. But, even if it had been, it was within the discretion of the district judge to open it.

2. Boswell was in search of coal lands and engaged Ambrose to aid him in finding coal suitable for his purpose. Through Ambrose, Boswell went to the land of Mrs. Browning in Virginia, and after inspection in company with Ambrose, and considerable conversation with Mrs. Browning and her husband and Ambrose, agreed with Mrs. Browning on the terms of the contract which was soon after executed in Baltimore. No complaint is made that the area covered by the lease was supposed by Mrs. Browning to be 1,057 acres and turned out to be only 762.1 acres. The misrepresentation alleged and relied on is that she and her husband plainly stated as a fact, which they had ascertained by proper tests, that the entire land, except that already min-

ed, was underlaid by Pocahontas coal, No. 3, whereas it turned out that there was a fault line in the land, and that all of the 431.4 acres south of that line was entirely barren of the coal seam.

Adjustment of the equities of the parties may be difficult, but it is evident that, if the contract between Mrs. Browning and Boswell is enforced according to its terms, Mrs. Browning will receive a large amount of money from the coal company, as assignee, for property which she did not have, and which therefore neither Boswell nor the coal company ever received from her.

Careful study of the record does not lead to the conclusion that Mrs. Browning was guilty of intentional falsehood in her representation as to the coal area. It is true that in mining she had followed the seam at one place almost to the surface; that at places it was almost perpendicular; that she had heard from others of a fault line beyond which the seam did not extend; and that she had been told by Mr. Mann, whom she should have regarded high authority, that she was mistaken as to the extent of her coal field. But it is also true that she had found coal south of Laurel creek, which she and others thought to be the supposed fault line; that, with or without reason, she had been embittered by contests about her coal land and supposed the hands of others were against her. The evidence of her attitude after the lease, as well as before, shows that these things had so warped her mind and perverted her judgment that she held to her conviction as to the coal area in the face of facts which would have overturned or at least shaken the conviction of an unprejudiced mind.

As to the precise language used by Mrs. Browning in expressing her conviction to Boswell and her reasons for it, the evidence is not reconcilable. But the exact places in which she said she had made entries showing that the coal underlaid all the land, and other details, are not of primary importance. The material fact proved is that she did tell Boswell that by making entries and by other means she had definitely ascertained that the coal seam underlaid all the land. Boswell was no doubt too trustful and should not have made so important a transaction without more careful investigation; but examination as to the extent of the coal field involved delay, and it does not lie in Mrs. Browning's mouth to say he and his associates must suffer and she herself profit by his reliance on her statement that she had ascertained as a fact that the coal extended under the entire land. Having induced the purchaser to confide in her positive declaration as to the extent of the coal area, she should suffer the consequences of her error by abating the purchase price, however honest may have been her convictions. McFerran v. Taylor, 7 U. S. (3 Cranch) 270, 2 L. Ed. 436; Smith v. Richards, 38 U. S. (13 Pet.) 26, 10 L. Ed. 42; Kell v. Trenchard, 142 Fed. 16, 73 C. C. A. 202.

"A court of equity would be of little value if it could suppress only positive frauds, and leave mutual mistakes, innocently made, to work intolerable mischief, contrary to the intention of the parties. It would be to allow an act originating in innocence to operate ultimately as fraud, by enabling the party who receives the benefit of the mistake to resist the claims of justice under the shelter of a rule framed to protect it." Story, Eq. Jur. (10th Ed.) § 155.

It is not possible that equity allows an exemption from this rule of those who sell coal lands on an explicit representation as to the area of coal.

The testimony is not convincing that Mrs. Browning intended to act corruptly with Ambrose as her own agent to sell while he was professing to aid Boswell as his agent in arriving at the value of the coal field. But the law looks with the utmost jealousy on double-dealing, and will always grant relief to a party making a transaction through an agent who, without his consent, has acted in association with the other party; and it is not necessary that there should be any intention to deceive or overreach. United States v. Carter, 217 U. S. 286, 30 Sup. Ct. 515, 54 L. Ed. 769, 19 Ann. Cas. 594; Ferguson v. Gooch, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234; Empire State Ins. Co. v. American Central Ins. Co., 138 N. Y. 446, 34 N. E. 200; Emons v. Alvord, 177 Mass. 466, 59 N. E. 126. Mrs. Browning's letter to Ambrose in response to his demand for a commission shows that she had given him to understand that she would pay him a commission upon an advantageous disposition of the coal, and, when the contract was made, she knew Boswell relied on him as his own agent. It made no difference that she may have forgotten her offer to Ambrose or attached no importance to it; she cannot claim the benefit of a bargain made under such conditions, especially when Ambrose by his own admission was acting the double part.

The statement made by Mrs. Browning to Boswell that the Consolidated Coal Company had made an offer of a million dollars for the property was based on another unwarranted inference of an inflamed and prejudiced mind. The evidence of Mrs. Browning that an offer of that sort was made seems to be uncontradicted. From the mere fact of an offer, she rushed to the unwarranted conclusion that it was made on behalf of her supposed enemy, the Consolidated Coal Company.

Importance is not attached to the action and statements of Col. Browning, for the reason that it would not be fair to hold Mrs. Browning bound by the sayings and doings of an inebriate husband, except in so far as they were sanctioned or confirmed by her.

For the reasons stated, it seems clear to me equity requires that Mrs. Browning should submit to an abatement from the consideration of $200,000 stipulated for in the contract, unless the claim be defeated by the particular defenses hereafter considered.

3. The demand that she should pay for the cost of the plant and equipment beyond what was required for the working of the coal actually acquired by Boswell stands on a different footing. This claim was allowed by the District Court under the principle laid down in Sigafus v. Porter, 179 U. S. 116, 21 Sup. Ct. 34, 45 L. Ed. 113, and other authorities, that one induced by false and fraudulent representations to make a purchase may recover, not only the difference between the real value and the price paid, but also such outlays as were legitimately attributable to the seller's conduct. On this point I am not only unable to concur in the finding by the District Court of actual fraud, but think the expenditures incurred in the erection of a plant and the

purchase of equipment beyond the real needs of the company were due to the negligence of Boswell and the coal company. According to the preponderance of evidence, facts were brought to the attention of Boswell, Sheehan, Ambrose, and other officers of the coal company only a few weeks after the lease contract was made, indicating the existence and location of the fatal fault line, and putting them on inquiry, if not on actual notice, that Mrs. Browning was mistaken as to the area of the coal land. Boswell, as the manager of the company, shut his eyes and went blindly forward with the expenditures, refusing to heed the warnings which required that he make careful examination before building the plant and supplying the equipment. The only explanation which suggests itself is that he was unwilling to face the truth after he had induced others to invest their money in the enterprise.

Whatever may have been the fault of Mrs. Browning, it was the duty of Boswell and the coal company to use due diligence to minimize the loss consequent upon her action; and the coal company cannot go to the extent of holding her responsible for the gross negligence of one or more of its officers in not heeding warnings as to the deficiency in coal area and in not making an examination before incurring any considerable expense. Warren v. Stoddart, 105 U. S. 224, 26 L. Ed. 1117; Cunningham Iron Co. v. Warren Mfg. Co. (C. C.) 80 Fed. 878; Lillard v. Kentucky, etc., Co., 134 Fed. 168, 67 C. C. A. 74. Assuming that no warning came until after the contract for the plant had been made, the company failed in its duty to endeavor to cancel or modify the contract, and thus reduce the damages falling on Mrs. Browning. For these reasons equity denies the right of the coal company to recover from Mrs. Browning the expenditures on the plant and equipment in excess of that required for the smaller area of coal.

The claim that this neglect of the lessees to have an examination of the coal field and their failure to make complaint of the shortage in coal area for about two years should also defeat the claim for an abatement of the purchase money is not well founded. It is true that such claims should be made as soon as the facts are known, and any subsequent promise to comply with the contract with full knowledge of the misrepresentation would preclude any relief to the lessee or purchaser. Fitzpatrick v. Flannagan, 106 U. S. 660, 1 Sup. Ct. 369, 27 L. Ed. 211. But Mrs. Browning cannot be allowed to hold the purchase money of property which she represented to be hers when she ought to have known it was not in existence, on the ground that the purchaser should not have relied on her representation. There is an obvious difference in the degree of promptness required for rescission and for abatement. Odbert v. Marquet (C. C.) 163 Fed. 892. No degree of diligence in ascertaining the deficiency could have affected its existence, or altered the fact that Mrs. Browning under the contract would receive money which was not her due. The demand for the abatement was made very soon after the deficiency was ascertained and communicated to the coal company by engineers appointed for the purpose of examination, and that was sufficient.

4. By demurrer it was contended that the misrepresentations, if any, were made to Boswell, and that his assignment of the lease contract to the coal company did not carry the right to claim damages for the misrepresentations. The principle does not apply where the right to damages is merely incidental to a subsisting substantial property right which has been assigned and which is itself susceptible of legal enforcement. National Valley Bank v. Hancock, 100 Va. 101, 40 S. E. 611, 57 L. R. A. 728, 93 Am. St. Rep. 933. Besides there can be no doubt that Mrs. Browning knew that the transaction with her was the initial step in a plan to form a coal company which would take over the property and work the mines. Being thus fully advised that the coal company was the real beneficiary of the contract, she is in privity with the company and liable to it as if she had contracted directly with it. Iowa, etc., Co. v. American, etc., Co. (C. C.) 32 Fed. 734; 20 Cyc. 80. The principle was strongly applied by this court in the recent case of National Bank v. Kershaw Oil Mill, 202 Fed. 90, 120 C. C. A. 362.

5. I am unable to agree that Mrs. Browning should escape abatement on the ground that the provision of the contract, "it is expressly understood and agreed between the parties hereto that this is a lease in gross and not by the acreage," refers to the extent of the coal seam. Courts do not favor contracts of hazard, and in arriving at the real agreement of parties, where a sale is made on the estimate of a given quantity, the presumption will always be indulged that the quantity controlled or influenced the price. McComb v. Gilkeson, 110 Va. 406, 66 S. E. 77, 135 Am. St. Rep. 944. Having sold her coal at a price based on her distinct representation that it underlay all the land leased, Mrs. Browning must point to something in the contract or other evidence clearly showing that the purchaser released her from the obligation imposed by the representation. The clause of the contract above quoted does not furnish this proof, for it expressly refers to the acreage of the land leased and not to the extent of the coal sold. To hold that Boswell by this provision of the contract meant to release Mrs. Browning from all obligation on account of her representations as to the quantity of coal purchased would be to impute to him great stupidity and put upon him and his assignees an unjust hardship by resorting to a forced construction of the agreement.

But, even if the clause quoted could be referred to the extent of the coal field, equity still requires relief for a deficiency so great that it is manifest the contract would not have been made had the truth been known. 39 Cyc. 1250, and cases cited. As is said in Wuest v. Moehrig, 24 Tex. Civ. App. 124, 57 S. W. 864:

> "The court acts in such cases, not upon the contract exhibited by the deed merely, but because it is shown by the evidence that the deed does not operate as by the real contract it was intended, and conveys more or less than it should have done."

6. The next question to be considered is whether the District Judge erred in denying the motion made by Mrs. Browning to have the infant, James S. Browning, Jr., made a party defendant after the filing of the cross-bill or supplemental answer of Boswell and the coal company asking relief from the lease contract.

If the remedy of rescission of the contract were appropriate, or if the funds in the hands of Mrs. Browning and to come into her hands under the contract were not adequate to meet all the demands of the infant, the assignment of error on this point would be serious. But the wrong done to the lessees and purchasers was the untrue representation as to the area of the coal field made by Mrs. Browning and not participated in by the infant. For the damages resulting from this wrong, Mrs. Browning, and not her infant son, is primarily responsible. It is true that the infant might be required by a court of equity to abate any unjust enrichment coming to him at the expense of the lessees and purchasers, if full relief for them could not be obtained from Mrs. Browning. But as a practical matter, even if the abatement should be allowed, it would not be necessary to decree anything against the infant in this cause, since Mrs. Browning has in her hands abundant resources arising from her interest in the contract to provide for the abatement without affecting the interest of the infant.

True, the court with propriety might have granted the motion on behalf of the infant to be made a party so that he might appear by guardian ad litem, and might have decided between the infant, James S. Browning, Jr., and Mrs. Browning what he ought in good conscience to contribute to the abatement, since it would be manifestly unjust to allow him to profit by her mistake as to the extent of the common property. McComb v. Gilkeson, 110 Va. 406, 66 S. E. 77, 135 Am. St. Rep. 944. But it is not necessary to send the case back on that issue, for Mrs. Browning and the infant both contend that his rights should be settled in the circuit court of Tazewell county, and the other parties cannot object to that course. Mrs. Browning, therefore, could ask in that court for any relief against the infant, James S. Browning, Jr., which might be properly due her.

7. It is not possible to arrive at the just measure of abatement with absolute accuracy, because Boswell knew some of the land was occupied by the railroad and some by the creek bed; that some had already been mined; and that some had been injured by Mrs. Browning's bad mining. It would serve no good purpose to extend this opinion by analysis of the evidence and computations. Consideration of the matter leads to the conclusion that the methods of stating the proportion and making the deductions adopted by the District Judge are as nearly correct as it is possible to make them. It is true, as argued by counsel for the appellant, that the portion of the coal field remote from the plant and to be worked in the future must have been considered by the parties less valuable, acre for acre, than that near the plant and to be worked immediately. But this consideration is offset by another, which is apparent, that, acre for acre, the value of the large coal field which Boswell supposed he was buying was greater than that of the small one which he actually acquired.

I am of the opinion, also, that the estimate of $25,000 as the value of the old plant is liberal to Mrs. Browning.

In my opinion the decree of the District Judge should be modified, and the cause remanded for such further proceedings as would be necessary to carry out the conclusions herein expressed.

In re SAMUELS et al.

Appeal of VALENTINE.

(Circuit Court of Appeals, Second Circuit. July 2, 1914.)

No. 249.

1. BANKRUPTCY (§ 69*)—PARTNERSHIP—ENTITY.

Under Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544, 547, 548 [U. S. Comp. St. 1901, pp. 3418, 3424]) §§ 1, 5, relating to bankruptcy proceedings against partnerships, a partnership is treated as an entity for at least some purposes.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 51–53, 56; Dec. Dig. § 69.*]

2. BANKRUPTCY (§ 54*)—PARTNERSHIP—MEMBERS OF FIRM—SOLVENCY.

A partnership cannot be adjudged a bankrupt so long as any of its members are individually solvent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 54, 84, 85; Dec. Dig. § 54.*]

3. BANKRUPTCY (§ 90*)—PARTNERSHIP—SECRET PARTNERS—MEMBER OF FIRM—ADJUDICATION—JURISDICTION.

In bankruptcy proceedings against a firm, the bankruptcy court has jurisdiction to inquire and determine whether an alleged secret partner is or is not a member of the firm, and, if he is, whether he is solvent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 124; Dec. Dig. § 90.*]

4. BANKRUPTCY (§ 81*)—PARTNERSHIP—SECRET PARTNER—OBLIGATION TO FILE SCHEDULES OF DEBTS AND LIABILITIES.

In bankruptcy proceedings against a firm, a creditor's petition against an alleged secret partner, asking that he be required to file schedules of his assets and liabilities on the theory that he was a member of the firm and liable for its debts, could not be sustained under Bankruptcy Act, § 59, providing the method by which creditors can proceed to have a person adjudged a bankrupt; there being no claim that the alleged partner was insolvent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113–118, 125; Dec. Dig. § 81.*]

5. BANKRUPTCY (§ 15*)—PROCEEDINGS AGAINST PARTNERSHIP—SECRET PARTNER—TRIAL OF ISSUE—DUTY TO FILE SCHEDULES—JURISDICTION.

Bankruptcy Act, § 21a, provides that a court of bankruptcy, on application of any officer, bankrupt, or creditor, may, by order, require any designated person to appear in court or before a referee and be examined concerning the acts, conduct, or property of the bankrupt, whose estate is in process of administration under the act. *Held*, that neither under such section nor independent thereof did a bankruptcy court have jurisdiction of a creditor's petition in proceedings against a firm to try the question of an alleged secret partner's membership in the firm against his will, and to compel him to file schedules of assets and liabilities.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 21; Dec. Dig. § 15.*]

6. BANKRUPTCY (§ 149*)—PARTNERSHIP—PROCEEDINGS AGAINST SECRET PARTNER.

A bankruptcy court in proceedings against a partnership has no jurisdiction to administer on the estate of an alleged secret partner without declaring him a bankrupt or finding him insolvent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 229; Dec. Dig. § 149.*]

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

7. BANKRUPTCY (§ 90*)—COURTS—JURISDICTION—PARTNERSHIP—PROCEEDINGS AGAINST PARTNER.

When no petition in bankruptcy has been filed against an alleged secret partner as an individual, and he asserts under oath that he is not a partner, he cannot be summarily adjudged such on an inquiry before a referee in bankruptcy to which he does not consent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 124; Dec. Dig. § 90.*]

Petition to Revise and Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here on a petition to review and appeal from an order of the District Court of the United States, Southern District of New York, entered October 14, 1913 (207 Fed. 195). An involuntary petition in bankruptcy was filed on August 6, 1912, against Jacques Samuels and Benjamin Lesser individually and as copartners composing the firm of Samuels & Lesser. The name of the firm was by mistake incorrectly stated in the petition, and was subsequently corrected by a nunc pro tunc order describing the firm as Abrahams & Lesser. The subpœna issued upon this petition was served upon Samuels and Lesser, neither of whom interposed any answer, and on April 25, 1913, an order of adjudication was entered on default. Thereafter Edward F. Quinn, an alleged creditor of the firm of Abrahams & Lesser, moved in the District Court to compel Moses M. Valentine to file schedules of his assets and liabilities, upon the theory that he was in the firm and as such liable for its debts. Upon this motion Valentine filed an answer objecting to the jurisdiction of the court to adjudge him a bankrupt, or to determine his solvency, or to determine the issue of partnership in this proceeding, and denying that he was a partner and objecting to the sufficiency of the petition in bankruptcy, and setting up that the petitioner was not a party to the proceeding in bankruptcy and had brought suit upon his alleged claim against the appellant in a state court. The District Judge ordered that the matter be referred to a special master for examination and report, and required the said Valentine to do certain things, as will more fully appear in the opinion.

Weschler & Kohn, of New York City (Abram I. Elkus and Wesley S. Sawyer, both of New York City, of counsel), for appellant.

Grenville Clark, of New York City (Elihu Root, Jr., of New York City, of counsel), for Edward F. Quinn and Alexander S. Webb, as trustees in bankruptcy.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The question which this court must determine in this suit is whether the Bankruptcy Court, in the administration of the estate of a partnership which has been adjudged a bankrupt, has jurisdiction, upon a petition which does not ask that a third person be adjudged a bankrupt, or allege that he has committed an act of bankruptcy or is insolvent, and which makes no application for his examination concerning the acts, conduct, or property of the bankrupt, to determine whether such third person is a member of the firm, and if it finds that he is, can administer upon his estate. If it has no such right, then it cannot, upon such a petition, require a disclosure of such third person's assets and liabilities, and the District Court was without power to make the order respecting which this appeal was taken.

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

It will be conceded that if a member of a partnership becomes bankrupt, that fact does not subject the partnership to adjudication in bankruptcy, or give the bankruptcy court jurisdiction over the partnership property. But if the partnership becomes bankrupt, does the bankruptcy court have the right to draw to itself and apply to the payment of the partnership creditors the individual property of a partner who has not been adjudged a bankrupt?

The Bankruptcy Act in section 1 provides that the word "person," when used in the act shall include partnerships. The same section also declares that:

"A person shall be deemed insolvent within the provision of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed * * * with intent to defraud * * * shall not at a fair valuation, be sufficient in amount to pay his debts."

Section 5a declares that:

"A partnership, during the continuation of the partnership business or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt."

Section 5c declares that:

"The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property."

And section 5h reads as follows:

"In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt."

[1] A partnership is certainly treated in the Bankruptcy Act as an entity for certain purposes. In Francis v. McNeal (1912) 228 U. S. 695, 700, 33 Sup. Ct. 701, 702 (57 L. Ed. 1029), the Supreme Court, through Mr. Justice Holmes, said in referring to certain provisions of the Bankruptcy Act:

"No doubt these clauses taken together recognize the firm as an entity for certain purposes. * * * But we see no reason for supposing that it was intended to erect a commercial device for expressing special relations into an absolute and universal formula, a guillotine for cutting off all the consequences admitted to attach to partnerships elsewhere than in the bankruptcy courts. On the contrary, we should infer from section 5, clauses 'c' through 'g,' that the assumption of the Bankruptcy Act was that the partnership and individual estates both were to be administered, and that the only exception was that in 'h,' 'in the event of one or more, but not all of the members of a partnership being adjudged bankrupt.'"

There are many decisions that a partnership is not insolvent within the meaning of the Bankruptcy Act unless all its members are insolvent. As said by Judge Lowell in 1904, in Re Forbes (D. C.) 128 Fed. 137, 139, the rule that there can be no bankruptcy of a partnership without bankruptcy of all the partners (save in exceptional cases) is based, not upon the words of the statute, but upon general principles of law.

"It is impossible," he said, "to declare a partnership insolvent so long as the partners are able to pay its debts and theirs, whether out of joint or separate estate, and so the courts have generally held that a partnership is not insolvent unless by the insolvency of all its partners."

And in Vaccaro v. Bank of Memphis, 103 Fed. 436, 442, 43 C. C. A. 279, 285 (1900), decided in the Sixth Circuit by Judges Lurton, Day, and Severans, the first two of whom have since become members of the Supreme Court of the United States, in an opinion written by Judge Lurton, the law was stated as follows:

"The question as to whether a partnership is to be regarded as such an entity or persona as to justify an adjudication of bankruptcy against it as such, and irrespective of any adjudication of bankruptcy against its individual members, is one not free from difficulties, many of which are suggested by the learned opinion of Judge Hammond in this case. This question need not now be decided, for we are of the opinion that there can be no adjudication of the bankruptcy of the firm of A. Vaccaro & Co., or of B. Vaccaro and A. B. Vaccaro as partners, unless it is shown that the partnership and the individuals which composed the firm are insolvent. Apart from any consequences arising out of the death of A. Vaccaro, it cannot be doubted but that the insolvency of the firm and of every member would have to be averred and shown before the firm could be adjudicated bankrupt. This was the settled ruling under the Massachusetts insolvency law of 1838, upon which much of the bankrupt act of 1898 seems to have been modeled. Hanson v. Paige, 3 Gray [Mass.] 239. The reason for the requirement is that every member of a partnership is liable in solido for all of the firm debts, regardless of any agreement between the partners. The fact that the individual debts of the members of the firm are to be first paid out of the individual assets does not affect the question of individual liability. There is a sense in which a firm may be said to be insolvent where the joint property is insufficient to pay the joint debts. But if, in fact, there is a partner whose individual estate is ample to pay the firm debts, as well as his own, the firm is not insolvent under a law which defines insolvency as a condition where the property of the debtor at a fair valuation is insufficient to pay his debts."

The question came before the Eighth Circuit in 1907, in Re Bertenshaw, 157 Fed. 363, 371, 85 C. C. A. 61, 69, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 986, and an opinion, contrary to that announced in Vaccaro v. Bank of Memphis, supra, was delivered by Judge Sanborn. After calling attention to the principle announced in the Vaccaro Case, he said:

"The proposition itself is utterly inconsistent with the principle established by the uniform current of authority that a partnership is a distinct entity, separate from the partners who compose it, under the act of 1898, and the two propositions cannot both logically stand together. * * * When, however, the act of 1898 made the partnership a person, required its consideration, adjudication, and the administration of its property as a distinct entity, and declared it insolvent when its property was insufficient to pay its debts, the tests of insolvency under the insolvency law of Massachusetts and the Bankruptcy Act of 1867 were inapplicable to cases under it, and the only test was that declared by the act itself, the insufficiency of the property of the person, the partnership, to pay the person's, the partnership's, debts."

Each of these divergent views has found support in the courts. But it is not necessary to marshal the authorities or to enter upon a consideration of the reasons upon which they are based for the purpose of ascertaining which of the two theories should be accepted. That is made unnecessary by the opinion of the Supreme Court of the

United States in the recent case of Francis v. McNeal, supra. In that case the Court said:

"So far as Vaccaro v. Security Bank of Memphis, 103 Fed. 436, 442 [43 C. C. A. 279], is inconsistent with the opinion of the majority in Re Bertenshaw, 157 Fed. 363 [85 C. C. A. 61, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 986], we regard it as sustained by the stronger reasons and as correct."

[2] We must therefore accept it as established law that a partnership is not bankrupt so long as any of the members who compose it is individually solvent.

In the case at bar the partnership of Abrahams & Lesser was adjudged bankrupt, and so were the two known partners. But at the time of the adjudication it was not known that Valentine was a member of the partnership; his relation to the firm not having been disclosed. He was therefore not joined in the petition which was filed against the firm and his copartners, or alleged copartners. If he is a partner and is solvent, then the firm to which he belongs is not bankrupt, when the act of bankruptcy charged is one involving insolvency, for the combined partnership and individual assets would suffice to pay the partnership debts.

[3] If under such circumstances the bankruptcy court has no right to inquire and determine whether one, who is alleged to be a secret partner of the firm against which bankruptcy proceedings are pending, is or is not a member of the firm, and, if he is, whether he is solvent, then certainly the court is left in an anomalous and even an extraordinary situation. That it is possessed and must be possessed of such power we cannot doubt. And we must proceed to inquire whether the proper proceedings have been taken as against Valentine, the alleged secret partner, to enable the court to enter upon the inquiry. The proceedings taken were as follows: A creditor of the bankrupt firm filed a petition in the bankruptcy court in which it was alleged that the petitioner was informed and believed "that Moses M. Valentine up to the time of the proceedings in bankruptcy herein, and for some time previous thereto, was a dormant or secret partner in said copartnership." He also alleged that the sources of his information and the grounds of his belief were summarized and set forth in the affidavit of one Clark, which he annexed to and made a part of his petition. He concluded the petition by asking that the court grant an order directing Valentine to "file a schedule of his debts and an inventory of his property in the same manner as is required in cases of debtors against whom adjudication of bankruptcy has been made." Notice was served on Valentine that a motion would be made for an order directing him "as a partner in said firm of Abrahams & Lesser" to file a schedule of his debts and an inventory of his property. Thereupon Valentine filed an answer, in which he alleged that he had never been a member of the firm of Abrahams & Lesser, and had never been interested therein, and that he was solvent. The answer also declared that he did not "submit himself to the jurisdiction of the court, nor has he at any time submitted himself to such jurisdiction, for the purpose of being himself adjudicated a bankrupt, or for the purpose of having his solvency or insolvency passed upon, or for the purpose of

having his alleged partnership with the above-named bankrupts determined in this proceeding, and he respectfully reserves the right to object to the jurisdiction of this court to determine the question of his alleged partnership with any of the above-named bankrupts or the said bankrupt firm and to adjudge him a bankrupt."

The Bankruptcy Act in section 59b provides as follows:

"Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over; or if all of the creditors of such person are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt."

And section 59d provides as follows:

"If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a large number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties * * * shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed."

[4] It is evident that the creditor Quinn in filing his petition was not proceeding under section 59. That section provides a method by which creditors can proceed to have a person adjudged a bankrupt, but the petition in question does not ask to have Valentine adjudged a bankrupt, and does not assert that he is insolvent, and does not allege facts which are sufficient to justify a single creditor in filing the petition under the foregoing section.

[5] But can the petition be sustained under section 21a? That provision reads as follows:

"A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person including the bankrupt and his wife, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act: Provided, that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt."

Under this provision the court is empowered upon application of any creditor, "by order" to require "any designated person" to appear and be examined "concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration." The petition clearly is not authorized under section 21a. That section intended to provide a searching and summary method for the discovery of hidden assets, not only by the examination of the bankrupt, but of other witnesses. The proceeding it authorizes is meant to assist the trustee in discovering and collecting the assets. The section confers authority upon the trustee or any creditor of the estate to apply for the examination of any person. The person to be examined cannot object to being sworn and examined on the ground that no issue has been made

up for determination, neither can he object that there is no fact in dispute. The simple object is to obtain information as to the bankrupt's property. Under this provision a petitioning creditor might have asked the court to issue an order for the examination of Valentine concerning "the acts, conduct, or property" of the bankrupt firm, with the view of ascertaining whether or not he was a secret member of that partnership and had in his possession assets available to the creditors.

The application of the petitioning creditor in this case was not in terms made to compel Valentine to submit to an examination concerning "the acts, conduct, or property of the bankrupt," but it simply asked that he be compelled to file schedules of his assets and liabilities as if he had been adjudged a bankrupt. The petition was not framed under section 21a, and the course pursued respecting it was not the course usually adopted in such cases, when an application is made for an examination of a witness under this section. The practice is upon the coming in of an application made to the court under this provision for the court to make an order directing the designated person to appear before the referee or special master "to be examined concerning the acts, conduct, and property of the bankrupt," and that due service of the order by copy be made upon such person. But in this case Valentine was served with a notice that an application was to be made to the court for an order to compel him to file an inventory of his property "in the same manner as is required in cases of debtors against whom adjudication of bankruptcy has been made." We find nothing in the Bankruptcy Act which warrants any such method of procedure. Section 21a simply authorizes the creditor to apply for an *examination* of a person designated in the application.

Valentine appeared pursuant to the notice and objected to the jurisdiction of the court, denied under oath that he was a member of the bankrupt firm, and denied that he was insolvent. But the court issued an order directing that the question be referred to a special master for examination, testimony and report as to whether Valentine was a partner in the firm of the bankrupts, and further providing that, in the event that the said special master reported that Valentine was a partner, he should, within 10 days after the filing of the report and its confirmation by the court, file a schedule of his debts and an inventory of his property as provided for in the Bankruptcy Act. We fail to find upon the facts as disclosed in this record that the court had any jurisdiction over Valentine, or any authority to make any such order. The counsel for appellees in our opinion misapprehended the question involved upon the record. In his brief and in the argument he stated that:

> "The precise question on this appeal is whether or not the Bankruptcy Court has jurisdiction merely to inquire whether a nonbankrupt partner has a surplus over individual debts, which should go toward the payment of firm debtors."

But this does not appear to us to be the question. The application made to the court below, as appears from what has already been said, was not in terms an application to inquire into anything. The court below thought that:

"The only question open is whether Valentine was in fact a partner at the time of the petition. Upon that he is not entitled to a jury, as I understand the theory, because although this court administers his estate, it does not declare him a bankrupt, and need not even find him insolvent. His only recourse, if he would escape such administration, is to pay off the firm creditors."

[6] We are satisfied that the court was in error in thinking it had jurisdiction upon the application submitted to it to make the order it did, or that it possessed any right to administer upon Valentine's estate without declaring him a bankrupt or finding him insolvent. It has undoubtedly been held in some cases that the bankruptcy court can administer upon the estate of nonbankrupt partners. Dickas v. Barnes, 140 Fed. 850, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; In re Ceballos & Co. (D. C.) 161 Fed. 445; Matter of Lattimer (D. C.) 174 Fed. 824; In re Junck & Balthazard (D. C.) 169 Fed. 481; In re Stokes (D. C.) 106 Fed. 312. But these cases proceed upon the theory that a firm may be bankrupt although some of its members remain solvent. And this theory, as we have pointed out already, appears to be contrary to the view entertained by the Supreme Court in the recent case of Francis v. McNeal, supra.

[7] It would be much more accurate to say that the question whether, when no petition in bankruptcy has been filed against him, an individual who asserts under oath that he is not a partner can be summarily adjudicated a partner on an inquiry before a referee in bankruptcy to which he does not consent. Such a question must be answered in the negative.

What would or would not happen if he were a partner may be interesting, but that question is not now before us.

The decree is reversed, with costs.

FREEMAN et al. v. WATSON et al.

(Circuit Court of Appeals, Third Circuit. July 3, 1914. Rehearing Denied August 29, 1914.)

No. 1825.

1. RAILROADS (§ 197*)—MORTGAGE—FORECLOSURE—REORGANIZATION.

A majority of the holders of the first mortgage bonds of a railroad corporation entered into an agreement by which a committee was appointed to adopt a plan for the reorganization of the company, with authority to employ agents, attorneys, etc., their bonds being deposited with the committee. This committee and a committee representing the holders of subsequent bonds made an agreement by which three "representatives" were appointed to represent all the parties, procure a foreclosure of the mortgage, purchase the property, organize a new corporation to which the property was to be transferred, and distribute the securities of the new company to the two committees for distribution to the bondholders. They purchased the property at a sale under a decree which provided that the purchaser might apply on the purchase price any first mortgage bonds at the amounts payable thereon out of the proceeds of the sale, and that the corporation should remain liable for any balance

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

due on the bonds. The new company was organized and its securities distributed among the bondholders of the old corporation. Upon the distribution of the proceeds of sale, holders of first mortgage bonds who did not join in the reorganization agreement objected to those who had deposited their bonds participating in the distribution until the nonassenting bondholders were paid in full, on the grounds that there was an illegal overissue of bonds, that the representatives had become the owners of such bonds, and that one of them had notice of the illegality. *Held*, that such bonds were entitled to participate in the distribution equally with the bonds not deposited, as the representatives held them merely as agents, and, while the bondholders might have agreed to surrender all claims of every kind under their bonds and take the bonds of the new company in full satisfaction thereof, the facts showed no intention to do so.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 662; Dec. Dig. § 197.*]

2. CORPORATIONS (§ 482*)—FORECLOSURE OF MORTGAGE—EVIDENCE.

Where, in a suit to foreclose a corporate mortgage, in which it appeared that illegality, if not fraud, attended the issue of the bonds secured thereby, the master's ruling that each bondholder must affirmatively prove his bona fide title before he could receive a dividend from the proceeds of sale was approved by the trial judge, and the case sent back to the master for a determination of the bondholders entitled to participate in the fund, a bondholder was not required to appear in person and prove his claim by his own testimony, but could establish it by the testimony of others, and might show a right to rely upon the title of a former bona fide holder.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1870, 1877–1888; Dec. Dig. § 482.*]

Appeal from the District Court of the United States for the Western District of Pennsylvania; James S. Young, Judge.

Foreclosure suit by the Fidelity Trust Company, trustee, against the Conneaut & Erie Traction Company. From a decree confirming a master's report and distributing the proceeds of the sale, Albert Edgar Freeman and others, bondholders, appeal. Affirmed.

A. E. Freeman, of Philadelphia, Pa., for appellants.

B. Franklin Pepper, of Philadelphia, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and HUNT, Circuit Judges.

J. B. McPHERSON, Circuit Judge. This appeal is from a decree distributing a fund produced by a master's sale of the property of the Conneaut & Erie Traction Company. The sale was made in reorganization proceedings, under a decree foreclosing a first mortgage, and the three appellants represent bonds amounting to $14,000 that did not assent to the reorganization agreement. There is little dispute about the facts, and in the following summary we have made free use of the briefs of counsel:

[1] In 1902 the traction company issued $800,000 of bonds, secured by a first mortgage upon all of its property, including its franchises. In 1904 a second mortgage was created, securing an issue of refunding bonds. In 1907 the company defaulted, and the district court appointed a receiver. Thereupon two committees were organized, one by the first mortgage bondholders, and the other by the second mortgage

bondholders. The members of the first committee were William Chalfant, Jr., William J. Fling, R. L. Forrest, E. C. Miller, and C. E. Willock, and the members of the second committee were C. B. Van Nostrand, Evans R. Dick, and George S. Graham. Out of the total issue under the first mortgage, bonds to the amount of $783,500 were deposited under the terms of an agreement hereafter referred to. All of the refunding mortgage bonds were deposited with the second committee.

On May 4, 1908, the two committees agreed upon a plan of reorganization. William J. Fling and R. L. Forrest of the first committee, and C. B. Van Nostrand of the second committee, were appointed to carry it out as "representatives" of all parties to the agreement, and were so described. As part of the plan, the Fidelity Trust Company of Philadelphia, trustee under the first mortgage, filed a foreclosure bill under which a decree was entered in April, 1909. In May the property was sold to the "representatives" for $200,000, of which less than $40,000 was ultimately paid in cash, the sale was duly confirmed, and a deed was made to the purchasers. When the master attempted to distribute the fund arising from the sale, the "representatives" presented the $783,500 of deposited first mortgage bonds so that a dividend might be awarded to these bonds out of the purchase price. Thereupon a nonassenting bondholder, now one of the appellants, objected on the ground that fraud or illegality had attended the issue under the first mortgage—specifically, that an overissue had been made contrary to law—and contended that no bond should be allowed to share in the distribution until the holder thereof should assume the burden of proving that he had acquired it bona fide, for value, and without notice of the fraud or illegality. The master overruled the objection, holding that as the bonds were in the usual form, and were therefore negotiable securities, the title of the holders was presumed to be good, and that the burden of proof was upon the objector. He, therefore, distributed the fund pro rata to the "representatives" and to the nonassenting bondholders. The latter excepted, and (while the matter was pending) was joined by the other two appellants, who are also nonassenting bondholders. The District Court sustained the exceptions, directing the master to take testimony and report: (1) What was the fact concerning the asserted fraud or illegality; and (2) who were the holders and owners of the bonds, with the amounts due thereon.

Much testimony was taken, and the master reported that illegality, if not fraud, had attended the issue of the bonds, and ruled that each holder must affirmatively prove his bona fide title before he could receive a dividend. Judge Young agreed, and sent the case back in order that the master might determine "who of the bondholders are entitled to participate in the fund." By this decision the "representatives" were obliged to assume the burden of proving that each holder of the deposited first mortgage bonds had a valid title. Until this should be done, of course the "representatives" could not use any of the bonds in part payment of the $200,000 purchase money, and the transaction could not be completed. Accordingly many witnesses were heard, 136 on behalf of the depositing bondholders, and 3 on behalf of

the nondepositing bondholders. In February, 1913, the master made a careful and detailed report, finding that $695,000 of first mortgage bonds were owned and had been deposited by persons or corporations who were bona fide holders for value without notice of the fraud or illegality and finding, also, that the $14,000 of undeposited bonds were similarly owned. Accordingly he distributed the fund pro rata to the "representatives" and to the owners of the $14,000. The latter excepted, but the exceptions were dismissed and the report confirmed. The present appeal is taken from the decree of confirmation. The issue, therefore, before this court is, Who is entitled to the proceeds of the foreclosure sale, and in what amount?

The assignments of error are numerous, but they may be grouped under two propositions, which are thus stated in the brief of the appellants' counsel:

> "I. That all the bonds other than those held by the appellants are owned by Messrs. Fling, Forrest, and Van Nostrand, are charged with the fraud, and are postponed in distribution to the bonds of the (appellants).
>
> "II. That the direction of the lower court in referring this cause back to the special master required the production of the bonds and (the) present owners thereof; that no bondholders have appeared other than the appellants, and therefore only the appellants' bonds are entitled to distribution."

Or, as stated by counsel for the appellees, the receiver and the "representatives," the objections for consideration are these:

1. Because the "representatives" were held to be agents of the depositing bondholders, while they should have been held to be the holders and owners of the bonds on their own account.
2. Because each bondholder was not compelled to appear in person and prove his or her claim.
3. Because in certain instances the master accepted insufficient evidence of good faith.
4. Because in other instances the master refused to charge some of the bondholders with bad faith, overruling the appellants' contention that because these bondholders had inspected the property before buying the bonds, they should therefore be charged with notice of the following facts: (a) That the bonds had been fraudulently or illegally issued; (b) that the road was to be only 30 miles in length instead of 35, the mortgage indicating the larger number; and (c) that a certain branch was not being built, the mortgage indicating also that this branch would be built as part of the mortgaged property.

The appellants' principal argument seems to be that, although the first committee was the agent of the depositing bondholders, and although the "representatives" were the agents of both committees, nevertheless the agency had ceased because the "representatives" had discharged all their duties; the result being that in some undefined manner the "representatives" have become the sole owners of the deposited bonds. If they are the owners, it is further argued that the bonds must be postponed to the appellants' nonassenting bonds, which must then be paid in full, because Forrest, one of the "representatives," was president of the traction company when the bonds were issued, and had notice of the fraud or illegality.

We do not agree with this argument, and we think its unsoundness will appear upon further consideration. The committees will be called No. 1 and No. 2. The agreement under which No. 1 was appointed is in brief as follows: The bondholders appointed the committee with power to adopt a plan of reorganization, and agreed to be bound thereby. They authorized the committee to employ agents, attorneys, etc., and to buy all the traction company's property of every kind at public or private sale, giving further power to assess the bondholders in order to raise the necessary funds for all purposes. The committee was to be free from personal liability except for fraudulent misconduct.

Under this agreement committee No. 1 were undoubtedly the mere agents of the depositing bondholders in the reorganization of the road, with the powers and under the conditions stated by their principals. These powers authorized the committee to make the reorganization agreement with committee No. 2. By that agreement Fling, Forrest, and Van Nostrand became the "representatives" or agents of both sets of bondholders, Fling and Forrest being also members of committee No. 1, and Van Nostrand, of committee No. 2. The agreement declared that the three persons named should be "representatives of all parties hereto (meaning both committees acting for the two sets of bondholders) with authority to take the steps and perform the acts hereinafter specified." In outline the steps to be taken were as follows: The Fidelity Trust Company was to be asked to foreclose the first mortgage, and the "representatives" were to agree upon a minimum price for the property and upon other terms of sale, and were authorized to buy the property if necessary. Committee No. 1 was to furnish in the first instance the cash needed to comply with the terms of sale, and was also to place the bonds in its hands at the disposal of the "representatives" to enable the purchase to be completed. The "representatives" were then to organize a new corporation, to be styled the Cleveland & Erie Railway Company, and were to transfer the property to such corporation; taking the needful steps to have the receiver discharged and to gain possession of the property. The new company was to issue securities of the nature and in the amounts set forth, these new securities to be distributed to the two committees in certain proportions, and the two committees were to distribute the securities in exchange for the bonds deposited with them. The "representatives" were to be free from personal liability; all obligations assumed by them being declared to be assumed "in their representative capacity and not as individuals."

This agreement emphasizes the agency of the "representatives"; they were clearly acting not as owners of the bonds, but merely as agents of the two committees and of the depositing bondholders for the purpose of completing the reorganization. It is not quite easy to understand the ground for the appellants' contention that the assenting bondholders ceased to own the deposited securities, and that the title thereto passed to the "representatives." On the surface it would seem that the transaction presents the case of an ordinary reorganization, of the type referred to in Cook on Corporations, sections 886 and 887. We can dis-

cover nothing to the contrary, either in the agreements or in the foreclosure decree. The situation was this:

Under the decree of foreclosure the first mortgage bondholders were obliged to bid at least $200,000. If they should become the purchasers, $30,000 of this sum was to be paid in cash, in order to meet the expenses of sale and certain preferred claims. (This amount was afterwards increased to nearly $40,000.) Of course the balance of the bid was applicable to the debts of the traction company in their order, and this meant that the whole balance would go to these bondholders. But as they were allowed to use their bonds in payment, they were not obliged to go through the superfluous formality of paying the remaining $170,000 with one hand and taking it back with the other. The mere presentation of valid bonds would be sufficient. The master's principal inquiry therefore was, How many bonds are valid? And with this inquiry his report is mainly concerned. All bondholders, assenting and nonassenting alike, were interested in this question—especially the nonassenting holders, since they were to receive in cash whatever their proper proportion might be. But, as the assenting bondholders had to find the money to pay the nonassenting holders, they were also interested, since the proportion awarded to them would relieve them pro tanto of the obligation to furnish actual money. This was a real advantage, and while, no doubt, they might agree to give it up if they chose, such an agreement would be unusual and would scarcely be presumed. The agreements looking to a reorganization were made in 1908, and the decree which was entered in April, 1909, may fairly be regarded as expressing the intention of the persons in interest:

"That at said sale no bid shall be received for the property unless the person making such bid shall have previously deposited with the said master a certified check to his order for the sum of $30,000. The balance of the purchase price shall be paid to said master upon the delivery of a deed conveying the property to the purchaser. The purchaser, for the purpose of making settlement or payment for the property, shall be entitled to apply toward the payment of the purchase price any first mortgage bonds and any matured and unpaid coupons at the amounts payable thereon out of the net proceeds of the sale, the master being empowered for such purpose to estimate and determine said amounts. The master is not authorized and shall not accept at such sale any bid of less than $200,000. * * *

"The balance, after paying the costs and expenses of the sale, shall be equally distributed among the holders of the first mortgage 5 per cent. gold bonds of the Conneaut & Erie Traction Company, and if any balance remain after paying in full the said bonds and coupons, with the interest due thereon, it shall be paid to the Conneaut & Erie Traction Company."

And there is a further provision that the traction company shall be bound for "any deficiency that may remain due and payable upon (the first mortgage bonds) after applying thereto all of the moneys realized from the sale applicable thereto."

Here are positive provisions that if the first mortgage bondholders buy the property they may use their bonds toward paying the purchase price, and that the company is to be bound for any deficiency after charging the purchase price against the bonds. Now, it is true that in spite of the decree the bondholders might have agreed to surrender all claims of every kind under their bonds in case they should become the

purchasers, and they might have agreed to take in full satisfaction thereof the bonds of the new company. If they made such an agreement, they are bound by it; and in a reported decision, on which the appellants mainly rely (Central Trust Co. v. Cincinnati, etc., Co. [C. C. Ohio] 58 Fed. 500), the bondholders apparently did so agree, and Judge Taft enforced the contract. The principal resemblance between that case and this lies in the fact that in both cases the reorganized company issued new securities that were accepted by the bondholders under the old mortgage. But the Ohio decision rests upon the peculiar equities there appearing, as is shown by Judge Cochran in McEwen v. Land Co., 138 Fed. 797, 17 C. C. A. 163, so that the reasoning of Judge Taft should be regarded as applicable to the special circumstances then before him.

We have here the case of an ordinary reorganization that has been partly carried out. The property has been conveyed to the new company, and the "representatives" have taken the risk of distributing the securities of the new company among the bondholders of the old. The risk may not have been serious, but it seems plain that the transaction has not yet been completed, and that the agency has not yet come to an end. The receiver has not yet been discharged, the fund arising from the sale has not yet been distributed, and the ultimate liabilities of the first mortgage bondholders have not yet been determined. The distribution is precisely the matter now in dispute, so that the purpose for which the committees and the "representatives" were appointed has not yet been fully carried out. The deposited bonds are still needed to discharge a part of the purchase price, and no sufficient ground appears in the reorganization agreement to justify us in holding that the bondholders intended to surrender their bonds with all valid claims thereunder upon the proceeds of sale, and to take the securities of the new company in full satisfaction. Some clear expression, or some definite implication, should exist before so unusual a result is reached, and we find neither in the present transaction. On the contrary, the agreement distinctly recognizes that the bonds may be used for the very end to which they are now being put, and there are no opposing equities to compel a different conclusion. We say nothing of other difficulties that might lie in the appellants' road, even if the bondholders had plainly abandoned all claim under their old bonds. The other branch of the appellants' first proposition would still require consideration, namely, that the "representatives" have somehow succeeded to the bondholders' title; and this is a subject we need not discuss.

[2] All the questions under the appellants' second proposition have to do with the competency or the sufficiency of the evidence offered to prove the titles of certain bondholders, and the full discussion by the master, approved by the district court, relieves us from the need of taking up the appellants' objections in detail. It is enough to say that it was not obligatory upon each bondholder to appear in person and to prove his claim by his own testimony. He was only obliged to offer competent and sufficient evidence for this purpose, and such evidence might proceed from other persons as well as from himself. So, too, he might show that he was at liberty to rely upon the title of a former

bona fide holder for value without notice. The evidence offered satisfied the master and the district court, and we should be slow to reject findings of fact on which they agreed.

The decree is affirmed.

YANG-TSZE INS. ASS'N et al. v. FURNESS, WITHY & CO., Limited (and fourteen other cases).

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

No. 201.

1. COLLISION (§ 107*)—STEAM VESSELS CROSSING—SPECIAL CIRCUMSTANCES RULE.

The privileged one of two crossing vessels is not relieved from the duty of keeping her course and speed as required by article 21 of the International Rules (Act Aug. 19, 1890, c. 802, 26 Stat. 320 [U. S. Comp. St. 1901, p. 2870]) by article 27, which authorizes a departure from the rules under special circumstances which render such departure "necessary in order to avoid immediate danger," unless there is clearly immediate danger, and then the departure must be no more than is necessary.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 224; Dec. Dig. § 107.*]

2. COLLISION (§ 123*)—CONTRIBUTORY FAULT—VIOLATION OF RULES.

Where a ship at the time of collision was acting in violation of a statutory rule, the burden is on her to show, not merely that her fault might not have been one of the causes of the collision, but that it could not have been.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 259-261; Dec. Dig. § 123.*]

3. COLLISION (§ 40*)—STEAM VESSELS CROSSING—MUTUAL FAULTS.

The steamships Alleghany and Pomaron both *held* in fault for a collision at sea in open weather and in the daytime while on crossing courses, in which the Alleghany was sunk, her fault being the failure to maintain a lookout, although the vessels were within sight of each other for several miles, and that of the Pomaron, which was the privileged vessel, a change of course without necessity.

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

4. EVIDENCE (§ 37*)—JUDICIAL NOTICE—LAWS OF FOREIGN COUNTRY.

Although the local laws of both countries to which two foreign vessels in collision on the high seas belong may coincide in providing that liability shall not be in solido, but in proportion to the degree in which each vessel is in fault, courts of admiralty of the United States cannot take judicial notice of such laws, nor apply such rule unless they are pleaded and proved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 52; Dec. Dig. § 37.*]

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

This cause comes here upon appeal to review a decree of the District Court of the United States for the Southern District of New York in favor of certain owners and underwriters of cargo of the German Steamship Alleghany for damages resulting from the total

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

loss of the cargo as the result of a collision with the Pomaron on February 2, 1912. The original libels were filed against the owners of the two vessels jointly. But the Hamburg-American Company, the owner of the Alleghany, filed a petition for the limitation of its liability and surrendered the amount of its pending freight for the voyage and the libels were thereupon stayed as to that company.

Burlingham, Montgomery & Beecher, of New York City (Charles C. Burlingham, Norman B. Beecher, and Robinson Leech, all of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (Howard S. Harrington, of New York City, of counsel), for appellees Coleman and others.

Convers & Kirlin and Lawrence Kneeland, all of New York City (J. Parker Kirlin, William H. McGrann, and Kneeland, Harison & Hewitt, all of New York City, of counsel), for other appellees.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. Furness, Withy & Co., Ltd., a corporation created by and existing under the laws of the United Kingdom of Great Britain and Ireland, prosecutes this appeal to reverse a decree of the court below. Fifteen separate libels were filed against the above-named corporation. The separate libelants were Yang-Tsze Insurance Association, Ltd., et al., Nord-Deutsche Insurance Company et al., Federal Insurance Company, Walter Oloffson et al., M. H. Silvera, Hazen & Co., Boston Insurance Company, Walter Despard, Eugene J. F. Coleman, Marshall K. Weidensaul, Frances W. Van Praag, Orton G. Orr, Laura Moore, Louis Bertschman, United States of America. The various libelants brought suits for cargo losses except the United States. The government suit was for loss of registered mail carried by the steamship Alleghany which sank at sea because of a collision with the steamship Pomaron, and the suits were brought against the owners of the latter vessel. The suits were brought on for trial simultaneously, having been consolidated and heard on the pleadings and proofs. The court below rendered a decision that the libelants were entitled to recover. One decree was entered awarding in all, damages and costs amounting to $172,029.81.

This collision occurred off the capes of Virginia about 11:30 a. m. on February 2, 1912. The Alleghany was on a voyage from New York to the West Indies. The vessel was an ordinary tramp steamer, 310 feet long. The Pomaron was a steel screw steamship of 1,809 tons gross and 1,027 tons net, 278 feet long and belonged to Furness, Withy & Co., Limited. She was on her way from Baltimore to European ports and loaded with grain and general cargo. The Pomaron sighted the Alleghany about an hour before the accident, the latter being some 10 or 12 miles away and on her port hand. Each vessel kept her course and speed for some 45 minutes. During this time the chief officer of the Pomaron had the Alleghany under constant observation. But all this time the Alleghany had not seen the Pomaron at all. This was occasioned by the fact that her chief officer, then on watch, had taken his observation and gone into the chartroom to calculate his position.

The Alleghany did not discover the Pomaron until the latter blew one blast on her whistle and ported her helm. This was between five and seven minutes of the collision. Between the time when the Pomaron saw the Alleghany and the time when she blew the blast on her whistle the two vessels had continued to approach each other without change of course or speed. At the time the Pomaron sounded the whistle the two vessels were about a mile apart and the Alleghany was proceeding at a speed of 11½ knots per hour and the Pomaron at a speed of 9 knots. After the Pomaron sounded the whistle the Alleghany shortly blew two blasts, and thereupon the chief officer of the Pomaron at once rang the engines full speed astern and ordered the helm hard aport. He testified that after he had run full speed astern he saw the Alleghany had put her helm hard astarboard and he could see—

"she was swinging around, her stern was flying into us, and of course, when he put his helm hard astarboard, his stern swung around and caught us on the bow, about abreast of No. 3 hatch."

[1] The bow of the Pomaron struck the starboard quarter of the Alleghany about 100 feet from her stern, and about 3 o'clock in the afternoon the Alleghany sank. Before the collision the Alleghany was on a course approximately south and the Pomaron on a course approximately east, the vessels being on crossing courses and the Alleghany having the Pomaron on her starboard hand. As the two vessels were on crossing courses they were subject to article 19 of the International Regulations. That article is as follows:

"When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other."

And article 21 provides:

"Where, by any of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed."

The Pomaron was to the southward and westward of the Alleghany and on the latter's starboard hand as the two vessels approached each other. These respective courses had been maintained for several hours prior to the collision, and the two vessels were about a mile apart when the Pomaron, the privileged vessel, changed her course to starboard. In doing so she failed to comply with article 21. The Pomaron seeks to excuse its porting under article 27. That article is as follows:

"In obeying and construing these rules due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

It becomes necessary, therefore, to inquire whether the special circumstances as they existed at the time the Pomaron altered her course was justified under article 27. The application of rule 27 is restricted by its terms to situations of immediate danger. That rule applies only to exceptional cases. As said by the Supreme Court in The Oregon, 158 U. S. 186, 202, 15 Sup. Ct. 804, 39 L. Ed. 943, exceptions to the rules are to be admitted—

"with great caution and only when imperatively required by special circumstances of the case. It follows that, under all ordinary circumstances, a ves-

sel discharges her full duty and obligation to another by a faithful and literal observance of these rules."

In Marsden's Collisions at Sea (6th Ed.) p. 455, it is said:

"But article 27 applies only to cases where 'there is immediate danger, perfectly clear'; and the departure from the rules must be no more than is necessary."

The "special circumstances" apparently relied upon to excuse the Pomaron under article 27 is the testimony of the officer in charge of the vessel that he could see no one on the bridge of the Alleghany. And attention is called to the doctrine of the Supreme Court in The Delaware, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771, where it is said:

"The weight of English, and, perhaps, of American authorities, is to the effect that if the master of the preferred steamer has any reason to believe that the other will not take measures to keep out of her way, he may treat this as a 'special circumstance,' under rule 24 (now rule 27), 'rendering a departure' from the rules 'necessary to avoid immediate danger.' "

And the officer in charge of the Pomaron insisted that the change in the Pomaron's course did not cause the collision. His testimony was as follows:

"Q. What was the danger? A. I saw if he was going to keep on the way he was doing he would catch us somewhere about the engine room. Q. If you had maintained your course he would have struck you near the engine room? A. Yes, about midships. Q. If you had both maintained the courses you were on then without change, what do you think would have happened? A. He would have run into us amidships. Q. Are you sure of that? A. Yes. Q. Wouldn't he have got across your bow? A. No, sir; couldn't have done it. Q. Could you have possibly got across his bow? A. No."

And on cross-examination he was asked:

"Do you think collision would have happened if you had not ported your helm? A. Yes, it would have happened in any case; she would have caught us somewhere probably about amidships if I had not ported."

But there can be no doubt that it was the duty of the Pomaron to have kept on her course until a departure was necessary to avoid immediate danger. At the time she ported her helm she was a mile away from the Alleghany, and the circumstances had not yet developed which justified any departure from the established rules. Her chief officer was asked:

"In order to get the matter quite plain on the record, will you tell us when it was that in your judgment the circumstances had developed so that collision became unavoidable unless you did something."

To which he replied:

"Really not until the Alleghany had given me two blasts on the whistle."

At that time the two vessels were, according to his testimony, half a mile away from each other. He testified that up to that time he had appreciated risk of collision, but thought it might have been avoided by the other vessel. He was then asked: "Then it became under the rule your duty to do something." And he answered, "Yes." "It had not been your duty to do anything before that?" To which he replied,

"No, sir." It is established, therefore, upon the testimony of the chief officer of the Pomaron, that he departed from the rule before it was necessary for him to do something to avoid an otherwise unavoidable collision.

[2] We are obliged, therefore, to hold that the Pomaron not only violated article 21 but that in doing so was not excused under article 27. Concluding then, as we have, that the Pomaron was in fault, it remains to inquire whether the fault contributed to the collision. For if the fault had nothing to do with the collision, it may be disregarded. The law unquestionably is that in cases of collision liability for damages rests upon the ship or ships whose fault occasioned the injury. And in considering whether this fault of the Pomaron contributed to the collision it is necessary to keep in mind the rule laid down by the Supreme Court in The Pennsylvania, 19 Wall. 125, 136 (22 L. Ed. 148 [1873]), where the court said:

> "But, when as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was * * * a contributory cause of the disaster. In such a case the burden rests upon the ship of showing, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute."

The principle thus laid down that, when a ship at the time of the collision is acting in violation of a statutory rule the burden is on her to show, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been one of the causes of the collision, has been reaffirmed in subsequent cases, and is the law beyond all controversy. Richelieu Navigation Co. v. Boston Marine Ins. Co., 136 U. S. 408, 422, 423, 10 Sup. Ct. 934, 34 L. Ed. 398 (1890); Belden v. Chase, 150 U. S. 674, 699, 14 Sup. Ct. 264, 37 L. Ed. 1218 (1893). And the same rule is established in the English courts. The Agra, L. R., 1 P. C., 501, 504, 505. The Elizabeth Jenkins, L. R., 1 P. C., App., 501. Under these decisions the burden of proof rests upon the Pomaron to show that the fault she committed could not have been one of the causes of the collision.

[3] But whether the collision would or would not have occurred if the Pomaron had held her course and speed cannot now possibly be determined because of the doubt which exists as to the exact bearing of the Alleghany from the Pomaron at the time. The bearing entered in the Pomaron's log is "about northeast," but both her chief officer and her wheelsman have testified that this is not correct, and that the bearing was between four and five points, nearer five than four. But the officer of the Pomaron for some inconceivable reason contented himself, after his discovery of the Alleghany, with one hasty sight over the compass to ascertain whether or not the bearing of the Alleghany was changing. He admitted that he watched the bearing of the Alleghany "just roughly," and that he "didn't bother to take any bearings at all," and that the Alleghany's bearing might have been more, or it might have been less, than three points if he "had taken a correct bearing." He is not to be excused for his failure to take correct bearings, and

should have taken several correct bearings during the 46 minutes which elapsed from first sighting the Alleghany to the collision, or during the 39 minutes from first sighting her to his change of course. Asked as to whether he took the bearing by the compass, he replied:

"It was not a proper compass bearing; I just glanced over the top of the compass and took a rough bearing."

Then he was asked:

"It was not a guess, you looked at the compass?"

To this he answered:

"It was not a true bearing, not an accurate bearing."

He also testified that at that time the Alleghany was bearing northeast and was three points or more on his port bow. The Alleghany remained on her original course until just before the collision. Whether she changed just before the collision is not free from doubt. The officer of the Alleghany who was on watch at the time says that "no commands were given to the steersman of the Alleghany," although the chief officer of the Pomaron states that the Alleghany swung under a starboard helm. If the Alleghany did bear northeast and was three points on the Pomaron's port bow when the latter changed course, it is a demonstrable proposition that a collision would not have occurred if both vessels had continued on as they were, neither one changing her course. It can readily be ascertained by applying the speed ratios whether the intersections of the known courses would be coincident, whether or not the two vessels would come together. If the Alleghany was three points on the Pomaron's port bow and had not changed her speed or course, she would have passed the point where the two courses intersected safely, and some seconds before the Alleghany reached it. And if as some of the testimony indicated the Alleghany was five points on the Pomaron's port bow, the Alleghany would have passed the point of intersection about two minutes before the Pomaron reached it. But in reality the contradictions in the testimony as to what the actual bearing of the vessels was makes it impossible to demonstrate whether or not any change at all in the Pomaron's course or speed was necessary to avoid collision. We have already cited the opinion of the chief officer of the Pomaron that the collision would have happened if neither vessel had not changed. But we cannot accept his testimony on the point as conclusive. He estimated that the Alleghany was making 13 knots, and this according to his report to the Board of Trade was a knot and a half more than she was making. This would make a difference of 750 feet in the Alleghany's position in the five minutes which elapsed between the first porting and the collision.

The loss of property for which a recovery is sought was due to a collision on the high seas, in broad daylight and in clear weather, and with no other vessels about to embarrass or interfere with navigation. The two vessels involved were steamers, and therefore could be maneuvered more easily than any other kind of vessels. They were in plain sight of each other when miles apart. They nevertheless came into collision and with such force that one of them sank in a few hours.

carrying down with her the entire cargo. It is difficult to see how it all happened unless both vessels were in fault and failed to exercise reasonable care. Plain common sense constrains one to such a conclusion. To exonerate either of them under such conditions can be justified only if upon the closest scrutiny of the navigation of each vessel it can be discovered that one of them was free from all culpable blame. We have examined the evidence in the case with care, and we have not been satisfied that either one of these vessels was free from fault. The vessels that navigate the high seas, and indeed vessels that navigate inland waters, intrusted with human lives and property of great value, must be held to the strictest standards of conduct, and when they fail to observe the requirements which the maritime law of the nations has prescribed, are to understand that they must abide the consequences.

That the negligence of the Alleghany was inexcusable and even unparalleled, seemed to be admitted. The vessel was under the command of one of the best officers the Hamburg Line had in its service. But he had no idea that there was any vessel anywhere in his vicinity. And for three quarters of an hour prior to the collision there was no lookout. The owners of that vessel filed a petition for limitation of liability and surrendered the amount of the freight for the voyage.

[4] The court below assessed the Pomaron with the full loss, while stating that the case was one—

"which shows the necessity for the proposed new rule which will not hold each ship in solido, but will apportion liability according to fault."

And it was urged upon us in argument that the court erred in not apportioning the damages in accordance with the degree of fault. Attention was called to the fact that the Alleghany was a German vessel, and that her cargo, for the loss of which the suit was brought, was shipped under bills of lading issued by the Hamburg-American Line, a corporation organized under the laws of the German Empire. And as the Pomaron was a British vessel, it is said that it was the duty of the court to have taken judicial notice of the fact that by the Maritime Conventions Act (1 and 2 Geo. V. C. 57) the English rule as to division of loss by collision due to mutual fault was modified in accordance with the convention signed at the Brussels Conference in 1910. In like manner it is said that judicial notice should have been taken of section 735 of the Commercial Code of Germany of May 10, 1897, which reads as follows:

"If the collision is caused by faults of both sides, then the liability for damages, as well as the amount of the damages to be paid, depends on the circumstances, especially to what extent the collision has been caused by the prevailing fault of the members of one or the other crew."

It may be that at the time when this collision occurred the laws of Great Britain and Germany coincided in providing that the liability for damages is to be in proportion to the degree in which each vessel is in fault. If the foreign law had been pleaded and proved, and the court had assessed the damages in accordance with it, there would have been some authority for so doing. That course was adopted by the Circuit Court of Appeals in The Eagle Point, 142 Fed. 453, 73 C. C. A. 569

(1906). But in the case at bar there is nothing in the record to show the law of Germany or of Great Britain, and the court was not at liberty to take judicial notice of it. The federal courts do not take judicial notice of the laws of a foreign nation designed only for the direction of its own affairs. But it has been held that in a certain class of cases a court of admiralty has the right to take judicial notice of the law promulgated by a foreign state if it relates to general maritime law. See Talbot v. Seeman, 1 Cranch, 38, 2 L. Ed. 15; The Scotia, 14 Wall. 170, 20 L. Ed. 822; The Belgenland, 114 U. S. 355, 370, 5 Sup. Ct. 860, 29 L. Ed. 152; The New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126. In the Talbot Case the right to take judicial notice was asserted of a foreign law, but the law was one which had been promulgated in the United States as the law of France by the joint act of that department which is intrusted with foreign intercourse, and of that which is invested with the powers of war. And the decision seems to have been based on the fact that it had been so promulgated. In the Scotia Case the court held that judicial notice might be taken of the original rules and regulations, which had been adopted by the British orders in council in 1863 and by Congress in 1864 and by more than 30 of the principal commercial states of the world, and that they might be treated as laws of the sea and of general obligation. And in the Belgenland Case the court said these rules and regulations having been, for more than 20 years, adopted by all the principal maritime nations of the world, they would be presumed to be binding upon foreign as well as domestic ships unless the contrary was made to appear. And in the New York Case the court stated it knew of no reason why the rule adopted in the Scotia Case should not be applied to the Revised International Rules and Regulations. But we do not find in any of these cases that the court has laid down the rule that it is the duty or the right of the court of admiralty to take judicial notice of local changes made in the general admiralty law by any foreign nation. On the contrary it satisfactorily appears that no such right is recognized. In the Belgenland Case the court considered the question as to the law to be applied in cases of collision on the high seas between ships of different nationalities and said:

"There can be no doubt that it must be the general maritime law, as understood and administered in the courts of the country in which the litigation is prosecuted."

It added that this rule had some qualifications and among such qualifications stated:

"That if the maritime law, as administered by both nations to which the respective ships belong, be the same in both in respect to any matter of liability or obligation, such law, *if shown to the court*, should be followed in that matter in respect to which they so agree, though it differ from the maritime law as understood in the country of the forum; for, as respects the parties concerned, it is the maritime law which they mutually acknowledge."

In Liverpool Steam Co. v. Phenix Insurance Co., 129 U. S. 397, 444, 445, 9 Sup. Ct. 469, 473 (32 L. Ed. 788) (1889) an admiralty case, the court below was asked to take judicial notice of a British statute exempting from liability for losses occasioned by the negligence of the

servants of the steamship company. The court refused to do so, and the Supreme Court sustained it in so doing and said:

"The law of Great Britain since the Declaration of Independence is the law of a foreign country, and, like any other foreign law, is matter of fact, which the courts of this country cannot be presumed to be acquainted with, or to have judicial knowledge of, unless it is pleaded and proved. The rule that the courts of one country cannot take cognizance of the law of another without plea and proof has been constantly maintained, at law and in equity, in England and America. * * * The rule is as well established in courts of admiralty as in courts of common law or courts of equity."

And in the case of The Scotland, 105 U. S. 24, 29 (26 L. Ed. 1001 [1881]) Mr. Justice Bradley said:

"If a collision should occur in British waters, at least between British ships, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, *provided it were shown what that law was. If not shown, we would apply our own law to the case.*"

The Supreme Court, as these extracts from its opinions show, does not recognize any duty in the Admiralty Court to ascertain and apply the foreign law in fixing the liability of foreign vessels responsible for a collision where the foreign state has by statute changed the rule of the general maritime law. Such statutory limitation must be "shown" to the court and not taken judicial notice of, and it must be "shown" as any other fact is shown, by proper evidence. As the foreign law was not pleaded and no evidence of it was introduced, the court had no alternative but to follow the rule of the forum.

We do not wish, however, to be understood as intimating in what we have said that, even if the foreign law had been pleaded, the court could have assessed the damages according to the principle adopted by statute in Great Britain and in Germany. Whether it could or could not have done so is not now before us. And we do not find it necessary under the facts disclosed in the present record to consider how the decision of the Supreme Court in The Oceanic Steam Navigation Co., Limited, v. Mellor, 233 U. S. 718, 34 Sup. Ct. 754, 58 L. Ed. 1171, announced May 25, 1914, affects the question.

Decree affirmed.

CHALONER v. SHERMAN.

(Circuit Court of Appeals, Second Circuit. June 5, 1914.)

No. 202.

1. INSANE PERSONS (§ 26*)—COMMITTEE—ACTION FOR DAMAGES—ISSUES.

Where a person who had been adjudged insane in proceedings in a state court brought suit against his committee to recover damages, the plaintiff's present mental condition could not become an issue in the case unless the trial court was justified in setting aside the order adjudging plaintiff insane on collateral attack, and thereupon defendant had introduced some evidence of present incompetency as an affirmative defense.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 35, 36; Dec. Dig. § 26.*]

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

2. INSANE PERSONS (§ 26*)—APPOINTMENT OF COMMITTEE—REGULARITY—COLLATERAL ATTACK.

In a suit by an insane person against his committee to recover damages, evidence as to plaintiff's mental condition at the time the committee was appointed was inadmissible.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 35, 36; Dec. Dig. § 26.*]

3. INSANE PERSONS (§ 26*)—COMMITTEE—ACTIONS—EVIDENCE.

Where, in an action by an insane person against his committee for damages, it appeared that defendant was appointed as successor to a committee appointed in a de lunatico proceeding had in 1899, evidence that plaintiff was lured into the state in 1897 that he might be there adjudged insane was immaterial.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 35, 36; Dec. Dig. § 26.*]

4. INSANE PERSONS (§ 26*)—INQUISITIONS—JUDGMENT—COLLATERAL ATTACK.

Where proceedings were instituted against plaintiff in 1899 for the appointment of a committee on the ground that he was insane, and a committee was duly appointed, whether he was at that time a resident of Virginia or New York was a question to be determined in that proceeding, and having been determined the judgment on such issue could not be collaterally attacked.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 35, 36; Dec. Dig. § 26.*]

5. INSANE PERSONS (§ 8*)—DE LUNATICO PROCEEDINGS—JURISDICTION.

Code Civ. Proc. N. Y. § 2323, provides that, where an application for the appointment of a committee of an insane person is made to the Supreme Court, it shall be made within the judicial district where the person alleged to be incompetent resides, or if he is not a resident of the state or his place of residence cannot be ascertained, where some of his property is situated or the state institution is situated in which he is an inmate. *Held*, that the venue of such a proceeding is entirely within the control of the state, and hence, where plaintiff was within the state and had property there when proceedings were instituted to have a committee appointed for him on the ground that he was insane, the court had jurisdiction, though he was then a resident of Virginia.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. § 16; Dec. Dig. § 8.*]

6. INSANE PERSONS (§ 26*)—INQUISITIONS—JUDGMENT—CONCLUSIVENESS.

In a suit by a person who had been adjudged insane against his committee to recover damages, evidence that the determination of the proceeding to appoint the committee was based on perjurious testimony was inadmissible.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 35, 36; Dec. Dig. § 26.*]

7. INSANE PERSONS (§ 26*)—INQUISITIONS—JUDGMENT.

Failure of a person alleged to be insane to appear after due notice in de lunatico proceedings for the appointment of a committee could not affect the validity of the adjudication.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 35, 36; Dec. Dig. § 26.*]

8. INSANE PERSONS (§ 26*)—INQUISITIONS—JUDGMENT—COLLATERAL ATTACK.

Where plaintiff was duly notified of de lunatico proceeding against him for the appointment of a committee, the propriety and sufficiency of the notice could not be questioned in a subsequent action by plaintiff against his committee to recover damages.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 35, 36; Dec. Dig. § 26.*]

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

9. INSANE PERSONS (§ 39*)—COMMITTEE—FILLING VACANCY—NOTICE.
An order appointing defendant as committee of an insane person in the place of one who resigned was not void for failure to give notice thereof to the insane person.

[Ed. Note.—For other cases, see Insane Persons, Dec. Dig. § 39.*]

10. INSANE PERSONS (§ 29*)—RECOVERY—PROCEEDINGS.
Where a person who had been adjudged insane has recovered, such fact must be brought to the attention of, and application for relief made to, the court of original jurisdiction.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 42, 140, 150; Dec. Dig. § 29.*]

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 upon the verdict of a jury directed by the court in favor of defendant in error, who was the defendant below. Affirmed.

W. D. Reed, of New York City, for plaintiff in error.

J. H. Choate, Jr., of New York City, for defendant in error.

Before COXE and ROGERS, Circuit Judges, and MAYER, District Judge.

MAYER, District Judge. Chaloner, who was adjudicated an incompetent by the Supreme Court of the state of New York in 1899, brought this action in 1904 to recover damages against Sherman, who was appointed his committee in 1901, for alleged wrongful withholding of and refusal to turn over on April 4, 1904, Chaloner's property then in Sherman's custody as committee.

The numerous assignments of error, because of exclusion of testimony by the trial court, are based upon the theory that this court has power to set aside the judgment of the New York Supreme Court. The sole question is whether that judgment is void or was procured by extrinsic fraud so as to subject it to a successful collateral attack in another jurisdiction.

On March 10, 1897, an ex parte order was made by a justice of the New York Supreme Court, committing Chaloner as an insane person to the institution known as Bloomingdale Insane Asylum at White Plains, Westchester county. This order was in accordance with the Insanity Law of New York (Laws of 1896, c. 545) which permits a commitment without notice and that statute has been held to be constitutional. Sporza v. German Savings Bank, 192 N. Y. 8, 84 N. E. 406; Matter of Walker, 57 App. Div. 1, 67 N. Y. Supp. 647.

While an inmate of that institution under the commitment, a proceeding looking to the appointment of a committee was commenced by a petition presented by two of his brothers to the Supreme Court in the county of New York. This petition was accompanied with the affidavits of several physicians as to the mental condition of the alleged incompetent, and a notice of motion that on May 19, 1899, the petitioners would apply to the court for an order granting the prayer of the petition. Thereupon, on May 9, 1899, the court made an order requiring personal

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

service on Chaloner of this order, the notice of motion, petition, and affidavits.

On the same day, viz., May 9, 1899, personal service was made on Chaloner at the Bloomingdale Asylum.

On May 19, 1899, when the motion was returnable, no one appeared in opposition thereto, and the court, as provided by sections 2327 and 2328 of the New York Code of Civil Procedure, ordered that a commission in the nature of a writ de lunatico inquirendo be issued out of and under the seal of the court directed to three commissioners to inquire by a jury of the county of New York into the competency of the alleged incompetent, and it was also ordered that the sheriff be instructed to summon a jury in the manner required by law. It was further ordered that the commission be executed in the county of New York and that at least five days' previous notice of the time and place of the execution of the commission be given to Chaloner and to the person having charge of him who, in this instance, was the medical superintendent of the asylum. It was further ordered that the commissioners might, in their discretion, dispense with Chaloner's attendance unless the jurors or any of them should require such attendance.

Notice dated May 23, 1899, that the commission would be executed on June 12, 1899, at 4 p. m., at the New York county courthouse, was personally served on both Chaloner and the medical superintendent on June 6, 1899.

The commissioners took their oath on June 5, 1899, and it was filed on June 12, 1899.

The jury was duly summoned for and sat with the commissioners on June 12, 1899, at the New York county courthouse. Chaloner did not appear in person or by attorney. Counsel for the petitioners stated that, if after hearing the testimony the jury desired the presence of the alleged incompetent, he would be brought before them. Testimony was taken as to the mental condition of Chaloner and as to the property owned by him.

The medical superintendent testified that Chaloner said he was physically unable to be present.

Counsel for petitioners again said that he thought it entirely proper to take an adjournment to any day agreeable to the commissioners in order to produce Chaloner before the jury, but the jury stated that they did not desire his production. Thereupon counsel called the jury's attention to the order of the court requiring the presence of Chaloner if any of the commissioners or the jurors so wished.

Thereafter the medical superintendent was again called and stated that to produce Chaloner would temporarily do him harm mentally and that Chaloner "said he did not want to come down." Dr. Carlos F. MacDonald then testified that to call Chaloner would "tend to aggravate his mental condition."

Finally, the matter was submitted to the jury and a verdict was returned that Chaloner was incompetent.

A notice of motion for June 23, 1899, for an order confirming the inquisition and appointing Prescott Hall Butler, committee of the person and estate of Chaloner, was personally served on him on June 15, 1899, at the asylum.

There being no opposition, the court, on June 23, 1899, made and filed its decretal order of confirmation and appointed Butler the committee. Butler subsequently resigned, and his resignation was ordered accepted by the court on November 19, 1899, and Sherman, the defendant here, was appointed in his place.

Chaloner claims that he is and at all times was a resident of Virginia and for that reason his sanity could not be determined in New York; that he was lured into the state of New York in 1897 and was committed improperly without notice; that the inquiry de lunatico in 1899, in any event, should have been in Westchester county; that the notice thereof was insufficient; that the decretal order and all the proceedings were void, among other reasons, because he was not present before the commissioners and the sheriff's jury; that he always was and now is sane and was so declared in 1901 by a court of competent jurisdiction in Virginia; and that therefore the appointment of Sherman was void.

[1] Insanity is, of course, not necessarily a continuing condition, but the trial court was right in holding that Chaloner's present condition never became an issue in the case and could not have become so, unless the court below had been justified in collaterally setting aside the decretal order.

Then, if defendant had adduced some evidence of present incompetency as an affirmative defense, and then only would the present mental condition of plaintiff have been an issuable fact.

[2] The trial court was likewise right in excluding testimony to show the mental condition of Chaloner in 1899, for that issue could not be litigated in this action and was solely for the New York courts. Matter of Curtiss, 137 App. Div. 584, 122 N. Y. Supp. 468; Id., 199 N. Y. 36, 92 N. E. 396.

[3] Whether or not, in 1897, plaintiff was lured into this state, was immaterial because defendant was appointed not by virtue of the 1897 proceeding but as successor to the committee appointed in the 1899 proceeding.

[4, 5] Even assuming that plaintiff was at all times a resident of Virginia, the question of his residence was one of the facts in issue in the 1899 proceedings and having been there adjudicated cannot be collaterally attacked (Kinnier v. Kinnier, 45 N. Y. 535, 6 Am. Rep. 132); but, in any event, the New York court had jurisdiction in view of the fact that plaintiff was within the state and had property therein when the proceedings were commenced.

Section 2323 of the New York Code of Civil Procedure provides:

"An application for the appointment of such a committee must be made by petition, which may be presented by any person. Except as provided in the next section (relating to incompetents in state institutions) where the application is made to the Supreme Court, the petition must be presented at a Special Term held within the judicial district, or to a justice of said court within such judicial district at chambers, where the person alleged to be incompetent resides; or if he is not a resident of the state or the place of his residence cannot be ascertained, where some of his property is situated, or the state institution is situated of which he is an inmate."

The venue of a proceeding is entirely within the control of a state in respect of subject-matter over which a state court has sole juris-

diction and the fact that Chaloner had real property in New York county was enough to satisfy the statute. Matter of Gause, 9 Paige, 416; Emmerich v. Thorley, 35 App. Div. 452, 54 N. Y. Supp. 791.

[6] The trial court was also correct in excluding testimony offered to show that the testimony in the 1899 proceeding was perjurious.

The question whether the alleged perjurious testimony was true was necessarily adjudged by the New York court in finding the plaintiff incompetent. This court cannot determine whether or not the testimony in question was perjured without trying over again the very same issue which the New York court decided when it made the decretal order complained of. It is well settled that the fact that a judgment is procured by false testimony does not open it to collateral attack. United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; Freeman on Judgments (4th Ed.) § 334.

[7] The failure of a person affected by an order or judgment to appear after due notice cannot, of course, affect the validity of an adjudication. Simon v. Craft, 182 U. S. 427, 21 Sup. Ct. 836, 45 L. Ed. 1165.

The record shows that scrupulous care was exercised in serving the various notices of motions and proceedings on Chaloner.

If the trial judge had received in evidence the excluded letter written in July, 1897, by Chaloner to Woods, a Virginia attorney, it would have appeared that he then wrote:

"It is unnecessary for me to say that nothing but the most unexpected and dire necessity could induce me to go before a 'sheriff's jury,' the usual manner, in the state of New York, of carrying out a habeas corpus proceedings for a man who has been declared insane by a judge. I object to this for three reasons. First, because it is not the right way to go about it. I am not a citizen of the state of New York, and therefore the 'sheriff's jury' does not apply to my case. Second, because I do not desire the notoriety consequent upon such a proceeding. Third, because my family are most anxious that I should go before a 'sheriff's jury' in the desperate hope that the said jury would believe what they, and the doctors, said about me. In which case the jury would pronounce me insane, and hand me over to the custody of my family, who could then apply for and receive into their hands my property and the management thereof—under the name of a commission."

And it further appears, from Chaloner's deposition excluded by the trial judge, that he absented himself from the 1899 proceeding by his own choice. If therefore he knew at that time what he was doing, he deliberately failed to appear when full opportunity was afforded to him so to do.

[8] But the propriety and sufficiency of the notice as matter of law are no longer open to question. Matter of Blewitt, 131 N. Y. 541, 30 N. E. 587; Gridley v. College of St. Francis Xavier, 137 N. Y. 327, 33 N. E. 321.

[9] Finally, in regard to the failure to give Chaloner notice of the resignation of Butler and the appointment of Sherman as committee, it appears that there is no statutory requirement of notice in such a proceeding, and it would seem that notice to the committee of a proposed removal is the only notice required. Matter of Andrews, 192 N. Y. 514, 85 N. E. 699.

But, if notice were required, the failure to give it is an irregularity which must be dealt with by the state court of original jurisdiction. Matter of Osborn, 74 App. Div. 113, 77 N. Y. Supp. 423; Matter of Porter, 34 App. Div. 147, 54 N. Y. Supp. 654.

[10] Our conclusion is that the judgment of the New York court was not a void judgment, and it must remain valid until reversed or set aside by the courts of New York. This has never been attempted, and therefore the judgment of the Supreme Court of New York remains to-day in full force and validity. If the petitioner has recovered and is no longer insane, this fact should be brought to the attention of the state court, and if sanity is established the court will undoubtedly restore the plaintiff to his rights. So, too, even if some of the requirements of the statute had been omitted or neglected or insufficient evidence of insanity was adduced, relief must be obtained in the court which appointed the committee. If a prima facie case were made out, we have no reason to doubt that the state courts would grant appropriate protection to guard the plaintiff from arrest while attending such proceeding, just as this court did in this case. Chanler v. Sherman, 162 Fed. 19, 88 C. C. A. 673, 22 L. R. A. (N. S.) 992.

But, however this may be, we think that this court has not jurisdiction to set aside or annul the judgment of the state Supreme Court rendered in a proceeding in which it obviously had jurisdiction.

The judgment is affirmed, with costs.

FREED v. CENTRAL TRUST CO. OF ILLINOIS.

In re STANDARD FURNITURE DISTRIBUTING CO.

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

No. 1969.

1. CONTEMPT (§ 66*)—PROCEEDINGS—MODE OF REVIEW.

Proceedings for contempt in a court of bankruptcy for refusal to obey an order to turn over property to a bankrupt's receiver or trustee are for civil and not for criminal contempt, and are not reviewable by writ of error.

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

2. BANKRUPTCY (§ 439*)—CONTEMPT PROCEEDINGS—PROCEDURE ON REVIEW.

A writ of error, which aims to correct only errors of law arising on the common-law or criminal law side of a court of bankruptcy, may be treated as a petition to revise, and especially in contempt cases where a liberal practice should be adopted.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 439.*

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

3. BANKRUPTCY (§ 463*) — APPELLATE PROCEEDINGS — BILL OF EXCEPTIONS — TIME FOR FILING.

The rule at common law that a bill of exceptions must be filed within the term or within such time as may be granted during the term has no application in bankruptcy proceedings, and the court in a proceeding on its equity side may allow and certify a bill of exceptions by a nunc pro

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

tunc order to bring on the record evidence introduced on a previous hearing.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 926; Dec. Dig. § 463.*]

4. BANKRUPTCY (§ 136*)—CONTEMPT PROCEEDINGS—POWER OF COURT TO COMMIT.

A court of bankruptcy has no legal power to endeavor to enforce an order to pay over money to a receiver or trustee by civil contempt proceedings resulting in a decree committing the contemner to jail until he shall have complied with the original order, unless the evidence in the contempt proceedings clearly demonstrates a present ability and a willful refusal to obey.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

In the matter of the Standard Furniture Distributing Company, bankrupt. To review an order of commitment in contempt proceedings, brought by the Central Trust Company of Illinois, Isadore B. Freed brings error. Reversed.

Bernard J. Brown, of Chicago, Ill., for plaintiff in error.

Harold F. White, of Chicago, Ill., for defendant in error.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

MACK, Circuit Judge. This is a proceeding to review an order of the District Court, entered November 29, 1912, adjudging Isadore B. Freed guilty of contempt in refusing willfully and contumaciously to obey an order entered October 24, 1912, directing said Freed, as president of the Standard Furniture Distributing Company, a bankrupt, to turn over $1,100 to the Central Trust Company as receiver of the bankrupt, and committing him to jail "until he deliver to the receiver * * * the sum of $1,100 or until the further order of this court or until otherwise released by law."

Both orders were entitled and entered in the bankruptcy proceedings, the first on a petition of a creditor, rule on and due notice to Freed, and default for want of an answer thereto, the second on petition of the receiver, rule to show cause, answer thereto by Freed, and, as the order recites, testimony offered on behalf of the receiver and of Freed.

A writ of error, in which the United States was named as defendant in error, was sued out of this court on the day of the entry of the commitment order. Afterwards the Central Trust Company, as receiver, was made a defendant in error, and later the United States was dismissed as a party.

No time had been fixed by the District Court for filing a bill of exceptions or certificate of the evidence. Over the objection of the receiver that the court was then without jurisdiction, there was filed on April 22, 1913, by leave of the District Court, a so-called bill of exceptions, dated April 22, 1913, certified by the District Judge as con-

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

taining "all of the evidence offered and received on the hearing of said matter."

Motions to dismiss the writ of error and to strike this bill of exceptions from the record were reserved to the final hearing. At that time leave was granted to file a petition to review and revise without prejudice to defendant in error's right, however, to object thereto.

[1] 1. Counsel for plaintiff in error now properly concede that, as the proceedings culminating in the order of November 29th and the commitment pursuant thereto are clearly for civil and not for criminal contempt (Clay v. Waters, 178 Fed. 385, 389, 390, 101 C. C. A. 645, 21 Ann. Cas. 897), they cannot be reviewed by writ of error either under the Circuit Court of Appeals Act or by appeal under section 24a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431]). On the other hand, counsel for defendant in error admit that, as the orders were made in the course of bankruptcy proceedings for the purpose of enforcing the rights of the receiver in and to property held to belong to the bankrupt's estate, a petition to revise and review, if filed in due time, would have enabled this court, under section 24b of the Bankruptcy Act, to review the order entered by the bankruptcy court under its "jurisdiction in equity" in a "proceeding in bankruptcy." In re Cole, 163 Fed. 180, 90 C. C. A. 50, 23 L. R. A. (N. S.) 255; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405.

While for reasons stated in Re Friend, 134 Fed. 778, 67 C. C. A. 500 (see, too, Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725), we held that a petition to revise could not be dealt with as an appeal, the converse of this propostion, that an appeal cannot be dealt with as a petition to revise, while maintained by some Circuit Courts of Appeals (Brady v. Bernard, 170 Fed. 576, 95 C. C. A. 656), has been denied by others (Re Abraham, 93 Fed. 767, 35 C. C. A. 592; Chesapeake Shoe Co. v. Seldner, 122 Fed. 593, 58 C. C. A. 261).

The Supreme Court in Bryan v. Bernheimer, 181 U. S. 188, 21 Sup. Ct. 557, 45 L. Ed. 814 (the Abrahams case on certiorari), and in Holden v. Stratton, 191 U. S. 115, 119, 24 Sup. Ct. 45, 48 L. Ed. 116, by express reference to the effect of the Bernheimer Case, impliedly approved of the principle adopted in the Abrahams Case, and, in Duryea Power Co. v. Sternbergh, 218 U. S. 299, 31 Sup. Ct. 25, 54 L. Ed. 1047, while affirming the principle of the Friend Case, expressly distinguished but in no way limited or overruled the principle of these other cases. Bank v. Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051, holds that as the Court of Appeals on petition could revise only in matters of law, it is, of course, powerless to review and to reverse the District Court in matters of fact, in a case presented on appeal instead of by petition.

[2] If then, an appeal which, as applied to bankruptcy proceedings, aims to correct errors both of law and of fact arising on the equity side of the bankruptcy court (Bankruptcy Act, § 25a), may be treated as a petition to revise which aims to correct only errors of law so arising (section 24b), a writ of error which aims to correct only errors of law arising on the common-law or criminal-law side of the court may,

in our judgment, be similarly dealt with. While the writ and the petition differ in form, in substance they are similar; both begin new proceedings in this court to accomplish substantially the same end. Especially in contempt cases incident to bankruptcy proceedings should a liberal practice in this respect be adopted, in view of the uncertainty that so long prevailed in distinguishing between cases of civil contempt, properly reviewable in bankruptcy proceedings by petition to revise, and criminal contempt, reviewable only by writ of error. Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874. The motion to dismiss the writ will be denied, and the case will be dealt with as if the petition to revise had been filed when the writ of error issued.

[3] 2. While, at common law, a bill of exceptions must be filed within the term or within such time as may be granted during the term, this rule can have no application in bankruptcy proceedings. The District Court, sitting as a court of bankruptcy, has no terms. Moreover, this proceeding was on the equity side of the court. And in Kerr v. South Park Com'rs, 117 U. S. 379, 384, 6 Sup. Ct. 801, 803 (29 L. Ed. 924), the court says:

"We cannot, as we are asked to do by counsel for appellees, disregard the evidence and rulings of the court on the trial of the issue, which are certified by the court as authentic and correctly reported, and which the decree recites to be the basis of its findings, because they were not certified and brought on the record at the same term at which the decree was entered. The subsequent certificate merely ascertains and verifies what proceedings took place before the court at the time of the hearing, and, although they should regularly have been brought on the record at the same term, we know of no rule of chancery practice or procedure which forids the making of a nunc pro tunc order to supply such an omission and to prevent injustice."

This certificate therefore was properly a part of the record in the case. The motion to strike it out must be denied.

[4] 3. Coming, then, to a consideration of the merits of the case, we start with the proper concession of the receiver's counsel that while the court, to vindicate its authority, may punish as for a criminal contempt one who has it in his power to obey but willfully disobeys its order to pay over money to another, or who, after the institution of proceedings, has willfully disabled himself from complying therewith, it has no legal power to endeavor to enforce such an order in aid of the party to whom the money is to be paid, by civil contempt proceedings resulting in a decree committing the contemner to jail until he shall have complied with the original order, unless the evidence in the contempt proceedings clearly demonstrates a present ability and a willful refusal to obey. Re Cole, supra; Samel v. Dodd, 142 Fed. 68, 73 C. C. A. 254; Stuart v. Reynolds, 204 Fed. 709, 123 C. C. A. 13.

Neither from the allegations of the petition nor from the findings of the court does it appear that Freed, on November 29th or at any time after the entry of the default order of October 24th, was able to comply therewith.

The testimony as certified by the judge demonstrates the contrary. At the best, the default on October 24th amounted to an admission of

the finding then made that Freed then had the money in his control. But in the absence of any affirmative evidence whatsoever to contradict the testimony both of Freed and of his wife that the money had been used for household and other expenses at some time prior to the hearing in November, the finding in the order of October 24th, even regarded as an admission, would not justify a finding on November 29th of present ability to pay or an order of commitment until payment based thereon. Stuart v. Reynolds, supra; Re Cole, supra. See Re Goodrich, 184 Fed. 5, 106 C. C. A. 207.

It is, of course, immaterial what property the wife may have had; the coercion of civil contempt proceedings is personal, based on personal ability to perform, not on a hope of intervention by friends or relatives. Re Davision (D. C.) 143 Fed. 673.

The very language of the order of commitment, that on October 24th "Freed had in his possession and control money or property of sufficient value to comply with the order," in the absence of any allegation or finding of any ability to comply therewith at any later date, would indicate that the court erroneously deemed this fact sufficient.

The order must therefore be reversed and the cause remanded for such further or other proceedings, civil or criminal, as the court may deem proper, to enforce its order or to punish for the willful violation thereof, not inconsistent with the views herein expressed.

In re IRON CLAD MFG. CO.

(Circuit Court of Appeals, Second Circuit. June 11, 1914.)

No. 281.

1. BANKRUPTCY (§ 482*)—REVIEW—ALLOWANCE OF ATTORNEY'S FEES.
   While an appellate court may in case of clear error change the amount of an attorney's allowance made by the court in which the services were rendered, it will not do so unless the error is of the plainest.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. § 482.*]

2. BANKRUPTCY (§ 482*)—JURISDICTION OF COURT—FIXING FEES OF SOLICITOR.
   The jurisdiction conferred on a court of bankruptcy, by an application by parties to a collateral proceeding by a receiver in bankruptcy to substitute a new solicitor, to determine the amount of the lien of the present solicitor on papers in his possession does not extend to the fixing of the fees of such solicitor and the liability in personam therefor, nor can such jurisdiction be conferred by consent.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. § 482.*
   Jurisdiction of federal courts in suits relating to bankruptcy, see note to Bailey v. Mosher, 11 C. C. A. 313.]

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

This is an appeal from an order of the District Court entered December 26, 1913, fixing the compensation of James A. Allen, as solicitor

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

for the American Steel Barrel Company and Elizabeth C. Seaman in certain bankruptcy proceedings in that court. Modified and affirmed.

The proceedings were commenced in April, 1911, by the filing of a petition in the Eastern District of New York against the Iron Clad Manufacturing Company, a corporation in which Elizabeth C. Seaman was largely interested. Shortly thereafter the receiver of the Iron Clad Manufacturing Company applied to the court for an order "extending the receivership" to property in the possession of the American Steel Barrel Company, which application was still in the court when the order of December 26th was made. Allen appeared for the American Steel Barrel Company and represented it until relieved in February, 1913. Elizabeth C. Seaman also employed Allen to oppose the adjudication in bankruptcy of the Iron Clad Manufacturing Company because of her interest in that company, and he did represent it until it was adjudicated, and indeed upon an appeal later. Meanwhile, Elizabeth C. Seaman was also being examined under section 21a of the Bankruptcy Act, and was the object of certain contempt proceedings, in which she was fined by two orders, from one of which an appeal was taken. There were also several incidental proceedings, not necessary to mention, between the receiver of the Iron Clad Manufacturing Company on the one hand and of the American Steel Barrel Company and Elizabeth C. Seaman on the other, in which Allen represented one or both.

On January 27, 1913, the American Steel Barrel Company and Elizabeth C. Seaman, the respondents here, served notice on Allen by way of order to show cause why another solicitor should not be substituted. On February 6, 1913, Judge Mayer directed the American Steel Barrel Company to give bond for $10,000 and Elizabeth C. Seaman to give an undertaking in like amount, and that thereupon a new solicitor should be substituted. The total security under both obligations was to be only $10,000; Allen having been paid $3,400. Allen was thereupon directed to deliver to the substituted solicitor enough of the papers in his hands to enable him to continue the litigation; his own lien, however, being preserved. Judge Mayer resettled this order on February 15, 1913, so as to provide that Elizabeth C. Seaman should pay down $1,000, and the American Steel Barrel Company should execute a mortgage of $10,000 as a security for Allen's eventual fees, to be determined; the papers to be meanwhile delivered, as before, to the substituted solicitor. It may be noted that on February 11, 1913, the order of February 6th had been already once resettled; but, as this was superseded by the order of February 15, 1913, it need not be set forth.

Judge Mayer heard testimony regarding the amount of the fees in October and November, 1913, and fixed Allen's fees at $12,500, with a contingent addition of $5,000. This sum he apportioned, $6,500 against Elizabeth C. Seaman and $6,000 against the American Steel Barrel Company, and Allen was allowed to hold all the papers remaining in his hands until the payment of the sums so fixed. It is this order only from which Allen appeals.

See, also, 194 Fed. 906.

Roger Foster, of New York City, for appellant.

Harold Nathan, of New York City, for appellees.

Before COXE and ROGERS, Circuit Judges, and HAND, District Judge.

HAND, District Judge (after stating the facts as above). The only basis for the jurisdiction of the District Court was the necessity for an order substituting a new solicitor for the two parties in the bankruptcy proceedings in place of Allen. As he had at common law a possessory lien, it became necessary as an incident to that power to determine the amount of the lien; but that was all that the District Court could do. The consent of Mrs. Seaman and the American Steel Bar-

rel Company to have the general liability determined in personam by the bankruptcy court, although actually given, could not serve to confer jurisdiction over the subject-matter upon the court, and the statute gives no such jurisdiction. The District Court directed the American Steel Barrel Company to give a mortgage on its assets to secure Allen for the sums due him from it, subsequently found to be $2,600, and it directed Elizabeth C. Seaman to pay down $1,000, but gave Allen no security as against her for the balance, afterwards found to be $4,500.

Three questions arise: First, the proper value of Allen's services; second, the distribution of the amount between Elizabeth C. Seaman and the American Steel Barrel Company; third, the propriety of the provisions directing the turning over of the papers to Elizabeth C. Seaman without security.

[1] As to the value of the services, we are not disposed to disturb the decision of Judge Mayer. No doubt this court will in cases of clear error change the amount of an attorney's allowance, but the error must be of the plainest. Especially should this be true where, as here, the proceedings were largely taken before the same judge, who became familiar with the details of the proceedings in an intimate sense that we cannot.

It is very hard to see how the proceedings in the case could with propriety so long be dragged on. Judge Mayer in his opinion suggests that the plan was deliberately to tire out the other side by delay, and there is enough in the record to justify such a conclusion. Indeed, it was even suggested at the bar of this court, though afterwards withdrawn, that it was an element for consideration in fixing an allowance that through a period of over a year, while this matter was in litigation, Elizabeth C. Seaman had been able to draw a monthly salary of $1,000 from the American Steel Barrel Company. The bar, of course, understands that, whatever a solicitor may get from clients as a return for delaying legal proceedings and wearying his antagonists, he must get it without the help of courts, who do not recognize in such services any basis whatever for a legal obligation. The courts are open to decide causes, not to obstruct them.

Nor are we impressed with the justice of some of the items. For example, we find on March 22, 1912, most of the day was spent drafting a proposed order denying the motion to extend the receivership, a most inordinate time, even if equity rule 71 against recitals be disregarded. Again, take the time expended in examining authorities regarding the "extension of the receivership," no doubt a confused matter, but not one in which all the authorities of the least consequence number more than 15 or 20: June 16, 1911 (all the evening), June 18, June 19, June 21, June 22, June 25 (from 10:30 till 5:30). Again, the appellant took all of December 5, one-half of December 6, and nearly four hours of December 8, 1911, on the authorities as to right to appeal from the order of this court reversing Judge Chatfield.

These are, of course, not considerations adequate alone to use as the basis of fixing the amount; but they are significant as justification of the award actually made. It is not our duty to make the award, but to see whether it was within the bounds of reasonable judgment. The

opinions of experts upon questions of value are notoriously divergent, and the Supreme Court has particularly said that they are not conclusive. The Conqueror, 166 U. S. 110, 17 Sup. Ct. 510, 41 L. Ed. 937. Perhaps on the question of lawyers' fees the divergence is greater than anywhere alse. It would be preposterous to require a court, itself as good an expert as the witnesses, to accept their conclusions. In the case at bar we have made a detailed examination of the time spent, and find that the allowance appears to be at a rate in the neighborhood of $60 a day, or a gross income of $16,000 a year. Certainly we are not willing to say that this is below the limit which a fair man might think adequate compensation for an ordinary solicitor engaged upon such work. We have nothing in the record to indicate that the appellant had attained a position at the bar which made it reasonable to expect that his charges would, or should, be out of the ordinary.

The next question is the distribution of the amount. It may well be that Elizabeth C. Seaman is responsible in solido; on that we do not pass, because here we have only a question of lien. Clearly the appellant may not hold the papers of the American Steel Barrel Company for work done for the Iron Clad Manufacturing Company, nor upon the contempt proceedings, nor upon the examinations of Elizabeth C. Seaman, under section 21a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430]). It is impossible to tell with certainty just how the value of these services bears on the work done for the American Steel Barrel Company itself; but the division already made we will not disturb.

[2] The last question is of the protection of Allen's lien. The order will be that if the American Steel Barrel Company does not give a valid mortgage for $2,600, with interest, within ten days, they must return all papers to Allen which he delivered under the three orders of February, 1913, and that if Elizabeth C. Seaman does not within the same period pay her share, $5,500, with interest, she must redeliver all papers to Allen which he delivered, the same to be held in each case upon his solicitor's lien. A possible question might arise as to the appellant's right to hold the papers of Elizabeth C. Seaman upon a lien, not only of $5,500 due from her, but of $2,600 in addition, due from the American Steel Barrel Company. This would depend upon the liability of Elizabeth C. Seaman for the services rendered to the American Steel Barrel Company, thus collaterally raising the very question which we have declined to pass upon. In view of the fact that in any event we decline to do more here than fix the amount of the lien, we do not anticipate that this question will be raised.

As thus modified, the order is affirmed, without costs.

TOM v. NICHOLS-FIFIELD SHOE MACHINERY CO.

(Circuit Court of Appeals, First Circuit. July 10, 1914.)

No. 1062.

1. NEGLIGENCE (§ 136*) — DANGEROUS MACHINERY — LIABILITY OF MANUFACTURER—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

Where plaintiff's employer purchased a die-cutting machine from defendant to be set up and operated in his factory, and plaintiff while operating the machine in the course of his duty was injured by the sudden involuntary fall of the headpiece, due to a defect in the machine or a failure to properly adjust the same when it was being set up by defendant's employés shortly before the accident, plaintiff having no knowledge that the head piece was liable to fall when his foot was not on the treadle, whether defendant was negligent in constructing and setting up the machine, whether such negligence, if any, was the proximate cause of plaintiff's injury, and whether plaintiff was himself negligent, were for the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.*]

2. NEGLIGENCE (§ 27*)—DANGEROUS MACHINERY—CARE REQUIRED.

Where defendant rebuilt and sold to plaintiff's employer a die-cutting machine knowing that it would be operated by plaintiff's employés, defendant was bound to exercise reasonable care to make the machine safe, and was liable for injuries to plaintiff while operating the machine caused by a failure to exercise such care.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 25; Dec. Dig. § 27.*]

In Error to the District Court of the United States for the District of Massachusetts; James M. Morton, Judge.

Action by Jacob Tom against the Nichols-Fifield Shoe Machinery Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Wendell P Murray, of Boston, Mass. (Charles F. Smith, of Boston, Mass., on the brief), for plaintiff in error.

Walter Bates Farr, of Boston, Mass., for defendant in error.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

BINGHAM, Circuit Judge. This is an action for personal injuries sustained by the plaintiff (plaintiff in error), while in the employment of Habib Tom and engaged in operating a die-cutting machine, sold and delivered by the defendant (defendant in error) to and set up by it in the factory of said Tom in contemplation of its being operated by the plaintiff.

The declaration contains three counts. The defendant demurred to the declaration, and the demurrer was overruled. It was held, on the authority of Huset v. Chase Machine Co., 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303, that the second count stated a good cause of action, and the case went to trial upon that count, which reads as follows:

"And the plaintiff says that at Boston aforesaid, on or about June 12, 1907, the defendant company was engaged in business as a manufacturer of, re-

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

pairer of, and dealer in, certain sorts of machinery; that in the course of said business it then and there represented to one Habib Tom, a manufacturer of certain articles of wearing apparel, that a certain lining-cutter machine then and there owned by the defendant, and forming part of its stock of machinery in which it was then and there dealing, which machine was to be run by power, was suitable for use, and intended for use, in cutting the sort of material used by said Habib Tom in the course of his business as manufacturer aforesaid; and the defendant then and there further represented to said Habib Tom that said lining cutter was then and there in all its parts sufficient and adequate for the proper running and operation of said machine with safety to said Habib Tom, his servants or agents or operator, and for the proper performance of the work of cutting such material in his manufactures aforesaid; and the defendant further then and there represented to said Habib Tom that for a certain consideration then named it would transfer and deliver said machine in the conditions represented to said Habib Tom in the latter's factory in said Boston, and that it, the defendant, would also set said machine up in good workmanlike manner in said factory, in the condition aforesaid, in such way as not to endanger or harm said Habib Tom, his servants or agents or operator, while said Habib Tom, his servants or agents or operator, were properly using the same; and the plaintiff says that thereupon, believing the same to be true, and relying upon said representations, and acting thereon, said Habib Tom then and there paid and delivered to said defendant the consideration hereinbefore referred to, and in return for said consideration the defendant delivered to said Habib Tom in his said factory said machine; and, further, the defendant thereupon set said machine up in said factory, having done which, the defendant represented to said Habib Tom that said machine was then and there in all its parts as represented as aforesaid, and that it was then and there set up in said factory as represented as aforesaid that it would be there set up, and thereupon, and relying upon all said representations aforesaid, and believing the same to be true, and having reasonable cause to believe the same to be true, acting thereon, said Habib Tom set the plaintiff to work operating said machine in said factory, and the plaintiff says that at the time he was so set to work, and while the plaintiff was operating said machine, he was in the employ of said Habib Tom as his servant for that purpose, and he then and there had no knowledge of any defect in said machine, or in the way in which it was so set up by the defendant, and that while so operating said machine in a proper manner, and while the plaintiff's left hand and forearm were extended over a quantity of such material as aforesaid then in said machine, arranging the knives thereon for the purpose of cutting said material in said machine, and while the plaintiff was exercising due care, the top or head of said machine suddenly dropped on the plaintiff's said hand and forearm, and then and there caught said hand and arm between said headpiece of said machine and said knives, and then and there caused the plaintiff's said hand and arm to be so cut and mangled and bruised and injured, and so held said hand and arm imprisoned in said machine, that said hand and forearm thereafter had to be and were amputated from the plaintiff, and the plaintiff says that said weight or headpiece was caused or permitted so to fall then and there, and hold the plaintiff's hand and arm imprisoned as aforesaid, because said machine was not, when delivered and set up by the defendant in said factory, in the condition by it represented as aforesaid, and because said machine was not delivered and set up by the defendant in such a way as to permit the plaintiff, as servant of said Habib Tom as aforesaid, to properly operate the same as aforesaid without danger of the harm aforesaid happening to the plaintiff, and because at the time the defendant completed its delivery and setting up of said machine aforesaid there were insufficiencies in said machine, certain of its parts were inadequate to control said headpiece and prevent its dropping as aforesaid, which insufficiencies in said machine, and inadequacy of its parts to control said headpiece and prevent its so dropping, rendered said machine imminently dangerous to the life and limb of the plaintiff operating the same as aforesaid, all of which facts were at the several times aforesaid known to the defendant, but were unknown to and concealed

from said Habib Tom and the plaintiff, and the defendant negligently and carelessly failed then and there to safeguard or warn the plaintiff against said imminent danger and injury aforesaid, all to the great and permanent injury of the plaintiff, and causing the plaintiff great pain and loss of time and money."

At the close of all the evidence a verdict was directed for the defendant, and the plaintiff excepted. No question is here raised as to the second count stating a good cause of action. The only question is whether the evidence was sufficient to warrant the submission of the case to the jury.

The defendant contends that there was no evidence warranting the jury in finding: (1) That the plaintiff's accident was occasioned by a defect in the machine that existed at the time it was sold and installed; or (2) that the defect in the machine was one that rendered it imminently dangerous to life and limb of the plaintiff; or (3) that the defendant knew of the defect and concealed his knowledge of it from the employer; or (4) that the plaintiff was in the exercise of due care.

The machine consisted of a wooden bed, upon which the operator placed the material to be cut. Having spread out the material upon the bed, steel dies were placed upon it, and were driven through the material by a blow from the headpiece or beam, the fall of which was accentuated by power. The power was applied and shut off by means of a treadle, which, when pressed down, caused a friction cone pulley to be engaged by a belt-driven pulley that inclosed it. When the pressure was released, the treadle was raised by springs, and the cone of the pulley was withdrawn, shutting off the power. The machine was also equipped with a brake, which consisted of an iron ring, the ends of which were kept apart by a square plug. Turning this plug sideways forced the ends of the ring farther apart, so that the ring was expanded against the inside of the flange of the pulley, checking the motion. The construction was such that when the treadle was down and the power applied the brake was released; and when the treadle was raised and the power shut off the brake was applied. The headpiece weighed about 600 pounds, and when the power was shut off and the headpiece was up it was held in position only by the brake. When the treadle was operated it rocked a shaft to which an arm was attached. This arm was connected with a brake lever by a link or screw, which was a threaded rod supplied with nuts, the end of which passed through the eye of the brake lever. At the opposite end of the brake lever was the square plug which expanded the ring against the inside of the flange of the pulley, as above stated. The treadle was held up by two strong spiral springs, the force of which, when the foot was taken off the treadle, caused the shaft, and the shaft arm connected with it, to be rocked away from the operator, and the end of the screw link to be thrust farther through the eye of the brake lever, bringing a rubber plug on the link hard against the brake lever, causing the lever to turn the square plug sideways and expand the ring and apply the brake. This rubber plug was cylindrical in shape, and inclosed the link for about an inch and a half. It had on one side of it two nuts, which were locked together, and on the other side was the brake lever, through the eye of which the end of the link passed. When the operator pressed the treadle

down with his foot the shaft and its arm would rock towards the operator, tending to withdraw the link from the eye of the lever. If the end of the link were withdrawn from the eye of the lever when the treadle was pressed down, then when the treadle was raised again, the connection between the arm of the shaft and the lever having been broken, the brake would not be applied, and there would be nothing to hold the beam up.

[1] The evidence tended to prove that the plaintiff was injured by the headpiece or beam falling and catching his hand and arm between it and one of the dies, while he was smoothing the cloth and placing the dies preparatory to operating the machine; that he had not placed his foot upon the treadle, the treadle being up at the time, and that he had reason to believe the headpiece would remain up until the treadle was again pressed down; that the link or screw was too short to prevent its being drawn through the eye of the lever, unless two nuts or some other sufficient means were placed upon the end of the link to prevent its being drawn through, or, if the link was not too short, that the arm of the shaft was improperly adjusted upon the shaft so that it drew the link or screw too far back when the treadle was pressed down, causing the link or screw to be withdrawn from the eye of the lever and disconnecting the brake; that at the time the machine was set up there was but a single nut upon the end of the link, and that no change in this respect was made down to the time of the accident; that in the operation of the machine, in the natural and expected course of events, this single nut would be and was backed off the end of the link, allowing it to be withdrawn from the eye of the lever; that on the succeeding operation of the machine, when the head beam was up, the link being withdrawn from the eye, so that the brake would not work, the beam fell, and injured the plaintiff; that the reason the head beam did not immediately fall upon being raised was that it was temporarily held by cams or eccentrics on a dead center, and shortly afterwards, being released therefrom by the jar of the motor on the floor, the beam fell; that the difficulty with the brake could and should have been obviated in one of the following three ways: By making the link so long that it could not be drawn through the eye when the treadle was pressed down, or by readjusting the arm on the shaft so that it could not draw the link back far enough to release it from the eye, or by locking the nut with a check nut upon the end of the link so that it could not be backed off and allow the link to be withdrawn from the eye. Although the machine was not new at the time it was purchased of the defendant, it had been operated but a short time, and was represented to be in perfect condition and as good as new. All its parts had been gone over and rebuilt by the defendant, and it knew when the sale was made that the machine was to be set up in the purchaser's factory, where he employed a number of people, and was to be operated by his men.

It also appeared that it was arranged the defendant should set up the machine in the factory, ready to be operated; that a day or so after the purchase was made the defendant delivered the machine at the factory, set it up, operated it, and notified the purchaser that it was ready for use; that the purchaser himself operated the machine the

first two or three days, during which time the beam came down, because of the rubber plug splitting and coming off the link; that the defendant put on a new rubber plug; that thereafter the machine worked perfectly down to the time of the accident to the plaintiff, which occurred some four weeks after the sale was made; that at that time the single nut worked off the end of the link and allowed the link to be drawn through the eye of the lever; that this was due either to the want of a check nut to lock the nut on the end of the link, or to the link being too short, or to the brake mechanism between the lever and the shaft being rendered too short by the way in which the arm was adjusted upon the shaft; and that the defendant knew this was an unsafe and dangerous way to construct or set up the machine, and that no one would discover it but a skilled mechanic, and then only after a thorough examination.

We think the jury could reasonably have found from the evidence that the machine was defectively constructed or set up; that the head beam was liable to fall at any minute, and that the machine was therefore imminently dangerous to any one who should undertake to operate it in the way it was designed to be used; that, constructed as it was, with a single nut upon the end of the link, it was a mere trap; that the defendant knew it was to be operated by the purchaser's employés, of whom the plaintiff was one; that the defendant, having overhauled the machine and set it up, knew its condition, and that it was dangerous, and not only concealed the situation from the purchaser and his employés, but lulled them into security by giving them to understand and believe that the machine was properly constructed and set up. It could also be found that the plaintiff was in the exercise of due care. Although he knew it was dangerous to place his hand on top of the dies when his foot was on the treadle, he did not know that the head beam was liable to fall when his foot was not on the treadle, and reasonable men might fairly conclude that he was not negligent in what he did.

[2] We are also of the opinion that the circumstances disclosed by the case show that the defendant owed the plaintiff a duty to exercise care in setting up the machine, and that this duty did not arise out of the contract of sale between the defendant and Tom, but out of the relation existing between the plaintiff and the defendant, and irrespective of the contract of sale. "The law governing actions for negligence has for its foundation the rule of reasonable conduct." That rule "necessarily includes two persons, or one person and some right or property of another. It has to do with one's acts in reference to the person, property, or rights of another. It is a rule of relation. If there be no relation there is nothing upon which the rule can operate." Garland v. Railroad, 76 N. H. 556, 86 Atl. 141, 46 L. R. A. (N. S.) 338, Ann. Cas. 1913E, 924. When, however, one knows or has reason to believe that his conduct may affect injuriously the person or property or rights of another, then a duty arises requiring him to exercise reasonable care to see that his acts do not result injuriously to the person or property or rights of that other. So in this case, when the defendant set up the machine in the factory, knowing or having reason to anticipate that the plaintiff and his fellow employés were to operate

it, the law imposed a duty upon the defendant, with relation to the plaintiff and these men, to exercise reasonable care in setting up the machine, and rendered it liable in damages for a breach of the duty in case one of them was injured while operating the machine and as a result of its having been negligently set up. Gill v. Middleton, 105 Mass. 477, 479, 7 Am. Rep. 548; Baird v. Daly, 57 N. Y. 236, 15 Am. Rep. 488; Devlin v. Smith, 89 N. Y. 470, 478, 42 Am. Rep. 311, Pittsfield Co. v. Shoe Co., 71 N. H. 522, 53 Atl. 807, 60 L. R. A. 116; Id., 72 N. H. 546, 58 Atl. 242; Hubbard v. Gould, 74 N. H. 25, 28, 64 Atl. 668; Dustin v. Curtis, 74 N. H. 266, 268, 269, 67 Atl. 220, 11 L. R. A. (N. S.) 504, 13 Ann. Cas. 169; Burnham v. Stillings, 76 N. H. 122, 123, 79 Atl. 987.

Whether the defendant's act in negligently setting up the machine was the proximate cause of the plaintiff's injury was a question of fact for the jury, there being evidence from which such a conclusion might reasonably be drawn. It appeared that the defendant's men went to the factory of the purchaser, saw the place where the machine was to be operated, saw that a number of men, including the plaintiff, were employed there, and knew that they were likely to be called upon to run the machine. Under these circumstances, it could not be said as a matter of law that the defendant had no reason to anticipate that the plaintiff would be set to work on the machine, or that the injury which he received was not the proximate result of its negligence in improperly setting it up. Ela v. Cable Co., 71 N. H. 1, 3, 51 Atl. 281.

The judgment is reversed, the verdict is set aside, the case is remanded to the District Court for further proceedings not inconsistent with this opinion, and the plaintiff in error recovers his costs of appeal.

VANDERBILT v. OCEAN S. S. CO.

(Circuit Court of Appeals, Second Circuit. July 18, 1914.)

No. 263.

1. EVIDENCE (§ 407*)—BILLS OF LADING—PAROL EVIDENCE TO VARY OR CONTRADICT.

A bill of lading has a twofold character. It is a contract to transport and deliver the goods to the consignee on the terms specified in it; and it is also a receipt as to the quantity and description of the goods shipped. So far as it embodies the terms of the contract it is not to be varied by parol evidence; but so far as it constitutes a receipt it may be contradicted as between the parties by parol evidence showing that a different quantity was delivered.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1826–1828, 1841; Dec. Dig. § 407.*]

2. SHIPPING (§ 106*)—FREIGHT—BILL OF LADING AS EVIDENCE OF QUANTITY.

In a bill of lading for a cargo of lumber, the words "weight unknown" and "weight subject to correction," in addition to the words "said to contain 26,304 superficial feet more or less," will prevent the application of the rule that the recital as to quantity prima facie binds the ship;

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

and such bill of lading does not afford evidence of the quantity, but leaves the question open.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 175–178, 204; Dec. Dig. § 106.*]

3. Customs and Usages (§ 19*)—Evidence of Existence.

Evidence *held* to establish a general custom as well as a custom between the parties to allow a shipper a 10 per cent. deduction for wastage resulting from the dressing of rough lumber, and to entitle a shipper to such deduction on a shipment from Savannah to New York.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 41–43, 45, 46; Dec. Dig. § 19.*]

4. Shipping (§ 115*)—Breach of Contract of Affreightment—Damages.

Libelant shipped on respondent's vessel a cargo of lumber from Savannah to New York, and paid the freight lawfully due thereon. Respondent, refusing to allow the usual deduction for wastage on a portion of the cargo which was dressed before shipment, retained a portion of the cargo, which had been sold by libelant. *Held*, that libelant was entitled to purchase lumber in the open market to make up the deficiency and to recover the cost thereof from respondent.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 185; Dec. Dig. § 115.*]

5. Carriers (§§ 91, 94*)—Breach of Contract—Failure to Deliver Goods—Damages.

The act of a carrier in failing without lawful excuse to deliver goods intrusted to his care constitutes both a breach of contract and a conversion, and the measure of the shipper's damages is the value of the property at the time of the conversion, with interest thereafter.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 338–355, 367–395, 456; Dec. Dig. §§ 91, 94.*]

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

This suit comes here on appeal from a final decree in favor of the libelant, entered in the District Court for the Southern District of New York, October 27, 1913, awarding the sum of $257.42 to the libelant.

Barry, Wainwright, Thatcher & Symmers, of New York City (James K. Symmers and Earle Farwell, both of New York City, of counsel), for appellant.

Edward L. Owen, of New York City, for appellee.

Before COXE and ROGERS, Circuit Judges, and HAND, District Judge.

ROGERS, Circuit Judge. The question we have to determine in this suit is the amount of freight to be paid upon a certain shipment of lumber. The libelant shipped at Savannah, Ga., on board the steamer City of Atlanta, belonging to respondent, a certain amount of lumber to be transported to New York. His claim is that the amount so shipped was 26,304 feet; the amount of dressed lumber being 17,369 feet, and the number of feet of rough lumber being 8,935 feet. The freight agreed to be paid was as follows: On lumber 45 feet in length, $6.25 per thousand, and an additional $2.50 for all lumber over 45 feet; $25 was to be added for a minimum charge of lighterage and 30 cents a

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

thousand feet for wharfage. Upon the arrival of the lumber at New York the libelant sent a check to the respondent for $197.29 in payment of the freight. The respondent, thinking an error had been made in computing the freight, telegraphed its agent in Savannah requesting him to telegraph the amount of freight due. The report made by him did not agree with the statement furnished by the libelant. The respondent thereupon caused the shipment to be measured, and, as a result, found that the amount of lumber was 28,336 feet board measure. The libelant refused to pay freight upon this basis, and respondent, exercising its right of lien for unpaid freight, refused to deliver the undelivered portion of the shipment, and held it subject to payment of the full amount of freight. The libelant claimed that he should be required to pay on only 26,304 feet. Instead of paying under protest, he bought in the open market sufficient lumber to complete the amount of the consignment at a cost of $141.80. The sum claimed in the libel as damages is the cost of this last purchase.

Three separate measurements of the lumber appear to have been made; one by the shippers, as shown by the invoice, with a total of 28,234 feet; one by the lumber inspector of the respondent with a total of 28,236 feet; and one by the lumber inspector of the libelant with the total of 28,336 feet. The three measurements closely correspond; there being a difference of but 102 feet between the largest and smallest measurement. The foregoing figures are based on rough dimensions, and the dispute as to the amount of freight due arises out of the claim of the libelant that he is entitled under an alleged custom of the trade to deduct from these measurements 10 per centum of the board measure of all lumber that had been dressed at Savannah. If that deduction is to be allowed, then the amount upon which freight is to be charged as appears from the specifications of the shipment is 26,304 feet. The bill of lading stated the amount shipped as "said to contain 26,304 feet."

[1] A bill of lading has a twofold character. It is a contract to transport and deliver the goods to the consignee upon the terms specified in it; and it is also a receipt as to the quantity and description of the goods shipped. So far as it embodies the terms of the contract, it is not to be varied by parol evidence. So far as it constitutes a receipt it is like other receipts, subject to be contradicted or explained by proof as to the facts. The courts appear to have agreed without dissent that recitals in a bill of lading as to the quantity of goods received may be contradicted as between the parties by parol evidence showing that a different quantity was delivered. As a receipt, it is open to rectification or explanation by parol evidence. The Willie D. Sandhoval (D. C.) 92 Fed. 286; Kelley v. Bowker, 11 Gray (Mass.) 428, 71 Am. Dec. 725; Relyea v. New Haven Rolling Mill Co., 42 Conn. 579; Abbe v. Eaton, 51 N. Y. 410. A carrier is not therefore conclusively bound by the statement contained in a bill of lading as to the quantity of lumber received. The court below stated that "the bill of lading prima facie binds the ship and its owner." And no doubt that ordinarily is the case. The Franklin, 8 Wall. 329, 19 L. Ed. 455; The Delaware, 14 Wall. 601, 20 L. Ed. 779.

[2] The respondent claims that the bill of lading in the case at bar is not prima facie evidence as to the amount shipped, because of the language used in describing the article shipped: "Said to contain 26,-304 superficial feet *more or less*." The meaning of the words "more or less" depends upon the connection in which they are used. As used in a contract relating to personalty, and as applied to quantity, they have been often construed as qualifying a representation or statement of an absolute or definite amount, so that neither party can avoid it or set it aside by reason of any deficiency or excess if there is a fair approximation to the quantity specifically stipulated in the contract. City of Chicago v. Galpin, 183 Ill. 399, 55 N. E. 731; Cabot v. Winsor, 83 Mass. (1 Allen) 546, 550; Hackett v. State, 103 Cal. 144, 37 Pac. 156. In Kelley v. Bowker, 77 Mass. (11 Gray) 428, 71 Am. Dec. 725, where the words "more or less" were used in a bill of lading reciting a shipment of, and agreeing to deliver, 2,282 bushels of corn more or less, the court held that the words indicated an intention on the part of the carrier not to be bound in strictness by the number of bushels mentioned, and that the contract was complied with by delivering 2,217 bushels, if no more was shipped. In The Dixie (D. C.) 46 Fed. 403 the words "more or less" in a bill of lading reciting the receipt of 400 piles signed by the carrier as per charter party was construed to operate to prevent the carrier from being liable for a shortage of 90 piles, although the bill of lading had been transferred for value. It may be that the use of the words "more or less" will not, when taken alone, prevent the application of the rule that if the carrier claims that the goods shipped are in excess of the amount specified in the bill of lading the burden rests on him to prove it. But, however that may be, a bill of lading may contain other expressions which will prevent the application of the rule that the recital as to quantity prima facie binds the ship or its owner. Thus in The Ismaele (D. C.) 14 Fed. 491 (1882), the bill of lading stated the number of tons of iron specifically, but there was also stamped on it "weight unknown." The court said that such a bill of lading did not afford evidence of the quantity of iron shipped. And in Henderson v. 300 Tons of Iron Ore (D. C.) 38 Fed. 36, 39, Judge Addison Brown said:

"Under the clause 'weight unknown,' the statement of '300 tons,' in the bill of lading, was not even prima facie evidence as to the weight against the ship, when it appeared that all received was delivered."

In the bill of lading in the case at bar the words "weight unknown" and "weight subject to correction," in addition to the words "said to contain 26,304 superficial feet more or less," will prevent the application of the rule that the recital as to quantity prima facie binds the ship. We do not think that such a bill of lading affords evidence of the quantity of lumber shipped. It leaves the question open.

[3] But there does not seem to be any dispute as to the number of feet of lumber which the carrier transported. The fact is that before the shipment took place the libelant had 28,234 feet of undressed lumber. Of this amount he dressed 19,299 feet, and, allowing 10 per cent. for wastage in the dressing, he had dressed lumber to the amount of 17,369 feet. This left him with 8,935 feet of undressed lumber, or a

total of 26,304 feet, which was the exact amount delivered to the respondent and the amount receipted for in the bill of lading. Was there any error in deducting this 10 per cent?

Libelant testified that respondent had always allowed him on previous shipments the 10 per cent. deduction, and he had shipped at different times 800,000 feet. There is not in the record any testimony which contradicts him in that particular. He testified also that the custom of the trade "all over" was to allow 10 per cent. for wastage in dressing lumber. The witness Parke, whose business it was to inspect lumber, after stating that a deduction of 10 per cent. was allowed on dressed lumber, and that it was a customary deduction was asked: "Was that the custom at the time you speak of with respect to lumber carried by other steamship companies?" To which he replied: "Yes, sir; deductions were made on dressed lumber by every one to my knowledge." Again he was asked: "An average of 10 per cent.?" To which he answered: "Yes; on dressed." The witness McDonough, who had had extensive experience in the shipment of lumber, testified that the figures stated in the bill of lading gave "the net amount of feet shipped after deducting *the usual allowance for dressing.*"

The respondent's own witness Cunningham admitted that a deduction was made on dressed lumber. He was asked: "In charging freight have you ever heard of a custom of deducting 10 per cent. for dressed lumber?" To which he said: "I have always found that it is deducted according to the actual size; different sizes."

The evidence shows that the amount of the shipment of lumber was as stated in the bill of lading, and that libelant paid the full freight and charges according to the bill of lading. He was therefore entitled to full delivery of the shipment as per the bill of lading. For the failure to make such delivery respondent is liable to pay the market value of such lumber at the time its delivery was withheld.

[4] Respondent withheld the lumber from the libelant because the latter declined to pay freight on wastage resulting from the dressing of rough lumber, which lumber was dressed in Savannah before shipment. The wastage was left in that city. It has not been made plain to us why, as this wastage was never transported from Savannah to New York, the respondent should be permitted to charge for what was never carried. If any such right exists, we think the burden rests on the carrier to prove it, rather than on the shipper to disprove it. And the testimony has not satisfied us that any such right exists.

The respondent contends that, if it was in error in not making full delivery of all the lumber to the respondent, the latter was at fault in the course he adopted. The respondent withheld 3,545 feet of the lumber. To make good the deficiency the libelant went into the open market and bought that number of feet, paying for the same $141.80. This he did because the party to whom the libelant had sold the entire shipment demanded full delivery of the same. The respondent, relying upon the principle that whenever a breach of contract occurs it is the duty of the one injured by the breach to mitigate his damages as far as he is reasonably able to do so, insists that libelant should not have gone into the market and purchased the lumber he needed to make good the deficiency, but that he should have paid under protest the amount of

freight demanded and subsequently brought suit to recover back the excess; that if he did not see fit to adopt that course he should have brought an action in trover or replevin.

[5] The act of a carrier in failing to deliver without lawful excuse goods intrusted to his care constitutes both a breach of contract and also a conversion; and where property has been wrongfully converted to the use of another, the measure of damages has been usually held to be the value of the property at the time of the conversion together, with interest from the date of the detention. 13 Cyc. 170; Hutchinson on Carriers (3d Ed.) vol. 3, § 1374 (1906).

We think, therefore, that the court below was correct in allowing the libelant to recover in this suit, which has the effect of one for conversion, the amount he was obliged to pay in the open market to replace the lumber wrongfully withheld.

Decree affirmed.

THOMAS et al. v. FIELD-BRUNDAGE CO.

(Circuit Court of Appeals, Eighth Circuit. July 13, 1914.)

No. 3964.

BANKRUPTCY (§ 140*) — GOODS IN POSSESSION OF BANKRUPT — CONSIGNMENT FOR SALE—CONDITIONAL SALE.

A bankrupt being indebted to claimant for machinery sold it, claimant refused to make further shipments except on consignment and on January 16, 1911, shipped one car under a consignment invoice, and on February 25th following shipped a second car under an invoice which by mistake was marked, "Terms 4 Mo. note 6% Int." No such note was given, and, the mistake having been discovered, a duplicate invoice was issued, reciting, "Terms on consignment," and substituted for the original, which was returned. In August it was found that the bankrupt was unable to settle for a considerable portion of the January shipment, whereupon claimant took its obligations for the amount sold, and a letter reciting that the bankrupt had in stock of claimant's goods on consignment certain specified engines, which it was understood the bankrupt was to pay for when sold, at the same time as they received their customer's settlement, and the title to the engines was to remain in claimant and the bankrupt was simply to act as its agent in selling them and collecting for them, less the bankrupt's profit above claimant's selling price. *Held*, that such goods were on consignment for sale and not sold, and hence title to such as remained in the bankrupt's possession on the intervention of bankruptcy in November, 1911, did not pass to the bankrupt's trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*

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 Nebraska; Thomas C. Munger, Judge.

Petition by the Field-Brundage Company for an order on J. W. Thomas, trustee in bankruptcy of Allen P. Ely & Co., to compel the trustee to surrender to petitioner certain gasoline engines alleged to have been consigned to the bankrupts for sale on commission. An order of a referee rejecting the petition having been reversed by the District Court, the trustee and others appeal. Affirmed.

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

F. A. Mulfinger, of Omaha, Neb., for appellants.

W. A. Schall, of Omaha, Neb. (C. J. Smyth and Ed. P. Smith, both of Omaha, Neb., on the brief), for appellee.

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

SMITH, Circuit Judge. Allen P. Ely & Co., a copartnership, were in business as retail dealers in machinery at Omaha from about 1901 until November, 1911. They had been buying gasoline engines for seven or eight years of the Field-Brundage Company of Jackson, Mich., and were indebted to them in January, 1911, to the amount of $7,000 or $8,000. At about that time Mr. Raynor Field, the secretary and treasurer of the Field-Brundage Company, was at Omaha, and told Mr. Allen P. Ely, of the firm of Allen P. Ely & Co., that their account must be reduced to $5,000, and that would be the limit thereafter, and that they would not ship any more goods until the account was so reduced, but that they would make Allen P. Ely & Co. the agents of the Field-Brundage Co. and ship goods to them on consignment. Prior to this it had been the practice of the Allen P. Ely & Co. to settle promptly with the Field-Brundage Co. by giving their note or notes for the amount of each shipment. On January 16th the Field-Brundage Company sent a car load of engines consigned to themselves with directions to notify Allen P. Ely & Co. of their arrival. The invoice of this shipment was marked, on consignment. On February 25, 1911, a second car load was shipped, but the invoice was marked, "Terms 4 Mo. note 6% Int." No such note was ever given, and about the middle of March, 1911, the mistake was discovered and a duplicate invoice was made out and delivered to Allen P. Ely & Co., in which there was substituted for the language quoted the words, "Terms on consignment," and the original invoice was redelivered to the Field-Brundage Company. In August, 1911, Mr. Raynor Field was at Omaha and found that a considerable portion of the January shipment had been sold by Allen P. Ely & Co., and they had no money with which to pay for the same. He then took their obligations for the amount sold by Allen P. Ely & Co., and the following letter on the letter head of the Field-Brundage Co.:

"Jackson, Mich., Aug. 4, 1911.

"Field-Brundage Co., Jackson, Mich.—Gentlemen: We have in stock to-day of your goods on consignment, the following engines, which, it is understood, we are to pay you for when we sell them the same date that we receive our customer's settlement for them. The title of these engines is to remain in the Field-Brundage Co.'s name and we are to simply act as agents for you in selling them and collecting for them, less our profit on the goods above your selling price.

1	8 H. P. Hopper Cooled Engine, #2372, price	$ 215.00
1	10 H. P. " " " #2880 price	$ 265.00
1	6 H. P. Field Special on Skids #2897 price	$ 123.75
3	6 H. P. " " Engines mounted on Adams-Husker Trucks, Nos. 2932, 2938, 2942, price $143.75 each,	$ 431.25
		$1035.00

"Yours very truly, Allen P. Ely & Co., By Allen P. Ely.
"APE/MHR."

On November 23, 1911, Allen P. Ely & Co. filed their voluntary petition in bankruptcy, and on November 24, 1911, they were adjudged bankrupt, and the matter was referred to Charles G. McDonald. On December 6, 1911, J. W. Thomas was elected trustee of the estate of the bankrupts and qualified the next day and came into possession of the property described in the letter quoted. The Field-Brundage Company filed on January 10, 1912, a petition for an order on the trustee for redelivery of these goods, the trustee answered the matter, and was heard before the referee who rejected the petition. The Field-Brundage Company filed a petition for review in the District Court, and this resulted in a reversal of the finding of the referee and the granting of the petition, and J. W. Thomas as trustee, Allen P. Ely and Charles B. Ely, members of the firm of Allen P. Ely & Co., appealed.

The case turns upon whether Allen P. Ely & Co. bought these goods of the Field-Brundage Company, or whether they simply held them as bailees.

The referee cited Mack v. Drummond Tobacco Co., 48 Neb. 397, 67 N. W. 174, 58 Am. St. Rep. 691. In that case it was held the contract in question constituted a sale but the Drummond Tobacco Company had stipulated that Mack & Co. should give their notes or acceptances for the amount of each invoice.

He also cited Yoder v. Haworth, 57 Neb. 150, 77 N. W. 377, 73 Am. St. Rep. 496, and Buffum v. Descher, 1 Neb. (Unof.) 736, 96 N. W. 352, which are similar to the former case mentioned.

Much more nearly in point is National Cordage Co. v. Sims, 44 Neb. 148, 62 N. W. 514.

The appellant cites In re Miller & Brown (D. C.) 135 Fed. 868, and In re Wells (D. C.) 140 Fed. 752, both from the Middle District of Pennsylvania, and In re Penny & Anderson (D. C.) 176 Fed. 141, from the Southern District of New York.

Without determining whether these citations are in point, it suffices to say that if they are in any sense applicable to this case then they are in conflict with In re Columbus Buggy Co., 143 Fed. 859, 74 C. C. A. 611, and with John Deere Plow Co. v. McDavid, 137 Fed. 802, 70 C. C. A. 422, both decided by this court, and In re Galt, 120 Fed. 64, 56 C. C. A. 470, and In re Flanders, 134 Fed. 560, 67 C. C. A. 484, both decided by the Circuit Court of Appeals of the Seventh Circuit.

This court adheres to its former holdings, and the case is affirmed.

In re WHITE'S EXPRESS CO.

(Circuit Court of Appeals, Second Circuit. June 3, 1914.)

No. 265.

1. BANKRUPTCY (§ 140*)—PROPERTY PASSING TO TRUSTEE—CONDITIONAL BILL OF SALE.
   A contract under which property was furnished to a bankrupt for use and not for sale, and which expressly provided that the title should not pass until it was fully paid for, construed, and *held* a conditional bill of sale, and not a chattel mortgage.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. § 140.*]

2. BANKRUPTCY (§ 184*)—RIGHT TO RECLAIM PROPERTY—CONDITIONAL SALE.
   Prior to the amendment of Bankr. Act July 1, 1898, c. 541, § 47a (2) 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (U. S. Comp. St. Supp. 1911, p. 1500), an unfiled conditional sale contract in New York, under which property had been delivered to a bankrupt, and which under the state statute was invalid only as against subsequent purchasers, pledgees, and mortgagees in good faith, was good as against the trustee in bankruptcy; and, where such a bill of sale was filed after the amendment, but prior to the bankruptcy, it was valid as against the trustee, and entitles the seller to reclaim the property.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275–277; Dec. Dig. § 184.*]

Petition to Revise and Appeal from Order of the District Court of the United States for the Eastern District of New York.

This cause comes here on appeal from and petition to revise an order of the District Court, Eastern District of New York, dismissing the petition of General Vehicle Company, Inc., for reclamation of the sum of $3,333.33, proceeds of the sale of certain automobile trucks, which, by order on stipulation, was held by the trustee of White's Express Company, bankrupt, as a separate fund, subject to the same lien or rights, if any, which claimant had on and in the trucks.

H. H. Flagg, of New York City, for petitioner.

C. A. Houston, of New York City, for respondent.

Before COXE and ROGERS, Circuit Judges, and MAYER, District Judge.

MAYER, District Judge. The right of General Vehicle Company, Inc., to reclaim depends primarily on the question as to whether the agreement entered into between its assignor, General Vehicle Company, and White's Express Company was a conditional bill of sale or a mortgage.

[1] On July 19, 1909, claimant's assignor proposed, in writing, to furnish to White's Express Company certain automobile trucks at a stated purchase price, payable in installments. The written proposal, which was accepted on July 21, 1909, by the Express Company, contained the following provision:

> "The title of said apparatus shall remain in the company [meaning the claimant's assignor] until fully paid for."

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

Contemporaneously, a so-called maintenance agreement was entered into whereby the vehicle company agreed to sell to the express company all replacements of material necessary for the upkeep of the trucks. In this maintenance agreement, the vehicle company is described as the "company" and "party of the first part," while the express company is referred to as "the party of the second part," "the purchaser," and once as "the owner." We think it clear that the isolated use of the words "the owner" in the carelessly drawn maintenance agreement was accidental, and in view of the distinctly expressed reservation of title in the main agreement, we are satisfied that that agreement was a conditional bill of sale and not a chattel mortgage. Harkness v. Russell, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285; Tompkins v. Fonda Glove Lining Co., 188 N. Y. 261, 80 N. E. 933; Crocker Wheeler Co. v. Genesee Recreation Co., 140 App. Div. 726, 125 N. Y. Supp. 721.

The transaction was not one which contemplated a resale or the use of the proceeds of mortgaged goods as in In re Noethen, 201 Fed. 97, 119 C. C. A. 435, Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885, and Zartman v. First National Bank, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083.

[2] A copy of the conditional bill of sale was not filed in the office of the register of Kings county until July 19, 1912, and on October 21, 1912, White's Express Company was petitioned into bankruptcy, and was adjudicated a bankrupt on November 14, 1912. Prior to the act of June 25, 1910, amending, among other things, section 47a of the Bankruptcy Act, an unfiled conditional bill of sale was valid as against a trustee in bankruptcy, and in New York (section 62, Personal Property Law; Consol. Laws, c. 41), an unfiled conditional sale contract accompanied by delivery of the goods, is void only as against "subsequent purchasers, pledgees and mortgagees in good faith." Holt v. Henley, 232 U. S. 637, 34 Sup. Ct. 459, 58 L. Ed. 767; York Manufacturing Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; Arctic Machine Co. v. Armstrong County Trust Co., 192 Fed. 114, 112 C. C. A. 458; Big Four Implement Co. v. Wright, 207 Fed. 543, 125 C. C. A. 577, 47 L. R. A. (N. S.) 1223; Crocker Wheeler Co. v. Genesee Recreation Co., 140 App. Div. 726, 125 N. Y. Supp. 721. As the transaction was prior to the amendment of 1910 and the filing was prior to the bankruptcy in 1912, the contract of conditional sale was valid as against the trustee, and the claimant is therefore entitled to a return of the chattels, which, in this proceeding, are represented by the earmarked proceeds.

We think the order of the District Court was erroneous, and it is reversed.

In re BLEYER.

(Circuit Court of Appeals, Second Circuit. June 3, 1914.)

No. 266.

BANKRUPTCY (§ 407*)—DISCHARGE—OBJECTION—"FALSE STATEMENT"—BORROWING MONEY.

Where a bankrupt, by false representations as to the solvency of a corporation of which he was president, obtained $15,000 from a bank on notes of a corporation indorsed by the bankrupt, a large part of the money having been obtained for the bankrupt's individual use, such "false statement" was sufficient to prevent his discharge, within Bankr. Act July 1, 1898, § 14b (3), as added by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797, and amended by Act June 25, 1910, c. 412, § 6, 36 Stat. 839 (U. S. Comp. St. Supp. 1911, p. 1496) providing for the denial of a discharge of a bankrupt if he has obtained money on a materially false statement in writing.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 729–731, 737, 738, 740–751, 758, 760, 761; Dec. Dig. § 407.*

For other definitions, see Words and Phrases, vol. 3, p. 2670.]

Petition to Revise Order of 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 (210 Fed. 391) overruling the exceptions filed to the specifications of objection by the First National Bank of Easton, Pa., to the bankrupt's discharge.

Leo Oppenheimer, of New York City, for bankrupt.

Parker & Aaron and Charles A. Baker, both of New York City, for objecting creditor.

Before COXE and ROGERS, Circuit Judges, and HAND, District Judge.

COXE, Circuit Judge. The concrete question here is whether the false written statement as to the property of a corporation of which the bankrupt was president, made to a bank for the purpose of obtaining money, is within the statute (section 14b (3) of the Bankruptcy Act) which refuses a discharge to a bankrupt if he has obtained money upon a materially false statement in writing.

In the present case the exceptions to the specifications of the bank in opposition to the discharge constitute, in effect, a demurrer and all the allegations of the bank's objection must, therefore, be taken as established. It appears that by the representations made by him as to the solvency of the corporation of which he was president, the bankrupt obtained $15,000 from the bank upon three notes of the corporation indorsed by him. It is also admitted by the demurrer that "a large part of the said money was obtained by said bankrupt for his own individual use." He has made a false statement, on the strength of which he obtained money from the bank, ostensibly in the name of his corporation, but in reality, as it appears, a large part thereof was for his personal use and benefit. Does the fact that he acted in his representative capacity prevent his fraudulent statements, by means of

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

which he obtained money for his own use, from being considered as a bar to his discharge?

We are inclined to think his fraud is within the mischief of the statute and, although no case cited is directly in point, that the facts bring it within the doctrine of In re Dresser (D. C.) 144 Fed. 318, and In re Aldrich (D. C.) 168 Fed. 93. If the bankrupt had asked for an individual loan and had represented that he was president of—and therefore a stockholder in—a certain corporation, which had assets in excess of its liabilities to the extent of $100,000, and had obtained the loan for his own use, there can be no doubt that the discharge would be refused if it were shown that his statement was false. But in principle the two cases are alike. In both the bankrupt obtains money by false statements. It is the policy of the law to refuse such a person a discharge. It is not the form of the fraud which the law looks to, but to the intent and object to be attained. Where it clearly appears that the bankrupt has obtained personal pecuniary benefit from false statements, whether regarding his own property or the property of some one else, he does that which prevents him from securing a discharge.

The order of the District Court is affirmed.

KENNEDY v. CRANE et al.

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

No. 53.

SALVAGE (§§ 26, 34*)—RECOVERY UNDER CONTRACT—VESSEL FROZEN IN.

A tug owner, who contracted to move a loaded barge, which was frozen in the ice, to a place of safety, *held* entitled to recover for delay and injury to the tugs caused by floating ice, but to interest on the damages awarded only from the date of filing the libel.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 57–64, 68, 80–84; Dec. Dig. §§ 26, 34.*

Awards in federal courts, see note to The Lamington, 30 C. C. A. 280.]

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

On appeal from the District Court of the United States for the Southern District of New York to review a decree awarding to the libelant the sum of $1,054.49, including interest, and $80.47 costs amounting in the aggregate to $1,134.95.

Peter S. Carter, of New York City, for appellants.

W. J. Martin, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The libel was filed to recover for salvage, towage and repairs. The court awarded the libelant $1,054 for towing and for saving the barge Jupiter, chartered to the respondents, which, with a cargo of pyrites cinders, was frozen in at the Metal Works dock in the Hackensack river. The tugs Mary Ann and Emma

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

J. Kennedy were employed to do the towing from the dock to Newtown creek and had proceeded to a point in Newark Bay between the Lehigh Valley and Jersey Central railroad bridges when the flotilla encountered a gale of wind. This was about February 1, 1908. The gale dislodged the shore ice and drove it against the tugs and tow, completely surrounding them and dragging them to the shallow water on the easterly side of the bay where the Jupiter was held fast in the ice. The tugs, together with another chartered by the libelant, continued in an effort to get the barge to a place of safety. On February 4th the Mary Ann broke her shaft. On account of severe weather and a change of wind the work was discontinued till February 16th, when, after working three days, the Jupiter with her cargo was rescued and was towed to her destination. When held in the ice pack the barge was in a perilous position and in getting her off the tugs suffered considerable damage and were also in positions from which great danger might result.

This was not a usual towage contract; there was danger from the ice and the owner of the tugs realizing this, expressly stipulated that if the boats were caught in the ice he would expect to be reimbursed for the extra risk and for such damages as they might suffer. The questions were of fact and the judge's findings, upon controverted testimony, should not be disturbed by this court. We do not think the libelant is entitled to interest except from July 31, 1911, this being the date when the libel was filed and the date from which the respondents admit the interest should run.

The decree is amended by the deduction of the excess of interest and as so amended is affirmed with costs.

In re BURR MFG. CO.

In re LEAVITT & GRANT.

(Circuit Court of Appeals, Second Circuit. May 19, 1914.)

Nos. 279 and 262.

1. BANKRUPTCY (§ 481*)—COSTS ON PETITION FOR REVIEW—SUPERVISION FEE.

A petition to revise in a bankruptcy proceeding is the equivalent of an appeal, for the purposes of Act Feb. 13, 1911, c. 47, 36 Stat. 901 (U. S. Comp. St. Supp. 1911, p. 275), which abolishes the clerk's supervision fee where a final order or decree is sought to be reviewed by the Circuit Court of Appeals on writ of error or appeal, and where the order sought to be revised is a final order the statute applies.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 886; Dec. Dig. § 481.*

Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. BANKRUPTCY (§ 481*)—"FINAL DECREE."

An order in a so-called omnibus proceeding in bankruptcy, directing the distribution of the proceeds of sale of certain securities, is a final order, and so is a "final decree" within Act Feb. 13, 1911, c. 47, 36 Stat. 901 (U. S. Comp. St. Supp. 1911, p. 275), which abolishes the clerk's super-

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

vision fee where a final order or decree is sought to be reviewed by the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 886; Dec. Dig. § 481.*

For other definitions, see Words and Phrases, vol. 3, pp. 2774–2798; vol. 8, p. 7663.]

Petitions to Revise Orders of the District Court of the United States for the Eastern and Southern Districts of New York.

In the matter of the Burr Manufacturing Company, bankrupt, and of Leavitt & Grant, bankrupts. On petitions to revise orders of District Court. Reversed.

See, also, 209 Fed. 138.

Franklin Taylor, of New York City (Joseph J. Zeiger, of New York City, of counsel), for petitioner.

Henry A. Blumenthal, of New York City, for trustee.

Before COXE and ROGERS, Circuit Judges, and HAND, District Judge.

PER CURIAM. [1] We think the motions in these cases should be granted. The decision of the Supreme Court in Rainey v. Grace, 231 U. S. 703, 34 Sup. Ct. 242, 58 L. Ed. 445, holds that where a final judgment or decree is sought to be reviewed by writ of error or appeal, the Act of February 13, 1911, abolishes the supervision fee.

[2] In the Matter of Leavitt & Grant, the order sought to be reviewed was an order in a so-called omnibus proceeding in bankruptcy directing the distribution of the proceeds of sale of certain securities among certain claimants. It was a final order, and so was a final decree within the meaning of the statute. As the review was by appeal, the case comes within the statute and the decision of the Supreme Court.

In the Matter of Burr Manufacturing Company, the review was by petition to revise under section 24b of the Bankruptcy Act of July 1, 1898 (30 Stat. 553, c. 541 [U. S. Comp. St. 1901, p. 3432]), and although the statute of 1911 only mentions reviews by writ of error or appeal, we think a petition to revise is the equivalent of an appeal for the purposes of this statute. The review was of an order confirming a resale of property in bankruptcy. Such an order is a final order for the purposes of appeal, and so the case comes within the provisions of the statute and the decision of the Supreme Court. The fact that the petitioner asked the court at the same time and on the same record to review a preliminary order setting aside a previous sale and directing a resale does not take the case out of the statute.

As the supervision fees are still in the clerk's possession and have not been accounted for to the government, they should be returned.

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

THE WM. E. GLADWISH.

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

No. 234.

SHIPPING (§ 209*)—PROCEEDINGS FOR LIMITATION OF LIABILITY—COSTS.

A vessel owner, whose petition for limitation of liability was granted, and who gave a stipulation for release of the vessel, on her exoneration from liability on account of the claim against her, is not entitled to recover the amount paid as premiums on the stipulation.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646-655, 659, 661, 662; Dec. Dig. § 209.*

Limitation of owner's liability, see note to The Longfellow, 45 C. C. A. 387.]

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 disallowing the claim of the petitioner for $360 premiums paid upon the stipulation filed by him. Affirmed.

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

Norman B. Beecher, Chauncey I. Clark, and Horace L. Cheyney, all of New York City, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The Pennsylvania Railroad Company and the Logan Coal Company asserted a cause of action against the steamtug Gladwish for the loss of a barge and her cargo of coal near Watch Hill, R. I., while in tow of the tug.

The tug denied all liability and also sought to limit her liability. This the District Court permitted her to do and she was surrendered but subsequently gave bonds upon which her owner paid a premium of $90 per year for four years, amounting to $360, and she was released to her owner. The final result of the litigation was a complete exoneration of the Gladwish from blame. The court allowed the Gladwish the full costs of the litigation, but refused to allow the $360 paid by her owner for her release. We think the court was right. The Gladwish, 196 Fed. 491, 116 C. C. A. 185. The limitation of liability was allowed in the interests of the Gladwish. She alone profited by this proceeding which was ex parte. The owners of the barge and her cargo did not contest the right to limit the liability of the tug. It would have been entirely satisfactory to them to have placed her in the hands of a trustee. But her owners evidently thought that they should have the use of the tug during the litigation and so, solely for their benefit, she was released and bonds substituted. The owner has had the use of the tug and probably has made the $360 many times over during the four years of litigation. It does not seem to us that the appellees should pay the expenses incident to a release which was

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

entirely in the interests of the tug owner and by which, presumably, he profited pecuniarily.

This conclusion is in accord with our decision in the W. A. Sherman, 167 Fed. 976, 93 C. C. A. 228.

The decree is affirmed.

In re LEAVITT & GRANT.

(Circuit Court of Appeals, Second Circuit. June 2, 1914.)

No. 262.

BANKRUPTCY (§ 155*) — BROKERS — WRONGFUL CONVERSION OF SECURITIES — RIGHTS OF OWNERS.

Bankrupts, who were brokers, wrongfully pledged securities owned by customers as collateral for a loan in their bank. At the time of the bankruptcy they had a general deposit of $12,000 to their credit in their account, which the bank, as authorized, applied on their notes, and also sold the collateral, which produced a surplus. *Held*, that the owners of the securities were subrogated to the rights of the bank in the deposit, and were entitled to the $12,000 as against the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 155.*]

Petitions to Revise and Appeals from Order of the District Court of the United States for the Southern District of New York.

In the matter of Leavitt & Grant, bankrupts. William Marley and seven other claimants of a fund in the hands of the trustee appeal from and petition to revise an order of the District Court. Reversed.

E. Bromberger, C. T. Payne, B. L. Peck, Franklin Taylor, and E. Vandewater, all of New York City, for petitioners.

L. W. Wright and H. M. Stevenson, both of New York City, for respondent.

Before COXE, Circuit Judge, and HAND and MAYER, District Judges.

HAND, District Judge. In this case the brokers wrongfully pledged securities belonging to their customers as collateral for a loan in their bank. It so happened on the day of the failure that their deposit in the bank amounted to some $12,000. Upon the failure, the bank, in accordance with a collateral note to that effect, as well as with their right at law, applied the deposit upon the note and sold the securities. The question is whether in marshaling the balance the trustee may withdraw the amount of the deposit or not. It seems to us that the case is only another illustration of the familiar doctrine of subrogation. Here the customers' goods became security, involuntarily, for a loan of the bankrupts. Their goods were sold, and the proceeds paid the loan; being by this subrogated, they may insist upon the position of the original creditor, with all his rights either to securities (Guild v. Butler, 127 Mass. 386) or to set-off (St. Croix Timber Co. v. Joseph, 142 Wis. 55, 124 N. W. 1049; Bechervaise v. Lewis, L. R. 7 C. P. 372). When Leavitt & Grant made the deposit, they subjected it to the right of set-off under the terms of the note. This was an express pledge, though

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

it need not have been express, for the law creates it independently of the words of the parties.

As to the claim of Masters, it cannot be allowed. The rule in Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047, depends upon the fact that a broker bought back stock of similar character and kept it in his vaults. It is not to be supposed that the mere fact of replenishing a bank account was done with the intent of making up the deficiency. The difference between buying specific stock and getting cash is obvious.

The order is reversed, and fund will be distributed to the claimants, who can all be paid in full. Costs to the claimants in this court only.

OHIO VARNISH CO. v. GLIDDEN VARNISH CO.

(Circuit Court of Appeals, Sixth Circuit. July 25, 1914.)

No. 2458.

PATENTS (§ 328*)—INVENTION—WOOD GRAINING.

The Clapp patents, No. 839,363, for a process of wood graining, and No. 909,847, for a graining compound used in such process, which is of a constant color, the ultimate color of the finished work being obtained by the application over the compound of different colored varnishes, if not strictly anticipated, do not disclose patentable invention, in view of the prior art, and are invalid.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; Wm. L. Day, Judge.

Suit in equity by the Ohio Varnish Company against the Glidden Varnish Company. Decree for defendant (211 Fed. 676), and complainant appeals. Affirmed.

Albert H. Bates, of Cleveland, Ohio, and Robert H. Parkinson, of Chicago, Ill., for appellant.

James R. Offield and Charles K. Offield, both of Chicago, Ill., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. This suit was brought by the Ohio Varnish Company against the Glidden Varnish Company, for the infringement of patent No. 839,363, issued December 25, 1906, upon the application of F. M. Clapp, for a process of wood graining, and upon patent No. 909,847, issued January 12, 1909, upon a divisional application by F. M. Clapp, in connection with the process patent and for the graining compound used in the process. The nature of the claims sufficiently appears by claim 3 of the process patent and by claim 2 of the product patent, which are as follows:

"3. The process of producing surfaces in imitation of different grained woods, consisting in applying a graining compound constant for various woods and applying over this a varnish having a color selected according to the wood to be imitated.

"2. The composition of matter already mixed for graining consisting of substantially equal parts of raw sienna and whiting ground in water to make a

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

thin paste and thinned with alcohol in colorless form to make the proper consistency."

The process of "graining" a wooden surface so as to imitate the natural grain of the wood, and as practiced for many years, consisted, usually, of three steps: First. The wood was painted the color approximating the desired general tone of the finished article; this step, however, might sometimes be omitted. Second. Upon this painted surface was applied an adhesive, plastic mixture called the graining compound. This was composed of an absorptive body, like whiting, pigment to give color, and an evaporating vehicle, like alcohol, or liquids containing alcohol. This compound was then "wiped" and "combed" to imitate the grain of the wood. Third, the surface so created was varnished. Among the defenses urged against both patents is complete anticipation by common use of both process and product by professional grainers the country over; and, obviously, the inquiry into this defense involves the narrower question whether, if Clapp did accomplish anything that was not wholly anticipated, there was any invention in what he did.

It is not clear that merely using the well-known colored varnishes upon a noncolored base, instead of coloring the base and using a clear varnish, was, when done for the first time, more than the skill of a competent workman; but, however that may be, it is clear enough that any inventive merit in Clapp's process must be found in his use of a colored varnish upon a colorless or "constant color" graining compound. Nothing else is seriously claimed to be new.

If there is any novelty in the product patent beyond the thoughts expressed by "already mixed" and by "colorless," it consisted in grinding the materials in water instead of in oil,—a method long common when a "water color" or "distemper color" was desired. In accomplishing wood color imitation, it doubtless had been the usual practice for the grainer, mixing his graining compound, as he did, at the time of use, to put in, according to his judgment, pigments best suitable to reproduce the desired wood colors, and then to cover this with a transparent, colorless varnish. This selection and mixing of colors required professional skill. Clapp claims to have discovered that the same or similar results could be had by carrying the color in the varnish only and making the graining compound either "colorless" or, more accurately, "of a constant color." In this way, the graining compound could be sold ready for use, and could be applied by one of no skill in mixing colors. A very large business undoubtedly grew up on the basis of this idea. People were taught that they could do their own graining work, and a graining set put out by the Ohio Varnish Company, consisting of a can of the compound, brushes and combs, and a can of varnish of selected color, was sold in immense quantities.

Defendant produced 12 witnesses from different parts of the country, all life-long grainers, some of them rather ordinary workmen and some of large experience and skill, who testified regarding the supposed anticipation. Several of them testified to using practically the exact process and product from 5 to 25 years before Clapp's application. Complainant attacks the credibility of two or three of these witnesses,

and points out that each of the others is not corroborated. We do not find it necessary to decide whether a case of anticipation is made out under the strict rules of proof which properly prevail on that subject. We think it does appear, and beyond a reasonable doubt, that it was a well-known expedient in the graining art, and one not uncommonly used, to employ a graining compound of a "constant color" for several different desired color results, and then to get the selected color or shade of color by using a colored varnish; colored varnishes being thoroughly common. For example, the same graining compound—that is, one of the lightest shade in the series—was used as a basis for imitating oak or ash or chestnut or woods of a similar tone, and then the desired finish, ranging from very light to very dark, was obtained by putting more or less umber or other darkening color in the varnish. So, also, different shades or varieties of mahogany were imitated by using a very light red graining compound, whereupon varying the color of the varnish would produce a light or medium or dark mahogany. In either of these cases, we have a measurably "constant color" for the graining compound and, used in connection therewith, a colored varnish for varying the ultimate color. There is as much difference in general appearance between a light and a dark mahogany or a light and a dark oak as between many other woods of different names; and we see no inventive novelty in the thought that this well-known method could be applied to producing different colored woods of different names as well as different colored woods of the same name. We regard what Clapp did, giving him the benefit of every doubt, as that advance in degree which is not patentable (Ansonia v. Electrical Co., 144 U. S. 11, 12 Sup. Ct. 601, 36 L. Ed. 327; Bullock v. General Co. [C. C. A. 6] 149 Fed. 409, 419, 79 C. C. A. 229; Macomber, §§ 599, 654), rather than as that distinct step forward which, though short, involves invention (Diamond Co. v. Consolidated Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527; Morgan Co. v. Alliance Co. [C. C. A. 6] 176 Fed. 100, 109, 100 C. C. A. 30).

The large commercial acceptance of the patented product and the corresponding practice of the process are strongly urged as demonstrating that invention was present. We think these results are properly to be credited rather to the fact that Clapp either created or met, or both, a popular demand for something "ready to use." It is quite obvious, however, that invention cannot be found in providing, mixed and ready for use, a painting or similar material which is the same thing that skilled workmen had been accustomed to prepare as they used it.

Our conclusion on this point makes it unnecessary to consider other phases of the case.

The decree below is affirmed, with costs.

FOWLER & WOLFE MFG. CO. v. McCRUM-HOWELL CO.

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

No. 45.

1. PATENTS (§ 167*)—CONSTRUCTION—REFERENCE TO SPECIFICATION.

The claims fix the extent of the protection furnished by a patent, but the specification may be referred to for the purpose of limiting, though not of expanding, a claim.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 243; Dec. Dig. § 167.*]

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—RADIATOR.

The Fowler patent, No. 609,800, for a radiator, claims 1 and 2, which describe a section of wall radiator capable of being multiplied to any extent and in either direction, while of narrow scope as limited by the specification, are not anticipated and valid. Claims 3 and 4 are void for lack of invention. Claims 1 and 2, also, *held* infringed.

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

For opinion below, see 202 Fed. 964.

This was a bill in equity filed in the United States District Court for the Southern District of New York by the Fowler & Wolfe Manufacturing Company against the McCrum-Howell Company for an injunction, damages, and an accounting for the infringement of letters patent No. 609,800, issued August 30, 1898, to Arthur H. Fowler, of whom the complainant was the assignee for an improvement in radiators.

The court below dismissed the bill on the ground that the patent was invalid for the want of patentable novelty and invention. Whereupon complainant petitioned for an order allowing an appeal to this court which petition was granted.

The complainant is a Pennsylvania corporation and the defendant a corporation organized under the laws of the state of Connecticut.

The complainant's patent relates to a "wall radiator," by which is meant a radiator designed and adapted by its construction to be supported flat against the wall, and composed of units capable of being connected together to extend the area of the radiating surface to any extent, longitudinally or vertically over the surface of the wall.

As the units which are coupled together lie in the same plane, the entire radiator has no greater thickness than that of any of its units, while the area of the radiating surface may be extended longitudinally or vertically to any extent desired, and may assume almost any irregular outline to fit about doors or windows or to follow irregularities in the surface of the walls; in some cases the sections are coupled together to cover a length of fifty feet or more.

Claims 1 and 2 relate to the specific construction of the units which are coupled together to form the complete radiator or variable area; and this construction is designed to afford a maximum radiating surface and to give the greatest possible efficiency for a cast iron tabular radiator, both as to internal circulation of steam or hot water and external circulation of air, whether a unit is used alone or in combination with other units.

As a matter of fact the unit sections are rarely used singly. The great advantage of the invention is said to lie in the ability to extend the radiating surface over the wall indefinitely in any direction by the coupling together of small units.

Each unit or section is a casting composed of a multiplicity of communicating tubes, and consists of large outer tubes communicating with one anotner at the corners, one or more large intermediate cross-tubes between the opposite outer tubes, and a series of smaller connecting tubes between the cross-tubes and outer tubes.

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

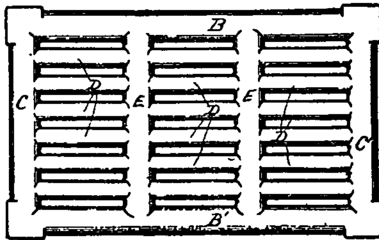
Claims 1 and 2 are as follows:

"1. A radiator section composed of a unitary hollow casting, consisting of four outer tubes communicating with one another at the corners, one or more intermediate cross-tubes between opposite outer tubes, and a series of connecting tubes between each intermediate cross-tube and the opposite outer tube or adjacent intermediate cross-tube.

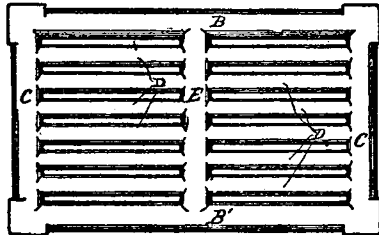
"2. A radiator section composed of a unitary hollow casting, consisting of a tubular structure embracing outer tubes communicating with one another at the corners, one or more cross-tubes between the outer tubes, and a series of connecting tubes between said cross-tubes and the adjacent outer tubes."

Claim 1 calls for a quadrilateral structure; there must be four outer tubes communicating with one another at the corners; there may be one or more intermediate cross-tubes between opposite outer tubes, which may extend between either pair of outer tubes, and a series of connecting tubes extending from the cross-tubes to the adjacent outer tubes, and, when two or more cross-tubes are used, between adjacent cross-tubes. The particular section shown in the drawings, by way of illustration, is a rectangular quadrilateral composed of four outer tubes *B B′* and *C C′*, of which the pair of opposite tubes *B B′* are longer than the other pair *C C′*, so that the section is longer on one axis than on the other. There are two cross-tubes *E E* which extend between the pair of longer outer tubes *B B′* and are therefore parallel with the shorter outer tubes *C C′*; and finally there is a series of connecting tubes *D* which extend between the cross-tubes *E E* and the opposite outer tubes *C C′*, and also between the adjacent tubes *E E*.

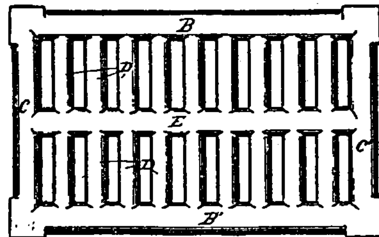
This is shown in the following Fig. A:



The substance of claim 1 is embodied just as fully, when there is one cross-tube *E*, with the connecting tubes *D* extending between it and the outer tubes *C C′*; as shown in the following Fig. B:



It is also embodied in a section in which the cross-tube or tubes *E* extend between the pair of shorter outer tubes *C C′*, and parallel with the longer outer tubes *B B′*, and the series of connecting tubes *D* extend between the cross-tube and the opposite outer tubes *B B′*, as shown in the following Fig. C:



Claim 2 differs from claim 1 particularly in the respect that it is not limited to a quadrilateral form. While it includes all of the forms shown above, it would also include a triangular section, having three outer tubes.

Claims 3 and 4 refer to means whereby the radiator sections are adapted to be connected with other sections in the same plane, so that the structure may be extended both transversely and longitudinally.

Claim 3 relates to a single section, which is made up of a multiplicity of communicating tubes, and provided at the corners with openings in the plane of the section arranged at right angles, one to the other.

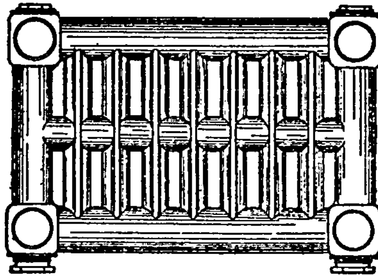
Claim 3 is as follows:

"A radiator section composed of a flat hollow casting, made up of a multiplicity of communicating tubes, and provided at the corners with openings in the plane of the section, arranged at right angles one to the other, whereby said section may be coupled with other sections to extend the radiator, both longitudinally and transversely."

Claim 4 recites, in addition to the elements of claim 3, the combination with similar sections, coupled with said section, through the openings referred to in claim 3, and respectively located in a longitudinal and transverse direction with reference to said section.

Claim 4 is the same as claim 3, with the addition as follows:
"In combination with similar sections, coupled with said section, at said openings, and respectively located in a longitudinal and transverse direction with reference to said section."

Defendant's Radiator in This Suit.



Emile Schultze, of New York City, and Ernest Howard Hunter, of Philadelphia, Pa., for appellant.

D. Walter Brown, of New York City, and Henry V. Brown, for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The question in this case brings before the court the validity of complainant's patent, and, if the patent is valid, then the question of the defendant's infringement.

It is the complainant's contention that the patentee gave to the world the first wall radiator composed of units capable of being connected together to extend the area of radiating surface over a wall. The complainant insists that there is a substantial and effective difference between a floor radiator and a wall radiator, and that the features of construction and proportions of parts which render the patent in suit peculiarly effective, are patentable features and entitled to protection as such.

A radiator is described as:

"A device for delivering the heat, steam or hot water admitted to its interior to the air of the room or compartment which it is desired to heat."

It is the function of a radiator to transmit the heat, which is supplied by the heating medium (steam or hot water) to the objects which are outside. It is the outside surface of the radiator which transmits the heat by contact with the air.

The art of warming buildings by radiators, located in rooms to be warmed, and connected by pipes with steam and hot water boilers, has been known to some extent for many years. In Hood's Treatise on Warming Buildings, published in London in 1855, mention is made of

the fact that Count Rumford, who lived from 1753 to 1814, made improvements in steam heating apparatus.

The appellant complains that the court below erred in holding that claims 1 and 2 were not restricted by the specification and drawings of the patent in respect to the relative sizes of the outer cross, and connecting tubes, of which the radiator sections are composed.

The opinion of the court below in respect to this particular matter is as follows:

"There was a prior suit brought upon this patent against a licensee who, of course, could not deny the validity of the patent. The licensee was dealing in a radiator, which was substantially in shape like the radiator described in the complainant's patent, except that its various connecting tubes were substantially of about the same size. In that case, Judge Buffington originally held on a motion for a preliminary injunction, that the defendant's radiator was substantially the same as the complainant's radiator, but upon final hearing he held that, in view of the prior art, the complainant's invention was a very narrow one, and that the claims must be interpreted in the light of the specifications and drawings, which stated and showed that the top and bottom tubes were larger than the cross-tubes, and that the cross-tubes were larger than the small intermediate cross-tubes, and held that as the defendant's radiator was not so constructed it did not infringe. Some of the witnesses for the complainant in the case at bar lay stress on the fact that, as shown in the drawings and described in the specifications, the outside tubes are larger than any of the intermediate tubes, and the intermediate cross-tubes are larger than the tubes between the cross-tubes, and claim that such a construction is important in aid of the rapid diffusion of steam throughout all parts of the radiator, and the effective expulsion of air and water from the radiator. But the answer to all these assumptions based upon the different sizes of the tubes shown in the drawings and described in the specifications is that no claim is made in the patent of any invention in those respects. The first and second claims in the patent apply to a unitary hollow casting consisting of tubes, and if the claims are good they give a monopoly of the use of such a unitary structure with tubes of any size. The fact that the specifications describe a structure with tubes of different sizes, is, of course, immaterial. An invention described in specifications, but not claimed, is not protected by a patent. As the first two claims are drawn, in my opinion, they are anticipated by the patents cited and by the condition of the prior art."

We cannot agree with the court in the construction placed on claims 1 and 2. In his specification Fowler set forth as his substantial advance in the art the fact that the cross-tubes of his radiator are of larger size than the connecting tubes, which run at right angles. In our opinion it is clear that these relative sizes are not mere preferential or illustrative constructions, but that they are the particular features which characterize the invention and are embodied in the claims in controversy. The patentee states in his specification:

"The sections are preferably two longitudinal top and bottom tubes *B B'*, united by two end tubes *C C'*, which are connected by a series of smaller longitudinal tubes *D*. I prefer to employ intermediate cross-tubes *E* connecting the tubes *B B'* and having the longitudinal tubes *D* connecting with them. In the construction shown there are two of these large intermediate cross-tubes *E* located between the end tubes *C C* and dividing the small longitudinal tubes *D* into three sets or series. The small longitudinal tubes *D* are located at sufficient distance apart to form intermediate openings or spaces for the circulation of air between them. Each section thus constructed is composed of a series of communicating tubes, forming a unitary rectangular hollow frame."

We think that the word "preferably" refers to the rectangular shape and not to the relatively "large intermediate cross-tubes" and the "small longitudinal" or connecting tubes. In this we find ourselves fully in accord with the position taken by the court in the Third Circuit, and we agree in thinking that the very fact that the two sets of intermediate tubes are called in the claims, one "cross-tubes" and in the other "connecting tubes," shows a purpose to differentiate them, and that the only ground of differentiation is found in the figures and specification in which latter the cross-tubes are described as "large intermediate tubes," and the connecting tubes as "small longitudinal tubes." See Fowler & Wolfe Mfg. Co. v. National Radiator Co., 172 Fed. 661, 663, 97 C. C. A. 187.

There will be found in the specification that the patentee repeatedly states that the horizontal tubes *B B′ C C′* are large and the series of longitudinal tubes *D* are small. He also states that as tubes of the size of the small tubes *D* are liable to offer considerable friction to the steam or water traversing them, he prefers to shorten their length by the interposition of the intermediate transverse tubes *E*. But the statement in the specification which reads "I prefer to construct the section *A* with the tubes arranged in the manner described," refers, as we understand it, to a section which is longer horizontally than vertically.

[1] We cannot understand why the court below should have reached the conclusion that an invention described in the specification but not included in the "claims" cannot be protected by a patent. We regard the law as well established that the claims of a patent are to be construed in the light of the specification. It is quite true that the claims fix the extent of the protection furnished by the patent. McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; Sutter v. Robinson, 119 U. S. 530, 7 Sup. Ct. 376, 30 L. Ed. 492; Burns v. Meyer, 100 U. S. 671, 25 L. Ed. 738. But it is equally true that the specification may be referred to for the purpose of limiting the claim although not available for expanding it. McClain v. Ortmayer, supra. Dey Time-Register Co. v. W. H. Bundy Recording Co. (C. C.) 169 Fed. 807, 813 (1909). In Howe Machine Co. v. National Needle Co., 134 U. S. 388, 10 Sup. Ct. 570, 33 L. Ed. 963, Mr. Chief Justice Fuller, writing the opinion of the court, said:

"Doubtless a claim is to be construed in connection with the explanation contained in the specification and it may be so drawn as in effect to make the specification an essential part of it; but, since the inventor must particularly specify and point out the part, improvement, or combination which he claims as his own invention or discovery, the specification and drawings are usually looked at only for the purpose of better understanding the meaning of the claim, and certainly not for the purpose of changing it and making it different from what it is."

We recognize the full force and effect of this statement of the law and do not believe that we are going contrary to its true meaning in holding that there can be read into the claims in this suit the qualification found in the specification that the tubes *D* are smaller than the others. By reading this qualification into the claims, they are made narrower and not broader.

In Duncan v. Stockham, 204 Fed. 781, 123 C. C. A. 133 (1912) the court in the Seventh Circuit said:

"The claim in suit does not name all the various means shown in the specifications and drawings for connection of the means or elements named therein to make them operative in the combination; but we believe the claim is, nevertheless, sufficient for enforcement, on reference to the specifications. It is to be interpreted to include such connections and relations of the several means of the combination which are named, as implied therewith to make them operative, in conformity with the specifications."

In Consolidated Roller Mill Co. v. Walker, 138 U. S. 124, 11 Sup. Ct. 292, 34 L. Ed. 920 (1890), the Supreme Court declared it saw no reason to doubt the correctness of the following statement made by the court below:

"To understand the nature of the invention intended to be covered by the first claim, resort must be had to the specification, and we there find that the 'swivel boxes' are essential to the contemplated greater movement at one end of the shaft than at the other, whereby is effected 'the tightening of the belt or belts at one side of the machine, without disturbing those at the other.' This is apparent on the face of the paragraph hereinbefore quoted at length; and the expert testimony is direct and convincing, that, to the practical working of the described device as a belt tightener, this swiveling feature is indispensable. Without the swiveled boxes Gray would not have 'independently adjustable bearings.' True, those boxes are not expressly mentioned in the claim, but we think they are to be regarded as entering therein by necessary implication, for the reason just stated, as well as by force of the words 'as shown.' Moreover, the prior state of the art would limit the claim to the specific organization shown and described."

So in a number of cases the Supreme Court has sustained the validity of a patent which otherwise might have been invalid by importing into the claim the particulars of the specification. See Seymour v. Osborne, 11 Wall. 516, 547, 20 L. Ed. 33 (1870); The Corn Planter Patent, 23 Wall. 181, 218, 23 L. Ed. 161 (1874); Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 558, 18 Sup. Ct. 707, 42 L. Ed. 1136 (1897); Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 432, 22 Sup. Ct. 698, 46 L. Ed. 968 (1901).

[2] The District Judge held that the cross-tubes *E* in the Fowler patent served no other function than that of radiating elements. In this view he agreed with the opinion of the primary examiner in the Patent Office. The testimony of the experts does not, however, in our opinion, support the conclusion. The professor of experimental engineering in Cornell University, who testified that he had studied the underlying principles relating to the art of heating and had given special attention to the use and efficiency of radiators, was questioned concerning the following statements in the specification in the Fowler Patent:

"The small tubes are perfectly made of an area substantially equal to that of a one-inch pipe; but as tubes of that size are liable to offer considerable friction to the steam or water traversing them, I prefer to shorten their length by the interposition of the intermediate transverse tubes *E*."

His testimony in reply was as follows:

"It is a well-known fact that if the friction is lessened in the flow of any fluid through a pipe, that the forces which act to move the fluid would pro-

duce a greater velocity, or, in other words, thereby increase the circulation. This statement then in effect, explains how the cross-tubes *EE* increase circulation by reducing the friction. The increase of circulation tends to remove the air from the radiator, which is usually found in considerable volumes in both water and steam and which prevents, in a large measure, the attainment of a uniform temperature throughout the radiator. The obvious effect, then, of the improved circulation, is a uniform temperature throughout every portion of the radiator, and this condition the specifications indicate as in a measure due to the transverse or cross-tubes *EE*."

Another witness, a graduate of Yale University, who had been for several years an assistant examiner in the United States Patent Office and was at the time of the trial a mechanical and electrical engineer, who was familiar with the subject of radiators and who had had wide experience, having been for ten years associated with one of the prominent companies engaged in the business of manufacturing and installing steam heating apparatus for railway cars, was also examined on the same subject. His testimony need not be set out at length. It suffices to say that it was in entire accord with that of the witness to whose testimony we have referred. There is nothing in the record that we have been able to find which contradicts the testimony of these witnesses. And irrespective of their testimony we should be inclined to the opinion which they have expressed. The examiners in chief in the Patent Office thought that the cross-tubes had another function than that of mere radiating elements and that they possessed specific utilities and were clearly patentable. We think the testimony clearly sustains the conclusion. The primary functions of the cross-tubes are twofold: First, their action on internal circulation in facilitating the discharge of air and water of condensation; and, second, their action on external circulation in directing the air currents which pass over the radiating surface. They increase the efficiency of the radiating unit, not by the mere addition of radiating surface, but by aiding the internal circulation of the steam and the external circulation of the air.

The court below was of the opinion that the first two claims had been long anticipated in the prior art. A patentee's claim to an invention is anticipated when it appears that another made the invention before the date when the patentee made it. And to authorize the allowance of a patent it is of course necessary that there should be a substantial difference in principle from prior inventions. But nothing can be regarded as an anticipation which is not a full and complete disclosure of the invention to the public such as will enable those skilled in the art to make and use it. It is well settled that to amount to anticipation, the two things accomplish the same purpose by substantially the same means operating in substantially the same way.

When the Fowler patent was before the court in the Third Circuit in Fowler & Wolfe Mfg. Co. v. National Radiator Co., 172 Fed. 661, 97 C. C. A. 187 (1909), it was not necessary to pass upon the validity of the patent. That suit, like this, was for an infringement, but the defendant was a licensee in the former suit and under the circumstances the validity of the patent was not one which could be properly raised. But in the present suit the validity of the patent is directly involved.

The District Judge, in holding that the Fowler patent had been anticipated in the prior art, stated that the first two claims were for a structure which was shown substantially in the prior patents of Reed, Safford, Wood, and in the Bundy Pyro wall radiators. And that it was also suggested "in the somewhat analogous art of boiler making in the boiler used as a radiator in the Exeter Machine Works."

In the Reed patent, No. 347,127, August 10, 1886, we are unable to discover the combination of parts which is found in the patent in suit. It is a radiator composed of sections of the loop form, having a central vertical tube connected with the outer tube by short hollow bosses. One of the defendant's experts found in it an anticipation of claims 1 and 2 of the Fowler patent. He does not appear to be sustained in this conclusion by any other expert on either side. The Reed radiator has three vertical tubes, the middle one appearing to be somewhat larger than the other, the latter being about the same size as the header tube. But there is nothing in the Reed patent which shows, describes, or even suggests the intermediate cross-tubes and the series of connecting tubes which we find in the patent in suit; nor is there revealed a structure in which the parts would have the same functions and operate to produce the high efficiency attained in the Fowler patent. There is nothing to induce perfect circulation and uniform temperature as in the patent in suit.

In the Safford patent, No. 355,216, December 28, 1886, we also fail to discover the combination of parts which the complainant claims. The Safford radiator, like the Fowler and Reed radiators, is composed of sections. It consists of a series of vertical radiating tubes. These vertical tubes are four in number and as the specification states are connected between the top and base portions by short horizontal tubes. The short horizontal tubes "form braces which strengthen the vertical radiating tubes," and also form communications between the series of vertical tubes. There is nothing, as it seems to us, in the Safford specification or claims which suggests the group of tubes *D* in the Fowler patent. The Safford patent is for an ordinary form of floor radiator. The arrangement is materially different from that of the Fowler patent. In the latter the sections are constructed with large outer or peripheral tubes and similar large cross-tubes to serve as the conducting and quick distributing means, together with the groups of small tubes set into the several panels formed by the larger ones and opening into the large ones at both ends.

In the Wood patent, No. 176,915, May 2, 1876, there is not shown a radiator having large outer tubes, a large cross-tube and a series of small connecting tubes. But the tubes are all of the same size. In the Fowler patent the relative dimensions of the tubes, as well as their number and arrangement, is essential to enable it to perform its functions and to accomplish its advantages. The three short connections of the Wood radiator are not at all the equivalent of the series of small connecting radiating tubes of the Fowler radiator. They are not designed for, neither are they capable of performing, the same functions. Wood states specifically that his radiator is constructed so as to allow for the free expansion and contraction of the different parts

of the radiator without impairing the joints. This is not in harmony with the idea of Fowler. As we have already stated the idea of the patent in suit is a construction such as to induce perfect circulation and uniform temperature. A construction of the Fowler radiator needs no allowance for the free expansion and contraction of the different parts.

In the Bundy Pyro patent the radiator consists of a tubular section having headers at the top and bottom connected by a series of vertical tubes. There are solid brace pieces, or bosses, between the vertical tubes, but no cross-tubes or connection between them. There are no large outer vertical tubes with a cross-tube between opposite outer tubes and a series of connecting tubes between the cross-tube and the outer tubes. Moreover, the crosspieces between the vertical tubes are merely solid braces and can have no effect whatever upon the circulation. This fact alone is sufficient to show that a fundamental difference exists between the Bundy and the Fowler radiators. It is perfectly obvious that the Bundy radiator does not embody the features of the Fowler radiator.

We pass on to a consideration of the Exeter sectional boiler to which the court below alluded in its opinion. It is a steam boiler for generating steam composed of a series of cast iron sections. They have been manufactured under the Brayton patent, No. 53,399 granted in 1866. It is claimed that some of these boiler sections were used as wall radiators and that they embody in all material respects the construction described in claims 1 and 2 of complainant's patent. We are, however, unable to discover that these boiler sections embody the construction of the claims of the Fowler patent, or that there is anything which in the slightest degree suggests the relative dimensions of the tubes which are necessary to produce the results attained under the latter patent. There are no large outer tubes and large cross-tubes *E* of the Fowler patent with a series of relatively small connecting tubes *D*, such as are essential in the Fowler radiator. If we were to attempt to consider the central cross portion as the cross-tube of the Fowler patent and the vertical portions as the connecting tubes, we should be constrained to abandon the idea by the fact that these parts are all of substantially the same dimensions. The functions and effects of the Exeter boiler section when used as a radiator are essentially different from the structure claimed in the patent in suit. In the Exeter section the cross-section of the space on the interior of the radiator between the vertical tubes was 2⅞ inches by 2¹¹/₁₆ inches, and the cross-section of the space on the interior between the end of the vertical tubes was 2⅞ by 2⅞ inches. It is manifest that these dimensions as well as the section itself indicate the absence of the tubular construction which characterizes the structure of the patent in suit. The dimensions are not such as to induce circulation or to provide an efficient relation between heating surface and area. The absence of tubular construction in the Exeter section prevents circulation. There would be simply a body of steam and possibly air over the water without any marked circulation of any character, and certainly none substantially similar to the circulation attained in the Fowler patent. We are wholly unable

to discover that the Exeter boiler in any way affects the novelty of the Fowler construction.

The opinion of the District Judge contains no allusions to the Backus patents and perhaps it is unnecessary for us to allude to them. The Backus patents, however, were granted June 29, 1886. Patent No. 344,512 provides for a device intended for generating steam by the heat of gas in a radiator placed in a fire place. Patent No. 344,511 relates to a combined heating and cooking device. As described in the specifications:

"The object of the invention is to provide a household article which will be valuable as a heating stove, a cooking stove, a boiler and steam radiator, and an ornament for a room."

The radiator of the Backus patent No. 344,512 does not have the same kind of circulation as the radiator of the patent in suit. And it does not have the same structure as there are no large cross-tubes connecting the other tubes. It operates in a different manner and does not produce the same result. And what has been said of No. 344,512 may be said also of No. 344,511. The latter does not differ in type from the former It would unduly extend the limits of this opinion for us to refer in detail to each of the 23 prior patents to which the attention of the court below was invited and which we find fully described in the record. An examination into these various devices has failed to convince us that claims 1 and 2 of the patent in suit are invalid because of anything to be found in the prior art.

An examination of the prior art as disclosed in the record has however convinced us, as the court in the Third Circuit was convinced when this patent was before it in the case before mentioned, that the invention of the patent in suit is a narrow one.

Claims 3 and 4 stand upon a different footing from claims 1 and 2 and we must hold them to be void. They merely provide old means for coupling the sections when they are laid together. Everything in claims 3 and 4 except the coupling devices, including the holes as part of the coupling device, is shown in claims 1 and 2, for it is manifest that the "unitary radiator section" is susceptible of indefinite multiplication. The single new feature contained in claims 3 and 4, that of coupling the sections, is not patentable invention.

We pass now to consider whether the proofs show that the patent in suit has been infringed by the defendant. The bill alleges that the defendant against the will of the complainant and in violation of its rights has infringed upon letters patent 609,800 "by selling, since the date of the said letters patent, radiators substantially the same in construction and operation as in the said letters patent are described, and is now so engaged in offering for sale and selling the same * * * to the great gain and profit of the defendant and to the great loss and injury of your orator."

The proofs establish the fact to our satisfaction that the defendant's radiator possesses the same functions and effects which the complainant's radiator possesses and which are specified in claims 1 and 2 of the patent in suit. We insert a drawing illustrating the defendant's radiator.

If we compare the above drawing with the drawing herein before inserted of the patent in suit, it is quite evident we think that the outer tubes of the defendant's radiator are *B B' C C'* of the patent in suit; that the tubular passageway cut through the intersecting tubes and made steam tight by the tubular bosses is cross-tube *E* of the patent in suit; that the remaining tubes are concededly radiating tubes, arranged in panels in series, and, since it does not seem to be disputed that they are smaller than *B B' C C'* and *E*, they are the tubes *D* of the patent.

In conclusion it may be remarked that the defendant's own conduct seems to indicate that it is fully aware of the meritorious character of the complainant's invention in making these panel series of small diameter. If there be no merit in these relative proportions, as defendant contends, it impresses us as strange that defendant insists on making its series of radiating tubes of smaller diameter than the *B, C,* etc., of the patent.

The decree is reversed, with the direction to grant a perpetual injunction as prayed, and that an accounting be had as to claims 1 and 2 of the patent in suit which we hold infringed by the defendant company, and that the complainant recover its costs.

WALLERSTEIN et al. v. S. LIEBMANN'S SONS BREWING CO.

(Circuit Court of Appeals, Second Circuit. May 27, 1914.)

No. 294.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PROCESS OF TREATING BEER.

The Wallerstein patents, No. 995,820, for beer and method of preparing same, and No. 995,824, for method of treating beer or ale, the process being for the purpose of making beer chill-proof and stable, *held* not anticipated, valid, and infringed.

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

Suit by Max Wallerstein and Leo Wallerstein against the S. Liebmann's Sons Brewing Company. Decree for complainants, and defendant appeals. Affirmed.

The following is the statement of facts and opinion of the District Court, by Veeder, District Judge:

Action by Max Wallerstein and Leo Wallerstein, trading as a copartnership under the name of American Burtonizing Company, against S. Liebmann's Sons Brewing Company, for infringement of letters patent No. 995,820, for beer and method of preparing same, granted to Leo Wallerstein June 20, 1911, and of letters patent No. 995,824, for method of treating beer or ale, granted to Leo Wallerstein on the same date.

The claims of patent No. 995,820 relied upon are:

"1. As a new article of manufacture, a beer or ale characterized by its capability of remaining clear when chilled subsequent to pasteurization, by its high degree of stability at ordinary temperatures, and by the presence therein, in the described state of activity, of a proteolytic enzym active in slightly acid media.

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

"2. In the art of brewing, the step which consists in adding to the beer or ale, subsequent to the cooling of the wort, a proteolytic enzym active in slightly acid media, such enzym being added in proportions and under conditions to remain in the finished beer in the described state of activity, and to render the beer chill-proof and more stable at ordinary temperatures.

"3. In the art of brewing, the step which consists in adding to the beer or ale, subsequent to the cooling of the wort, a proteolytic enzym active in slightly acid media, such enzym being added in proportions and under conditions to remain in the finished beer in the described state of activity and to render the beer chill-proof and more stable at ordinary temperatures, and subsequently pasteurizing."

The claims of patent No. 995,824 relied upon are:

"1. In the art of brewing, the step which consists in adding to beer or ale, before bottling, a proteolytic enzym derived from the gastric secretions of mammals.

"2. In the art of brewing, the step which consists in adding to beer or ale a proteolytic enzym derived from the gastric secretions of mammals, and subsequently pasteurizing."

The development of the bottling industry brought about a change in the method of consumption of beer. Instead of being served from the keg, or at all events within a short time after leaving the brewery, it was shipped long distances and kept for considerable periods of time. When thus kept, even at ordinary temperatures, beer tends, from a lack of stability, to become hazy and cloudy, and to deposit a sediment. But in this country it is customary to drink bottled beer very cold. This chilling causes brilliant beers or sparkling ales to lose their brilliancy and to become hazy and cloudy. It was soon found that under conditions of long shipment and storage the most carefully brewed beer developed micro-organic growths. To eliminate this brewers adopted the practice of pasteurization; that is, the beer in bottles was subjected to a temperature or from 140° to 150° F. for about half an hour. But while pasteurization prevented the growth of micro-organisms, pasteurized beer was found to be particularly sensitive to cold and unstable. There remain in the beer after steaming certain substances of an albuminous nature, which, while invisible at the time of steaming because dissolved, are slowly affected by a number of causes and become less readily soluble, especially at low temperatures, finally causing haziness or sedimentation and thus rendering the beer unsightly and unpresentable.

The production of stable and chill-proof beer was therefore a problem of vital importance to brewers. The evidence leaves no doubt of the reality of the problem or of the difficulty involved in its solution. What is the cause of the precipitation of albuminoids in finished bottled beer, despite normal treatment in brewhouse and cellar? Is the precipitation due to chemical or mechanical causes, or is it to the result of enzym action? All the technical skill of the trade was directed to these questions. It came to be generally assumed that the failure to produce chill-proof and stable beer was due to the behavior of the albuminoids, but very little was really known about such substances. It is sufficient to say that no solution was found, and brewmasters remained in ignorance of the cause of the precipitation which rendered beer unstable and sensitive to cold. The chemical action is still unknown, but the problem of producing chill-proof and stable beer has been solved by the complainants.

The patents in suit produce chill-proof and stable beer by adding to the beer at the proper stage a minute quantity of a proteolytic enzym active in an acid medium. Proteolytic enzyms are divided into classes according to the medium in which they act, that is, whether acid, neutral, or alkaline. The patents in suit refer to four proteolytic enzyms active in acid medium; pepsin, an animal enzym obtained from the stomach of pigs; papain, an enzym derived from the pawpaw; bromelin, a vegetable enzym derived from the pineapple, and malt peptase, derived from malt. Enzyms suitable for the purpose described are widely distributed in the vegetable and animal kingdom, and are readily prepared in concentrated form by known methods.

The procedure by which proteolytic enzyms active in an acid medium are

employed for the purpose of chill-proofing and stabilizing beer is exceedingly simple, and is specifically set forth in the patents in suit: "According to the present process, there is added to the beer at any suitable stage of the brewing, that is to say, at any period subsequent to the cooling of the wort, and usually after the conclusion of the main fermentation, a proportion of proteolytic enzyms active in slightly acid media sufficient to modify the proteids contained in the beer in such manner that they will not be precipitated upon chilling subsequent to pasteurization, the beer being rendered chill-proof in the sense that it is capable of remaining brilliant even when kept upon ice for a considerable time. In practice it has been found advantageous in most cases to add the enzyms to the clarified beer shortly before bottling. During the pasteurization which follows the bottling, the enzyms become active, and those proteids which would cloud the beer when chilled are so modified by the proteolysis that the resulting beer will remain clear and brilliant, being no longer sensitive to cold."

The patents point out specifically that as a general rule: "An enzym, exhibiting an activity of $^1/_{6000}$, may be employed in the proportion of 1 to 5 grams per barrel of 31 gallons of beer or ale, the proportion being increased or diminished according as the activity of the preparation may vary from the above standard, and according to the percentage of coagulable albuminoids contained in the beer."

The patents further state that care should be taken not to employ an excessive amount of enzym, as "the addition of the enzym preparation in excessive proportions may render the beer again sensitive to cold." The reason why the enzyms are to be added after the wort has been boiled and cooled is because such enzyms are destroyed at temperatures around 168° F. The record shows that the usual temperature for the pasteurization of beer is from 140 to 145° F. at which temperature the enzyms are active. The patent makes it very clear that the enzyms used should be "such as are not destroyed or rendered permanently inactive by subjection to the usual temperatures of pasteurization."

The precise chemical action of proteolytic enzyms on proteins is complex and not fully understood. It is unimportant, for the purposes of this case, to examine the various theories. The material consideration is that it is an undisputed fact that proteolytic enzyms active in an acid medium, when added to beer in proper quantity at the proper stage of the brewing process, render the beer chill-proof and stable. The evidence shows abundant recognition of the scientific discovery made by the complainants, and its extensive use is proof of its utility.

The patents in suit make it clear that the invention relates to the manufacture of lager beers and brilliant ales, such beers and ales alone being injuriously affected by the haziness or turbidity produced by chilling or by long keeping at ordinary temperatures. The specifications of the two patents are identical; the claims were originally included in one application, and were made in separate applications by direction of the Patent Office. Claim 1 of patent No. 995,820 covers a beer or ale which is stable and chill-proof after pasteurization, these qualities having been produced by the addition to the beer at the proper stage of the brewing process of proteolytic enzyms active in an acid medium. Claims 2 and 3 of this patent cover the process of producing the beer or ale of claim 1, which consists in adding to the beer subsequently to the cooling of the wort a proteolytic enzym which is active in a slightly acid medium in the proper proportions to effect the result described. These two claims differ from each other only in that claim 3 includes the step of pasteurizing which is not specifically set forth in claim 2. Patent No. 995,824 covers a process which is specific to the generic process of the other patent. The two claims in issue cover the art of producing a chill-proof and stable beer by adding before bottling a proteolytic enzym derived from the gastric secretions of mammals, i. e., as the specification makes clear, pepsin. These two claims differ only that claim 2 includes the step of pasteurizing.

Since the evidence satisfies me beyond any reasonable doubt that the defendant's beer is made chill-proof and stable by the use of proteolytic enzyms active in acid medium, and that the infringement is a deliberate and flagrant

appropriation of Wallerstein's disclosures, attention may be directed at once to the grounds upon which the validity of the patent is attacked.

The defendant introduced much testimony to show that certain extracts have long been made by compounding pepsin with malt liquor, the latter serving as a carrier for the former. It may be said at the outset that the defendant's testimony with respect to these malt preparations is wholly unsatisfactory. The testimony of the defendant's witness Wyatt was obviously unreliable; its counsel stated upon the argument that it would not be relied upon. The testimony as to the use of pepsin in these preparations is singularly conflicting, and in most cases without corroboration from persons whose knowledge must obviously have been superior to that of the witness testifying. It is unnecessary, however, to examine this testimony in detail because the malt extracts set up by the defendant do not relate to the art of chill-proof beer and are not relevant. The specifications expressly distinguish the lager beers and brilliant ales with which the patents are concerned from medicinal preparations such as malt extracts. Malt extracts are not beverages, nor are they drunk as such; they are tonics, taken in prescribed doses. They are heavy, dark-colored liquids, in which stability cannot be observed, and in which, moreover, since they are not iced, haziness or cloudiness due to icing does not occur. Even if the proof with respect to the use of pepsin in these malt extracts were clear and convincing, it would not constitute a defense to the patent in suit. The pharmaceutical art is remote from the art of brewing, and so far as pepsin may be used in such tonics it is used for a different purpose and with different results. Moreover, on any assumption of relevancy or sufficiency of proof the malt extracts or tonics referred to disclose mere accidental results of the use of pepsin, and cannot anticipate the patents in suit. If it be accepted as proven that pepsin was used with malt liquors having some of the characteristics of beer, although specially brewed for a different purpose, it is clear that such use did not give to the world the knowledge that Wallerstein gave. Brewers remained in ignorance of a method of making chill-proof and stable beer. They derived no more benefit or knowledge from the use of pepsin in tonics than from the use of pepsin in chewing gum.

Nor does the use of diastase to cure starch turbidity suggest the invention of the patents in suit. Beer brewed either by faulty mashing processes or from inferior malt is likely to contain unconverted starch, or, in other words, to exhibit starch turbidity. With proper malt and correct mashing the diastase, or amylolytic enzym, in the malt converts the starch into sugar and dextrin during the brewing processes. It has long been known to brewers that the use of additional diastase in the form of a watery extract of malt will convert starch. The additional diastase accomplishes what sufficient diastase in the malt would have accomplished. During the decade or more in which brewers have been searching for a method of making chill-proof and stable beer, this well-known use of diastase or amylolytic enzym failed to suggest a solution of the problem. All brewers knew that starch turbidity was due to unconverted starch in improperly brewed beer, but no one knew what caused the haziness or cloudiness in properly brewed beer after icing, or what made it unstable after prolonged keeping. A further objection to the defendant's contention is that there seems to be no chemical analogy between proteins and starch. It is known that an amylolytic enzym or diastase converts starch into sugar and dextrin, but it is not known, as I understand it, what the action of a proteolytic enzym on proteins is.

At the close of its testimony the defendant offered in evidence the Breker British patent No. 1884 of 1908, and amended its answer to include it. I understand this patent to relate, not to the production of a chill-proof and stable beer, but to the treatment of the mash from which the wort is prepared. It has long been known that malt contains a proteolytic enzym which becomes active during the malting and mashing processes. The action of this enzym is referred to in the handbooks of brewing as a peptonizing action, and is not original with Breker. The Breker patent has no relation to finished beer, and has no bearings upon the treatment of finished beer to render it stable. Breker boils the wort after his treatment, which destroys the proteolytic enzyms. It appears, moreover, from the file wrapper of patent No. 995,-

820, that an extract of malt such as Breker describes will not make beer chill-proof.

Finally, it is contended that the patents are indefinite and uncertain. But the witnesses—brewers familiar with the art and its processes, the persons to whom the specification is addressed—made no complaint on this score. The terms "chill-proof" and "stable" unquestionably conveyed a definite meaning to their minds.

The defendant seems to have found no difficulty in applying the disclosure of the patent so as to attain the desired result. The specification simply directs that to a barrel of 31 gallons of beer a proteolytic enzym must be added, and it must be added after the main fermentation, or at least after the boiling of the wort, because boiling temperatures destroy the enzym. The patents give the general rule that an enzym exhibiting an activity of $^1/_{6000}$ may be employed in the proportion of one to five grams, the preparation being increased or diminished according as the activity of the preparation may vary from the above standard, and according to the percentage of coagulable albuminoids contained in the beer. And the further direction is given that excessive quantities must not be used, since that would render the beer again sensitive to cold. The chill-proof and stable product is produced by specified means, and if the defendant or others find that this product is or may be attained by other independent means, they are free to practice them.

My conclusion is that the patents in issue are valid and infringed. The complainants may have the usual decree.

W. M. Stockbridge, of New York City, for appellant.

J. Q. Rice, of New York City, for appellees.

Before COXE and WARD, Circuit Judges, and MAYER, District Judge.

PER CURIAM. Decree affirmed on the opinion of Judge Veeder.

WALLERSTEIN et al. v. CHRISTIAN FEIGENSPAN, Inc.

(Circuit Court of Appeals, Third Circuit. June 8, 1914.)

No. 1844.

1. PATENTS (§ 327*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION—EFFECT OF PREVIOUS ADJUDICATION.

In the interest of uniformity of decision among the circuits, it is desirable to give much weight to the decision of a co-ordinate court as to the validity of a patent, especially on a motion for a preliminary injunction.

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

2. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PROCESS OF TREATING BEER.

A preliminary injunction directed against infringement of the Wallerstein patents No. 995,820, for beer and method of preparing same, and No. 995,824, for method of treating beer or ale, on a prior decision in another circuit sustaining the patents.

Appeal from the District Court, of the United States for the District of New Jersey; John Rellstab, Judge.

Suit by Max Wallerstein and Leo Wallerstein against Christian Feigenspan, Incorporated. From an order denying a motion for preliminary injunction, complainants appeal. Reversed.

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

James Q. Rice, of New York City, for appellants.
Herbert H. Dyke, of Newark, N. J., for appellee.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

J. B. McPHERSON, Circuit Judge. This was a suit on patents Nos. 995,820, and 995,824, granted in June, 1911, to Leo Wallerstein for improvements in beer and in methods of preparing beer and ale. A preliminary injunction was refused, and the present appeal was taken from that ruling.

[1, 2] If we were confined to the evidence that was before the learned judge when the injunction was refused, we should probably be indisposed to disturb his order; a large discretion must always be permitted to a court of first instance in passing upon such an application. But the situation has recently changed. A few days ago the Court of Appeals of the Second Circuit sustained the two patents, affirming the decision of Judge Veeder in a contested litigation (see the opinions reported in 215 Fed. 915, 132 C. C. A. 153), and of course we are at liberty to take notice of this new fact. In the interest of uniformity of decision among the circuits, we think it desirable to give much weight to the decision of a co-ordinate court, especially at this preliminary stage. It is true that a decree in one suit cannot bind the parties in another, and that new evidence may properly lead to a different conclusion in the second proceeding. Moreover, difference of opinion between two co-ordinate courts cannot always be avoided, even on substantially the same evidence, but so far as possible we think they should endeavor to act in harmony. (Our recent decision in Clip Bar Co. v. Steel, etc., Co., 213 Fed. 223, 129 C. C. A. 567, presented a different question from that now before us.) After a case reaches final hearing, its aspect may differ materially from the aspect presented in an earlier controversy on the same subject between other parties, and of course every court is bound to act on the evidence that is actually laid before itself. And the same statement concerning the differing aspect of two cases may be true even in the beginning of a litigation, although it is not so likely to be true. In the present case we think the new evidence presented to the district court of New Jersey and to this court does not yet furnish sufficient ground to overcome the prima facie correctness of the decision on appeal in the Second Circuit. We express no opinion on any of the questions that may ultimately become important in the suit before us; we confine ourselves to accepting for the present the decision in the Second Circuit. For the present, also, the countervailing case presented by the defendant's affidavits seems to be inadequate.

The order appealed from is therefore reversed, with instructions to the district court to enter a preliminary injunction upon such terms as to security, etc., as may seem advisable.

PERRY et al. v. WEED CHAIN TIRE GRIP CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1914.)

No. 2616.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CHAIN TIRE GRIP.
The Parsons patent, No. 723,299, claim 6, for non-skid chains for automobiles, *held* valid and infringed.

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in equity by the Weed Chain Tire Grip Company, Harry D. Weed, and the Parsons Non-Skid Company, Limited, against Arthur S. Perry and Milton H. Perry, doing business under the name of Perry Chain Grip Company, the Union Steel Screen Company, and the Motor Specialty Company. Decree for complainants, and defendants appeal. Affirmed.

O. C. Billman, of Cleveland, Ohio, for appellants.

Frederick S. Duncan, of New York City, for appellees.

W. H. Chamberlin, of Chicago, Ill., amicus curiæ.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. There was a decree below adjudging infringment of all the claims of the Parsons patent, No. 723,299, upon non-skid chains for automobiles. This patent has been the subject of so many reported decisions [1] that it is useless to set out the details of the present controversy. Infringement is not denied The contest is on the issue of validity

If it had been made clear to the Circuit Court of Appeals of the Seventh Circuit, as it now seems to appear from the Scientific American articles, that Thomson's armor not only really had the creeping motion around the tire, but that he knew and understood this function and claimed merit for it, that court might not have sustained the first and the other very broad claims of the Parsons patent. These claims are not confined to non-skidding devices, or to vehicle wheels, but extend to protective armor and to all kinds of wheels or pulleys. However, we do not doubt that Parsons' development of the idea and his practical application of it to rapidly running wheels by the cross-

[1] Weed Chain Tire Grip Co. v. Excelsior Supply Co. (C. C.) 179 Fed. 232; Parsons Non-Skid Co. v. E. J. Willis Co. (C. C.) 190 Fed. 333; Excelsior Supply Co. v. Weed Chain Tire Grip Co., 192 Fed. 35, 113 C. C. A. 1; Pitts Anti-Skid Chain Co. v. Weed Chain Tire Grip Co., 192 Fed. 41, 113 C. C. A. 14; Parsons Non-Skid Co. v. Seneca Chain Co. (C. C.) 192 Fed. 46; Weed Chain Grip Co. v. Atlas Chain Co. (D. C.) 194 Fed. 448; Weed Chain Tire Grip Co. v. Cleveland Chain & Mnfg. Co. (C. C.) 196 Fed. 213; Parsons Non-Skid Co. v. Asch (D. C.) 196 Fed. 215; Parsons Non-Skid Co. v. McKinnon Chain Co. (D. C.) 196 Fed. 218; Parsons Non-Skid Co. v. Atlas Chain Co., 198 Fed. 399, 117 C. C. A. 286; H. Channon Co. v. Parsons Non-Skid Co., 203 Fed. 862, 122 C. C. A. 173; Parsons Non-Skid Co. v. E. J. Willis Co., 209 Fed. 227, 126 C. C. A. 333.

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

chains, or equivalent device well adapted to creeping, was a meritorious invention, and this—the invention in its commercial form—is protected by claim 6. Whether the remaining claims are valid is of no vital importance to defendant, and in such a situation any uncertainty we may feel regarding some of them does not justify us in declining to follow the repeated adjudications.

The decree below must be affirmed, with costs.

MERRELL-SOULE CO. v. POWDERED MILK CO. OF AMERICA et al.

(District Court, W. D. New York. July 9, 1914.)

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PROCESS OF DESICCATING MILK.

The Stauf patent, No. 666,711, for a process of desiccating blood, milk, and the like, as applied to the conversion of milk into a dry powder which can be dissolved in water with its characteristic freshness and purity unchanged, was not anticipated, discloses patentable invention, and is entitled to a fair range of equivalents. Neither was the invention first patented in a foreign country, so as to render the patent void under Rev. St. § 4887 (U. S. Comp. St. 1901, p. 3382); also *held* infringed.

2. PATENTS (§ 65*)—ANTICIPATION—PRIOR PATENTS.

Vague and indefinite suggestions in a process patent of an alternative process, which, so far as appears, has never been practiced or tested, are insufficient to anticipate a subsequent patent for a specific and proved process.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 80; Dec. Dig. § 65.*]

3. PATENTS (§ 66*)—VALIDITY—PREVIOUS PATENTING OF INVENTION IN FOREIGN COUNTRY.

A patent in this country is void, under Rev. St. § 4887, as amended in 1897 (U. S. Comp. St. 1901, p. 3382), only when it is primarily shown that the invention was first patented in a foreign country, and that the application for such patent was filed more than seven months before the application was filed in this country, and, for the purposes of such section, the date when an invention is "patented" under the German law is the "ausgegeben" date printed on the face of the patent when issued and not the date of the decision to grant the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79, 81; Dec. Dig. § 66.*]

In Equity. Suit by the Merrell-Soule Company against the Powdered Milk Company of America, Wellington C. Patrick, and Dana R. Shedd. Decree for complainant against the corporation defendant; dismissed as to the individual defendants.

Livingston Gifford, of New York City, and Howard P. Denison and Eugene A. Thompson, both of Syracuse, N. Y., for complainant.

Archibald Cox and Robert W. Byerly, both of New York City, for defendants.

HAZEL, District Judge. [1] The bill herein was filed to enjoin the defendant corporation and the individual defendants from infringing United States letters patent, No. 666,711, granted January 29, 1901,

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

to Robert Stauf of Posen, Germany, and now owned by complainant, for an improved method of desiccating blood, milk, and the like. We are concerned in this action with the process of manufacturing dry powder from fresh milk rather than with the particular device or apparatus by which this is accomplished. The patent has a single claim, consisting of a series of steps, so phrased that a mere restatement of it will disclose the object of the invention, which reads as follows:

"The process of obtaining the solid constituents of liquids, such as blood, milk, and the like, in the form of powder, said process consisting in converting the liquid into a fine spray, bringing such spray or atomized liquid into a regulated current of heated air so that the liquid constituents are completely vaporized, conveying the dry powder into a suitable collecting space away from the air current, and discharging the air and vapor separately from the dry powder."

There are four essential steps in the claim: (1) The conversion of the fresh milk into a fine spray; (2) bringing the spray into a regulated current of heated air to vaporize the liquid constituents; (3) conveying the dry powder to a suitable collecting space away from the air current; and (4) discharging the air and vapor separately from the dry powder. The claim contains in terms no limitation as to the form of the devices used in practicing the process. The specification, in describing the nature and operation of the apparatus, says:

"A pipe *a* serves to supply air under pressure to the spray-nozzles *b*. The air under pressure draws the liquid to be operated upon from the vessels *d* through tubes *c* and projects the same in a finely-atomized condition—that is to say, as a fine spray—in oblique jets into the interior of a shaft-like casing *e*. At the lowest part of the said casing is provided a suitable source of heat—say, a gas-fire *f*. The air, admitted laterally through openings provided with suitable regulating devices or registers D is heated by the source of heat and rises. The spray of atomized liquid coming from the jets or nozzles *b* comes in contact and mixes with the heated air, and the watery constituents of the spray are evaporated. The steam and the dry particles are carried upward by the heated air and by a cone *g*, extending into the casing *e*, are guided into chambers *h*, surrounding the shaft *e* in the form of a gallery; said chambers being constituted by suitable casings closed at the top. The sides of said gallery are made of woolen fabric, mill-gauze, or like pervious material, permitting the air and vapors to pass and escape into the atmosphere, while the dry powder falls down and is collected in the hoppers *i*, whence it is removed by openings fitted with suitable closing devices, such as rotary valves or the like."

In addition to the foregoing, the complainant filters the air before it passes to the spray nozzle and regulates the current of air by varying the speed of a blower which forces it over steam coils into the drying chamber, but these are not thought to be patentable departures from the Stauf process.

The defenses are invalidity, noninfringement, and voidness of the patent in question because of the provisions of section 4887 of the Revised Statutes (U. S. Comp. St. 1901, p. 3382). These defenses will be considered in the order in which they are stated.

It is shown herein that, prior to the patent in suit, repeated efforts were made to convert milk into a form better adapted for commercial purposes than is its original form. One of the early methods employed

was the condensing and drying of the milk; later on, in accordance with the Just and Ekenberg processes, it was dripped on steam-heated rollers from which it was scraped off after being cooked. But none of these methods proved satisfactory, as the flavor of the milk was changed, its acidity increased, and it was incapable of complete solution in water. The art was therefore confronted with a difficult problem in the desiccation of milk which the complainant company solved by its process of transforming the milk into a fine powder wholly soluble in water.

There is evidence that the new process was independently discovered by Lewis C. Merrell, an officer of the complainant company, but that subsequently it was ascertained that the said process had already been patented by Stauf both in this country and abroad, whereupon the complainant company purchased the United States patent. The defendant company, while conceding Merrell's conception, nevertheless contends that the Stauf patent was incapable of successful commercial use, and that it taught no one how to practice the process under consideration, but I think the contrary fairly appears from an examination and analysis of the prior publications in evidence, upon which reliance is placed to prove anticipation or limitation of the claim in controversy.

The expert witness for the defendants makes reference in his deposition to many patents granted anterior to the patent in suit, in which it is claimed that spraying a solution into air to evaporate the water content and leave the solid in powder form is shown, but I am not satisfied that such was the fact. While there were a number of prior processes of one kind or another showing the spraying or injection of liquids into a chamber or casing, still none of them were shown to be capable of accomplishing the result of the patent in suit, and hence the presumption follows that such processes were incapable of so doing, as otherwise the skilled in the art would no doubt have quickly recognized the fact, and would have abandoned the objectionable Just, Ekenberg, and Campbell methods, to which reference has heretofore been made. Cimiotti Unhairing Co. v. American Unhairing Machine Co., 115 Fed. 498, 53 C. C. A. 230.

The prior art refers to a number of inventions relating to the concentration of milk at a low temperature or to the preparation of preserves or other substances by removing the water content, but nowhere is there any suggestion of a powder obtained by spraying, save in the Percy and La Mont patents. In the patent to Percy, granted 1872, there is described a process of desiccating liquids by atomizing, which comes close to the Stauf invention in controversy, but there is no evidence to show that such process was ever in practical use or capable of producing the result of the patent in suit. Had it been operative, it is quite unlikely that it would have remained unknown to dairymen and others who, long before the Stauf patent, were endeavoring to transform milk into a convenient form for commercial use. In his specification Percy declares that he brings fluid substances into minute division, the atoms coming in contact with currents of air or other gases, and he claims the principle of atomizing and desiccating simul-

taneously by dried or heated air, which is forced forward through a pipe, causing a division of the substances for the purpose of drying them. The description, however, fairly discloses that his process in important particulars was essentially different from the process in suit. I quite agree with complainant's expert witness Browne that starch or dextrine (the substances mentioned in the Percy patent) may be dried by a current of hot air ejected from a pipe, but the complete evaporation of the moisture in milk or blood by spraying depends upon more careful treatment. To successfully accomplish the latter, the sprayed particles, I think, must be driven into a current of air, so that they contact and mix with it in the casing during the period of evaporation. The witness Browne on this point testified as follows:

"Hot air cannot be furnished in sufficient volume through a spray nozzle to effect the drying of milk or blood in which there is a high moisture content. It is important in the Stauf process that the spray particles should be deprived of their moisture before they can settle upon any receiving surface, and this involves the supply of hot air in sufficient volume and at sufficient temperature to absorb all of the water in the milk or blood. Hence there must be a regulated current of heated air; sufficient volume and sufficient heat being supplied with due regard to the amount of water to be removed."

The Percy patent is devoid of any such disclosure. The success of complainant's process was owing to the fact that the milk was actually projected or sprayed into the current of heated air, and then borne upward by it into the receiving chamber. Defendants' expert witness Gunz, who claims that there was no important difference between the Percy process and that of the complainant company, seems to have ignored this important feature of the Stauf process. Nor is there any reference by Percy to discharging the air and vapor or deporting the dry powder away from the air current. It is evident that the Percy patent does not disclose the combination of elements of the claim in suit, and the mere possibility that it might be made to perform the function of the Stauf patent is not sufficient to predicate anticipation. Gordon v. Warder, 150 U. S. 47, 14 Sup. Ct. 32, 37 L. Ed. 992.

[2] The La Mont patent, No. 51,263, of November 28, 1865, to which importance is properly attached by defendants, was for drying a batter of beaten eggs by a current of heated air. After describing the preferred method of operation, this patentee suggests an alternative method; i. e., that the egg batter may be forced by means of a powerful blast of air into a thin spray, which falls through a current of heated air and then dries in fine particles. The specification is without a drawing, and it is difficult definitely to determine of just what the process consists. In this situation the following excerpt from Westinghouse Air Brake Co. v. Great Northern Railway Co., 88 Fed. 258, 31 C. C. A. 525, is not entirely inapt:

"The prophetical suggestions in English patents of what can be done, when no one has ever tested by actual and hard experience and under the stress of competition the truth of these suggestions, or the practical difficulties in the way of their accomplishment, or even whether the suggestions are feasible, do not carry conviction of the truth of these frequent and vague statements."

The phrase of the specification "fall through a current of heated air" is not explained, nor the manner in which the vapors are discharged

from the chamber or the powder collected away from the air zone. In the absence of proof that the La Mont suggestion of spraying egg batter and allowing it to fall through a current of air ever became operative, it may fairly be presumed that it never came into practical use. In his later patent No. 50,421, no mention is made of his method of spraying the batter, and I am entirely satisfied that the instrumentalities employed by him for carrying out his process were incapable of desiccating fresh milk and producing a powder completely soluble in water.

In the Walker patents, Nos. 285,187 and 347,846, the offal or meal is dried by means of heat contained in coils, but the specification says nothing of spraying a liquid into a regulated current of heated air. The expert witness for defendants also lays stress on the patents to Sherwood & Farnsworth, Downing & Hughes, Blackman, Haseltine, Bassler, and Newton, some of which were for condensing milk, glucose, tannin, etc., while others related to concentration of syrups or sugar juice, and, though in some instances such liquids were sprayed into a receptacle, no one of the patents was capable of producing a milk powder which could be dissolved in water with its characteristic freshness and purity unchanged. As these patents do not as closely approximate the patent here considered as do the patents to Percy and La Mont, they may be passed over with the simple comment that none of them discloses the combination of steps of the claim in suit. Even if, considering them collectively, we find that they disclose the series of steps of the patent in suit, they nevertheless are not anticipations, as, when considered singly, it is clear that each patent lacks an element possessed by the Stauf patent. Schmertz Wire-Glass Co. v. Pittsburgh Plate-Glass Co. (C. C.) 168 Fed. 73. Stauf, though not a pioneer in the broad sense in which that term is ordinarily employed, was nevertheless the first to spray a liquid into a regulated current of air to remove the moisture content, thus producing a fine powder which was carried to a collecting space outside the air currents, allowing the air and vapor to pass to the atmosphere.

As to infringement: Except as to a few unimportant changes, the apparatus of the defendant company for desiccating milk is not thought patentably different from complainant's. In the defendants' apparatus the force of heat of the Stauf patent (different, it is true, from "a gas fire *f*," but nevertheless the equivalent means for supplying heat suitably regulated to the casing or chamber) is applied by forcing the heated air, which is regulated by a fan, into the evaporating chamber after it has passed over steam coils. The liquid is sprayed or atomized into the heated chamber and instantly dried and vaporized, while a material quantity of the fine powder descends to the bottom of the chamber away from the air current; the remaining quantity being borne by the air current into a dust collector, which retains the solids as the air and vapor pass to the atmosphere through air escapes. I am unable to perceive any material dissimilarity in this adaptation of defendants under Brigham patent, No. 1,071,692, from complainant's. There is no doubt but that substantially the same result is attained by both. I think the defendants' process is fairly within the scope of the claim in

controversy, and, considering the progress made in the art by complainant's process, a fair range of equivalents should not be denied. The adaptation by the defendant company of a blower device in place of a natural draught for regulating the air, and of a fan for regulating the current, and its substitution of a duster for a screen to collect the powder, were mere changes of form from complainant's and do not avoid infringement. Crown Cork & Seal Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 C. C. A. 72.

There is contradiction in the testimony regarding the different products, the defendant company claiming that its product is more palatable than complainant's, but this fact, if it is a fact, is not thought of material importance. If there is a slight difference in the flavors of the two products, it is easily attributable to a variety of causes. The important fact remains that a milk powder, completely soluble in water, was produced by the defendant company by its adaptation of the process described in the specification and claim of the patent owned by the complainant company.

[3] Whether the Stauf patent in suit is void under section 4887 of the Revised Statutes depends upon whether the invention was first patented in a foreign country, as that term is legally defined, and whether application for such patent was filed more than seven months prior to the filing of the application in this country. There is dispute as to whether the Stauf German patent is for the same invention as the patent in suit, but in my opinion the processes in all essential particulars are the same. A comparison of the claims discloses only slight differences between them, such as the use of the term "current ascending from below" in the German patent as opposed to the term "regulated current" in the patent in suit, and the additional element of "discharging the air and vapor separately from the dry powder" found in the United States patent. While these differences and additions are probably not unimportant, I should nevertheless hesitate to construe the German patent so narrowly as to preclude their use, and therefore I am persuaded that there is such substantial identity between them as complies with section 4887, as amended; hence the principle announced in the case of Leeds v. Victor, 213 U. S. 320, 29 Sup. Ct. 495, 53 L. Ed. 805, holding that difference in combination is a substantial difference, does not strictly apply. But the contention that the Stauf invention was first patented in Germany prior to January 29, 1901, the date upon which it was given out, is not sustained by the evidence. The statute contemplates that the grant of a patent in this country is void only when it is primarily shown that the invention was first patented abroad, and that the application for such patent was filed more than seven months before the application was filed in this country. The dates of filing the applications, of their allowance, and of their issuance are as follows: June 12, 1899, German application filed. October 3, 1900, United States application filed. December 9, 1900, United States application allowed. January 9, 1901, German application allowed. January 29, 1901, United States patent issued. March 14, 1901, German patent ausgegeben.

Under the German law, as I understand the record, an application for patent is published on the day following the filing thereof, and a provisional protection is immediately accorded it. Later, when it is definitely decided to grant a patent, that fact is published and a so-called title deed prepared for the patentee. On the German document in evidence (the Stauf patent) there is printed the ausgegeben date, viz., "Ausgegeben den 14, Marz 1901," which complainant claims was the date of grant, notwithstanding an earlier decision by the board of patent examiners to allow the patent. The defendant company claims that such ausgegeben date merely constituted a publication of the patent for circulation and sale of copies, and that the actual date of patenting a German patent is the date of the decision by the board of examiners to grant the patent. The testimony of an expert witness, who claimed to be familiar with the German patent law, and who expounded it, together with excerpts from decisions of the German Imperial Court found in the record, are claimed to support the latter contention. I have carefully considered the subject, and am quite prepared to believe that a patentee under the German law secures certain monopoly rights during the pendency of the application, but that full and definite monopoly rights are not secured to him until after the Patent Office decision, when there is a sealing or issuing of the patent, which is evidenced by the ausgegeben date printed on the face of the patent. Until then there is no actual patenting. The German decisions in evidence do not appear to me to decide the precise question under consideration; but it is not an entirely new question in this country, having been previously decided in Queen v. Friedlander (C. C.) 149 Fed. 775, that the "publication or ausgegeben date is the date upon which the patent is actually issued," and in several other cases that the word "patented," as used in section 4887, means "the actual issuance of the patent under the seal of the government" of the foreign country. It was so held in American Co. v. Cushman (C. C.) 57 Fed. 842, and this holding was followed by Judge Shipman in this circuit in 1894 in the case of Edison Co. v. Waring Co. (C. C.) 59 Fed. 358, affirmed 69 Fed. 645, 15 C. C. A. 700. The amendment to the statute concededly has not altered the effect of these decisions, and Congress, in re-enacting the earlier statute, presumably adopted the interpretation of the judicial decisions bearing thereon rendered before the amendment. The Abbottsford, 98 U. S. 444, 25 L. Ed. 168; McDonald v. Hovey, 110 U. S. 619, 4 Sup. Ct. 142, 28 L. Ed. 269; Sedgwick on Const. Stat. 365; White v. Apollo, 209 U. S. 14, 28 Sup. Ct. 319, 52 L. Ed. 655, 14 Ann. Cas. 628. But the defendant contends that some of the decisions cited on this point (the Queen Case, for instance) were rendered under section 4886 of the Revised Statutes (U. S. Comp. St. 1901, p. 3382), which relates to an entirely different subject; section 4887 dealing with protection in a foreign country, while section 4886 deals with disclosures as anticipations of the alleged invention. This contention, however, is thought unsound. The word "patented," as used in both sections, when considered in relation to the issuance of the patent or the period from which the monopoly dates, has no different signification. Upon this point there was also evidence by the complainant to show that it is the practice of the

United States Patent Office to regard the ausgegeben date of a German patent as the date of grant and the time from which the monopoly runs. Such practice is not inconsistent with the decisions cited, which have had the subject of the dates of foreign patents under consideration.

There is no positive evidence to show that the individual defendants, who were formerly in the employ of the complainant company, violated their contract with the complainant to keep secret its modus operandi, or that they participated in any profits derived from the infringement. Indeed, the process, being a patented one, was open to the public, and the defendant company was free to discover it by a search of the files of the Patent Office. Both Patrick and Shedd, who, by the way, are not officers or stockholders of the defendant company, testified that they did not disclose the process or apparatus, or assist in originating the process adapted by the defendant company to its business, and, according to the witness Howe, the essential features of the process and apparatus were originated by one Brigham, who secured a patent for his improvement before the individual defendants entered the employ of the defendant company.

A presumption of bad faith sometimes arises from the employment of former employés of a competing concern operating under patent rights, but none is thought to exist in the present case, which would warrant holding Patrick and Shedd personally liable for the infringement, and therefore the bill is dismissed as to them, but the complainant is entitled to a decree, with costs, holding the patent in suit valid and infringed by the defendant company.

NATIONAL MERCANTILE CO., Limited, v. WATSON, Corporation Com'r, et al.

(District Court, D. Oregon. July 27, 1914.)

No. 6372.

1. CORPORATIONS (§ 642*)—FOREIGN CORPORATIONS—WHAT CONSTITUTES DOING BUSINESS.

Where a Canadian corporation, engaged in loaning money, had an agent residing in Oregon, and applications for loans made to him were forwarded to the company for approval, and, on approval of an application, an undertaking agreeing to pay to the agent the amount of the loan in consideration of monthly payments was issued to the agent, who assigned the same to the prospective borrower, the loan being secured by mortgage on Oregon real estate, the corporation was doing business in Oregon.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520–2527; Dec. Dig. § 642.*]

2. CORPORATIONS (§ 648*)—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS.

L. O. L. Or. § 6727, requires foreign corporations to file with the Secretary of State a copy of the charter certified to by the legal keeper of the original, together with a certificate of a United States diplomatic or consular officer in such foreign country that such certifying officer has the requisite official knowledge whether such charter or articles of incorporation are of a genuine, valid, and subsisting character, and that such copy is duly certified by the officer having the legal custody of the orig-

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

inal. A Canadian corporation doing business in Oregon had the certificate of the registrar of joint-stock companies that the copy of the article of association was a true copy of the original in the registrar's office, also the certificate of the provincial secretary of British Columbia that the registrar was the duly appointed officer, and that the signature and seal attached to his certificate were his signature and seal, and that said registrar had the legal custody of the original document, and also a certificate of the United States consul general at Vancouver, B. C., that the registrar was the duly appointed and commissioned registrar of joint-stock companies for the province of British Columbia, and that to all his official acts full faith and credit were due and given. *Held*, that the corporation was not entitled to do business; there being no certificate that the registrar had requisite official knowledge whether the articles were of a genuine, valid, and subsisting character.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2516; Dec. Dig. § 648.*]

3. CORPORATIONS (§ 661*)—FOREIGN CORPORATIONS—RIGHT TO SUE.

A foreign corporation unauthorized to do business in Oregon, because of failure to file the certificate required by L. O. L. Or. § 6727, is not entitled to sue in the federal court for the district of Oregon.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536, 2539, 2542, 2543, 2544, 2546, 2563-2567; Dec. Dig. § 661.*]

In Equity. Suit by the National Mercantile Company, Limited, against R. A. Watson, as Corporation Commissioner, and others. Judgment for defendants.

Wilson, Neal & Rossman, of Portland, Or., for plaintiff.

Martin L. Pipes, John M. Pipes, and George A. Pipes, all of Portland, Or., for defendant Watson.

A. M. Crawford, of Salem, Or., and Walter H. Evans and Arthur A. Murphy, both of Portland, Or., for all other defendants.

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

WOLVERTON, District Judge. The chief purpose of this suit is to have declared void and inoperative an act of the legislative assembly of the state of Oregon entitled "An act to protect purchasers of stocks and bonds and prevent fraud in the sale thereof; to create a corporation department," etc., approved February 28, 1913 (Laws 1913, p. 668), and commonly known as the "Blue Sky Law."

The complainant is a British Columbia corporation, with its principal place of business at Vancouver, and claims to be doing a loaning business upon real estate mortgage security. It has a general agent, A. D. Baker, residing in Portland, Or. Applications for loans are made to him, and he forwards them to the company for approval. When approved, the company issues to Baker an undertaking, under seal, agreeing, in consideration of the payment of one-hundredth of the loan each month, to pay to said Baker the amount of the desired loan as soon as the loan fund of the company contains a sufficient amount of money to make up the said loan. The undertaking being assignable, Baker at once assigns the same to the prospective borrower, who thereupon makes his payments to Baker, or to the company, at his option. The loans so made or agreed to be made are secured by mortgages

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

upon real property in Oregon. Baker attends to securing the mortgages, and, when executed, forwards them to the company, and also collects and forwards to the company the monthly installments as they become due and payable.

[1] The question is presented primarily whether, under this state of facts, the complainant is doing business within the state of Oregon. The answer is obvious. Practically the entire business of the company relating to loans within the state is transacted by Baker, the general agent, residing at Portland. He solicits the loans, takes applications, collects the first payment, together with all installments, attends to taking the mortgages, and forwards all to the company at its home office. From the home office is issued the obligation, to Baker, which he assigns to the borrower at Portland. The business does not consist of the securing of one loan only, or of a limited number, but of continuous and numerous transactions of the kind, with numerous persons, and cannot be other than a carrying on of the business, and that within the state.

Being engaged in business within the state, the defendants, by plea in abatement, challenge complainant's right properly so to continue in business or to maintain this suit on the ground that a copy of its charter or articles of incorporation has not been properly certified. The objection consists in the fact that the certificate of the consul general of the United States residing at Vancouver, B. C., fails to state that the certifying officer (that is, the legal keeper of the original charter or articles of incorporation) has the requisite knowledge as to whether such charter or articles of incorporation is of a genuine, valid, and subsisting character.

[2, 3] The statute of Oregon (section 6727, Lord's Oregon Laws) requires that every foreign corporation shall, before transacting business in the state, file with the Secretary of State a written declaration of its desire and purpose to engage in business within the state, which declaration shall, among other things, be accompanied by a certified copy of the charter or articles of incorporation of the company, certified to by the legal keeper of the original, together with a certificate of a United States ambassador, minister, consul general, vice consul, or charge d'affaires in such foreign country, "that such certifying officer has the requisite official knowledge as to whether such charter or articles of incorporation are of a genuine, valid, and subsisting character, and that such copy is duly certified by the officer having the legal custody of the original."

The company has the certificate of the registrar of joint-stock companies to the effect that the annexed copy of the articles of association is a true and correct copy of the original filed in the registrar's office; also the certificate of the provincial secretary of British Columbia to the effect that the registrar is the duly appointed officer, and that the signature and seal attached to his certificate are his signature and seal, and that said registrar has the legal custody of the original document; and also a certificate of the consul general of the United States residing at Vancouver, B. C., to the effect that the registrar is the duly appointed and commissioned registrar of joint-

stock companies for the province of British Columbia, and that to all his official acts full faith and credit are due and given. This officer does not, however, certify, as required by the statute of Oregon, that the registrar has requisite official knowledge "as to whether such charter or articles of incorporation are of a genuine, valid, and subsisting character."

This leaves the credentials for obtaining a certificate or license for engaging in business in this state, as we think, fatally defective, and for that reason the complainant can have no proper or legal standing for doing or transacting business within the state. Not being authorized to do business within the state, it follows irresistibly that it has no legal standing for maintaining a suit here, and it has been so held in this jurisdiction. Cyclone Mining Co. v. Baker Light & Power Co. (C. C.) 165 Fed. 996; La Moine Lumber & Trading Co. v. Kesterson (C. C.) 171 Fed. 980. It is further maintained, under the plea in abatement, that the complainant has failed to pay or offer to pay the annual license fee of $100, as required by an act of the legislative assembly of the state, approved March 4, 1913. Session Laws 1913, p. 772. This statute requires that every foreign corporation shall, between July 1st and August 15th of each year, pay in advance to the corporation department an annual license fee of $100. And this objection is also perhaps well assigned.

Again, it is urged that the complainant is engaged in a lottery business. While we are not assured that the business carried on can be so characterized, yet, from a cursory examination of the scheme under which the company makes its supposed loans and prosecutes its project, we are not at all persuaded that it is not engaged in a fraudulent business.

But for the fatality in the consul general's certificate, as heretofore indicated, the suit ought to abate, and such will be the order of the court.

THE ADELAIDE T. CARLETON.

(District Court, D. Connecticut. July 8, 1914.)

No. 1704.

SALVAGE (§ 13*)—RESCUE OF DISABLED SCHOONER—NATURE OF SERVICE.

A schooner, worth with her cargo about $15,000, during a storm and dense fog, was blown upon a rock in Long Island Sound, causing her to leak somewhat, and so injuring her rudder fastenings as to render her unable to navigate. In the morning she displayed a distress signal, in response to which she was towed to port by a tug, under an agreement that the price should be fixed by the underwriters at New Haven, which, however, was not done. *Held* that, while the schooner was not in immediate danger, her master was evidently in doubt as to his ability to reach port, and the service so rendered by the tug was a salvage service, for which she was entitled to an award of $750.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. § 15; Dec. Dig. § 13.*]

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

In Admiralty. Suit by the New England Transportation Company, for itself and the crew of the tugboat Resolute, against the schooner Adelaide T. Carleton. Decree for libelant.

Clifford I. Stoddard, of New Haven, Conn., for libelants.

Carpenter & Park, of New York City, for claimant.

Frederick H. Wiggin, of New Haven, Conn., for trustee of New England Transp. Co.

THOMAS, District Judge. On the 11th day of March, 1912, the schooner Adelaide T. Carleton, of Rockport, Me., of the burden of about 208 tons, left Elizabethport, N. J., via Long Island Sound, bound for Stockton Springs, Me., having laden on board a cargo of about 360 tons of fertilizer.

On the night of March 15th, and during the prosecution of said voyage, a very severe storm out of the northwest had raged, accompanied by heavy rains and dense fog. On account of the fog it was impossible to make accurate observations of the position of the schooner, and about 5 o'clock on the afternoon of the 15th she was blown upon Goose Rock, near Falkner's Island. With a change of the wind she came off the rocks and anchored with both anchors in deep water, where she lay in a fairly calm sea with the wind blowing from 15 to 19 miles an hour, until the morning of the 16th. She was making water slowly, which her crew was able to take care of with the pumps; but her rudder was unhung out of the lower pintle, rendering the rudder useless. About 6:30 that morning the captain ordered the signal of distress, the American flag, Union down, put in the rigging, which order was obeyed.

At 5 o'clock on the morning of the 16th the steam tug Resolute, belonging to the New England Transportation Company and in command of a captain, with a pilot and four deck hands on board, left New London bound west for New York through Long Island Sound. About 7 o'clock in the morning the captain and pilot of the Resolute sighted the Carleton about two miles off shore from Falkner's Island, flying the American flag, Union down. The Resolute changed her course about two points and bore down upon the schooner, which was at anchor as already described.

The captain of the Resolute drew alongside of the schooner, and Captain Kent, commanding the schooner, had a conversation in the pilot house of the Resolute with Captain Snow. This conversation related to the condition of the schooner, and Captain Kent requested that Captain Snow tow the schooner to New London. This he refused to do, but agreed with Captain Kent to tow the schooner to New Haven harbor. Before undertaking the work it was agreed to submit the value of the services to the underwriters at New Haven.

Upon arriving at New Haven the schooner was drawn up alongside of canal dock and beached in the mud. The matter of the value of the services was never submitted to the underwriters. At New Haven a survey was made of the schooner, and the surveyors found "that on sounding the pumps the vessel has but six inches of water in her, and that at no time had she had over eight inches, and we also find that

her rudder is unhung out of the lower pintle," and recommended that she be towed to New London, put on the dock, and that temporary repairs be made there. Rubber gaskets were procured on shore at New Haven with which to fix the after pump, and on the following day the schooner was towed, without any further repairs, to New London by a New Haven harbor tug in company with two scows, and at New London was dry-docked, where temporary repairs were made to her rudder and keel. The value of said repairs was $408, and in the course of a short time, under one sail, she continued on to her destination, Stockton Springs, Me., where she discharged her cargo of fertilizer, which was intact as the result of her experience.

At the time the Resolute drew alongside of the schooner, the wind was blowing west, the sea was not rough, but choppy, and the atmosphere was clear, and in towing the schooner to New Haven no risks, in addition to the ordinary risks of navigation, were taken by either the tug or its crew. The schooner, it was claimed by the libelants, was in such a position as to be unable to get out without a rudder, as the wind was blowing from the west, and she was, so to speak, in a pocket, and could not get out without help, and I find this claim to be true.

While Captain Kent testified that he could have laid there for a long period of time with the wind and water as it then was, yet it is significant that he at least must have thought that he was in more or less of a dangerous condition, in view of the fact that he hoisted his signal of distress, and not a towing signal. Of course, he had no knowledge as to the exact damage that had been done to his vessel, nor could he tell whether it would be possible for him to sail, even if he had a rudder, to New Haven or New London, without the vessel leaking badly. The question is: What were Captain Kent's beliefs as his vessel lay at anchor with reference to his ability to get under way without help? After she was put upon the dry dock it was ascertained that she could have continued on without serious danger from leaking; but with her rudder out of commission, and the signal of distress flying, it seems conclusive that Captain Kent must have been quite uncertain about his ability to safely move at the time the Resolute approached.

It was testified that $50 to $75 is reasonable compensation for a tug to go from New Haven harbor and tow such a vessel to the place where this one was landed in New Haven harbor; but it seems to me that there is more in this transaction than mere towage. It must have been evident to Captain Kent's mind that he expected to pay, or that the owners expected to pay, more than mere towage, else the conversation with the captain of the tug Resolute in the pilot house would have definitely fixed the towage services, as Captain Snow had been a tug captain in the waters of Long Island Sound for 27 years, and familiar with navigation and towage charges in and about the sound. It seems to me that Captain Kent must have realized that he was in some kind of danger, and, although that danger was not imminent, yet it was sufficient to produce the belief in his mind that he needed as-

sistance, and needed it enough to order a signal of distress to be attached to the topmost part of the rigging.

In The Blackwell, 77 U. S. (10 Wall.) on page 13, 19 L. Ed. 870, the Supreme Court said:

"Courts of admiralty usually consider the following circumstances as the main ingredients in determining the amount of the reward to be decreed for a salvage service:

"1. The labor expended by the salvors in rendering the salvage service.

"2. The promptitude, skill, and energy displayed in rendering the service and saving the property.

"3. The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed.

"4. The risk incurred by the salvors in securing the property from the impending peril.

"5. The value of the property saved.

"6. The degree of danger from which the property was rescued."

In view of all the circumstances and conditions then existing, I find the libelant entitled to recover low salvage. What, then, becomes fair compensation for the salvage of the schooner and her cargo? The schooner was worth approximately $4,000 and the cargo $10,063.

From all of the facts and circumstances I find that $750 is fair compensation, and order said amount to be apportioned as follows: Seventy-five per cent. to the owners and twenty-five per cent. to the crew of the Resolute in proportion to their wages, after the captain of the Resolute is awarded $100 for his services.

Let judgment therefor be entered for the libelants in the sum of $750 and costs, and a decree accordingly.

KEMP & BURPEE MFG. CO. v. MITCHELL et al.

(District Court, E. D. Pennsylvania. July 18, 1914.)

No. 168.

1. EVIDENCE (§ 427*)—PAROL EVIDENCE—WRITTEN CONTRACT—VARIANCE BY PAROL—WAIVER.

On an issue of breach of plaintiff's sales agency contract by defendants' sale of machines covered by the contract within defendants' territory, parol evidence, showing defendants' knowledge that machines similar to those which were the subject-matter of the contract had been before and were, during the existence of the contract, being sold by plaintiff's licensee within the territory covered by defendants' contracts, offered to show a waiver of the latter's alleged exclusive right to the territory, was not objectionable as tending to alter or vary the terms of the contracts, under the rule that a waiver may be inferred from the acts, conduct, and declarations of the parties and may be proved by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1861; Dec. Dig. § 427.*]

2. PRINCIPAL AND AGENT (§ 81*)—AGENCY CONTRACT—SALE OF MACHINERY—RIGHT TO EXCLUSIVE TERRITORY—WAIVER.

Where defendants contracted to sell plaintiff's manure spreaders in a specified territory respectively for each of the years 1904, 1905, and 1906, with full knowledge that plaintiff had issued a license to another to manufacture and sell similar spreaders within defendants' territory, and

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

defendants during such period made payments to plaintiff without any claim for damage or set-off, failed to assert any right to the exclusive sale of the spreaders within the territory, and to rescind or give plaintiff any notice of intention to claim damage for an alleged breach, their right to the exclusive occupation of the territory was waived.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 194–214, 219, 223; Dec. Dig. § 81.*]

Action by the Kemp & Burpee Manufacturing Company against Benjamin C. Mitchell and another, doing business as B. C. Mitchell & Son. On exceptions to a referee's report. Overruled, and report confirmed.

G. Harry Ditter, of Philadelphia, Pa., for plaintiff.

J. Barton Rettew, of Philadelphia, Pa., for defendants.

THOMPSON, District Judge. The evidence fully sustains the findings of fact of the learned referee.

[1] The first exception assigns error in the admission of oral or written evidence tending to alter or vary the terms of the several written contracts between the parties. As stated by the referee, there was no evidence admitted intended to alter or vary the terms of the contracts. The evidence in question was offered and admitted solely for the purpose of showing upon the part of the exceptants knowledge that spreaders similar to those which were the subject-matter of the contracts between the parties had been before and were, during the existence of those contracts, being sold by the licensee of the Kemp & Burpee Manufacturing Company within the territory covered by the sales contracts between the parties to this proceeding. The purpose was to establish upon the part of Benjamin C. Mitchell, individually and trading with Clinton T. Mitchell as B. C. Mitchell & Son, a waiver to that extent of the terms of the written contracts.

A waiver may be inferred from the acts and conduct and declarations of the parties, and may be proved by parol. Hyde v. Kiehl, 183 Pa. 414, 38 Atl. 998; Allen v. Sowerby, 37 Md. 410; Kribs v. Jones, 44 Md. 396; Herzog v. Sawyer, 61 Md. 344.

The second and third exceptions relate to the findings that the Mitchells knew that sales were made by J. B. Kemp Manufacturing Company, licensees of the Kemp & Burpee Manufacturing Company, in the restricted territory of the Mitchells during the years 1903, 1904, 1905, and 1906 under such license. The findings of knowledge, together with the other findings of fact, are amply sustained by the evidence.

[2] The fourth, fifth, and sixth exceptions bear upon the findings that the Mitchells by their conduct impliedly, if not expressly, waived any claim for damages because of alleged breach of the terms of the contracts in permitting the manufacture and sale of the spreaders by J. S. Kemp Manufacturing Company in the restricted territory specified in the contracts for the sale of the spreaders by the Mitchells. I find no error in the conclusions of law of the referee upon which these exceptions are based.

The evidence clearly shows that the contracts of 1904, 1905, and 1906 were entered into with a full knowledge upon the part of the Mitchells of their terms, and with the full knowledge upon their part

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

of the existence of the license to J. S. Kemp Manufacturing Company, and that J. S. Kemp Manufacturing Company was manufacturing and selling manure spreaders under their license in the restricted territory. That the Mitchells by their acts, conduct, and declarations waived their right to claim damages for alleged breach of the contracts by failing to assert their rights during the period of existence of the contracts; by making payment to the Kemp & Burpee Manufacturing Company during that period without any claim for damages or set-off; by failing to rescind or to claim damages, or to give any notice of intention to claim damages for the alleged breach.

"Waiver is where one in possession of any right, whether conferred by law or by contract, and of full knowledge of the material facts, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely on it. Thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterwards." Bishop on Contracts, § 792; Pokegama Sugar Pine Lumber Co. v. Klamath River Lumber & Improvement Co. (C. C.) 96 Fed. 34.

"Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim." Swain v. Seamans, 9 Wall. 254, 19 L. Ed. 554.

"Waiver of a right or benefit may be established by the actions, declarations, acquiescence, even silence, of a party, as well as by his expressed consent and approval. * * *

"While a waiver is not in the proper sense of the term a species of estoppel, yet where a party to a transaction induces another to act upon the reasonable belief that he has waived or will waive certain rights, remedies, or objections which he is entitled to assert, he will be estopped to insist upon such rights, remedies, or objections to the prejudice of the one misled." Marine Iron Works v. Wiess, 148 Fed. 153, 78 C. C. A. 279.

For the reasons above stated, the exceptions of Benjamin C. Mitchell and B. C. Mitchell & Son to the referee's report and award are dismissed, and the report is confirmed.

In re METALLIC SPECIALTY MFG. CO.

(District Court, E. D. Pennsylvania. May 22, 1914.)

No. 4189.

1. BANKRUPTCY (§ 474*)—ADMINISTRATION—FEES.

It is the duty of every one connected with the administration of the bankruptcy laws to make sure that no fees or charges, except those intended by the acts of Congress, are paid out of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 878–884; Dec. Dig. § 474.*]

2. BANKRUPTCY (§ 482*)—ADMINISTRATION—COUNSEL FEES—REVIEW.

Fees payable to counsel for a bankrupt's trustee are subject to supervision by the court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. § 482.*]

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

3. BANKRUPTCY (§ 482*)—ADMINISTRATION—COUNSEL FEES.

Where an original allowance to counsel for the bankrupt's trustee was intended to cover ordinary services, present and future, it did not preclude a subsequent allowance for subsequent extraordinary and unanticipated services, made necessary by the presenting of a doubtful claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874-876, 897; Dec. Dig. § 482.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Metallic Specialty Manufacturing Company. On petition to review a referee's order allowing additional fees to counsel for the trustee. Affirmed.

See, also, 210 Fed. 663.

Allen S. Morgan, of Philadelphia, Pa., for claimants.

Conard & Middleton and Simpson & Brown, all of Philadelphia, Pa., for trustee.

DICKINSON, District Judge. The only justification for an opinion in this case beyond the announcement of the ruling made is the general importance of the subject. There are these considerations to be kept in mind in passing upon the question of compensation to be allowed to counsel for trustees in bankruptcy.

[1] 1. It is the duty of every one connected with the administration of the bankruptcy laws to make sure that the fund which would otherwise be distributed among creditors is not diminished by the payment of any fees or charges except those intended by the acts of Congress to be paid.

[2] 2. Counsel for the trustee, both as representing the trustee and therefore the court, and as members of the bar of this court, are in an especial sense to have all their acts, and emphatically their claims to compensation, pass under the supervision of the courts.

3. As the compensation allowed by the court is in fact usually paid by creditors, and always by creditors of a discharged bankrupt, the power to fix the amount of compensation ought to be exercised with that degree of care and discriminating judgment which any one should exercise who is spending the money of another. The value of professional services is difficult to measure in money. The true professional spirit is absolutely without taint of commercialism, and inspires the doing of professional work without the thought of compensation being uppermost or even present. Such services, however, deserve compensation, and command a high measure of it. Happily, in this case, we are saved the ofttimes difficult duty of fixing the amount of such compensation with justice alike to counsel and to those out of whose money the compensation comes. It is practically admitted, or at least not seriously disputed, that the allowance made by the referee is reasonable and fair. The exception is based upon the proposition that the allowance originally made was prospective and covered by anticipation the services for which this allowance is asked for.

[3] The original allowance was intended to include services then still to be rendered, but the services then in view were expressly limited to ordinary services. The fact is admitted that extraordinary and at the

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

time unexpected and unanticipated services have been rendered by counsel. The fact has been found by the referee and is not in dispute. The ground of the objection therefore falls. Something was said at the argument about these petitioners themselves having been the cause of the necessity for these extra services, and that they presented a doubtful claim, which called forth a vigorous opposition from the trustee and his counsel. It is more than probable that some friction resulted from this, and some heat resulted from the friction. This fact, even if it be a fact, is of no importance, except that it makes clear the existence of the other fact that the extraordinary services were rendered. These petitioners are asserting their legal right to object to the allowance of this fee, and they cannot be deprived of a legal right, nor is that right in any degree lessened by any ill temper on their part, whether excusable or inexcusable.

The findings of the referee are approved, and the order made by him affirmed.

THULLEN v. TRIUMPH ELECTRIC CO.

(District Court, E. D. Pennsylvania. May 26, 1914.)

No. 3054.

PLEADING (§ 222*)—OVERRULING OF DEMURRER—LEAVE TO PLEAD OVER.

In the absence of stipulation otherwise or unless a demurrer was interposed for delay, it is the general practice in all jurisdictions on the overruling of a demurrer to the declaration to give leave to the defendant to plead over.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 570–574; Dec. Dig. § 222.*]

At Law. Action by L. H. Thullen against the Triumph Electric Company. Sur demurrer to statement. Overruled.

Furth, Singer & Bortin, of Philadelphia, Pa., for plaintiff.

Henry S. Drinker and Abraham M. Beitler, both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. It is the almost universal practice in all jurisdictions when a declaration is met by a demurrer, which the court overrules, to give leave to withdraw the demurrer and to plead over, unless, of course, the demurrer was interposed merely for delay. We assume the defendant in this case would wish this usual grace accorded to it. Even if there had been a stipulation (which there was not) that a final judgment should be entered by the court, the case would none the less (if the judgment was for the plaintiff) be required to be tried in the nature of a writ of inquiry to assess the damages for the breach of the contract alleged, unless the principle of the presumption of damages to the amount of the agreed compensation applies to this case.

If the parties will stipulate that final judgment may be entered on the present state of the record, and if for the plaintiff that the dam-

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

ages may be assessed at an agreed sum with costs, we will dismiss and dispose of the questions raised by this demurrer and dispose of the case; otherwise we will overrule the demurrer, which we now do, and grant leave to the defendant to withdraw it and plead over, the plea to be filed within ten days. Further leave is granted to either side to move for a reargument if the suggested stipulations are filed. If no such stipulations are filed and no plea is filed within ten days from this date, the plaintiff may move for judgment.

For obvious reasons, at this stage we refrain from a discussion of the legal merits of the case.

MANUFACTURERS' LIGHT & HEAT CO. v. OTT et al., Public Service Commission of West Virginia.

(District Court, N. D. West Virginia. July 29, 1914.)

1. CONSTITUTIONAL LAW (§§ 62, 80*)—CORPORATIONS (§ 394*)—EXECUTIVE BOARDS—CONSTITUTIONALITY OF STATUTE CREATING.

   Act W. Va. Feb. 22, 1913 (Laws 1913, c. 9), creating a state Public Service Commission and prescribing its powers, is not invalid as conferring on such Commission legislative, executive, and judicial powers in violation of the state Constitution, but merely creates an agency for carrying out the legislative scheme with respect to public service corporations.

   [Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102, 140, 143-147; Dec. Dig. §§ 62, 80;* Corporations, Cent. Dig. § 1576; Dec. Dig. § 394.*]

2. COURTS (§ 489*)—JURISDICTION OF FEDERAL COURTS—STATUTE GIVING REMEDY IN STATE COURT.

   One entitled to invoke the jurisdiction of a federal court on the ground that a state statute deprives him of property rights in violation of the Constitution of the United States cannot be deprived of that right by reason of being given a remedy in the state courts.

   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1324-1330, 1333-1341, 1372-1374; Dec. Dig. § 489.*]

3. GAS (§ 2*)—REGULATION—STATUTES—"GAS COMPANY."

   The term "gas companies" as used in Act W. Va. Feb. 22, 1913 (Laws 1913, c. 9), relating to public service corporations, includes companies furnishing natural gas.

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

   For other definitions, see Words and Phrases, vol. 4, p. 3045.]

4. CONSTITUTIONAL LAW (§ 38*)—VALIDITY OF STATUTE.

   A statute is invalid that requires something to be done which is forbidden by the Constitution, but it is not essential to the validity of a statute that it should enjoin obedience to the Constitution, or re-enact its provisions.

   [Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 36; Dec. Dig. § 38.*]

5. CONSTITUTIONAL LAW (§ 318*)—DUE PROCESS OF LAW—STATUTE CREATING PUBLIC SERVICE COMMISSION.

   Act W Va. Feb. 22, 1913 (Laws 1913, c. 9), relating to public service corporations and creating a Public Service Commission, is not subject to the objection that it authorizes the Commission to take property without due process of law, in that it makes no provision for notice and hearing

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

before the fixing of rates; that being a requirement of the state Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 949; Dec. Dig. § 318.*]

6. COMMERCE (§ 60*)—STATE REGULATION OF NATURAL GAS COMPANIES—CONSTITUTIONALITY.

A state regulation, fixing the price to be charged by gas companies for natural gas furnished to consumers within the state, is not an unlawful regulation of interstate commerce, although some of the gas supplied is piped from other states; Congress having taken no action affecting the subject.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 91–95; Dec. Dig. § 60.*]

7. GAS (§ 14*)—STATE REGULATION OF RATES—WEST VIRGINIA STATUTE.

Under Act W. Va. Feb. 22, 1913 (Laws 1913, c. 9), creating a Public Service Commission, such Commission has power on its own motion to institute an inquiry into the reasonableness of gas rates, and on a finding that those charged are unreasonable, to fix reasonable rates.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10–11; Dec. Dig. § 14.*]

8. CONSTITUTIONAL LAW (§ 318*)—STATE REGULATION OF RATES—LEGALITY OF PROCEEDINGS.

Gas companies *held* not denied due process of law on a hearing before the Public Service Commission of West Virginia as to the reasonableness of gas rates because of the expression of a request by one of the commissioners that the leading counsel for the companies should withdraw, made after charges against the fairness and integrity of the Commission had been made but not substantiated, and because of the closing of the hearing after counsel without justification had withdrawn and refused to further appear.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 949; Dec. Dig. § 318.*]

9. GAS (§ 14*)—STATE REGULATION OF RATES—REVIEW BY THE COURTS.

In a suit to enjoin the enforcement of gas rates fixed by a state commission after a hearing, the court cannot consider ex parte affidavits to supply the place of evidence which complainants had the opportunity to produce before the commission, but did not, and on such affidavits set aside the findings of the commission. Nor can it set aside such findings where on the evidence there is ground for difference of opinion among reasonable men.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10–11; Dec. Dig. § 14.*]

10. GAS (§ 14*)—STATE REGULATION OF RATES—VALIDITY OF RATES.

A rate fixed for natural gas by a state commission cannot be held confiscatory because it would require the companies affected, under contracts made by them, to supply gas to consumers in other states at a loss.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10–11; Dec. Dig. § 14.*]

11. GAS (§ 14*)—STATE REGULATION OF RATES—SUIT TO ENJOIN ENFORCEMENT OF RATES.

In a suit in a federal court to enjoin the enforcement of gas rates fixed by a state commission, the complainant assumes the burden of showing with reasonable certainty the invasion of rights affirmed or conferred by the Constitution or laws of the United States, as the court cannot set up views it might have reached as to what ought to be done against the

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

conclusions of the Commission, which have a reasonable basis of support in the evidence.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10–11; Dec. Dig. § 14.*]

In Equity. Suit by the Manufacturers' Light & Heat Company, the Manufacturers' Gas Company, the Tri-State Gas Company, the Wheeling Natural Gas Company, the Ohio Valley Gas Company, the Blacksville Oil & Gas Company, the Cameron Gas and Oil Company, the Wetzel Gas Company, and the New Cumberland Water & Gas Company against Lee Ott, Howard N. Ogden, Charles H. Bronson, and Wade C. Kilmer, composing the Public Service Commission of the State of West Virginia. On motion for preliminary injunction. Motion denied.

A. Leo Weil, of Pittsburg, Pa., Geo. E. Price, of Charleston, W. Va., B. M. Ambler, of Parkersburg, W. Va., and Charles McCamic, of Wheeling W. Va., for plaintiff.

A. A. Lilly, Atty. Gen., of Charleston, W. Va., and Frank W. Nesbitt and J. B. Sommerville, both of Wheeling, W. Va., for defendant.

Before PRITCHARD and WOODS, Circuit Judges, and DAYTON, District Judge.

WOODS, Circuit Judge. The Public Service Commission of West Virginia made an order on April 22, 1914, setting forth the finding of unjust, unreasonable, and excessive rates charged consumers of natural gas in the state of West Virginia by Manufacturers' Gas Company, Tri-State Gas Company, Wheeling Natural Gas Company, Ohio Valley Gas Company, Blacksville Oil & Gas Company, Cameron Gas & Oil Company, Wetzel Gas Company, and New Cumberland Water & Gas Company, and declaring and prescribing as reasonable and just rates ranging from 11 to 25 cents per thousand cubic feet, according to the class of service and the Commission's view of the situation of the company. Thereafter the Manufacturers' Light & Heat Company, a Pennsylvania corporation, and the West Virginia corporations above named brought this suit to enjoin the Commission from putting the prescribed rates into effect. The bill asserts the right of the Pennsylvania corporation to be heard on the ground that it has acquired all of the stock of the West Virginia corporations and is operating all their pipe lines and other property as a unit. A temporary restraining order was granted by Hon. Alston G. Dayton, District Judge, and the application for a temporary injunction was heard and is now to be passed on by three judges, as required by the statute. The numerous grounds upon which the injunction is asked will be considered in what seems to be their logical sequence.

[1] 1. The statute creating the Public Service Commission and prescribing its powers and duties enacted February 20, 1913, is attacked on the ground that it confers legislative, executive, and judicial powers and unites the three forms of power in one Commission, contrary to the Constitution of the state. Detailed analysis of the statute is not

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

required to show that it is in no essential particular unlike the numerous similar statutes which have been sustained by the courts. It confers the power to investigate and ascertain if the public service corporations of the kind named in it are charging reasonable rates, as a means of fixing reasonable rates for the future; but no judicial power is conferred to adjudge damages or other relief for making unreasonable charges or for other violations of law. The provision for appeal from the orders of the Commission to the Supreme Court of the state does not connote judicial power in the Commission. The point is decided by the Supreme Court of the state in United Fuel Co. v. Public Service Commission (W. Va.) 80 S. E. 931, holding that the appeal provided only meant to enlarge somewhat the power before exercised under the writs of mandamus and prohibition; that under it the court could not review any act of the Commission falling within the scope of its power; that the court's action must be judicial in holding the Commission within its sphere as prescribed by the statute and limited by the statute, the Constitution of the state, and the Constitution of the United States, as distinguished from the limited administrative power of the Commission. The powers of the Commission have no feature of the executive branch of the government, for it controls no power nor machinery for the enforcement of its orders. The Legislature of the state has not delegated its legislative power, but merely provided an agency for carrying out the legislative scheme with respect to public service corporations. The statute falls within the distinction thus stated by Justice Day in Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 32 Sup. Ct. 436, 56 L. Ed. 729, and applied in many other cases:

"The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress."

[2] 2. Tangent to this point is the objection made by the Commission, relying on Prentis v. Atlantic Coast Line R. R., 211 U. S. 210, 29 Sup. Ct. 67, 56 L. Ed. 150, that this court should not entertain the bill until the complainants have sought relief by the appeal to the Supreme Court of the state provided by the statute. At least two questions under the federal Constitution are made by the pleadings, whether the rates prescribed are confiscatory, and whether the complainant's property is about to be taken without due process of law. In the case last cited the court restated the principle laid down in Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, and other cases that the sufficiency of rates with reference to the federal Constitution is a judicial question over which federal courts have jurisdiction by reason of its federal nature, and that one entitled to sue in the federal courts cannot be deprived of that right by reason of being allowed a remedy in the state court. True, in the Prentis Case it was held that the complainants must carry their grievance to the Supreme Court of Appeals of West Virginia for review before invoking the equity jurisdiction of

the federal courts; but this was on the distinguishing ground that under the Virginia Constitution and statute the proceedings by which the matter was to be carried to the Supreme Court were legislative in character, and that the court in reviewing the action of the Commission was performing an extrajudicial function. The distinction is clearly drawn by the Supreme Court of West Virginia in United Fuel Co. v. Public Service Commission, supra, and by the Supreme Court of the United States in Bacon v. Rutland R. R., 232 U. S. 134, 34 Sup. Ct. 283, 58 L. Ed. 538.

[3] 3. The contention that the term "gas companies" used in the statute was not intended to embrace companies furnishing natural gas has no foundation. The statute was enacted in view of the fact that a very large part of the gas consumed in the state was natural gas. But even if there were ground for debate, the matter has been settled by the holding of the State Supreme Court in the United Fuel Company Case that the statute embraces companies furnishing natural gas.

[4, 5] 4. The statute is not subject to the objection that it attempts to authorize the Commission to take property without due process of law in that it makes no provision for notice and a hearing before fixing rates. The complainants were entitled to notice and a hearing, but express statutory requirement for such notice is not essential, for the reason that the constitutional requirement that there shall be notice and an opportunity to be heard is a part of the law governing the Commission. As the statute is silent on the subject, the presumption is that the Legislature intended the Commission to comply with the Constitution, not to violate it. Such commissions are under two laws, namely, the statute law of the state, which confers upon them certain powers over public service corporations, and the constitutional law of the state and of the United States, which requires that they shall exercise the powers conferred by statute only by due process of law, that is, after giving the companies due notice and opportunity to be heard. A statute is invalid which requires something to be done which is forbidden by the Constitution, but it cannot be essential to the validity of a statute that it should enjoin obedience to the Constitution. Paulsen v. Portland, 149 U. S. 30, 13 Sup. Ct. 750, 37 L. Ed. 637; Chicago, B. & Q. R. R. v. Nebraska, 170 U. S. 57, 18 Sup. Ct. 513, 42 L. Ed. 948; French v. Barber A. P. Co., 181 U. S. 324, 21 Sup. Ct. 625, 45 L. Ed. 879.

[6] 5. We are unable to agree that the fixing of the rates to be charged by complainants to their customers in West Virginia is an unlawful regulation of interstate commerce. The regulation of companies engaged in the transportation of gas is expressly excluded from the scope of the interstate commerce statute. Neither the West Virginia statute nor the orders of the Commission purport to interfere in any manner with the transportation of natural gas from West Virginia to other states. Nothing is attempted except the regulation of the prices of natural gas to the citizens of West Virginia to be charged by corporations operating in West Virginia under state authority. The action of these corporations in uniting their operations with those of like corporations of Ohio and Pennsylvania in pumping gas into a common

system of pipes supplying customers in the three states may produce the result that some gas from Ohio and Pennsylvania comes into West Virginia, although it is undisputed that a much larger quantity of gas goes out of West Virginia into Ohio and Pennsylvania than can possibly come in from these states. But this interflow of gas from one state to another according to the pressure from the main gas pipes as common reservoirs cannot affect the power of the state of West Virginia to make reasonable regulations as to rates for gas furnished to its own citizens. West v. Kansas Gas Co., 221 U. S. 229, 31 Sup. Ct. 564, 55 L. Ed. 716, 35 L. R. A. (N. S.) 1193, relied on by complainants, has no application, for in the present case no effort is made to prevent the transportation and sale of natural gas from West Virginia into other states. It is not necessary to decide whether the Congress may not regulate charges for natural gas under such conditions, and under the well-known rule the court should not anticipate that question. In the present state of the law, the Congress having taken no action, it was clearly within the power of the state Legislature to provide for the protection of its own citizens against excessive charges. If it be assumed that interstate commerce will be incidentally affected, yet the regulation of the local charges of a natural gas company as a public service corporation is within the police power of the state until the Congress sees fit to act. The recent and full review of the subject by the Supreme Court in the Minnesota Rate Cases, Simpson v. Shepard, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, leaves no room for discussion. The statute falls clearly within the principle there laid down by the court after setting out the limitations on state action:

"But within these limitations there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending federal intervention. * * * Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the federal power."

[7] 6. The objection is made that the Commission had no authority under the statute to institute of its own motion an investigation into the reasonableness of rates, to find them unreasonable, and to direct a change to rates which it concluded from the investigation to be reasonable. True, section 11 confers the right on the individual citizen to make formal complaint and to have a hearing on it, in case the public service corporation does not, after notice, "satisfy such complaint," but this method and procedure is not exclusive; for section 5 confers the power to investigate without the limitation that the investigation must be on complaint of a citizen, and also to change rates found to be unreasonable or unjust into just and reasonable rates. The implication is clear that the rates may be changed in consequence of the investigation that the Commission is authorized to make of its own mo-

tion. The authorities relied on by complainant's counsel do not support the objection.

7. Nor is there any force in the position that the complainants did not have due notice. Section 2 of the statute (Laws 1913, c. 9) provides:

"The Commission shall prescribe the rules of procedure and for taking evidence in all matters that may come before it, and enter such final orders as may be just and lawful.

"In the investigations, preparations and hearings of cases, the Commission may not be bound by the strict technical rules of pleading and evidence, but in that behalf it may exercise such discretion as will facilitate their efforts to understand and learn all the facts bearing upon the right and justice of the matters before them."

The formal notice served on the corporations clearly stated that an investigation would be entered upon to ascertain whether certain proposed increases in rates were excessive and discriminatory or just and reasonable. This notice plainly indicated that if the rates proposed and those in force were found to be unjust and unreasonable they would be set aside and just and reasonable rates substituted. Indeed, this was the construction of the statute adopted by one of the counsel for complainants in his opening statement to the Commission.

[8] 8. The complainants contend with earnestness that they were denied due process of law in that: (1) Their leading counsel was required by the Commission to retire from the cause; and in that (2) the Governor of the state improperly interfered in the hearing, and the Commission acted in subservience to his will. If these charges be established, then the hearing was inadequate and manifestly unfair, and it would be the imperative duty of the court to enjoin rates based on it. Interstate Commerce Commission v. L. & N. R. R. Co., 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. 431; Interstate Commerce Commission v. Baird, 194 U. S. 25, 24 Sup. Ct. 563, 48 L. Ed. 860.

The investigation was commenced before Commissioners Ogden and Bronson at Wheeling on October 31, 1913. The taking of the testimony began on November 17, 1913, and the complainants introduced much evidence tending to show that the rates charged and proposed by them were reasonable. The Commission called experts on rates, and the corporations and domestic consumers who had complained to the Commission of excessive rates introduced testimony tending to support their contention. An adjournment was taken until January 20, 1914, and without objection the matter was taken up before the Commission on that date at Charleston. Counsel not being ready to proceed, there was an adjournment to February 9th, and then occurred the proceedings on the part of the Commission which it is alleged were so manifestly arbitrary and partial as to deprive complainants of a fair hearing. The complainants submitted the following in addition to the grounds of objection made at the beginning:

"Influences have been exerted upon members of this Commission by the executive branch of the government, which without right or authority has been permitted to direct and dictate the action and procedure of said Commission, and which has expressed the intention of controlling the final decision of said Commission, the members whereof not having been as yet con-

firmed by the Senate, their names or any of them may be withdrawn by said executive before confirmation, and therefore hold office at the will of said executive, whereas the very fundamental principles of the Anglo-Saxon system of administration of law and justice, a system prevailing in West Virginia, requires that the members of any tribunal by law vested with power to sit in judgment upon the rights, property, and liberty of the subject shall be unbiased, unprejudiced, and uncontrolled, free to decide according to the very right of the cause, and answerable only to their country, their conscience, and their God."

After some acrimonious discussion between the Attorney General and counsel for complainants the Commission gave permission to counsel for complainants to show the basis of the charge of undue influence by the Governor of the state. Counsel's efforts to make the showing resulted in nothing except the letter of the Governor set out in the margin,[1] and a statement by Commissioner Bronson of a telephone conversation between himself and Commissioner Ogden during the hearing at Wheeling, to the effect that "two other members of the Commission would come to Wheeling that night and pass the necessary resolution forbidding the increase in rate that was being requested by the Manufacturers' Light & Heat Company." In the excitement engendered by

[1] January 9, 1914.

Public Service Commission, Charleston, West Virginia—Gentlemen: It is my desire that no further hearings be held by your Commission outside of your courtroom in the State Capitol, until directed by me. If there are any parties who have claims to present to the Commission, the information can be secured before a notary public or some other person who has authority to administer an oath, and the information can then be presented to the Commission for consideration, or the parties can come before the Commission personally.

I am very desirous of having your Commission take the Manufacturers' Gas Case up on January 20th and bring this investigation to a speedy termination, and this must be done in your courtroom at the Capitol.

I feel that the Manufacturers' Gas Company should not have been permitted to raise their rates or even to indicate on their bills their intention to raise the rate, until the question of rate making had been decided by your Commission. No attention has been paid to the violations of the general order that was passed by your Commission some months ago, which had for its purpose, as I understand, the restraining of any public service corporation doing business in this state from raising their rates until permission had been secured from your Commission. If you permit one public service corporation to disregard an order of this kind, what treatment must you expect from other public service corporations of the state? This order should be considered sacred by the Commission, and any infraction or disregard by a public service corporation of this order should be taken up and vigorously resented by injunction or other court proceedings which will protect the orders and rulings which your Commission may issue from time to time. I feel that by permitting the Manufacturers' Gas Company to impose upon the general order that was issued by your Commission some months ago, and making no effort to prevent them from raising their rate in Hancock and Brooke counties and in other counties, when the increase in rate is permitted to appear in the bill with a gentlemen's agreement that the increased rate be not collected until your Commission has decided as to whether or not a raise in the rates will be permitted, you will compromise yourself, and this will give you no little concern in the future. It is my desire that a full and free investigation be made of the Manufacturers' Gas Company Case just as soon as possible, and that we have a decision from the Commission at the earliest possible time.

Very respectfully, [Signed] H. D. Hatfield.

the charge against the Commission, Commissioner Ott made the remark set out in the marginal extract from the proceedings,[2] indicating his own desire that Mr. Weil, the leading counsel for the gas companies, should withdraw from the case. Commissioner Ogden, who was presiding, announced that Commissioner Ott expressed only his own view, and not that of the Commission, but that no further interrogation of a commissioner from his seat would be permitted. Mr. Weil then called Mr. Fitch, an expert, who testified that he had been requested by the Governor, as well as by the Commission, to make an examination of the property of the gas companies concerned. Mr. Weil thereupon said he had no further competent testimony, unless he were allowed to prove, by one of the commissioners, a conversation of which he had heard between the Governor and a commissioner. Commissioner Bronson then stated that he had no objection to being examined as to any conversation with the Governor or any one else, and other members of the Commission invited Mr. Weil to state anything he knew tending to show improper conduct on the part of any commissioner.

At the afternoon session on the same day Mr. Weil announced his withdrawal from the case on account of the remark of Commissioner Ott. His associate counsel also announced their withdrawal because they could not proceed without Mr. Weil who was most familiar with the matter. The acting chairman, Commissioner Ogden, expressed his regret at the withdrawal of counsel; and, though at first refusing to do so, counsel finally asked in an indefinite way for a continuance. Upon inquiry by the acting chairman, an officer of the Manufacturers' Light & Heat Company, who was present, expressed his inability to answer then or on the next day what they would do about representation. The Commission then ordered the inquiry to proceed, and continued to take testimony until February 13, 1914; the gas companies taking no part.

We have set out the proceedings with a detail, which may be justly criticised as excessive, because fairness and integrity of a commission

[2] "As far as the Commission is concerned, Mr. Weil, this Commission is here to hear the evidence in this case, and we are going to decide on the evidence as you present it—we are going to decide it fairly and impartially. And if this Commission is vested with the powers you have said awhile ago, equal to the Czar of Russia, personally I would be glad to have you withdraw from this trial. You have made some statements that have made yourself obnoxious to this Commission, and it would be fair to your client for you to get out of this case and let your other attorneys go on with it. That is my sentiment in this case. If I have that power that you delegated to me awhile ago, as the Czar of Russia, I am asking you to withdraw now. I don't think I have such power, but if I have, on your own statement, I want you to withdraw from the case.

"Mr. Weil: I don't think we will have any difficulty on that score whatever—none whatever.

"Chairman Ott: You made the statement here that we are crooks. I have had no outside influence brought to bear upon me in this case, and this matter of bringing this case to Charleston was considered before ever that letter was written, and my Brother Commissioner, Mr. Kilmer, had written an order to that effect, and we did it for the purpose of the whole Commission hearing this evidence as it was given. Whatever judgment I pass in the case is going to be unbiased and honestly and fair between you and the other people."

like this is of so great importance, not only to the commissioners themselves and the private interests concerned, but to the public, that courts should examine charges of unfairness and lack of integrity with scrupulous care. The solemn responsibility of making such charges can only be justified by proof of them. Evidently they should be specific and supported by statements of the facts relied on, verified by a responsible person. The charges in this instance were mere conclusions of counsel, no facts were stated, and there was no verification. The Commission should have required verified allegations against its members or a withdrawal of the charge, as a condition of allowing counsel to proceed in the cause.

The testimony offered entirely failed to sustain the imputation against the Commission. It would be indecorous for this court to either commend or condemn the action of the Governor further than to ascertain whether the Commission was improperly influenced by him. The letter of Governor Hatfield condemns the arrangement by the Commission with the gas companies pending the investigation; it presses upon the Commission the importance of a speedy investigation and decision, and insists that the investigation should take place at the rooms of the Commission at the Capitol. There is not in it any expression of opinion as to the merits of the controversy. It was stated by one of the commissioners that the change from Wheeling to Charleston had been decided on before the Governor's letter was received, but even if the letter influenced the Commission to make the change, it is not shown that the change was wrong or how it could have affected the result. The telephone conversation between two commissioners was of no significance, being a mere suggestion as to the course to be pursued pending the hearing. The suggestion was not adopted; and all know that when men consult, measures are often honestly proposed as right and then rejected even by their authors as unjust.

9. Counsel were not justified in withdrawing from the proceedings. It is true that the bar and others have reason to expect from judges and others to whose authority as presiding officers they must submit the most scrupulous courtesy, but ideal conditions cannot be demanded. Acerbity in official action or speech is rarely justified, and in this case, notwithstanding the provocation, it would have been better had Commissioner Ott not expressed the desire for Mr. Weil to withdraw; but, since it is not necessary, we express no opinion as to the length a public service commission may go in vindicating its dignity when charges affecting its fairness are made and not established. The expressed wish of one commissioner did not legally nor ethically compel withdrawal, when the acting chairman speaking for the majority invited Mr. Weil to remain; and the asperity of Mr. Ott by no means proved that he would not try to decide the controversy on its merits.

On February 13, 1914, Acting Chairman Ogden announced that all persons interested would be allowed to offer on the next day any evidence germane to the issues, and to recall any of the witnesses for examination. On February 14th Mr. W. C. Neill announced that on account of his interest as an employé of the Manufacturers' Light & Heat Company he had attended the hearing on his own responsibility

without authority to represent the company; that he was then authorized to appear specially merely to make known to the Commission the desire of the companies to cross-examine the witnesses and to offer testimony in rebuttal if time should be given, "sufficient after the testimony shall have been transcribed, to enable counsel to carefully examine the same and have such cross-examination prepared."

While the investigation was in progress stenographic reports of the testimony had been sent to the Pittsburg office of the companies, and its counsel and officers had been advised by Mr. Neill of the course of the proceedings. Yet with all this, at the termination of the hearing they refrained from having counsel present, authorized to go on with the investigation, or even to agree with the Commission on their behalf for a future day. It is true, Mr. Neill agreed, as far as he could agree, that counsel would proceed on February 16th, but he was not authorized to bind the gas companies. Under these circumstances we think there was clearly ground for the Commission to hold that sufficient opportunity had been given to the gas companies to be heard, and to exercise the discretion to close the hearing. It is to be born in mind that it is not the province of this court to say whether the Commission exercised its discretion wisely, but to decide whether it acted so unreasonably and arbitrarily as to deny to the gas companies a fair opportunity to be heard. There was opportunity which was lost for the want of diligence and promptness. The gas companies took the chance of being sustained in their refusal to be represented before the Commission. We have shown they had no adequate reason for their refusal, and the court can give them no relief for their default.

[9, 10] 10. This difficulty hangs to the allegation of the bill that the rates fixed are confiscatory. Looking alone at the evidence before the Commission, no doubt can exist and no serious contention was made to the contrary that there was justification for the reduction in the rates, ranging from 1 to 7 cents a thousand feet. The complainants' case then depends upon their position that it is shown by the affidavits presented to this court that the witnesses before the Commission misapprehended the accounts and bookkeeping of the Manufacturers' Light & Heat Company, and were mistaken in a number of important statements. The court is asked to hold that these ex parte affidavits must prevail over the testimony taken before the Commission, and upon them to adjudge the rates to be confiscatory. This cannot be done for two reasons: The complainants having had an opportunity to present their evidence to the Commission and to cross-examine the witnesses, and having failed to do so, it would be usurpation on the part of the court to set aside the finding of the Commission on the ground that if the complainants had offered their testimony, it would have tended strongly to produce a different result. The second reason is that, giving full consideration and force to the affidavits as if the affiants had testified before the Commission, it cannot be questioned that there was ground for difference of opinion among reasonable men as to the reasonableness of the rates charged and of the rates fixed by the Commission. True, the affidavit of Ratcliffe, the treasurer and comptroller of the managing company, is to the effect that the

average rate fixed by the Commission to be charged in West Virginia is 12.76 a thousand feet, based on the deliveries of 1913, and that the average cost of production for four years, 1910, 1911, 1912, 1913, was 12.52, without allowing anything for depreciation or interest on the investment. There is much other statistical information in the affidavits concerning the expenses, dividends, debts, cost of boring, loss in dry wells, and the peculiar risks and uncertainties of the business of furnishing natural gas. All this tends strongly to show that at the rates fixed by the Commission the business in its entirety would be conducted at a loss. But, assuming all these statements to be true, they are far from convincing that the rates fixed for supplying natural gas to customers in West Virginia do not allow a reasonable profit. For they relate to the entire operations of the Manufacturers' Light & Heat Company, including its business in Ohio and Pennsylvania. The witnesses for complainants say that no separate account is kept of the companies chartered in West Virginia and operating there, the average cost above stated being for the entire operations of the Manufacturers' Light & Heat Company, including its business in Ohio and Pennsylvania. The testimony is undisputed that the main source of natural gas supply is in West Virginia, and that the cost of supplying gas to consumers in that state is necessarily much less than in the other states. It seems obvious that West Virginia corporations supplying gas to the citizens of that state from wells in the state cannot say the rates fixed to consumers in West Virginia are confiscatory, because at the same rates the companies would lose money on business which they had chosen to conduct in other states in association with corporations of those states. Even if it be conceded that interstate commerce is involved, the principle must be regarded settled beyond dispute.

"The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, over which, so far as rates are concerned, the state has no control. Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business." Smyth v. Ames, 169 U. S. 466, 541, 18 Sup. Ct. 418, 432 (42 L. Ed. 819).

The case has no analogy to Houston, etc., R. R. Co. v. United States, 234 U. S. 342, 34 Sup. Ct. 833, 58 L. Ed. 1341, decided by the Supreme Court June 8, 1914. Under the familiar facts of that case the rule stated was:

"Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the state, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme within the national field."

Here, as we have seen, if federal authority embraces the right to make rates for natural gas, it has not been exercised; and there is nothing in the record showing that the rates ordered will unduly

favor customers of natural gas in West Virginia over customers in other states. It would hardly be contended that lower rates near the source of supply will be confiscatory, unjust, or discriminatory because the companies may have to charge higher rates at more distant points in other states for a supply involving greater expense for piping and pressure. Nor can the court assume that the public authorities of the other states will not, in adjusting rates, take into account the difference in the expense of supplying the gas.

The fact that the Manufacturers' Light & Heat Company may have improvidently accepted franchises from municipalities in Ohio and Pennsylvania requiring gas to be furnished at the same rates charged in West Virginia, and that reductions at these points would require gas to be furnished there at less than cost, may be worthy of consideration by the Commission in prescribing the rates in West Virginia. But it cannot be controlling, for to hold it so would be to enable the gas companies to contract away the police power of the state of West Virginia to require reasonable charges for its own citizens.

[11] In invoking the interference of this court with the actions of the duly constituted state authorities the complainants assumed the burden of showing with reasonable certainty the invasion of rights affirmed or conferred by the Constitution or laws of the United States. The court cannot set up views it might have reached of what ought to have been done, against the conclusions of the Commission which have a reasonable basis of support in the evidence. San Diego Land Co. v. National City, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154; San Diego Land Co. v. Jasper, 189 U. S. 439, 23 Sup. Ct. 571, 47 L. Ed. 892; 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.

Our conclusion is that the complainants have failed to make out a prima facie case of violation of any right guaranteed by the Constitution or statutes of the United States; and the application for a temporary injunction must be refused.

PRITCHARD, Circuit Judge, and DAYTON, District Judge, concur.

BROOKLYN TRUST CO. et al. v. McCUTCHEN.

(District Court, E. D. New York. July 16, 1914.)

PARTNERSHIP (§ 257*)—ACCOUNTING—GOOD WILL.

Partnership articles provided that all assets should belong to two active partners, and in the event of the death or withdrawal of either after an equitable accounting to him or to his estate of his interest in the same, the ownership should be with the surviving or remaining active partner, that for the purpose of determining such interest, an agreed valuation should be made at the beginning of each year of the trademarks, brands, and other assets of the business of the firm which did not appear on its books, which should, as regards them, be by mutual consent the basis of an equitable accounting, and that in the event of the death or withdrawal of either partner the liquidation of the business should remain in the surviving partner. The partners continued under

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

such articles for a series of years, the agreement being extended without re-execution. There was no agreement, however, as to the valuation of the firm's good will, except that the trade-marks were carried on the books from year to year at a valuation of $15,000. *Held*, that the provision for annual valuation of good will was waived by the partners, and hence, on an accounting by the surviving partner with the executors of the deceased partner, the surviving partner was neither entitled to have the good will considered as included in the $15,000, at which the trade-marks, etc., were valued, nor was he entitled to such good will as of his separate property by virtue of his rights as surviving partner, but he was required to account for its reasonable value.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 563; Dec. Dig. § 257.*]

In Equity. Suit by the Brooklyn Trust Company and another, as executors of the will of L. J. Busby, deceased, against Charles W. McCutchen. On final hearing. Decree for complainant.

See, also, 189 Fed. 273.

Dykman, Oeland & Kuhn, of Brooklyn, N. Y. (Arthur E. Goddard and William N. Dykman, both of Brooklyn, N. Y., of counsel), for plaintiffs.

Ivins, Wolff & Hoguet, of New York City (Robert Louis Hoguet and Randolph W. Childs, both of New York City, of counsel), for defendant.

CHATFIELD, District Judge. The firm of Holt & Co., from 1861 to 1868, had as partners one Robert S. Holt and one S. O. Ryder. At some time during that period, another partner by the name of Searles had an interest in the business. In 1868 Mr. Ryder retired, leaving the ownership of the entire property with those who then composed the firm of Holt & Co. Mr. Ryder later placed upon the market a brand of flour under the same name as a well-known brand of Holt & Co. In 1882, the members of the firm of Holt & Co. brought an action against certain dealers who were buying and selling the brand of flour placed upon the market by Mr. Ryder. The action resulted in favor of Holt & Co., and upon appeal to the Supreme Court of the United States it was held, in Menendez v. Holt, 128 U. S. 514, 522, 9 Sup. Ct. 143, 32 L. Ed. 526, that good will, unless divided among the partners of a firm on its dissolution, remained with the firm itself, or those members of the firm who continued the business, when the partnership relation was severed by the withdrawal of one of the partners.

The issue at bar need not be now stated at length. This court, in Brooklyn Trust Co. v. McCutchen (C. C.) 189 Fed. 273, overruled a demurrer with respect to the complaint. In that opinion the facts and issues are sufficiently stated. Some of the items of testimony must, however, be taken up in order, as final hearing has now been had.

The Menendez litigation was ended after Mr. McCutchen, the present defendant, and Mr. Busby, the plaintiffs' testator, were members of the firm of Holt & Co. In 1885, a partnership agreement, which shows upon its face the effect of the Menendez decision, was entered into among the three partners of Holt & Co., under date of January 31, 1885, for a period of five years.

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

Paragraph II provided that the parties above named should contribute *"as the capital of the business"* such balances as should appear upon the balancing of the books. By paragraph III, losses and profits were to be divided equally. By paragraph IV, each partner was to be entitled to interest and to draw his share of the profits. Paragraph V then follows, in the same language as paragraph V of the partnership articles in effect at the death of Mr. Busby, and under which this suit is brought (See [C. C.] 189 Fed. at page 274), where paragraphs VI and VII are also quoted. Paragraph VIII provided that the agreement would be terminated upon 30 days' notice in writing, and that "in the event of the death or withdrawal of either partner, the liquidation of the business shall remain with the surviving or remaining partners." Immediately under the articles of agreement, follows this paragraph:

"New York, February 2, 1885. We hereby agree upon the sum of fifteen thousand dollars ($15,000) as the valuation for the current year ending Jan'y 31, 1886, of the assets referred to in article V of the foregoing articles of copartnership. "Robert S. Holt.
"L. J. Busby.
"Chas. W. McCutchen."

Immediately thereunder, and dated January 30, 1890, there is a signed agreement to renew and extend the foregoing Articles of Copartnership, for the term of five years from February 1, 1890.

Upon January 31, 1895, the partnership agreement was again copied in exactly the same form, with the exception that paragraph III was changed so as to provide that Leonard J. Busby and Chas. W. McCutchen should be the managing and active partners of the firm, and that the losses and profits should be shared and apportioned equally by and between them; that the interest of Robert S. Holt should be nominal only, but that his name should be retained at his request; that he should be freed from liability by the guaranty of the other partners; that he should not be required to perform any service; and that he expressly waived all claim to any share in the profits of the business, but was to receive interest on such capital as he elected to leave in the business. At the bottom of this instrument is a signed agreement, extending it for two years to January 31, 1900. This extension is not dated, but evidently was made in 1898, the first agreement having three years to run from 1895. Each two years thereafter, a renewal of the agreement for two years was signed, until some time after February 1, 1904, when a paragraph was signed and added, as follows:

"In the event of the death of Robert S. Holt, the undersigned, L. J. Busby and Chas. W. McCutchen, hereby mutually agree to continue the business as surviving partners, under the same firm name of Holt & Co., during the term of the above agreement."

Upon January 31, 1906, the agreement was again signed and renewed for two years, and on January 31, 1908, it was again signed and renewed for *one* year.

Mr. Holt died in 1904, and the capital which he had invested in the business was paid by the partnership. No question of solvency could have been raised, and therefore it makes no difference whether he could

have been held as a partner before his death. After that event, the business was continued by Mr. Busby and Mr. McCutchen until the death of Mr. Busby, on February 23, 1908.

As was stated in the previous opinion, liquidation, in the sense of agreeing upon a definite amount from the books of the company, was had as to the amount to be paid to Mr. Busby's estate, and that amount has been paid by Mr. McCutchen, with the exception of the disputed item for which this suit has been brought. This is claimed by the plaintiff to be the sum of one-half the value of the good will of the business, including brands and trade-marks, and thus including the sum of $15,000 at which the item of trade-marks was entered in the various ledgers of the firm.

The defendant claims that this entry of $15,000, under the head of trade-marks, represented the agreed "valuation" referred to in paragraph V of both agreements, which valuation was to be used as a basis for accounting in the case of death or withdrawal of any member of the firm. It appears from the books of the firm that in 1895, the capital transferred under the terms of the partnership agreement contained an item called "Trade-mark a/c $15,000" as an agreed item, and that there was charged to profit and loss a corresponding item of $15,000. These items were carried into the private ledger of 1896 and subsequent years in the form of a charge under date of February 1st, and a credit under date of February 1st, of the following year. Each year also, from 1895 on, a balance sheet was made up under date of February 1st, containing, in the list of assets, that is, of property inventoried, entered in the books, an item "Trade-mark a/c $15,000." This inventory contained the various items of merchandise, stock, bonds, fixtures, real estate, etc., as well as the capital invested in the name of each partner.

Prior to 1895 the entries of these inventories and items do not appear in the testimony; but nowhere throughout the entire period was any signed "valuation," made at the beginning of each business year, "of the trade-marks, brands, and other assets of the firm" which did not appear upon its books, except the one entry for the current year beginning February 2, 1885, which has been quoted above, and in which the valuation was fixed at $15,000. For that year this valuation seems to have been entered in the books in the form of the item "Trade-mark a/c $15,000," and thus the assets represented thereby were shown by the books from that time on. If the value of the good will increased, then it was not listed as an asset, nor valued according to the agreement. It will thus be seen that at the outset, the partners provided for one year against any question on this point in case liquidation and accounting became necessary. Thereafter the books of the firm showed the asset of $15,000 put down as "Trade-mark a/c" throughout all the years subsequent to Mr. Holt's withdrawal from the right to participate in the profits of the firm.

It is evident that Mr. Holt intended to leave and did leave to his partners whatever property right, as well as risk, went with the good will and continuation of the business. He received a consideration therefor, and the litigation of Menendez v. Holt had clearly shown

what was meant thereby. He, therefore, had no wish to increase his own share by a further valuation, nor did he intend to give to one of the others (in case either withdrew before himself) a full share in the good will of the business, but as between the others, no such intent is shown. Neither of them showed any idea of giving to the other more than one-half of the whole.

After Mr. Holt's withdrawal, the books show the acquirement of a certain trade-mark known as the "Mount Vernon Brand," for which $3,000 was allowed, and which for a number of years was carried as an inventory asset item at that figure. No change was made in the $15,000 item, and the Mount Vernon item was finally marked off to profit and loss. The inventory showed great care with respect to every entry. The smallest articles were given a value, and included.

The plaintiff argues from the above that Mr. Busby and Mr. McCutchen treated the trade-mark account as one of the assets shown by the books in the same way as they treated the "Mount Vernon Brand," so long as it was entered as an asset on the books, and that these items were entered at their cost or capital valuation. It argues, further, that the particularity with which this was done and the care exercised by both partners, especially by Mr. Busby, who went over the inventories and made annotations and corrections therein each year, go to show evident knowledge of what was included, and (by necessary inference) full knowledge and appreciation on their part of the fact that good will was an asset, not shown by the books, and therefore fixed or valued for the purpose of an accounting, as required by article V of the partnership agreement. The plaintiff, therefore, concludes that after 1886 and until 1905, none of the partners attempted to carry out the requirement of this article. The plaintiff further concludes that after 1905 the new agreement accepted the cost valuation of this trade-mark account, in accordance with Mr. Holt's agreement, as an item in the capitalization in which he shared, and as to which his part was left in the business, but that Mr. Busby and Mr. McCutchen, as between themselves, saw fit to take the risk of failure to comply with article V of the partnership agreement, except in so far as they were bound to recognize the property in which Mr. Holt was interested.

The plaintiff further contends that in the absence of any expressed valuation, or, in other words, in spite of the failure to comply with section V of the agreement, all "trade-marks, brands, and other assets of the firm, not appearing upon the books," could be shown by evidence, and that the ordinary rules of law with respect thereto gave to each partner an equal share, while at the same time recognizing that the liquidation of the business should remain with the surviving or remaining partner (under paragraph VIII), and that (under paragraph V) the ownership of the entire business should pass to the survivor exactly as had been contemplated by Mr. Holt, and as had been provided for by him for the continuation of the business under the old firm name. It will thus be seen that the plaintiff treats the partnership agreement as abrogated, in so far as there was not compliance by an express written or oral valuation of the assets for the purpose of ar-

ticle V, and in other respects insists on the enforcement of the partnership agreement.

The plaintiff argues that the defendant is ignoring the methods of entering the trade-mark account as an asset, and the methods of figuring and entering the item of capital of the various partners and of such assets as the Mount Vernon Brand, when the defendant attempts to show that this inventory item, known as "Trade-mark a/c," was intended to be and actually was the agreed valuation upon which the accounting was to be had. The defendant, on the other hand, charges that the plaintiff is inconsistent in assuming that the partnership articles were not carried out in their entirety, and is estopped from urging the point. The defendant contends that the entry of the items entering into the capital account, and the carrying of the inventory item of trade-marks at the sum of $15,000, all through the periods involved, show an agreement by Mr. Busby and Mr. McCutchen to keep the sum of $15,000 as an express value for "trade-marks, brands, and other assets," not appearing upon the books. The defendant asserts that Mr. Busby and Mr. McCutchen, by their careful scrutiny of all these matters, accepted and made the book entry of the trade-mark account among the assets of the firm, the express valuation which, in the year 1885, was entered upon the partnership agreement.

The defendant cites the cases of Frederick v. Cooper, 3 Iowa, 171, United States v. Robeson, 9 Pet. 319, 9 L. Ed. 142, Perkins v. United States Electric Light Co. (C. C.) 16 Fed. 513, and American Bonding & Trust Co. v. Gibson County, 127 Fed. 671, 62 C. C. A. 397, to show that the plaintiff is bound by the partnership agreement to the extent of being unable to claim any item not set forth in accordance therewith, and that the plaintiff cannot treat the agreement as abrogated or as unfulfilled in any respect, unless it can prove an actual modification or express amendment thereof. The defendant urges the proposition that the written agreement cannot be varied so long as it is in force.

The defendant has introduced some testimony with respect to a partnership in which Mr. Busby was interested with one Buttfield, who was called as a witness. Mr. Buttfield testified that in 1897 Mr. Busby questioned an item of $20,000 as the valuation of the good will, etc., between him and Mr. Buttfield as too great, in view of the fact that Mr. McCutchen and Mr. Busby placed the value of the entire assets of that nature in the firm of Holt & Co. at but $15,000. Mr. Buttfield's testimony was not entirely the same in his statements of this conversation. His testimony would be just as consistent with the theory that Mr. McCutchen was comparing the trade-mark values of the two firms, or that he was comparing the good will of the firms in so far as it consisted of trade-marks, that is, tangible assets.

Objection was made to any evidence of transactions with the decedent, under section 829 of the Code of New York, and section 858, Rev. St. (U. S. Comp. St. 1901, p. 659). It appears that this action, on an exactly similar complaint, was partially tried in this court, and discontinued when it was learned that the defendant had been required to submit a verified answer; and it is contended that by this the plaintiff had opened the door to oral testimony as to such transactions. The

present action was immediately instituted, and it does not seem that the case is similar to that where an executor is required to set forth his claim in advance of hearing, under section 2709 of the New York Code; and the plaintiffs' objections would therefore seem to be good in so far as the testimony under objection attempts to relate personal transactions or communication with the deceased.

But the testimony of Mr. Buttfield and Mr. McCutchen with respect to these matters adds nothing in the way of proof, and is not at all objectionable as it stands. Mr. McCutchen's evidence generally was to the effect that Mr. Busby fully understood the requirements of the partnership agreement, and intended to have the inventory items treated as express valuation. It must be held that his present understanding of the matter and his belief that such was the case is the only basis for his testimony. It must also be held that both Mr. Busby and Mr. McCutchen appreciated the necessity shown by the case of Menendez v. Holt for a definite agreement as to the assets of the firm in case of termination or dissolution, in order to prevent application of the ordinary rules of law. With full knowledge and appreciation of this fact, they seem to have both taken the risk of becoming the surviving partner and thereby acquiring possession of the entire assets, if the interest of Mr. Holt, or of the retiring or deceased partner, was limited to a share in the $15,000 expressed in the capitalization figures; but they also assumed the obligations which went therewith. Their conduct shows an abrogation or failure to comply with the provisions of article V, rather than any idea that $15,000 represented a basis for an equitable accounting. When considering the proposition to sell the business to certain of their employés, they put the valuation of the good will at $75,000; and both Mr. Busby and Mr. McCutchen acquiesced in the statement of Mr. Busby, to the effect that the business was the result of their individual effort, and that they intended to treat it as such, and not to regard the value of the good will as a mere incident to the inventoried assets.

The plaintiff charges the defendant with a desire to retain the benefits of the work of both partners and to inequitably deprive Mr. Busby's estate of his share. The defendant accuses the plaintiff of a desire to obtain assets which Mr. Busby had agreed should belong to his partner or successor, if he should be the one who first died or retired, and that such action on the part of the plaintiff is illegal and inequitable. As was said in the previous opinion, the burden is evidently upon the plaintiffs to establish the fact that the partnership agreement was not carried out, and was therefore to a certain extent, abrogated. It is not necessary to go so far as to hold with the plaintiffs' contention that the burden is thrown upon the defendant of proving an express compliance with the provisions of article V. The evidence indicates that article V was not carried out, and by the acts of the partners themselves, the partners consciously waived and therefore in effect set aside the terms of their agreement, so far as the valuation of good will was concerned. If the agreement was set aside in this respect, the surviving partner is bound to account therefor; and an accounting as to all assets, as to part of which liquidated valuations are stated, would also include the un-

liquidated or unmentioned or unconsidered (but not unknown) asset, which would have to be determined according to the rules of law in such case. This is precisely what happened in the present matter. The item of good will is capable of ascertainment, and ought to be possible of fair adjustment without arbitrary capitalization from probabilities based upon profits of preceding years. In other words, the business men interested should be able to consider this item with more accuracy than the court, if they can reach an agreement.

The rule established by certain cases may furnish a basis for computation where no agreement between the parties can be had; but the question of amount will be left for the entry of a decree with an accounting to determine any items necessary, if agreement cannot be reached.

GEO. WM. BENTLEY CO. v. CHIVERS & SONS, Limited, et al.

(District Court, S. D. New York. November 26, 1913.)

1. CORPORATIONS (§ 668*) — FOREIGN CORPORATIONS — SERVICE — MANAGING AGENT.

Since the object to be attained by service of process is to give defendant notice of suit, if the relations of the party served in an action against a foreign corporation are such that the service will surely give notice to the defendant, the party served being clothed with such general powers and duties that he is in fact the corporation's alter ego, becomes pro hac vice its managing agent for the purpose of receiving process, regardless of the nature of the duties he may perform for it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603–2627; Dec. Dig. § 668.*]

2. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—ACTIONS—SERVICE—PERSONS SERVED.

Where complainant had a contract of exclusive agency to sell the goods of C. & Sons, an English corporation, in the United States until January 22, 1919, and in August, 1913, C. & Sons sent L., whom it described as "a member of our staff," with authority to cancel complainant's contract of agency and to make a settlement, it appearing that C. & Sons was doing business in New York, L., though described as its entomologist, was nevertheless its "managing agent," so that service of a subpœna on him in a suit by complainant to restrain defendant from canceling the contract and appointing another as its agent to handle its goods was sufficient to confer jurisdiction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603–2627; Dec. Dig. § 668.*]

In Equity. Suit by the Geo. Wm. Bentley Company against Chivers & Sons, Limited, and another. On motion to quash the marshal's return of service of subpœna. Denied.

Robinson, Allen & Hoy, of New York City (Nelson L. Robinson, of New York City, of counsel), for plaintiff.

McLaughlin, Russell, Coe & Sprague, of New York City (Rufus W. Sprague, Jr., of New York City, of counsel), for defendant Chivers & Sons, Limited.

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

COXE, Circuit Judge. This is an action to restrain the defendant, Chivers & Sons, Limited, an English corporation, from granting to any one, other than the plaintiff, the right to sell in the United States the goods of Chivers & Sons, Limited, consisting of jams, marmalades, jellies, etc. The bill alleges that by a written contract dated January 22, 1909, that right was exclusively conferred upon the plaintiff for a period of ten years. The plaintiff insists that it has duly kept and performed all the covenants of said agreement and is able and ready to do so until January 22, 1919, when the said agreement expires. The complaint alleges further that on October 1, 1913, the plaintiff was informed by the defendant that the agency of the plaintiff would be terminated on December 31, 1913. It is also alleged that the defendant Rosenstein Bros., Incorporated, has been, or is about to be, appointed agent for Chivers & Sons, Limited, in the United States in place of the plaintiff. The plaintiff alleges that relying upon the permanency of the said agreement it has expended large sums in organizing said business, has employed about 50 salesmen and has made arrangements with individuals and business houses in various parts of the United States, representing to them that it has an exclusive agency to deal in said goods until January 22, 1919. The plaintiff asserts that if the defendant be allowed to terminate the agreement the plaintiff will suffer irreparable loss for which there is no adequate remedy at law.

The relief demanded is:

First, that the defendant be enjoined from repudiating its contract with the plaintiff by entering into a new contract with Rosenstein Bros., Incorporated, or with any other person.

Second, that Rosenstein Bros., Incorporated, be enjoined from selling the defendant's goods except through the agency of the plaintiff.

In short, the complaint states a clear case of repudiation on the part of the defendant Chivers & Sons, Limited, causing very serious damage to the plaintiff. Although a partial remedy might, perhaps, be obtained by enjoining the defendant Rosenstein Bros., Incorporated, it is manifest that complete relief can only be had by compelling the defendant Chivers & Sons, Limited, to perform its contract with the plaintiff.

The defendant, Chivers & Sons, Limited, now moves to quash the subpœna issued in the cause on the ground that no valid service thereof was made. The marshal makes return and certifies that he served the subpœna upon—

"Chivers & Sons, Limited, by exhibiting the same to Sidney C. Lamb as managing agent in America of said Chivers & Sons, Limited, at Hotel Knickerbocker, New York City, by exhibiting the original and leaving with him a copy."

The defendant insists that this service is insufficient for the reason that Sidney C. Lamb is not an officer, director or agent of Chivers & Sons, Limited, but is simply an entomologist employed by said corporation. That Chivers & Sons, Limited, was doing business in the state of New York through its agent, the plaintiff, can hardly be disputed. In June, 1913, the defendant wrote the plaintiff as follows:

"Should your principal be unable to come over this season, we propose sending out a member of our staff in the autumn to discuss future policy with you."

And in August following it wrote:

"As intimated in our previous letter, we are sending out a member of our staff, Mr. S. C. Lamb, to confer with you as to our future policy in view of the new conditions and possibilities in consequence of the revision of the American tariffs. Mr. Lamb will be accompanied by our managing director's eldest son, Mr. J. Stanley Chivers, and will sail on the 23d inst. per S. S. 'Philadelphia.'"

In September, 1913, Mr. Lamb arrived in New Yôrk and complained, upon a seemingly untenable pretext, that the plaintiff had committed a breach of the contract. He then demanded its cancellation, asserting, as the plaintiff contends, that he had full authority from the defendant to terminate the contract. In October, 1913, the defendant wrote the plaintiff, in substance, that Mr. Lamb had full authority from it to terminate the contract and that it considered the contract terminated. On October 2, 1913, Lamb wrote:

"In the circumstances we feel compelled to sever our relations with yourselves and trust that when we arrive in Boston we shall be able to come to some amicable settlement."

It also appears that on the 30th and 31st days of October the defendant had property in the Southern district of New York. Mr. Lamb may be an entomologist, but upon the occasion of his visit to this country he was armed with plenary powers to represent the defendant fully and generally in the matter of cancelling the contract. The plaintiff was the agent of Chivers & Sons, Limited, in this country, but Lamb came from England clothed with all the power to represent it that the corporation could confer. As between the plaintiff and Lamb he was the corporation and represented it as fully as the president could have done if he had come here to attempt to terminate the contract.

[1] The object to be attained in the service of process is to give the defendant notice of the suit. The Federal courts in fixing the status of the persons who have been served with process issued against a corporation have had this constantly in view. Are the relations of the party served to the defendant of such a character that the service will surely give notice to the defendant? Is he clothed by the defendant with such general powers and duties that he is, in fact, the alter ego of the defendant? He may be called the corporation's entomologist or engineer or attorney, but if in fact he be clothed with general powers to act for the corporation he becomes, pro hac vice, its managing agent.

[2] So far as this litigation is concerned, no better notice could have have been given the corporation, even if service has been made on its president. Lamb was necessarily more familiar with the situation in America than any one connected with the defendant.

To dismiss this suit, in limine, would be a practical denial of justice; it would prevent a trial in this country where the cause of action arose and where most of the witnesses reside and compel the commencement

of a new action in the courts of England. This result should not be permitted unless the law clearly demands it. I do not think the law is so. In Herndon-Carter Co. v. Norris & Co., 224 U. S. 496, 32 Sup. Ct. 550, 56 L. Ed. 857, the court held that in order to subject a foreign corporation to the jurisdiction of a federal court it must be doing business within the state of the court's jurisdiction and service must be made there upon some duly authorized officer or agent. If it appears as matter of fact that the defendant corporation was doing business in the state and that service was made upon its agent, the court has jurisdiction.

In Pennsylvania Lumbermen's Ins. Co. v. Meyer, 197 U. S. 407, 25 Sup. Ct. 483, 49 L. Ed. 810, the court held that a fire insurance company which issues its policies upon property in another state is engaged in business in that state when its agents are there adjusting losses.

In Re Hohorst, 150 U. S. 653, 14 Sup. Ct. 221, 37 L. Ed. 1211, the question was whether the service of the subpœna upon one Kunhardt was sufficient and the court says:

"There is no room for suggesting that there was within the district any director or other officer of the company, or any agent expressly authorized to accept service upon it. The company's docks where its steamships land and take and discharge cargo, and its office for the transaction of matters immediately connected with its actual industrial operations in this country, were in the state of New Jersey, and under the charge of a superintendent employed and paid by the corporation for the purpose, and not a member of the firm of Kunhardt & Co. But the usual monetary and financial transactions of the corporation were transacted by that firm, as agents of the corporation, at the office of the firm in the city of New York, which had been advertised by the corporation as its own office. The firm of Kunhardt & Co. being the financial agents of the corporation, the office of the firm being in the city of New York, and being the office of the corporation for the transaction of its monetary and financial business in this country, the service of the subpœna in New York upon the head of the firm as general agent of the corporation was a sufficient service upon the corporation. St. Clair v. Cox, 106 U. S. 350, 359 [1 Sup. Ct. 354, 27 L. Ed. 222]; Société Foncière v. Milliken, 135 U. S. 304 [10 Sup. Ct. 823, 34 L. Ed. 208]; Mexican Central Railway v. Pinkney, 149 U. S. 194 [13 Sup. Ct. 859, 37 L. Ed. 699]; New York Code of Civil Procedure, § 432; Tuchband v. Chicago & Alton Railroad, 115 N. Y. 437 [22 N. E. 360]."

See, also, Boston & M. R. Co. v. Gokey, 210 U. S. 155, 28 Sup. Ct. 657, 52 L. Ed. 1002; Peterson v. Chicago R. I. & P. Co., 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 841.

I am of the opinion that the evidence sufficiently establishes two propositions: First, that the defendant Chivers & Sons, Limited, through its duly authorized agent in New York, was doing business there, and that Sidney C. Lamb, at the time of the service was the defendant's managing agent in New York.

The motion to quash is denied.

ALBURY et al. v. CARGO OF THE LUGANO.

(District Court, S. D. Florida. November 6, 1913.)

1. SALVAGE (§ 40*)—PRIORITY OF LIEN—CUSTOMS DUTIES OF SALVED CARGO.

Claims for salvage are entitled to priority of payment over customs duties from the proceeds of cargo salved from a foreign ship and brought into the United States.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. § 105; Dec. Dig. § 40.*]

2. SALVAGE (§ 38*)—AMOUNT OF COMPENSATION—SAVING CARGO OF STRANDED STEAMSHIP.

Awards of 30, 45, and 50 per cent. of the salved value of cargo from a stranded British steamship, made respectively in favor of the three vessels which performed the services and brought in the cargo, according to the labor and degree of peril involved in each instance.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 93–102; Dec. Dig. § 38.*]

3. SALVAGE (§ 27*)—COMPUTATION—COSTS AND EXPENSES.

The question what items of costs and expenses payable from the proceeds of salved goods should be deducted before salvage claims are computed considered.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 65, 66; Dec. Dig. § 27.*]

4. CUSTOMS DUTIES (§ 23*)—GOODS SUBJECT TO DUTY—SALVAGE OF FOREIGN CARGO.

The United States has an equitable claim for customs duties on the proceeds of foreign goods brought into an American port by salvors from a wrecked vessel, and which on being sold in the salvage proceedings enter into the consumption of the country, but not with respect to such goods as on such sale are exported.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 19, 29; Dec. Dig. § 23.*]

5. SALVAGE (§ 21*) — RIGHT TO COMPENSATION — EMBEZZLEMENT OF SALVED PROPERTY.

A vessel which, after aiding in salving the cargo of a wrecked vessel, fails to turn over to the court all of the property saved by her forfeits all right to salvage compensation.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. §§ 48–51; Dec. Dig. § 21.*]

In Admiralty. Suit by Dunham Albury and others against the cargo salved from the British steamship Lugano. Decree distributing proceeds.

Eugene O. Locke, of Jacksonville, Fla., for libelants.
G. Bowne Patterson, of Key West, Fla., for claimants.
Herbert S. Phillips, U. S. Atty., of Tampa, Fla.

CALL, District Judge. The libel in this case claiming salvage was filed on March 29, 1913, and process issued on that day. The marshal, in pursuance of such process, seized and took into his possession the goods libeled. On April 19, 1913, an amended libel was filed, setting out the names of all the libelants. On May 27, 1913, the master of the steamship as claimant filed his answer to the amended libel. On Au-

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

gust 22, 1913, the United States filed its intervention, claiming duties on the salved goods to the amount of $95,893.61, and claiming the duties as a first lien on the salved goods and certain expenses amounting to something over $1,800. August 18th to 30th the property was sold under order of court. Upon the pleadings and the testimony taken the cause came on to be heard upon the 5th day of May, 1914.

The goods salved were brought into Key West under three consortships, and in the sale of the goods, the amounts realized from each consortship are shown to be as follows:

First consortship	$64,126 67
Second consortship	14,084 30
Third consortship	2,228 18

The evidence shows that the Dr. Lykes, a schooner engaged in the salvage work making two trips with cargo, was short in the delivery of goods to the amount of $934.06 and over in the amount of $137.90. No attempt has been made in the evidence to account for this discrepancy of receipt and delivery of cargo by the officers, crew, or owner of the Dr. Lykes.

The facts as shown by the evidence are as follows: During the night of March 9, 1913, the British steamship Lugano, while on a voyage from Vigo, Spain, to Havana, Cuba, loaded with a general cargo, went ashore on Long Reef, one of the reefs off the coast of Florida. On the morning of March 10, 1913, Dunham Albury, a licensed wrecker, boarded her, and his services and those of his consorts were accepted by the master to save the ship and cargo. The evidence makes it very probable that the ship bilged when she went upon the reef. The salvors worked from March 10th to March 21st, in gangs, day and night, hoisting out cargo and loading it upon the several boats, using the ship's steam and machinery, except for two days when the water flooded the boiler room and cut off the steam from the donkey engine, whereupon the salvors procured pumps from Miami, and thereby reduced the water in the boiler room so that steam could once more be obtained, and used the ship's power once more in discharging cargo. All the cargo saved was carried to Key West, about 150 miles distant, and stored, except as above noted, by the schooner Dr. Lykes. The weather during this period was stormy, and several of the vessels of the salvors were injured. On March 22d the salvors gave up hope of saving the ship, and discontinued their work upon it on account of the heavy weather. During the time between March 22d and April 3d efforts were made by some of the salvors under contract with the owners of the vessel to float her, without avail, for which no claim is made in this case. On April 4th they returned to work, saving cargo, and worked until the 15th of that month. The cargo saved in the first consortship was not damaged and injured by water; that saved in the second consortship was about half wet and half dry; that saved in the third consortship was wet, consisting of barrels of wine and glass. In saving the goods salved in the first and second consorts the men were required to stand in water in breaking out the cargo ranging from a few inches to some feet. In salving the goods saved in the third consortship the men were required to work in the water, diving in many

instances to get the goods. This water had become very bad on account of the rice, flour, and caustic soda in the cargo, and the fumes made some of the salvors and members of the crew sick, and the caustic soda in the water inflamed the eyes, bodies, and limbs of the men working in it. It was also necessary for the men to clear the suction of the pump used in keeping the boiler room clear of water by diving and cleaning it with their hands. The ship was listed about 15 degrees as she lay upon the reef. There were engaged in this service some 80 vessels of all kinds, schooners, sloops, and boats, aggregating over 1,000 tons, and nearly 500 men in the first consortship and fewer vessels and men in the second and third.

The questions to be decided by this court are four: First, The priority of the claims of the salvors and the United States; second, the amount of salvage to be allowed the salvors; third, the items of costs to be paid before the allowance of any amount for salvage; fourth, the amount to be allowed for customs duties on sale of the goods that were sold and were consumed in the United States.

[1] The question whether the duties upon the cargo brought into Key West by the salvors should be paid prior to the allowance of salvage was before the District Court for the Eastern District of New York, and decided by Judge Benedict adversely to the claims of the government, as set forth in its intervention in this case, and I have not been cited to any authority holding a contrary view. Judge Benedict fully discusses the questions involved, and the authorities bearing upon the questions, and a further discussion of the question by me is unnecessary. Merritt v. One Package of Merchandise, etc., and other cases (D. C.) 30 Fed. 195. On the authority of these cases and others bearing upon the question, but not directly in point, I hold that the salvors have the prior right to be paid salvage before any duties can be allowed the United States.

[2] The next question to be considered is the amount to be allowed the salvors for their services in saving the property. There can be no question but that the service is a salvage service. In fixing the amount of salvage, the court will be governed by the consideration of the following elements: (1) Labor expended by salvors in rendering the salvage service; (2) promptitude, skill, and energy displayed in rendering the service and saving the property; (3) the value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed; (4) the risk incurred by the salvors in securing the property from the impending peril; (5) the value of the property saved; (6) the degree of danger from which the property was rescued. The Blackwall, 10 Wall. 14, 19 L. Ed. 870.

The court further say in that opinion:

"Compensation as salvage is not viewed by the Admiralty Courts merely as pay, on the principle of a quantum meruit or as a remuneration pro opere et labore, but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property."

Authorities could be multiplied on this subject, but it would be of no particular value in this case.

Applying these principles to the case under consideration, and bearing in mind the circumstances under which this cargo was saved, what is a proper amount to allow the salvors? The amount for which the property was sold must be the guide to this court of the value of the salved property. After viewing all the circumstances of this case, in the light of the principles announced by the courts in salvage cases, and bearing in mind that salvage should not amount to forfeiture, I am of the opinion that the proper amount of salvage to be allowed in this case, to be calculated and to be distributed, according to the rules of this court, is as follows: Thirty per cent. on the value of the goods saved by the first consort; 45 per cent. on the value of the goods saved by the second consort, and 50 per cent. on the value of the goods saved by the third consort.

[3] This brings me to the consideration of the item of cost, proper to be charged against the fund before salvage is calculated. Of course, all court costs, costs of storage, care of property, sale, etc., are first deducted. And in addition to these certain other cost bills have been presented, among them the consignee's bill. This last has been paid under order of this court, dated January 22, 1914, but I do not understand this order as settling the question whether or not it should be paid before salvage calculated. I have therefore examined the items of this bill; and, while it is entirely proper that it should be paid out of the money in the registry of this court, there are certain items that should be paid from the residue, and not from the fund before salvage calculated. These items are represented by vouchers attached to consignee's bill, and are not allowed against the salvage, as follows, to wit: Vouchers Nos. 1, 2, 3, 8, 9, 10, 18, 19, 20, 21, 23, 26, 27, 35, 36, 37, 38, 42, 43, 44, 45, 46, 47, 48, 51, 52, and 53.

At the hearing a bill was presented for services rendered by an expert in classifying the salved cargo. In my opinion this bill should be paid from the proceeds in the registry of the court, before the salvage is calculated.

There is also a bill of expenses incurred by the United States, presented at the hearing. It appears that the services were rendered while the goods were in the custody of the marshal of this court under attachment issued herein. The sections under which the Collector of Customs acted are not applicable to goods brought in as these were, and in custodia legis; said claim is therefore disallowed.

[4] The only remaining question is, What amount shall be allowed the United States for duties? It is well settled by adjudications that the United States has an equitable claim for duties on all such goods as were sold and entered into the consumption of the country. See cases cited in Fed. vol. 30, p. 195.

In this case evidence has been adduced showing that quite an amount of these goods were exported for which no duties can be allowed. It is the opinion of the court that, after deducting the amount for which the exported goods were sold from the residue, after the payment of costs chargeable against such residue, 30 per cent. of amount left in the registry of the court shall be paid to the United States in satisfaction of its claim for duties. The amount remaining after such

payment shall be paid to claimants upon filing claims as their interests appear.

[5] There is one other question that must be decided by the court in this case, that of the shortage of cargo by the schooner Dr. Lykes. The evidence leaves no doubt that she was short in her cargo something like $800 after deducting the overages. "Punctilious honesty is required of salvors. Embezzlement, however small in amount, whether at sea, in port, or after the goods are in the custody of the law, works a forfeiture of all salvage," says Judge Marvin in section 220 of his work on Salvage. In this case there has been no attempt to explain this shortage by the master or crew of the Dr. Lykes. The only thing in the testimony is a conversation testified to by a witness with the master of the schooner, in which the master is quoted as saying, "he could not help it." It would appear to the court that this case is one of flagrant carelessness, if not worse.

It is therefore ordered that the shares of the master and crew of the schooner Dr. Lykes be forfeited to the use and benefit of the owners of the property.

The decree will be entered in accordance with this opinion.

BALDWIN LOCOMOTIVE WORKS v. McCOACH.

(District Court, E. D. Pennsylvania. June 27, 1914.)

No. 2968.

TAXATION (§ 376*)—EXCISE TAX ON CORPORATIONS—COMPUTATION OF NET INCOME.

The net income of a corporation, subject to excise tax under Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946), is not to be determined by bookkeeping facts, but by the real facts of gross income and actual payments therefrom for the purposes specified, to which may be added only a reasonable allowance for depreciation of property, if any. An increase in the book value of the assets of a corporation by a revaluation of property does not constitute any part of the gross amount of its "income received within the year." On the other hand, a book charge because of the sale of an issue of bonds at less than par, or because of bad debts or for money paid out for charities, is not a part of the "expenses actually paid within the year out of income" to be deducted from gross income.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 625, 629–631; Dec. Dig. § 376.*]

At Law. Action by the Baldwin Locomotive Works against William McCoach, late Collector of Internal Revenue for the First District of Pennsylvania. On motion for judgment for want of sufficient affidavit of defense. Sustained in part.

John G. Johnson, of Philadelphia, Pa., for plaintiff.

Edwin S. Kremp, Asst. U. S. Atty., of Reading, Pa., and Francis Fisher Kane, U. S. Atty., of Philadelphia, Pa., for defendant.

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

DICKINSON, District Judge. This case and the others which were argued with it by consent involve but one general question which the court is asked to pass upon. That question is whether the plaintiff is liable to the tax which it has paid and which it is seeking to have returned to it. It is conceded by both sides that if the tax was collectible judgment should be refused. If it should not have been collected under the facts as averred in the affidavit, the plaintiff is entitled to the judgment asked for. Whether the tax in this sense was payable depends upon the act of Congress by authority of which the collection is sought to be justified.

The pertinent sections of this act are these:

"Sec. 38. That every corporation * * * organized for profit and having a capital stock represented by shares * * * now or hereafter organized under the laws * * * of any state or territory of the United States * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation * * * equivalent to one per cent. upon the entire net income over and above $5,000 received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations * * * subject to the tax hereby imposed. * * * Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation * * * received within the year from all sources (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property. (Second) All losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation of property, if any. (Third) Interest actually paid within the year on its bonded or other indebtedness, * * * not exceeding the paid up capital stock of such corporation * * * (Fourth) All sums paid by it within the year for taxes * * * (Fifth) All amounts received by it within the year as dividends upon stock of other corporations * * * subject to the tax hereby imposed."

The importance of having a proper construction placed upon the act cannot be overrated. It is important alike to the taxpayer and to the government. The answer to the question ought to be made to rest upon some intelligible and ascertainable principle of law, and not be made to depend upon either the liberality of the taxpayer or the amiability of the officials of the Internal Revenue Bureau in reaching an agreement upon the return upon which the amount of the tax is based.

The usual claims to favorable consideration have been put forth, on the one hand, because the corporations concerned have included in the amount of their "net income" moneys which might have been excluded, and, on the other, that the government has consented to deductions from "gross income" which might have been disallowed. Neither is subject to just criticism for standing out for its rights. The most popular heroes in the history of our race are the Hampdens, and there is the best of authority for holding that Cæsar is entitled to have rendered to Cæsar the things which are his.

The question before the court is a very narrow one. There are no constitutional principles involved. Whatever might be urged as to whether this is a direct tax has been disposed of by the finding that it is an excise, and, it being excise, it is admittedly within the power of

Congress to declare what shall be paid. To this declared will of Congress all must bow. The only inquiry left to us therefore is what is the declared will of Congress? The first observation called forth by the act of Congress is that Congress has declared its will upon three points: First, that the amount of the tax shall be based upon the "net income" received by the taxpayer within the year. Secondly, that this "net income" shall be determined by finding first the "gross income" and then taking from this amount certain specified deductions. Thirdly, no deductions, with one exception, shall be made unless the amounts to be deducted were paid out of income within the year, and no income is to be considered unless it was income received within the year. The general purpose is first to have the amount of the "net income" received during the year determine the amount of the tax.

The second observation to be made is the choice of terms which Congress has made. The amount of the tax might have been made to turn upon the "net gains, profits, increase and income" or upon the amount or value of the "net assets" of the taxpayer or upon the "increase in the net assets." Congress has seen fit to confine itself to the "net income" alone. This is also of some importance, because a reference to the tax laws of the several states and the act passed following the sixteenth amendment will disclose a more embracing phraseology than mere "net income." A like choice of words is to be discovered in the part of the act which enumerates what may be deducted from the "gross income." The "ordinary and necessary" expenses, the "losses," the "taxes," etc., are all to be determined by what the corporation has actually "paid." It is not "expenses and losses" which have been properly "incurred" or taxes which have been lawfully "assessed," but the amount which has been "paid" is made the criterion. The deduction of a reasonable allowance for "depreciation," which is permitted also to be made from the amount of the gross income, is not out of harmony with this general test of "payment." It is the case of "the exception proving the rule," because this allowance, not being for actual payment, would not be justified were it not expressly mentioned. It is allowed because, while not in form a payment, it is one in a real sense. What Congress meant to have allowed is what conservative business men charge off annually from "machinery" and like accounts. The textile manufacturer, for instance, who annually charges off 10 per cent. from his "machinery" account, is merely arbitrarily assuming and anticipating that in ten years' time he will be required to actually pay out the 100 per cent. for new machinery, and he is only distributing that actual payment over the ten-year period both to keep himself from fooling himself into believing that he is making more money than he is really making, and to give greater uniformity to his statements of annual profits.

What inferences may properly be drawn from this choice of phrases by Congress will be considered later.

The use of any words brings us to the point to which all discussions in the last analysis come, to wit, a matter of mere definition. When Congress used the words "net income," "expenses, losses, taxes, etc., paid," what did Congress mean? Whatever definitions may be form-

ulated of the word "income," one thought is always conveyed, and that is, what comes in as contrasted with what goes out—"income" as contradistinguished from "outgo." The man who starts with a certain cash capital and who pays cash for everything he buys and gets cash for everything he sells, and puts all his receipts into a bag from which he makes all his payments, can readily determine his "net income" by the simple process of counting the money in the bag and deducting therefrom the amount of capital with which he started. When he takes an account of stock and adds this, he knows the amount of his nominal profits. If he keeps two bags, one for capital, and the other for profits, and borrows from one to put in the other, and keeps an account of these borrowings, and if he buys and sells on credit and keeps an account of these transactions, he has entered upon the domain of the bookkeeper. The difficulty which he then encounters is due to this, that bookkeeping is an artificial and arbitrary system of keeping accounts, and he can increase or deplete his nominal profits at his will. More actually insolvent business ventures have been made to appear nominally profitable by bad bookkeeping than in any other way. A manufacturing concern, for instance, which is a fit subject for proceedings in bankruptcy, may be made to show large nominal profits by the fraudulent expedient or the honest mistake of charging repairs which properly belong in the expense account up to a machinery or other capital account and thus be made to figure as assets. By the reverse process of bookkeeping all profits may be made to disappear. Proper bookkeeping, therefore, involves in this respect the highest business judgment, and "profit" and "loss," "capital" and "income" become mere bookkeeping terms.

To come from general illustrations to the specific instances furnished by the facts in this case, the Baldwin Locomotive Works revalued some of their properties with the result of an increase of $3,750,000 in the nominal value of their assets. On a statement of their book assets and liabilities their nominal profits for the year in which this was done were that much more than they would otherwise have appeared to be. Was their "income" for that year that much more? They made an issue of bonds to the amount of $10,000,000 and sold the bonds at 95. As a matter of bookkeeping they credited one account as if they had received $10,000,000 and charged another as if they had paid out $500,000. Was their net "income" for that year $500,000 less than it would otherwise have been? In the one case, it is clear that there had been a nominal, not an actual, receipt of $3,750,000, and, in the other, not an actual payment of $500,000 out of gross income. In each case, the bookkeeping was based upon an anticipated not a past event. As in the latter case, assuming the solvency of the corporation, the payment is practically certain to be required, it is equally good bookkeeping to charge up the whole amount at once as for the expense of a broker's commission, or to apportion the sum over a part or the whole of the life of the bonds, or to charge up the whole amount when the bonds come to be paid. In the former case, to enter the increased value as realized is good or bad bookkeeping according to whether the anticipation of realization is justified or not.

These instances afford us a touchstone for this case.

Whether it was good business policy to charge off this $500,000 in a lump at the time the bonds were sold or apportion it over two years' time, as the managers of this company thought, or to apportion it among the 31 years the bonds have to run, as the defendant thinks, or whether the $500,000 should be charged up when the principal of the bonds is paid, is wholly and purely a question of bookkeeping. The same observation applies to the bookkeeping act of having the books show that a particular piece of property possesses a certain value. The bookkeeping system or business policy may be adopted of charging up all the property acquisitions of the corporation at the cost price irrespective of any estimated value it may have. The policy may be adopted of having the book account follow all the variations and vagaries of the market.

The first question to be determined, therefore, is whether the amount of net income is to be determined according to mere bookkeeping facts or according to the real facts of gross income and the actual payments thereout for the purposes specified in the act. This must be determined from the language employed by Congress. If the amount is to be determined by the mere bookkeeping facts, then it is difficult to escape the conclusion that we must take the facts from the books as kept, assuming, of course, their integrity and that they were kept in good faith. No other bookkeeper, governmental official, or otherwise, could be permitted to manufacture a different set of bookkeeping facts for the plaintiff. If the amount is to be determined by the real facts, then a judicial inquiry must be made which will disclose them. This is not as easy to determine as it might seem to be, because we may become so familiar with a bookkeeping fact as to be unable to distinguish the real fact. Waiving for the moment whether any man actually increases his "gross income" by the simple expedient of saying what he has is worth so much and writing his say-so upon his books, it would doubtless surprise many bankers and merchants to be told that banks did not receive and merchants did not pay interest in advance when a note is discounted. Yet it is undoubtedly true that if the note is not paid at maturity no interest is ever paid. The real difficulty is one of apperception in that we may have different concepts of the same thing. This bond issue may, for instance, be treated as the borrowing of $10,000,000 for the use of which the plaintiff paid $500,000 down and interest thereafter until the loan was repaid. It may be treated as the borrowing of $9,500,000 for the use of which the plaintiff agreed to pay interest on $10,000,000 annually and $500,000 additional when the loan matured. It may be treated as a sale of property as that the plaintiff had bonds which it valued at $10,000,000 and sold for $9,500,000. It may be treated as a service transaction in which plaintiff employed some underwriter to sell its bonds and paid $500,000 for the service. All of these concepts would arise out of the same fact that the plaintiff had received $9,500,000 and had agreed to pay $10,000,000 with interest. Any discussion as to which was the true concept would be purely academic and turn upon economics or take us within the domain of metaphysics. Some help might be had

from the analogue of income and capital between life tenants and remaindermen, but we are driven in the end back to the act of Congress. The question must therefore be determined by discovering what Congress intended to be paid as disclosed by the language of the act and applying this meaning by some practical method to the facts of the particular case.

Recurring to the phraseology of the act to determine whether this nominal increment of value is "gross income" and whether this discount on the price of bonds sold is to be deducted in determining the "net income," we find the questions narrowed to these:

(1) Is this increase in the estimate of value of assets any part of the "gross amount of the income received within the year"?

(2) Is this sum of $500,000 any part of the "ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and property including" rentals, etc., or is it "interest actually paid within the year on its bonded indebtedness"?

The question would ordinarily be further narrowed by the record fact that the question arises on a rule for judgment for want of a sufficient affidavit of defense and be made to turn upon the averments of the affidavits which must, of course, be taken as verity. The statement of claim and the affidavit of defense agree, however, as to the facts. They differ only in the legal conclusions drawn therefrom.

Before drawing these conclusions, we will refer again to the exception in the act, of depreciation in value of property allowed as a deduction from gross income. If this had not been expressed, would any depreciation have been allowed? As the act does not provide that any increment in value shall be added to the gross income, whence comes the authority to add it? As no deductions can be made except those named, all of which must consist of amounts paid and also of amounts paid within the year and still further of amounts paid within the year out of the gross income, how can we find this $500,000 to have been paid out of income without holding the $10,000,000 out of which it was paid (if as yet it has actually been paid at all) to be income and adding that to the taxable sum?

The conclusions reached and the reasons therefor are as follows:

1. The $10,148.01 deduction for the year 1910 on account of what was received for interest, not dividends, is admittedly not properly to be deducted.

2. The $4,838.49 similar deduction for the year 1911 and the $20,306.49 bad debts deduction aggregating $25,144.98 are also admittedly not to be deducted.

3. The $83,870.94 deduction on the $500,000 out of the bond issue for the year 1910 is held not to be a proper deduction and is liable to tax.

4. The $12,245.80 paid for charities in 1910 is held not to be a proper deduction because we are bound by the fact as stated that this was a charitable gift, not an expense, and charitable gifts are not mentioned among the permitted deductions. The amount is therefore taxable.

5. The increased valuation in 1910 of $593,449.66 net of certain properties was not gross income received during that year and is not taxable.

6. This applies also to the $485,000 increase in the estimated value of the stock of the Standard Steel Works Company.

7. This applies also to the $2,954,086.72 estimated value of patterns, etc., not theretofore valued.

8. The conclusion 3 as to 1910 deduction claimed on the $500,000 bond issue account applies also to the $391,935.48 deduction claimed for 1911. This sum is taxable.

9. The conclusion 4 as to 1910 deduction for charities applies to the $1,723.85 charities account for 1911.

The plaintiff has leave to move for judgment for part of the $42,852.37 claimed in this action in accordance with the conclusions above stated, to wit, $40,325.36, with interest thereon from October 23, 1913, and costs of suit; otherwise rule for judgment discharged.

In re CHARLES R. PARTRIDGE LUMBER CO.

(District Court, D. New Jersey. July 31, 1914.)

1. BILLS AND NOTES (§ 330*)—FILING AGAINST BANKRUPT—CLAIM—ASSIGNMENT—BONA FIDE HOLDER.

Where a claim against a bankrupt on certain notes was duly filed, and then assigned, the notes became merged in the claim; and hence the assignee was not a holder of negotiable paper, and could not be accorded the rights of a bona fide holder of the notes for value.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 794–804; Dec. Dig. § 330.*]

2. BANKRUPTCY (§ 342½*) — REFEREE'S FINDING — CONFLICTING EVIDENCE — REVIEW.

A referee's finding on a question of fact, based on conflicting evidence involving questions of credibility, will not be disturbed by the court, unless there is most cogent evidence of mistake and miscarriage of justice.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 530; Dec. Dig. § 342½.*]

3. CORPORATIONS (§ 414*)—ACTS OF AGENT—WANT OF AUTHORITY—AGENT TO SELL.

Where a special agent was employed by the president of a corporation to negotiate certain of the corporation's notes for cash, the agent had no express or implied authority to exchange the notes of the corporation for bonds of another company, nor was such act within the apparent scope of his authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1640–1646; Dec. Dig. § 414.*]

4. CORPORATIONS (§ 414*)—AUTHORITY OF AGENT—NEGOTIATION OF NOTES—POSSESSION OF BLANK NOTES.

Where a special agent of a corporation was authorized to discount its notes for cash, the fact that the agent was intrusted by the president of the corporation with possession of blank notes signed by the president in the corporation's name was insufficient under the circumstances to lead

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

one dealing with the agent to believe that he had authority to purchase corporate bonds with such notes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1640–1646; Dec. Dig. § 414.*]

5. CORPORATIONS (§ 426*)—ACTS OF AGENT—WANT OF AUTHORITY—RATIFICATION.

Where a special agent was authorized by the president of a corporation to dispose of certain of the corporation's notes, but the president had no knowledge that the agent had exchanged certain of the notes for bonds of another company until after the corporation became bankrupt, and the trustee also did not have such knowledge until after the bonds had been sold as a part of the bankrupt corporation's assets, the sale of the bonds by the trustee did not constitute a ratification of the agent's acts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702–1704, 1707, 1708, 1710–1716; Dec. Dig. § 426.*]

6. BANKRUPTCY (§ 314*)—ADMINISTRATION OF ESTATE—CONTRACT OF BANKRUPT'S AGENT—REPUDIATION—CONDITIONS.

Where a bankrupt's agent without authority transferred certain of the bankrupt's notes in exchange for bonds which the bankrupt's trustee sold as a part of the assets of the bankrupt, without knowledge of the agent's lack of authority, the trustee was entitled to repudiate the transfer subject to a return of the bonds by the trustee, if possible, or to permit the other party to the transaction to file an amended claim against the bankrupt's estate for their value.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469–473, 478, 483–487, 489, 490; Dec. Dig. § 314.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the Charles R. Partridge Lumber Company. On petition to review an order of the referee allowing the claim of Joseph M. Myers, assigned to Edgar C. Van Dyke, in part only. Claim disallowed in toto.

Hunt, Hill & Betts, William Hazen Peck, and Morris Douw Ferris, all of New York City, for claimant.

Edwards & Smith, of Jersey City, N. J., for trustee.

HAIGHT, District Judge. The claim in question was originally filed by one Joseph M. Myers. It is based on three promissory notes, aggregating in amount $10,000, alleged to have been made by the bankrupt company and dated May 6, 1912. Each note was payable to the claimant. The petition for adjudication was filed on May 8, 1912. The claim was filed on July 16, 1912. The trustee was elected on the same date. By an instrument dated August 28, 1912, and filed with the referee on November 7, 1912, Myers assigned the claim to Edgar C. Van Dyke, who had acted as his attorney in preparing and filing the proof of claims. On October 7, 1912, the trustee filed objections to the allowance of the claim. The referee allowed the claim to the extent of $500, and directed that the costs be paid in the same proportion as the amount of recovery bore to the amount of the original claim. It is on the claimant's petition to review this order of the referee that the matter is now before the court.

[1] The referee found that the notes in question were issued pursuant to a scheme to defraud the company, entered into between Myers and one E. H. Cohic, an alleged agent of the bankrupt. He al-

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

lowed the claim to the extent of $500, upon the theory that Van Dyke was a bona fide holder of the notes for value, and that the consideration which he paid for them was $500. Holcomb v. Wyckoff, 35 N. J. Law, 35, 10 Am. Rep. 219. I think that if the referee's determination—that the notes as between the original parties were void or voidable—is correct, that he was in error in allowing the claim for any amount whatever. Van Dyke was not a holder of negotiable paper; he was the assignee of a debt alleged to be due to Myers from the bankrupt estate, and which had theretofore been filed and proved with the referee, before whom the bankruptcy proceedings were pending. The instrument of assignment purports to transfer "all that certain debt of $10,000 due and owing to me on three promissory notes * * * which claim has been duly filed with the referee in bankruptcy." It also recites the bankruptcy of the alleged maker. One of the notes bears no indorsement, and the payee's indorsement on the others is erased. The notes were therefore not negotiated. Negotiable Instruments Law N. J. (P. L. 1902, c. 184) § 30. If one holding negotiable paper of a bankrupt were permitted, by filing a claim based thereon and assigning the same to an innocent purchaser, to defeat the right of a trustee to assert defenses against the claim which he could have interposed had the claim not been assigned, it is not difficult to forsee what dangerous results might follow. None of the reasons which brought about the rules peculiar to negotiable instruments are present in such a situation as this. In addition the notes had ceased to be negotiable instruments; they had become merged in a general proved claim against the estate of a bankrupt. The assignee was therefore not a bona fide holder of a negotiable instrument in the usual course of business, in the sense that the equities existing between the original parties to the notes could not be asserted against him. As far as Van Dyke is concerned his rights are the same as Myers, and the validity of the claim must be determined as though it had not been assigned.

An examination of the facts is therefore necessary. The bankrupt company was engaged in the lumber business. In August, 1911, Mr. Partridge, president of the bankrupt company, employed a Mr. Cohic to sell certain stock, which Partridge owned, of the bankrupt company. He worked under that arrangement until December of that year, when he was elected secretary of the company, which position he held until the 26th of April, 1912. He then resigned and continued under the "original agreement" from that time until the petition in bankruptcy was filed against the company. He also appears to have been employed by Partridge in negotiating promissory notes of the company, and for that purpose was permitted on one or more occasions to carry around with him blank promissory notes of the company, signed by the president. On May 6, 1912, two days before the petition in bankruptcy was filed against the company, he claims to have delivered two of the notes, upon which the present claim is based, together with another note, to Myers in exchange for 15 $1,000 bonds of the Gates Coal & Coke Company, and agreed to deliver additional notes aggregating $7,500 the following day; that he then offered to deliver the note for $7,500 (being the remaining note upon which the claim is based), but that Myers

desired to have it split up in several notes of smaller denominations; that he accordingly retained that note (presumably as agent for Myers) for the purpose of having the several smaller notes signed by Mr. Partridge, which were then to be delivered to Myers. He claims that he was unable to see Partridge until after the petition in bankruptcy had been filed; that Myers then insisted upon the delivery of the $7,-500 note; and it was accordingly delivered to him. This was on May 9th, the day after the petition for adjudication was filed. It also appears that at the same time Myers delivered 15 additional bonds of the same company to Cohic for the latter's personal use. The consideration, if any, which passed for these seems to have been the extinguishment of a debt amounting to $600, which Myers owed Cohic. The bonds remained in Cohic's possession until about June 5, 1912, when he delivered them to the receiver, who later delivered them to the trustee. They were subsquently sold by the trustee, together with the other assets of the bankrupt estate, at a bulk sale.

Although the evidence is very persuasive that the transaction was fraudulent, I do not find it necessary to determine whether there was sufficient evidence (as counsel for claimant contend there was not) to justify the referee's conclusion in that respect, as the claim must be disallowed on another ground. The minutes of the company were not offered in evidence. There is no evidence to show that the president of the company was ever authorized by the board of directors to sign notes of the company, or to purchase these bonds or like property, or for that matter to negotiate the company's commercial paper. It is urged on behalf of the trustee that the failure to show this authority on the part of Mr. Partridge is fatal to the allowance of the claim. I will assume, however, without deciding, that the filing of the proof of claim, in the absence of proof to the contrary, has relieved the claimant of the necessity of proving that Partridge was duly authorized to negotiate and sign the company's negotiable paper, and that he had the requisite authority to authorize Cohic to purchase the bonds. Whitney v. Dresser, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584. It is clear that the only instructions which Cohic received regarding what he was to do were given to him by Partridge. Mr. Partridge testified that he had never authorized Cohic to use the notes of the company for the purpose of obtaining the bonds in question; and never knew that Cohic was doing so, or had done so, until after the bankruptcy proceedings had been instituted, and that he gave the notes to Mr. Cohic in trust, to be discounted for cash "without paying an exorbitant rate of interest or discount." In this respect he is contradicted by Cohic, who testified that he had express authority from Mr. Partridge to use the notes for the purchase of these bonds.

[2] The finding of the referee that the transaction was fraudulent necessarily embodies the finding that Mr. Cohic's testimony in this respect was false. The finding of the referee was based upon conflicting evidence, involving questions of credibility, and the court should not disturb his finding, unless there is most cogent evidence of mistake and miscarriage of justice. Ohio Valley Bank v. Mack, 163 Fed. 156, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184 (C. C. A. 6th Cir.). The evi-

dence clearly justifies this finding. Cohic's testimony is filled with contradictions and improbabilities, and is, I think, utterly unworthy of belief. Irrespective of the general rule above stated, I would have no hesitation in finding as a fact that Cohic, in exchanging the notes for the bonds, if he actually did so, exceeded his authority and abused the trust which had been reposed in him. Myers dealt with him as agent. The matter, therefore, presents a situation which calls for the application of the principles of agency.

The extent of the principal's liability for acts of an agent in matters of contract is thus clearly stated by Mr. Justice Depue in Law v. Stokes, 32 N. J. Law, 249, 251 (90 Am. Rep. 655):

"A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the precise act which he expressly authorizes him to do, but also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond that, he is liable for the acts of the agent within the appearance of authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. For the acts of his agent within his express authority the principal is liable because the act of the agent is the act of principal. For the acts of the agent within the scope of the authority he holds the agent out as having or knowingly permits him to assume the principal is made responsible because to permit him to dispute the authority of the agent in such cases would be to enable him to commit a fraud upon innocent persons. In whichever way the liability of the principal is established, it must flow from the act of the principal. And when established it cannot, on the one hand, be qualified by the secret instructions of the principal, nor, on the other hand, be enlarged by the unauthorized representations of the agent."

[3] Cohic was a special agent, and his authority was to negotiate the notes for cash, and Myers was bound to ascertain, at his peril, the extent of Cohic's authority. Dowden v. Cryder, 55 N. J. Law, 329, 26 Atl. 941; Milne v. Kleb, 44 N. J. Eq. 378, 14 Atl. 646; Owings v. Hull, 9 Pet. 607, 9 L. Ed. 246.

[4] As above stated, Cohic had no express authority to exchange the notes for the bonds, nor was that within his implied powers. The purchase of bonds was not necessary for the performance of what he was directed to do, namely, discount the notes for cash. Neither can it be said that it was within the apparent scope of his authority. The mere possession by an agent of blank notes of a lumber company (which Partridge apparently permitted him to have) would not lead one, dealing with the agent, to believe that he had been clothed with power to purchase bonds of a coal and coke company which had already defaulted in the payment of interest on the bonds, especially when, as in this case, Myers knew that the lumber company was in dire need of funds and was endeavoring to borrow. Many cases illustrating the tendency of the courts to strictly limit an agent's authority in dealing with the principal's negotiable paper are set out in 31 Cyc. 1381 et seq. Cohic testified that 15 of these bonds were given to him for a consideration not exceeding $600. This, presumably, was approximately their value. Of course the value of the 15 bonds which were purchased with the notes of the bankrupt company was the same. Myers must be presumed to have known, assuming that he was acting in good faith, that Cohic had no authority to exchange promissory notes of his principal,

amounting to $15,000, for bonds worth only $600. It was therefore clearly his duty to have inquired as to Cohic's authority.

[5] The sole remaining question is whether the receipt, retention, and sale of the bonds by the trustee has the effect of ratifying Cohic's authorized act. Mr. Partridge testified that he had no knowledge of it whatever until after bankruptcy had intervened. The bankrupt company, therefore, did not ratify it.

[6] Accepting and retaining benefits obtained directly under an unauthorized contract of the agent, in order to work a ratification, must be based upon full knowledge by the principal of all the material facts of the transaction. Owings v. Hull, 9 Pet. 607, 9 L. Ed. 246; Bennecke v. Ins. Co., 105 U. S. 355, 26 L. Ed. 990; Gulick v. Grover, 33 N. J. Law, 463, 97 Am. Dec. 728; Titus et al. v. Cairo Fulton R. R. Co., 46 N. J. Law, 393; Clement v. Young-McShea Amusement Co., 70 N. J. Eq. 677, 67 Atl. 82, 118 Am. St. Rep. 747. If the above rule respecting ratification is applied to the trustee, I do not think that the receipt and sale of these bonds by him can be held to be a ratification of Cohic's act. As far as the evidence in the present case shows, neither the receiver nor the trustee, when the bonds were received, were advised of the material facts and circumstances attending the transaction. In fact, at the time Cohic delivered the bonds to the receiver he made a written statement to the effect that the transaction had been carried out with the approval and at the express direction of Mr. Partridge. The bonds were sold by the trustee, with the other assets of the company, in bulk, on August 19, 1912. He did not file objections to the claim until October 7, 1912, and apparently learned for the first time that the act was entirely unauthorized on March 27, 1913, at a hearing on this claim, when Mr. Partridge was a witness. His objection to the claim, of course, is a disavowal of the contract. Under these circumstances it will be presumed, in the absence of evidence to the contrary, that had the trustee known of the material facts and circumstances, he would not have accepted or disposed of the bonds. If the bonds were of any value whatever, the trustee should not, of course, be permitted to disavow the contract and also retain the bonds or their value. The evidence does not disclose satisfactorily whether or not the bonds were of any value. At any rate, the question of value was not the subject of inquiry before the referee. I will therefore not attempt to fix the value. It may also be that the trustee can secure possession and make delivery of the bonds to the proper person.

The order of the referee will be overruled and the claim totally disallowed. The claimant will be required to pay the costs of the proceeding before the referee. The trustee will be directed to return the bonds to the proper person within 10 days from the signing of an order, or, in the event of his inability to do so, the claimant or the assignee, as may be proper, will be permitted to file with the referee an amended claim for the value of the bonds, within 10 days, after being notified that the trustee is unable to make delivery of the bonds. The referee will be permitted to extend either time, in his discretion.

In re STERN et al.

(District Court, D. New Jersey. May, 1914.)

1. BANKRUPTCY (§ 136*)—ORDER TO TURN OVER MONEY—FAILURE TO COMPLY—CONTEMPT—PUNISHMENT.

Since a proceeding to punish a bankrupt for failure to comply with an order, requiring him to turn over money alleged to have been withheld, to his trustee, is for civil contempt, and the only punishment would be remedial, that is, a commitment of the bankrupt, unless and until the order was complied with, the punishment cannot be imposed when it is shown that the bankrupt at the time of the hearing was unable to comply with the order.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

2. BANKRUPTCY (§ 136*) — WITHHELD ASSETS — PROCEEDINGS AGAINST BANKRUPT.

In proceedings against a bankrupt to compel him to turn over assets alleged to have been withheld from his trustee, it is the duty of the court first to ascertain whether the property was in the bankrupt's possession or control at the time of the bankruptcy, and then whether the property is still in his possession and he is physically able to deliver it to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

3. BANKRUPTCY (§ 136*)—WITHHELD ASSETS—FAILURE TO DELIVER TO TRUSTEE—ABILITY—BANKRUPT'S DENIAL.

In proceedings to punish a bankrupt for contempt in failing to comply with an order requiring him to turn over to his trustee, assets alleged to have been withheld, the bankrupt's mere denial of his ability to comply with the order is not controlling.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

4. BANKRUPTCY (§ 136*)—WITHHELD ASSETS—ORDER TO SURRENDER—FAILURE TO COMPLY—CONTEMPT.

Where a bankrupt, after being ordered to pay over alleged withheld assets to his trustee, so deals with the fund as to make it impossible for him to comply with the order, he will be guilty of criminal contempt, and punishable in a proceeding for criminal contempt by a fine in a definite amount, or by commitment to prison for a fixed term.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. § 136.*]

5. BANKRUPTCY (§ 485*)—OFFENSES—CONCEALMENT OF ASSETS.

Where a bankrupt knowingly and fraudulently conceals assets from his trustee, he is punishable under Bankruptcy Act, July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), making such act an offense, though the property had been disposed of before any order had been made requiring the bankrupt to pay over the assets withheld to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 906, 908; Dec. Dig. § 485.*]

In Bankruptcy. In the matter of bankruptcy proceedings of Jacob and Joseph Stern. On application to have bankrupts adjudged guilty of contempt. Denied.

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

J. Howard Reber and J. B. Colahan, 3d, both of Philadelphia, Pa., for trustee.

A. S. Ashbridge, Jr., of Philadelphia, Pa., for bankrupts.

HAIGHT, District Judge. This is an application to adjudge the bankrupts guilty of contempt for failing to comply with an order directing them to pay to the trustee $3,116, for which they had failed to account. An order was made by the referee in December, 1911, which directed the bankrupts to pay $14,686.80 to the trustee. This was modified as to amount by order of the court filed in July, 1912. The bankrupts failed to comply with the order. Thereafter, on the petition of the trustee, an order to show cause was made why the bankrupts should not be adjudged guilty of contempt. They answered, setting up that they were unable to comply with the order in whole or in part. The testimony which was taken before the special master, to whom this phase of the matter was referred, shows that the bankrupts are unable to comply with the order, and the special master has so reported.

[1] Under the principles enunciated in Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, the present proceeding must be considered as one for civil contempt, and the only punishment that could be imposed would be remedial, that is to say, a commitment of the bankrupts, unless and until they had complied with the order. As the bankrupts are now, so far as the evidence shows, unable to comply with the order, the only punishment which is permissible in these proceedings cannot be imposed. American Trust Co. v. Wallis (C. C. A., 3d Cir.) 11 Am. Bankr. Rep. 360, 126 Fed. 464, 61 C. C. A. 342; Boyd v. Glucklich (C. C. A., 8th Cir.) 8 Am. Bankr. Rep. 393, 116 Fed. 131, 53 C. C. A. 451; Kirsner v. Taliaferro (C. C. A., 4th Cir.) 29 Am. Bankr. Rep. 832, 202 Fed. 51, 120 C. C. A. 305.

[2] The practice and rules which must govern the courts in this district in proceedings to compel bankrupts to deliver property to their trustees has recently been announced by the Circuit Court of Appeals of the Third Circuit, in Epstein v. Steinfeld, 32 Am. Bankr. Rep. 61, 210 Fed. 236, 127 C. C. A. 54. It was held that the first stage is to determine whether the property was in the bankrupt's possession or control at the time of the bankruptcy, and that the second stage—

"is to determine whether or not the property required is still in the possession or control of the bankrupt, and that he is physically able to deliver it to his trustee."

The practice to be followed in deciding the latter question is thus stated by the court:

"The correct practice at this stage of the proceedings has been authoritatively stated by Judge Gray in American Trust Co. v. Wallis (C. C. A., 3d Cir.) 11 Am. Bankr. Rep. 360, 126 Fed. 464, 61 C. C. A. 342, in the following language: 'If the bankrupt denies that he has possession or control of the property, or, if a third person in possession thereof claims to hold it, not as the agent or representative of the bankrupt, but by title adverse to him, and there is no evidence to indisputably show that such denial or claim is false or fraudulent, and that the case is one of simple concealment or refusal

on the part of the bankrupt, or the one in possession, to deliver up the property as ordered, it would be an unwarranted stretch of power on the part of the court to resort to a summary proceeding for contempt for the enforcement of its order. In the absence of fraud or concealment, the bankruptcy court can only order the delivery of property to the trustee which the bankrupt is physically able to deliver up, having the same in his possession or control.' "

[3] The mere denial of the bankrupt is by no means controlling. Matter of Kramer & Muchnick (D. C. Pa.) 31 Am. Bankr. Rep. 525, 210 Fed. 977.

[4] I do not doubt, if it could be shown that the bankrupts had so dealt with this money, after they had been ordered to pay it to the trustee, as to make it impossible for them to comply with the order, that they would be guilty of and could be punished for a criminal contempt. Such punishment could, however, be imposed only in a proceeding for criminal contempt, and would take the form of a fine in a definite amount, or a committal to prison for a fixed term. Gompers v. Bucks Stove & Range Co., supra.

If the evidence before me were sufficient to justify the belief that there could be a conviction for such a criminal contempt, I would not hesitate to direct appropriate proceedings to be instituted. The bankrupts deny that they had possession or control of this money at the time the order was made, "and there is no evidence to indisputably show that such denial or claim is false or fraudulent." This would constitute a complete defense to proceedings for criminal contempt as well as civil contempt.

It is urged that the order directing the bankrupts to pay the money to the trustee has established that they did have the money in their possession, and that thus their ability to comply with the order at the time it was made is res adjudicata. In the memorandum of this court, upon which the order was made, it was said:

"The sum of $3,116 above referred to was in their [the bankrupts'] possession just prior to the institution of the bankruptcy proceedings, and under the circumstances may properly be regarded as still in their possession."

It thus appears that the finding that the bankrupts had the money in their possession at the time of the making of the order was based on a presumption. This does not satisfy the requirements of the above-mentioned rule.

[5] In view of the long period of time which intervened between the filing of the petition for adjudication and the making of the referee's order that the money be paid to the trustee, the above finding of the court could not preclude the bankrupts from showing, in proceedings ror either civil or criminal contempt, that they were actually unable to comply with the order when it was made. The petition in bankruptcy was filed in April, 1910, and the order of the referee, directing the payment of the money, was not made until December, 1911. The great difficulty in this case is the length of time which elapsed between the filing of the petition and the order to pay. During that time the bankrupts may very well have used, or legitimately disposed of, the money. If the bankrupts knowingly and fraudulently concealed this money from the trustee, even though it had been disposed of be-

fore the order to pay was made, they were liable to criminal prosecution and punishment under section 29b of the Bankruptcy Act. A means is thereby provided for punishment of those bankrupts who can escape punishment for contempt by showing their inability to comply with an order directing them to turn over property to a trustee.

The present order to show cause must therefore be discharged, but without prejudice to institute proceedings for criminal contempt, if there is sufficient evidence to establish the fact that the bankrupts were able to comply with the order of the referee as modified by the court, at the time it was made.

ALPHA PORTLAND CEMENT CO. v. SCHRATWIESER et al.

(District Court, E. D. New York. July 10, 1914.)

CORPORATIONS (§ 232*)—LIABILITY OF STOCKHOLDERS—UNPAID STOCK—STOCK ISSUED FOR PROPERTY.

A New York corporation was organized and exchanged its capital stock of $20,000, for the property of a New Jersey corporation, assuming its debts. Defendants owned practically all of the stock of the New Jersey corporation, which was capitalized at $250,000, and succeeded to the stock of the new company. One of defendants was also the principal creditor of the New Jersey company, and all of its debts except hers were paid. She made further advances to the new company, which was unsuccessful and became bankrupt. *Held*, on the evidence, that the transaction by which the property was transferred to a corporation with a reduced capital was not fraudulent, and that the stock of the bankrupt, having been issued in good faith in payment for property which included patents and might reasonably be believed to be worth the par value of the stock, could not be said to have been unpaid in whole or in part, so as to render defendants liable to creditors of the corporation under Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 56.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 879, 880, 883, 884, 987; Dec. Dig. § 232.*]

In Equity. Suit by the Alpha Portland Cement Company against Catharine M. Schratwieser, Jacob Schratwieser, Arthur J. Schratwieser, George Graf, and William C. Foster, as trustee in bankruptcy of the Schratwieser Fireproof Construction Company. On final hearing. Decree for defendants.

Louis H. Porter, of New York City, for plaintiff.

Phillips & Avery, of New York City (Frank M. Avery and C. Royall Frazer, both of New York City, of counsel), for defendants.

CHATFIELD, District Judge. The Schratwieser Fireproof Construction Company of New Jersey was organized by the husband of Catharine M. Schratwieser, one of the defendants. Its principal property consisted of patents for fireproof floors, etc., issued to Mr. Schratwieser and used by him in fireproof construction. After Mr. Schratwieser's death the company lost money, and by May, 1908, some $27,000 had been advanced in cash by Mrs. Schratwieser, or was owed to her for rent. In that month a New York corporation was formed, which issued its stock in exchange for the property of the New Jersey cor-

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

poration, and assumed the debts of that corporation. The amount of stock issued in the New York corporation was $20,000, all of which (except 14 shares) went to Mrs. Schratwieser or her sons, and at the time of this action all the shares were standing in her name. The debts of the New Jersey company amounted to about $30,000, and a chattel mortgage had been given Mrs. Schratwieser to secure $15,000 of that total debt. It appears that the debts of the New Jersey corporation have since been taken care of by Mrs. Schratwieser or by the New York corporation, except that owing to herself. The New York corporation has not made money. Mrs. Schratwieser has continued to advance money to it, amounting to $6,633.51, and also has allowed it to occupy certain premises, for which she has not received rent. This now amounts to $11,700, and she has been paid one dividend on her claims in bankruptcy proceedings against the New York corporation. The plaintiff herein has recovered a judgment against this corporation for the sum of $4,755.10, with interest, which is unpaid except for $116.64 received as dividend in the bankruptcy proceedings. The machinery of the New Jersey corporation, outside of the patent rights and good will of the business, which was turned over to the New York corporation in exchange for the issuance of capital stock, was worth, new, about the sum of $12,500, and realized at the sale in bankruptcy but $990, having been appraised with some horses at about $1,600. Its only other property consisted of rights to patents and bills receivable, amounting on their face to not more than $3,500. The proceedings in connection with the organization of the New York corporation and the transfer of property in return for what was issued as fully paid stock were more or less informal, and were conducted by the attorneys upon the apparent assumption that the parties had the right to make the transfers, and that close observance of formality was unnecessary. The judgment creditors bring the present action, charging that the New York corporation was formed as the result of a fraudulent purpose on the part of Mrs. Schratwieser and the others interested in the New Jersey corporation to evade payment of its debts and to obtain the property in fraud of those creditors.

Inasmuch as the New Jersey corporation had the right to form the New York corporation and to transfer its assets, as the debts of the New Jersey corporation which were assumed by the New York corporation have been paid, and as none of the transactions have been concealed, it is impossible to see any basis for the charge of fraud, unless the plaintiff is able to show that the parties contemplated the loss of further money by the New York corporation and the concealment of assets through the transfers and claims of Mrs. Schratwieser. All stockholders, directors, and officers of the New Jersey corporation consented to the transfer.

It appears from the testimony that the Schratwieser business was supposed to be exceedingly valuable, and depended upon the use of the form of fireproof construction covered by their patents, under the fireproofing regulations of the city of New York. Up to the present time, according to the testimony, these regulations have prevented any profitable business based upon the use of the patents in question, and Mrs.

Schratwieser, as well as all of the other stockholders, would apparently have been better off (unless it be through the receipt of salaries) if the business had been wound up and the real estate had been rented for other purposes than they are at the present time. Two patents for fireproof lath are held by Mrs. Schratwieser as her personal property; but there is no evidence to show fraud on her part in claiming these as distinguished from the other patents which belonged to the New Jersey corporation. The right to use a patent can be granted by any formal assignment in writing; and the New York corporation evidently obtained all rights, as against any of the parties to this action, to the patents for which stock was issued. Section 4898, R. S. (U. S. Comp. St. 1901, p. 3387). The bankruptcy proceedings have prevented Mrs. Schratwieser from realizing more upon her claims than she would have had if the New Jersey corporation had gone out of business and paid its debts. It is difficult, therefore, to see how the charge of fraud can be made out.

The plaintiff bases a second cause of action upon the provisions of the Stock Corporation Law of New York, section 54, which provides:

"Every holder of capital stock not fully paid, in any stock corporation, shall be personally liable to its creditors, to an amount equal to the amount unpaid on the stock held by him for debts of the corporation contracted while such stock was held by him" (now Stock Corporation Law 1909 [Consol. Laws, c. 59] § 56)

—and charges that the assets shown by the testimony, consisting of old machinery, etc., were much less than the par value of the stock which went into the hands of Mrs. Schratwieser (namely, $20,000) over and above the chattel mortgage. The patents, according to plaintiff's contention, were of no value at all, having been sold in bankruptcy for $50; and it is urged that no substantial value was given in exchange for the stock of the New York company, if the debts of the New Jersey corporation were deducted from its assets. The plaintiff, therefore, contends that the stock of the New York corporation was issued in pursuance of a plan to secure Mrs. Schratwieser for her claims, and to obtain the stock of the new corporation without consideration. It claims, therefore, that the plan was to secure something for nothing, and that therefore the total par value of the stock can be recovered in this action for the benefit of the creditors who may join with the plaintiff in its prayer for relief. This involves the same proposition of deliberate intent to defraud those who dealt with the New York corporation on the assumption that a clear $20,000 over and above debts had been invested at the time of organization. The statutory liability can arise only upon such findings of fact as would substantiate the other charges of fraud if assets and security for debts were obtained by Mrs. Schratwieser for no consideration in return. The evidence does not indicate any fraudulent scheme, nor does it indicate that Mrs. Schratwieser and her sons obtained stock in the new corporation for merely nominal assets, unless we assume that the assets were known to them to be worthless, but were nevertheless of great value to themselves. The proposition is self-contradictory. The capital stock of the original corporation was $250,000; and the change to an incor-

poration under the laws of the state of New York, with a much smaller amount of stock, when considered with the hopeful opinion of the value of the patents which the Schratwieser family had received from their father, indicate that the parties expected to make money rather than to lose it, and could hardly contemplate fraud against those with whom they should deal in the future.

The only matters from which an inference of fraud can be urged in the transactions would seem to be involved in the charge that the New York corporation was organized with fictitious assets, for the purpose of making away with the proceeds of the future transactions. Inasmuch as Mrs. Schratwieser continued to pay the expenses of these transactions and to advance money, and has been losing more money than any other person from the outset, it is impossible to draw such an inference from the evidence. The patent rights were worth at the time of their sale by the New York corporation such price as could be obtained for them. If those organizing the New York corporation honestly fixed their valuation, then the unfortunate result that the patent rights became valueless, or that they suffered a gradual diminution until they were sold for a nominal price, would not prove that the action of the directors was incorrect. Good faith on the part of the directors is now recognized by the present form of the statute, which provides as follows:

"No corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purposes of such corporation. Any corporation may purchase any property authorized by its certificate of incorporation, or necessary for the use and lawful purposes of such corporation, and may issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be full paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this chapter; and in the absence of fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive; and in all statements and reports of the corporation, by law required to be published or filed, this stock shall not be stated or reported as being issued for cash paid to the corporation, but shall be reported as issued for property purchased" (Stock Corporation Law 1901, c. 354, § 42; now Consol. Laws 1909, c. 59, § 55),

instead of requiring, as formerly, that:

"No corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purposes of such corporation. No such stock shall be issued for less than its par value." Stock Corporation Law, chap. 688, Laws of 1892, art. 3, § 42.

The misfortunes of the business and the lack of experience of the parties conducting it would seem to explain the bankruptcy in every way; and, under the circumstances, it seems strange that Mrs. Schratwieser was taken care of, even to the extent of preventing loss from any of the debts which were owed her by the New Jersey corporation. The creditors of that corporation might have made some objection to her receiving this security; but, as they have been paid, as her security was in no way a preference, and as the chattel mortgage was properly filed from year to year, the creditors of the New York corporation have not been deceived, and the bill should be dismissed.

HARTMAN et al. v. SWIGER et al.

(District Court, N. D. West Virginia. July 8, 1914.)

1. CONTRIBUTION (§ 1*) — RIGHTS OF STOCKHOLDERS AS TO CORPORATION — FEES OF ATTORNEYS EMPLOYED BY STOCKHOLDER.

The relation between a stockholder or bondholder of a corporation and attorneys employed by him to look after his interests in the conduct or winding up of the affairs of the corporation is purely personal, and it is only under peculiar conditions that he can call on his fellow stockholders or bondholders to contribute to the payment of such attorneys.

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

2. ATTORNEY AND CLIENT (§ 184*)—BANKRUPTCY (§ 191*)—ATTORNEYS' LIEN —PROTECTION AGAINST ASSIGNMENT BY CLIENT.

A stockholder in a corporation employed defendants as attorneys to represent him in protracted litigation relating to the affairs and winding up of such corporation and its predecessor of which he was also a stockholder. On the sale of the property of the second corporation, money distributable to the stockholders came into the hands of defendants, but prior to that time, without the knowledge of defendants their client had assigned his stock, in part to his mother and wife, and had been adjudged bankrupt. *Held*, that defendants had a lien on the money in their hands distributable to such stock for the reasonable value of their services, and those of associate counsel employed by them, which was good against the trustee in bankruptcy, and also under the law of West Virginia against the assignees of the stock.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 388; Dec. Dig. § 184;* Bankruptcy, Cent. Dig. §§ 286, 287, 290, 351; Dec. Dig. § 191.*]

3. BANKRUPTCY (§ 191*)—PREFERENCES—ATTORNEYS' LIEN.

The bankruptcy proceedings against the stockholder were instituted in another state after those for dissolution of the corporation, but the trustee took no steps in the jurisdiction where the corporation was located and the dissolution proceedings were pending to secure or claim the fund which might be distributable to the bankrupt thereon, but sold the stock as an asset of the estate. *Held*, that defendants, who were not notified of the bankruptcy proceedings, were under no duty to prove their claim therein, but were entitled to rely on their lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286, 287, 290, 351; Dec. Dig. § 191.*]

In Equity. Suit by Mary Hartman, Anna C. Hartman, and D. C. Clark against Arlen G. Swiger and J. H. McCoy. On final hearing. Decree for complainants in part.

Plaintiffs have filed their bill herein, alleging themselves to be the owners of 350 shares of the capital stock of the Ohio Valley Brewing Company, standing on the books of the company in the name of Geo. W. Hartman, 100 shares of which were assigned by Geo. W. Hartman to plaintiff Mary Hartman as security for the payment of $600, with interest from July 11, 1910, 100 shares assigned by him to plaintiff Anna C. Hartman August 21, 1910, and the remaining 150 shares assigned by Gilbert F. Meyer, trustee in bankruptcy for George W. Hartman to plaintiff Clark. It is then charged that Geo. W. Hartman has been adjudged a bankrupt and that in 1912 defendant Arlen G. Swiger was appointed a special commissioner by the circuit court of Tyler county, this state, to make sale of the property of the Ohio Valley Brewing Company, and as such commissioner did sell the same and applied a part of the proceeds to the indebtedness of the company, leaving a balance of $15,000

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

to be distributed to its stockholders; that he has not accounted for the purchase proceeds of $21,000 received by him, but has appropriated large sums therefrom to his own use and to the use of his codefendant McCoy; that the directors of this company by resolutions adopted February 20, 1912, directed said special commissioner, Swiger, to pay over to its attorneys McCoy and Swiger any balance of the proceeds of its property after payment of taxes, liens, and charges, and, further, that McCoy and Swiger, attorneys, should pay out such balance to its stockholders pro rata upon their stock holdings. It is then charged that said McCoy and Swiger, attorneys and defendants herein, have paid to all stockholders other than plaintiffs a portion of such funds but while they have made demand from said commissioner and said attorneys and defendants for their pro rata share of such proceeds, accompanying their demand with full proof of their stock holdings, the said defendants, as special commissioners and attorneys, have refused to account for and pay over to them the pro rata shares of such proceeds, due them under direction of the company's board of directors, but on the contrary, have appropriated the same to their personal use. An accounting is demanded and a decree asked upon same for the pro rata sums due them upon their stock holdings.

To this bill the two defendants have filed joint original and amended answers, in which they admit diversity of citizenship, that the books of the Ohio Valley Brewing Company show 350 shares of its stock outstanding in the name of Geo. W. Hartman, never transferred to any one else, evidenced by stock certificates Nos. 11, 12, 13, and 14, but denying any knowledge of the assignments thereof to plaintiffs as set forth in the bill. They charge that Mary Hartman and Anna C. Hartman, plaintiffs, are, respectively, the mother and wife of Geo. W. Hartman, but which one is the mother and which the wife, they are unable to say. They admit the adjudication in bankruptcy of George W. Hartman; that on November 8, 1912, defendant Arlen G. Swiger was appointed special commissioner to sell, and, as such, afterward did sell, this brewing company's property for $21,000, as charged, but say the balance of proceeds remaining for stockholders after payment of taxes, liens, and charges was not $15,000, but $10,060.16. They admit that Arlen G. Swiger as such commissioner has refused to account to plaintiffs, but charge that they have given a full account to Geo. W. Hartman of the matter and the condition of the fund, and they deny that a dollar of such fund has been appropriated to his use or that of his codefendant McCoy. They admit the directions of the company's directors as set forth in their resolutions that they have paid in full all other stockholders their pro rata shares of the balance of proceeds, except to Geo. W. Hartman or plaintiffs, and that plaintiffs, by counsel, have made demand upon them for such payment. They allege that they gave such attorney a full exhibit of the condition of the funds in their hands, but refused to pay over to him the money demanded on behalf of plaintiffs by him, but informed him they would pay over to him the money due upon the Geo. W. Hartman stock assigned to plaintiffs, less the amount of their just, proper, and appropriate counsel fees, which Geo. W. Hartman owed them. They allege the sum of $4,047.19 to be in their hands out of which they retained and paid to themselves and to Thomas P. Jacobs, associate counsel with them, the sum of $1,500, of which sum each was paid $500, as of April 13, 1912, as a portion of the fees due them and said Jacobs for attending to numerous pieces of litigation conducted for Geo. W. Hartman, who had never paid them theretofore anything for such services. And then, in careful detail, they set forth that since 1908 they and said Jacobs had been employed by Geo. W. Hartman as attorneys to advise him touching his interests in much and varied litigation in the state court, this court, the Circuit Court of Appeals for this Fourth Circuit, and the Supreme Court of the United States, for which they are entitled to receive in all the sum of $2,000, of which they have paid themselves the $1,500 above set forth, leaving $500 still due them. This litigation involved the organization of the Sistersville Brewing Company by Hartman and Bollinger Bros., the settlement of its affairs and claims to its property, its sale and purchase by Hartman and others, the organization of the Ohio Valley Brewing Company in the nature of a successor to the Sis-

tersville one, the conduct of its affairs, and its ultimate sale under judicial proceedings. They allege that all these services were rendered by them under direct employment with Geo. W. Hartman, who never transferred his 350 shares of stock in the Ohio Brewing Company, and of the bankruptcy proceeding against whom, in the Western District of Pennsylvania, they had no notice of, either actual or constructive, until some time in May, 1913, when a notice of sale to be made by Gilbert F. Meyer, trustee in bankruptcy, of the estate of George W. Hartman, was mailed to the Sistersville Brewing Company, about May 19, 1913, the date of said trustees' sale, after Hartman had been adjudicated bankrupt and after the time when creditors could have presented and proved any claims they had against him. They charge that neither they nor Jacobs were made parties to said bankruptcy proceeding in any manner; that George W. Hartman, knowing that he owed them and Jacobs for the services set forth, did not schedule in such bankruptcy proceedings the indebtedness on his part to them therefor; that his assignments of stock to his mother and wife were fraudulently made to defeat creditors; that bidders at the trustees' sale were not informed of the fund of $4,047.19 arising from the sale of the company's property in the hands of defendants, but this fact was concealed and sale was made in consequence of this stock and of other property rights and interests of said Geo. W. Hartman for the small sum of $600. It is thereupon charged that said defendants and Jacobs have an attorney's lien upon this fund for their services, that the amount claimed, $2,000, is reasonable, and that the trustee in bankruptcy took such stock subject to such lien and the obligation of such lien upon the fund arising from the sale of the company's property, and that the purchaser under his sale did likewise.

To these answers the plaintiffs have filed a reply denying in effect the employment of defendants and Jacobs by Hartman, charging the services rendered by them to have been at the instance and costs of the respective brewing companies and the bondholders thereof, and denying the alleged value of the services. Motion to strike out portions of the answer was entered and reserved until this final hearing.

Charles T. Moore, of Pittsburgh, Pa., and Hubbard & Hubbard, of Wheeling, W. Va., for plaintiffs.

Thomas P. Jacobs, of New Martinsville, W. Va., and John P. Arbenz, of Wheeling, W. Va., for defendants.

DAYTON, District Judge (after stating the facts as above). [1] It is very apparent from pleadings and evidence in this cause that defendants are asserting in good faith a lien for legal services running over a number of years. At the threshold I may state that careful consideration of the facts, as disclosed by the evidence, convinces me that George W. Hartman employed these attorneys personally to protect his interests as a bondholder and stockholder of these two brewing companies, that they rendered such services and incurred such expenses in attending to his interests as to entirely warrant them in charging and receiving the sums claimed by them, and that the position taken by plaintiffs' counsel to the effect that the companies and the bondholders interested should alone be held liable for payment does not impress me as sound. Any stockholder or bondholder of a corporation may well employ attorneys to defend his interests in the conduct and winding up of its affairs, and it by no means follows that in such case, the attorneys must seek remuneration alone from the corporation assets. The relation is a purely personal one between the attorney and his client, the stockholder or bondholder, and it is only under peculiar conditions that such person, employing the attorney, can call for contribution in

payment of legal services from his fellow stock or bond holders. Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157; Central Railroad v. Pettus, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915; Harrison v. Perea, 168 U. S. 311, 18 Sup. Ct. 129, 42 L. Ed. 478.

[2] The next question to be considered is whether these attorneys had a lien upon the funds involved herein. The law governing attorney's liens, classifying them into possessory and charging ones, is too well settled to warrant further discussion, and it must be admitted that:

"If the relationship of attorney and client exists, the possessory lien will cover in general property of any sort belonging to the client and held by the attorney." 4 Cyc. 1005.

It also extends to the fees of associated counsel employed by the attorney or, rather:

"If the attorney collects the judgment, he may deduct, not only his own fee, but he is protected in the payment of like reasonable fees to other attorneys or counsel employed in the suit." Jones on Liens, § 144.

In the leading case in this state of Renick v. Ludington, 16 W. Va. 378, it is said:

"(1) An attorney has a lien, on the judgment * * * obtained by him for his client, for services and disbursements in the case, whether the amount of his compensation is agreed upon or depends upon a quantum meruit.

"(2) This lien includes not only the amount necessary to pay for his services and disbursements in the case, in which the judgment or decree is rendered, but also the amount necessary to pay for his services and disbursements in any other case, so connected with it as to form the basis on which such judgment or decree is rendered, or essential to the realizing of such judgment or decree. * * *

"(4) * * * Notice of the existence of such lien to the assignee of such judgment or decree is not essential to the maintenance of such lien against such assignee without notice."

Under these well-settled principles it is beyond doubt that these attorneys would be entitled to the lien claimed by them as attorneys of record in this running and related litigation, involving Hartman's interest in these two companies, as against Hartman, if he had not assigned his stock, or part of it, to his mother and wife, or if he had not been adjudged bankrupt and his interest had not vested thereby in his trustee. Do these or either of these conditions affect or destroy the lien? We have already seen that assignment, pending the litigation, even where no notice is given the assignee of the lien, neither affects nor defeats it. Renick v. Ludington, supra. If this were not so as a general principle, it seems to me that where, as in this case, one assigns his interests to near relatives, such as mother and wife, and continues to call upon the attorneys originally employed by him to prosecute and protect such interests, to perform such additional services, the law would presume him as doing so with knowledge and consent of such related assignees, in short, as their agent.

So far as the assignment by law to the bankrupt trustee is concerned, it is too well-settled to admit of controversy that such trustee takes only such title as the bankrupt has, subject to all liens and equities existing upon or against the property. Zartman v. Bank, 216 U. S. 134, 30 Sup. Ct. 368, 54 L. Ed. 418.

[3] This brings us finally to the question of the effect of the bankruptcy proceeding upon this lien and the failure of the defendants to assert it therein. It is to be borne in mind that this bankruptcy proceeding was instituted in the District Court for the Western District of Pennsylvania, and not in this Northern District of West Virginia, where these companies were located, their property situated, and the fund arising from the sale of it must and did necessarily arise and have its existence, and, further, that no attempt whatever was made in this proceeding by the trustee therein to secure and reduce into possession this fund. He did not even intervene in the state court proceeding, instituted prior to the bankruptcy one, and seek to have it decreed to him. Prior to the amendment of June 25, 1910 (chapter 412, 36 Stat. 838 [U. S. Comp. St. Supp. 1491]) of the Bankruptcy Act, some conflict of cases existed as to the propriety or necessity for the institution of ancillary proceedings in bankruptcy in other districts to secure possession in the trustee appointed by the bankrupt court of original jurisdiction, of property or funds situate in such other districts. I have always believed that propriety and necessity therefor was very apparent when, for instance, bankrupt courts in other states undertook to decree direct, real, and personal property situate in this state of corporations claimed to have their "principal place of business" or office situate in some one of their large cities, and that the power to entertain such ancillary proceedings was inherent in bankrupt courts as courts of equity. But it is no longer an open question. This amendment of 1910 expressly authorizes courts of bankruptcy to exercise ancillary jurisdiction over persons or property within their respective territorial limits, in aid of the receiver or trustee appointed in any bankruptcy proceeding pending in any other court of bankruptcy. This amendment effectively disposes of any conflict which may have arisen in respect to the exercise of ancillary jurisdiction. Collier on Bankruptcy (10th Ed.) § 23b, par. 4i, pp. 498, 499. Hartman's bankruptcy proceeding was instituted after this amendment. It was the plain duty of his trustee, if he desired to claim this fund, to institute such ancillary proceeding for the purpose, and give all persons interested due and proper notice of his claim, and to have this claim of lien on the part of these attorneys adjudicated here under the laws of this state, as it was entitled to be. He did not do this, but chose to sell, in another state, Hartman's certificates of stock for what he could get, possibly for less than half what he would have secured had he instituted such ancillary proceeding, and let the purchaser get what he could as his assignee. This purchaser cannot have one particle better right than he had, and no court here, in my judgment, under the law of this state, would have authorized the surrender of this fund to him until this attorney's lien had been paid thereout.

It follows that the defendants are entitled to retain out of this fund the $2,000 for fees as claimed by them, and to surrender to plaintiffs only the balance, and decree may be entered to that effect.

NORTHERN TRUST CO. v. McCOACH.

(District Court, E. D. Pennsylvania. July 14, 1914.)

No. 2922.

INTERNAL REVENUE (§ 9*)—CORPORATION TAX ACT—EXEMPTIONS—STATE TAX.

Act Pennsylvania June 13, 1907 (P. L. 640), entitled "An act to provide revenue by levying a tax upon the shares of stock of certain classes of corporations," requires such corporations to report to the auditor general the number of shares into which their stock is divided and the actual value thereof, ascertained in the manner prescribed by the act, and provides that on such report or return the auditor general shall assess the shares for taxation at a specified rate based on the actual value, to be determined by ascertaining the aggregate sum of payments on the stock, the surplus, and undivided profits and dividing such sum by a figure representing the total number of shares. It is thereupon made the duty of the executive officers of the corporations to post the tax settlement in the corporation's place of business, and within a specified time, at its option, either to pay the total amount of the tax out of its general funds or collect the same from its stockholders and pay the amount into the state treasury. The act further declares that if the corporation's officers fail to comply with the act, they shall be adjudged in default, and as a penalty the corporation shall be responsible to the state for the tax assessed against the stockholders. *Held*, that the tax so assessed was a tax against the property of the individual stockholders, and not against either the corporation or its property, and hence was not such a tax as to be deducted from the corporation's return to the United States under Corporation Tax Act (Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 [U. S. Comp. St. Supp. 1911, p. 946]), providing for a tax on the net income of corporations, and authorizing the deduction of all sums paid by a corporation within the year for taxes imposed under the authority of the United States or any state.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. § 9.*]

Action by the Northern Trust Company against William McCoach, late Collector of Internal Revenue for the First District of Pennsylvania. Judgment for defendant.

James Wilson Bayard and John G. Johnson, both of Philadelphia, Pa., for plaintiff.

Edwin S. Kremp, Asst. U. S. Atty., of Reading, Pa., and Francis Fisher Kane, U. S. Atty., of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The plaintiff in this case made its return of its net income to the collector of internal revenue for the First district of Pennsylvania for taxation under the act of Congress of August 5, 1909. It stated the amount of its net income to be a certain sum after deducting the amount of a payment which it had made into the treasury of the state of Pennsylvania for what it claimed to have been taxes imposed upon the plaintiff by that state. The collector denied the correctness of the return in this respect and demanded and enforced by the disallowance of the deduction the payment of the excise tax upon this amount. The plaintiff, after payment of this sum, in turn demanded its repayment of the collector, and upon his refusal has

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

brought this action to recover the moneys so paid in accordance with the procedure acts provided for such cases.

This raises the sole question of the propriety of the deduction made by the plaintiff in its original return. The question is brought before the court on a rule for judgment for want of a sufficient affidavit of defense, and must, of course, be determined on the facts as set forth in the affidavit.

An outline statement of these facts is as follows: On July 15, 1897, an act of the General Assembly of the state of Pennsylvania was approved by the Governor and became a law of that state. This was the general revenue act for that and succeeding years, and was passed "to provide revenue by taxation." P. L. 1897, p. 292. All banks and savings institutions were brought within its provisions. This act of Assembly was followed by another act approved June 13, 1907 (P. L. 1907, p. 640). This is entitled "An act to provide revenue by levying a tax upon the shares of stock of" the classes of corporations referred to therein. The plaintiff is of one of the designated classes. These acts are similar in their provisions. The pertinent features are that the corporations, at a designated time in each year shall make a report to the auditor general of the state, setting forth the number of shares into which their capital stock is divided, and the actual value thereof as ascertained in the manner provided in the act, and that, upon such report or return being made, the auditor general shall assess the shares for taxation at a certain rate, based upon the actual value of the stock to be determined by ascertaining the aggregate sum of payments on the capital stock, the surplus, and undivided profits, and dividing this amount by a figure representing the total number of shares of stock. The auditor general is given the power to correct this return if, in his judgment, it is not correct, and to settle the amount of the tax which he may determine to be due. It is thereupon made the duty of the executive officers of each of the corporations concerned to post this tax settlement in the place of business of the corporation, and within a specified time, at its option, either to pay the total amount of the tax out of its general funds, or to collect the same from its shareholders and pay the amount into the state treasury. It is further provided that if the officers of the corporation fail to comply with the requirements of the act to give notice to its stockholders by posting the settlement above mentioned, such officers shall—

"be adjudged to be in default, and as a penalty for such default, such company shall be responsible to the commonwealth for the amount of the tax assessed against the shareholders of such company."

The act further provides that if the corporation shall either collect each year from its stockholders the state tax and pay it into the state treasury by a certain date, or shall pay the amount out of its general funds, then the amount of the tax shall be determined by the aggregate amount of capital stock, surplus, and undivided profits, less the amount which might be invested in shares of stock in corporations liable to a tax on their capital stock, and that so much of its capital stock, surplus, profits, and deposits as are not invested in real estate shall be exempt from all other taxation under the laws of the state.

The act of Congress (36 Statutes at Large, 112) became a law on August 5, 1909. The pertinent provisions of this act are as follows:

"Sec. 38. First. That every corporation, joint-stock company or association, organized for profit and having a capital stock represented by shares, * * * now or hereafter organized under the laws of the United States or of any state or territory of the United States * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, * * * equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year. * * *

"Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, * * * received within the year from all sources, * * * (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any state or territory thereof, or imposed by the government of any foreign country as a condition to carrying on business therein."

There should also be included in this outline statement of the general facts the further fact that the question arising in this case under the Pennsylvania statute has arisen under the statutes of two of the other states of the Union. These statutes are respectively similar in their provisions to the Pennsylvania statute. One was a statute of the state of Massachusetts, and the other was a statute of the state of Missouri. The one ruling is reported as the case of Eliot National Bank v. Gill (D. C.) 210 Fed. 933, and the other as the case of National Bank of Commerce of St. Louis v. Allen (D. C.) 211 Fed. 743.

It is to be observed, as was incidentally stated in the opinion in the Baldwin Locomotive Works Case, 215 Fed. 967, which was argued with the present case, that the act of Congress prescribes that the net income thereby taxed shall be ascertained by deducting from the gross income certain specified allowances, including, among others—

"all sums paid by it [the corporation whose net income is to be taxed] within the year for taxes imposed under the authority of the United States or of any state."

The criterion or test, or at least one criterion or test, is payment by the corporation, and the payment must have been for a "tax imposed." The other tests that the payment must have been made within the year, and that the payment must have been one which was required by and under the authority of the state of Pennsylvania, are not in question. Inquiry is thereby narrowed to the question of whether the payment was for "taxes imposed" upon the corporation, or for something else or something different. The acts of assembly referred to are entitled, one of them, "An act to provide revenues by taxation," and the other, "An act to provide revenue by levying a tax," etc. On their face, therefore, the main purpose of these acts was clearly to "impose a tax." The inquiry is thereby further narrowed to whether the tax was imposed upon the corporation. The distinction between the levy of a tax upon the property of a corporation and the levy of a tax upon the property of its stockholders existing in the form of shares of stock in the same corporation is an obvious one. The point is made by the plaintiff that the revenues sought to be derived by the state from the imposition of the tax would probably have been secured by the simple and direct method of taxing the property of the corporation ex-

cept for an obstacle in the way of a direct collection of the tax from a certain class of corporations from which, however, it is transparently evident it was the intention to enforce the collection. The class of corporations referred to is that of national banking associations. The state of Pennsylvania is without power to levy a tax upon the capital of national banks. It has, however, the power to levy a tax upon the property of its own citizens, and can do so notwithstanding that this property may exist in the form of shares of stock in national banks. Viewed in the light of political and legal principles, the difference, as well as the distinction, between the property of the corporation and the property of the stockholder is clear and welldefined. Viewed in the light of economic principles, these two things blend into one, because it is clear that in any event the tax comes out of the pockets of the stockholder. Because of this economic fact, had all the corporations proposed to be taxed been subject to the taxing power of the state, the simple and direct method referred to of taxing the corporation itself would doubtless have been adopted, but as some of them, for the reasons stated, could not be taxed by the state, a method was adopted of offering a practical inducement to all of the corporations to voluntarily pay the tax imposed. This result was sought to be accomplished in one of three ways: The first was to give the option of payment to the corporation. The second was to make of the corporation a collecting agent for the state by paying the tax and then collecting the amount from the shareholders. The third was to impose upon the officers of the corporation the performance of a duty which it was anticipated would not be performed, and then impose the payment of the tax upon the corporation as a penalty for the default of its officers in the performance of the imposed duty. The practical result in any one of the three methods by which the state might secure the revenue to itself is as to the stockholders precisely the same, and, it may be added, that so far as affects the corporation, its stockholders, or the state, a like result is reached whether the tax is imposed upon the property of the corporation or the individual property of its stockholders. The strength of the position of the plaintiff lies in this: Conceding the tax to have been formally and literally imposed upon the property of the stockholders, the payment was made out of the general funds of the corporation, and the option given to the corporation to so pay makes the statute impose the tax conditionally upon the corporation itself, and when the condition is performed by the exercise of the option, the imposition of the tax upon the corporation becomes absolute. This, however, is strictly an option of payment not of obligation.

In this view it is further, of course, assumed that the manner of exercising the option, whether by a direct payment of the tax, or by submitting to the penalty for the mere purpose of payment, in no way affects the state or the result accomplished. There is, however, another and controlling consideration. The very question here involved has been considered and answered. This brings us within the principle that tax laws should be given the same construction by all courts throughout the territorial limits within which the tax is levied. We feel, therefore, constrained to apply this principle and to hold that the

tax imposed by the state of Pennsylvania by the acts of assembly referred to is a tax imposed upon the property of the individual stockholders, and not upon either the corporation or its property, and because of this the amount of payment is not to be deducted from the gross income of the corporation in determining the taxable net income. This is based upon the rulings in the cases above cited.

The rule for judgment is therefore discharged.

PENNSYLVANIA CO. FOR INSURANCES ON LIVES AND GRANTING ANNUITIES v. McCOACH.

(District Court, E. D. Pennsylvania. July 14, 1914.)

No. 2418.

Action by the Pennsylvania Company for Insurances on Lives and Granting Annuities against William McCoach, late Collector of Internal Revenue for the First District of Pennsylvania. On rule for judgment for want of sufficient affidavit of defense. Judgment for defendant.

James Wilson Bayard and John G. Johnson, both of Philadelphia, Pa., for plaintiff.

Edwin S. Kremp, Asst. U. S. Atty., of Reading, Pa., and Francis Fisher Kane, U. S. Atty., of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This case was argued with the case of Northern Trust Co. v. Same Defendant, 215 Fed. 991, along with several other cases, all involving the same question.

For the reasons stated in the opinion filed in the Northern Trust Company Case, the rule for judgment in the above case is discharged.

PHILADELPHIA TRUST, SAFE DEPOSIT & INS. CO. v. McCOACH.

(District Court, E. D. Pennsylvania. July 14, 1914.)

No. 2436.

Action by the Philadelphia Trust, Safe Deposit & Insurance Company against William McCoach, late Collector of Internal Revenue for the First District of Pennsylvania. On rule for judgment for want of sufficient affidavit of defense. Judgment for defendant.

James Wilson Bayard and John G. Johnson, both of Philadelphia, Pa., for plaintiff.

Edwin S. Kremp, Asst. U. S. Atty., of Reading, Pa., and Francis Fisher Kane, U. S. Atty., of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This case was argued with the case of Northern Trust Co. v. Same Defendant, 215 Fed. 991, along with several other cases, all involving the same question.

For the reasons stated in the opinion filed in the Northern Trust Company Case, the rule for judgment in the above case is discharged.

FIDELITY TRUST CO. v. McCOACH.

(District Court, E. D. Pennsylvania. July 14, 1914.)

No. 2444.

Action by the Fidelity Trust Company against William McCoach, late Collector of Internal Revenue for the First District of Pennsylvania. On rule for judgment for want of a sufficient affidavit of defense. Judgment for defendant.

James Wilson Bayard and John G. Johnson, both of Philadelphia, Pa., for plaintiff.

Edwin S. Kremp, Asst. U. S. Atty., of Reading, Pa., and Francis Fisher Kane, U. S. Atty., of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This case was argued with the case of Northern Trust Co. v. Same Defendant, 215 Fed. 991, along with several other cases, all involving the same question.

For the reasons stated in the opinion filed in the Northern Trust Company Case, the rule for judgment in the above case is discharged.

BARNARD REALTY CO. v. NOLAN.

(District Court, D. Montana. July 25, 1914.)

No. 108.

1. MINES AND MINERALS (§ 38*)—PLACER PATENT—LODE LOCATIONS—EVIDENCE.

In a suit to quiet title to plaintiff's placer location, evidence *held* insufficient to warrant a finding that lodes subsequently located, under which defendant claimed, were "known to exist" at the time plaintiff's placer patent was applied for.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½–113; Dec. Dig. § 38.*]

2. ESTOPPEL (§ 22*)—GROUNDS—PLACER PATENT—DESCRIPTION.

That a placer applicant prior to the application acquired title by deed describing the land as being "where the Original lode crosses said gulch," but the "Original lode" was the name of some 30 200-foot claims asserted along the supposed strike of the lode each way from a discovery 2,100 feet east of the land in controversy, not marked or developed save at discovery, and existing only by virtue of the discovery and in a location notice filed with a miner's recorder, such description was insufficient to estop the placer claimant to deny that there was a known lode within the limits of his placer location at the time he applied for a placer patent.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 27–51; Dec. Dig. § 22.*]

3. MINES AND MINERALS (§ 16*)—PLACER PATENT—"KNOWN LODE."

Float, outcroppings, lodes, and abandoned locations, separately or together, are not sufficient to constitute a "known lode" within the exclusion of the placer mining law, but to be impressed with such character, the lode at the time of the application for placer patent must be clearly ascertained and defined, and of such extent and content that it will then, in view of conditions then existing, justify development and exploitation,

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

and because of which the placer claim is valuable and more valuable than for placer mining.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 21-23; Dec. Dig. § 16.*

For other definitions, see Words and Phrases, vol. 5, pp. 3944, 3945; vol. 8, p. 7700.]

4. MINES AND MINERALS (§ 38*)—PLACER PATENT—INCLUDED LODES—LIMITATIONS.

Since a patent to a placer mining claim does not pass title to a known lode within the limits of the placer claim at the time of the application, limitations will not run against the right of a lode claimant as against those claiming under the placer patent.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.*]

5. MINES AND MINERALS (§ 38*)—PLACER LOCATIONS—QUIETING TITLE—RES JUDICATA.

A judgment for plaintiff, in a suit to quiet title to a placer location as against conflicting lode claims, is not res judicata as against the United States and persons not parties, who may relocate and relitigate the question whether they were "known lodes" at the time of the placer application for patent.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½-113; Dec. Dig. § 38.*]

In Equity. Suit by the Barnard Realty Company against Joseph P. Nolan. Decree for complainant.

E. B. Howell, of Butte, Mont., for plaintiff.

William Scallon, of Helena, Mont., and Timothy Nolan and Louis P. Donovan, both of Butte, Mont., for defendant.

BOURQUIN, District Judge. Suit to quiet title, a quartz-placer controversy. Plaintiff's placer patent was applied for on October 1, 1873, and upon the land conveyed by the patent defendant's six lode locations were made in October, 1912. Were these lodes or any of them known to exist on the date first mentioned? The burden is on defendant to establish the affirmative. He has failed and the court finds for plaintiff.

Briefly, from the evidence it appears that the land was a typical gulch placer gold claim, worked in a crude and limited way for several years prior to the application, and more effectively and extensively thereafter. It was in the vicinity of Butte, Mont. When surveyed for patent a careful examination for lodes was made, and one only was found and excluded. Practically all surrounding land was unclaimed public land, and so valueless that the placer applicant, instead of extending his boundaries, contracted them so that he would pay for no land but that having value for placer deposits. At that time the placers that first lured miners to the vicinity were on the wane, and Butte had only about 40 inhabitants. The lode outcroppings attracted some attention as early as 1865, and some lode locations were that early made. Save in a few isolated instances lode locations were made, abandoned, relocated, and again abandoned. Little development was done, the lodes were generally condemned as valueless, and this continued until a revival of interest in lode mining or prospects came in 1874 and 1875. When the

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

patent here involved was applied for Butte was "frontier" in all the term implies. More than 400 miles from a railroad, with scant two score inhabitants, without developed lode mines and ore reduction plants, lacking the advanced knowledge of geology and kindred sciences possessed to-day, Butte's lodes that subsequently made her the greatest mining district in the world, and which from a part thereof or approximately six square miles in less than 40 years have produced more than $1,000,000,000, in gold, silver, copper, and zinc and more than produced by any equal area on earth in all time, were rejected and of no recognized worth.

Of some half score witnesses having some acquaintance with the vicinity and this land at the vital date, all save two testify that upon this land no lodes were known. These two are defendant's only witnesses. One of them testifies, in substance, that about 1865 or 1866 in two trenches excavated upon this land for placer mining, bedrock was reached, and therein ledge matter or two several lode outcrops were exposed; that at another point on or near this land "in the 70's" he saw "indications of a lead" that "indicated simply ledge matter." It may be noted here that whether the aforesaid trench exposures continued a day or a year, the trenches had been filled and the bedrock recovered by débris, due to the gulch stream and the elements, long prior to this application, and the applicant knew naught of them. The other likewise testifies to one visit in 1867 to the neighborhood, and possibly upon this land at one or two points; that he was "convinced" a lode might be traced through the placer "from the broken float along" on the hillside above or on the placer, and where he "kicked down to where we considered was solid quartz." This may have been of one of the trench exposures aforementioned. This latter witness also testifies that on the east side of this placer, and perhaps upon it along the possible strike of a lode called the Original, he saw float "every 50 or 100 feet or such matter," though the "solid ledge did not crop out," and across the land and on the hillside and "in a direct line" he "saw the stains." Leading questions and conclusions not justified by the facts they testify to impair the value of these witnesses' testimony. They, too, made or owned and abandoned lode locations, the former saying the lodes were "no good"; "everybody seemed to condemn them and think they were no good until 1874 or 1875."

[1, 2] But defendant contends that since the placer applicant prior to the application acquired title by a deed describing the land as being "where the original lode crosses said gulch," it must be accepted that this lode existed upon the land and was a "known lode" in that plaintiff cannot deny the landmarks in its claim of title. The Original lode was the name of 30 odd 200-foot claims asserted along the supposed strike of the lode each way from a discovery 2,100 feet east of this land, not marked nor developed save at discovery, and existing only by the discovery and on paper—in a location notice probably filed with the miners' recorder. As asserted, some of these claims crossed this land. These, too, were all abandoned save three or four at or near discovery. The deed is not evidence the lode was known to exist upon this land. Even a lode location upon this land by the placer applicant himself would not be conclusive. Neither deed nor location is even prima facie

evidence of a known lode, and are deprived of all value by evidence of a lode's nonexistence. The lodes located by defendant are claimed to be those testified to by his two witnesses aforesaid. They were in fact discovered in the bedrock when the placer deposits were removed by extensive work long subsequent to the patent application. That excluded from placer patents is not lodes, nor necessarily lode locations existing before but abandoned after the date of the placer patent application, but is *known* lodes.

[3] Float, outcroppings, lodes, and abandoned locations, separately or combined, are not sufficient to constitute a "known lode" within the exclusion of the placer mining law. To be impressed with such character the lode must, at the time of application for the placer patent, be clearly ascertained and defined, and of such extent and content that it will then, in view of conditions then, justify development and exploitation, and because of which the placer claim is valuable and more valuable than for placer mining purposes. Subsequent development, however marvelous the results, is immaterial if the lode be not thus "known" when the application for the placer patent is made. And the reason is lode outcrops exist everywhere in the mining country. Not one in hundreds develops into a profitable mine. Valueless, no reason exists to exclude them from public grants and patents, and such grants made and patents issued without excluding them prima facie lodes of value do not exist. See Iron Silver Case, 143 U. S. 405, 12 Sup. Ct. 543, 36 L. Ed. 201, and cases cited; Migeon v. Ry. Co., 77 Fed. 256, 23 C. C. A. 156.

[4] The proof, seeking to withdraw or exclude from a solemn grant of the government premises prima facie conveyed by it, must be clear and convincing, in quantity and quality that inspires confidence and produces conviction. The proof submitted by defendant near 41 years after the patent was applied for fails to attain this standard. He fails to make out a prima facie case. The land at the time the patent was applied for was valueless in so far as these lodes now claimed by defendant were concerned. None of them was then known to exist, was then a "known lode." Adverting to the contention of plaintiff heretofore made that it should be given the benefit of limitations applicable to suits to vacate patents, with reluctance the court denies it. Regretable as it is for the sanctity of a solemn grant of lands by the United States and for the certainty and definiteness that should attach thereto and for the stability of titles evidenced thereby, the settled course of decision by the Supreme Court of the United States is that patents like unto this, though prima facie conveying all lands within the placer boundaries therein described and for all of which the patentee paid, convey no title, defeasible or otherwise, to lodes known to exist when the patent is applied for; that such lodes, though unidentified and undefined, are excepted and excluded from the patent, title to them remains in the United States, and at any time thereafter they may be, and by strangers to the patent, possessed, located, and patented even as any other lode upon public lands.

[5] In consequence, if after a placer patent has issued the first attempt to so secure lodes within the placer alleged to be "known" lodes fails, if a suit like this determines the lodes were not "known lodes"

when the patent was applied for, the patentee is not thereby confirmed in his title, for the decree is not res judicata in respect to the United States and persons not parties; and such persons can relocate the lodes and relitigate the issue, again and again, ad infinitum. Or suit after suit may succeed and lode after lode be carved out of the patent until the whole is gone and the patentee has but his paper grant, a delusion and a snare, conveying nothing. For if no title to the lode passes by the placer patent, if it wholly remains in the United States, neither laches nor limitation can vest title in the patentee.

The construction so placed upon the placer mining statute seems at variance with that upon analogous statutes, and not due to any marked differences between them. Under all of said analogous statutes it is held that though they prohibit the granting of lodes or mineral lands, yet a patent is, save in cases of fraud, a conclusive determination, made by a special tribunal having jurisdiction to determine, that the land conveyed contains no lodes or mineral lands; that in any case the patent conveys the lands, though mineral or containing lodes, but by defeasible title if secured by fraud; that in all cases the title is valid against all the world save that when secured by fraud the United States by a direct suit may annul the patent and divest title, *provided* suit be brought within six years of the patent's date.

No sound reason appears why this limitation should not here apply, save the decisions aforesaid and this court's duty to follow them. Hence, despite the lapse of near 41 years since application, the necessity to hear witnesses and upon their testimony ascertain what this patent conveyed or did not convey, determined by what the witnesses recollect they saw or could have seen or did or did not see upon the premises involved at the date of application aforesaid. The determination is for plaintiff, decree accordingly, but non constat plaintiff may not be compelled again to try the issue.

WILLIAMS v. POPE et al.

(District Court, W. D. New York. January 15, 1914. On the Merits, July 29, 1914.)

1. COURTS (§ 347*)—FEDERAL COURTS—EQUITY RULES—EXCEPTIONS—SCANDAL—IMPERTINENCE.

   Under Equity Rule 21 (198 Fed. xxiv, 115 C. C. A. xxiv), exceptions to pleadings for scandal or impertinence no longer obtain, but such matter may be stricken by the court.

   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

2. COURTS (§ 347*)—FEDERAL COURTS—EQUITY RULES—BILL OF PARTICULARS.

   Where defendants in a suit in equity believe that they cannot safely proceed to trial without a more complete statement of complainant's alleged grievances, a bill of particulars may be required as provided by Equity Rule 20 (198 Fed. xxiv, 115 C. C. A. xxiv).

   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. § 347.*]

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

3. PILOTS (§ 1*)—EXAMINATION—BOARD OF SUPERVISING INSPECTORS—RULES.

Amended Steamboat-Inspection Rules and Regulations 5, par. 1, provides that, before an original license is issued to any person to act as a master, mate, pilot, or engineer, he shall personally appear before some local board or a supervising inspector for examination; that he shall make application, and when practicable present discharges or letters from the master, or other officer, under whom he served, stating the capacity in which the applicant served, period of service, etc., and when practicable shall also present the written indorsement of the master and engineer of the vessel and of one licensed pilot as to his qualifications, and that no original license shall be issued to any naturalized citizen on less experience than would be required of a citizen of the United States by birth. Paragraph 3 provides that no original pilot's license shall be issued or grade increased except on written examination by a board of local inspectors or a supervising inspector, which examination shall be placed on file in the office of the inspectors issuing the license, and when application is made it shall be the duty of the inspectors to give the applicant the required examination as soon as practicable. *Held*, that such rules are neither void nor illegal.

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

4. PILOTS (§ 5*)—LICENSE—APPLICATION—EXAMINATION.

Where local inspectors of steam vessels, after examination, denied complainant a pilot's license, the affirmance of such decision by the supervising inspector did not show that an appeal from an order declining to issue a license on a subsequent examination would not have been fairly considered, or that because of such prior rejection a subsequent appeal would have been useless.

[Ed. Note.—For other cases, see Pilots, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

5. PILOTS (§ 5*)—APPLICATION FOR LICENSE—DENIAL — EXAMINATION — APPEAL.

Where an application for a pilot's license was denied after examination of the applicant before local inspectors, the applicant's failure to appeal to the supervising inspector, as authorized, was fatal to his right to maintain a bill to restrain such local inspectors from refusing to issue him a license, in the absence of proof of a conspiracy between the local inspectors and the supervising inspector to refuse the applicant a license, notwithstanding his fitness to properly fill the position of pilot.

[Ed. Note.—For other cases, see Pilots, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.*]

In Equity. Bill by Frank R. Williams against Frederick Pope and another, local inspectors of steam vessels at Buffalo, N. Y. Dismissed.

Frank R. Williams, in pro. per.
John Lord O'Brian, U. S. Atty., of Buffalo, N. Y., for defendants.

HAZEL, District Judge. This is on motion by defendants to strike out portions of the bill as impertinent and to dismiss it on the ground that sufficient facts are not stated to constitute a cause of action. The bill is tautological, uncertain, and verbose. It was prepared in propria persona by the complainant, who is without legal training, and contains a number of conclusions of law and redundant irrelevant allegations, but on careful perusal it will be found to charge the defendants, who are inspectors of steam vessels at Buffalo, with conspiracy to prevent the complainant, who claims to be an experienced pilot and a person qualified to serve in that capacity and as master of steam ves-

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

sels, from obtaining the necessary government license to engage in his occupation, and with refusal to complainant of such license by defendants, owing to a conspiracy among themselves and others who are designated as inspectors and supervising inspectors.

[1, 2] The gist of the bill seems to be that the defendants wrongfully assigned rule 5, sections 42 and 46, as a justification for not granting the complainant a license, while the complainant claims that such rules are unreasonable and unauthorized, and contrary to section 4405 of the Revised Statutes (U. S. Comp. St. 1901, p. 3018). The bill also alleges that previous examinations of the complainant as to his capabilities as a pilot were unfairly conducted by the defendants, and his appeals to the supervising inspector, the supervising inspector general, and the board of supervising inspectors disallowed in accordance with a previously formed conspiracy to prevent him from engaging in his calling of pilot on the lakes, rivers, and channels. In view of the objections to the bill perhaps the strictly proper course to pursue would be to require the complainant to amend his bill. But under rule 18 of the New Equity Rules (198 Fed. xxiii, 115 C. C. A. xxiii) technical forms of pleading are abolished, and I have determined that complainant's bill, regardless of deficiencies (see Equity Rule 25 [198 Fed. xxv, 115 C. C. A. xxv]) sets forth complainant's asserted grievances. Under Equity Rule 21 (198 Fed. xxiv, 115 C. C. A. xxiv) exceptions to pleadings for scandal or impertinence no longer obtain. It is true that such matters may be stricken out by the court, but this is not thought necessary at this time. I shall not discuss the particular grounds upon which the defendants rely to establish the claim of failure to state a cause of action, nor shall I dwell upon whether or not the defendants were acting within their legal right of judgment and discretion as local inspectors of steam vessels, representing an executive department of the government. If, however, they still believe that they cannot safely proceed to trial without a more complete statement of complainant's alleged grievances, a bill of particulars may be required as provided by rule 20 (198 Fed. xxiv, 115 C. C. A. xxiv) of the New Equity Rules.

The motion to strike out parts of the bill and to dismiss it is denied.

Frank R. Williams, in pro. per.
Donald Bain, for the United States.

On the Merits.

HAZEL, District Judge. This action was brought against the local inspectors of steam vessels at Buffalo by the complainant who is aggrieved at their action, in October, 1913, in refusing his application for a first-class pilot's license. The bill charges that the rules and regulations prescribed by the board of supervising inspectors are illegal; that the defendants conspired to deprive the complainant of a first-class pilot's license, although his skill and qualification for the same were well known to them; that he successfully passed the examination required by the Revised Statutes of the United States and by the rules and regulations prescribed by the board of supervising inspectors, but that the defendants fraudulently made erroneous reports as to his examination; and that although complainant was competent and qualified to perform the duties of first-class pilot on Niagara river and Lake Erie between Buffalo and Cleveland. the inspectors discriminated against

him by refusing him a license and depriving him of the rights, privileges, and benefits which such license would secure to him. Objection to the sufficiency of the bill was made by defendants which objection, however, was overruled in an opinion heretofore filed, on the grounds stated therein. Issue was thereupon joined, and the United States attorney, representing the defendants, raised at the beginning of the trial the point of failure on the part of complainant to avail himself of his remedy at law under section 4452 of the Revised Statutes (U. S. Comp. St. 1901, p. 3040), namely, an appeal to the supervising inspector of the district wherein he was refused a license by the local inspectors. The complainant, however, contended that he would produce evidence to show that the supervising inspector had prejudged his right to a pilot's license, and that an appeal to him would therefore have been idle and supererogatory. Testimony was thereupon taken in substantiation of the averments of the bill and in refutation thereof.

[3] I do not deem it necessary to decide the many propositions of fact and law propounded in the brief submitted by complainant. I am of the opinion that rule 5, paragraphs 1 and 3, of the general rules and regulations prescribed by the board of supervising inspectors, relating to the examination of applicants for license, is not void or illegal. We are not here concerned with sections 42 and 46 of rule 5 held invalid by the Circuit Court of Appeals in Williams v. Molther, 198 Fed. 460, 117 C. C. A. 220.

[4] It has not been proven herein that redress would have been denied complainant if he had complied with the statute relating to appeals to the supervising inspector within the prescribed period, or that he would have been unjustly treated or discriminated against. On the contrary, the evidence shows that the supervising inspector pursued the unusual course of offering to re-examine complainant's case after the expiration of the time for taking an appeal from the decision of the local inspectors, and that complainant declined such offer, contending that a fair re-examination or rating would not be given his examination papers and in fact that a conspiracy existed to deprive him of the desired license. The affirmance of the decision of the local inspector of Oswego, refusing complainant's previous application for a license, does not prove that an appeal, taken on the examination herein concerned, would not have been fairly considered, or that because of such rejection a subsequent appeal would have been useless. Indeed the complainant substantially stated at the trial that he was willing to rest this point upon the answer of Supervising Inspector Nelson to a question which he desired to put to him, namely, whether the license would have been granted if an appeal had been taken, to which the answer in effect was that Nelson could not state what his determination as supervising inspector would have been without first closely examining the papers under discussion. This answer would seem to sufficiently indicate that complainant was not prejudged by the supervising inspector as to his fitness for a pilot's license.

[5] In my opinion, complainant's failure to take an appeal from the determination of the local inspectors is fatal to his cause of action, unless he can show that there was a conspiracy among the defendants and the supervising inspector to refuse him a pilot's license notwithstanding

his fitness to properly fill the position of pilot. But the existence of a conspiracy to injure the complainant or to wrongfully deprive him of a license, though averred in the bill, is not shown, nor is there any evidence whatever of bad faith or ulterior motive on the part of the local inspectors in the discharge of their official duties in denying him a license. The inspectors apparently acted in perfect good faith throughout his examination, conscientiously determining his percentage. If there were a few errors in marking the papers, as conceded by Capt. Pope on cross-examination, though not by Capt. Todd, who did the marking, the supervising inspector on appeal would doubtless have remedied such defects and have given the applicant the benefit of the corrections.

It is, however, unnecessary, I think, for me to pass upon the merits or demerits of the examination, inasmuch as the question of complainant's qualification for a license is by law authorized to be passed upon in the first instance by the board of local inspectors, with the right of appeal to the supervising inspector in case of dissatisfaction. As the complainant did not choose to avail himself of this right and as the existence of a conspiracy is not shown, the bill is without equity, and must therefore be dismissed.

GIMBEL BROS., Inc. v. BARRETT.

(District Court, E. D. Pennsylvania. August 10, 1914.)

No. 3140.

COMMERCE (§ 89*)—TRANSPORTATION OF FREIGHT—OVERCHARGE—RECOVERY—JURISDICTION.

Where a suit against a carrier for overcharges in violation of the Interstate Commerce Acts involved only a construction of the carrier's published rate and its application to the shipments in question, the district court had jurisdiction to determine the controversy without an application having been first made to the Interstate Commerce Commission.

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

Action by Gimbel Bros., Incorporated, against William M. Barrett, as president of the Adams Express Company. On motion to dismiss for want of jurisdiction. Denied.

Morton Z. Paul and Wm. A. Glasgow, Jr., both of Philadelphia, Pa., for plaintiff.

John L. Evans and Thomas De Witt Cuyler, both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The action in this case is brought under the Interstate Commerce Acts. The motion to dismiss is based upon the proposition that the court is without jurisdiction to entertain the action until the proper rates of charge, which are alleged to have been exceeded, have been first interpreted by the Interstate Commerce Commission. The acts of Congress, after setting forth the requirements of the law and imposing a liability upon carriers who are guilty of the acts declared to be unlawful, provide that any person claiming to be damaged may make complaint to the Commission or bring suit for damages. The impression first received upon the reading of the act

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

is that the tribunal, whose powers may be invoked to redress the injury, is optional with the complainant. This impression is deepened by the further provision that both remedies cannot be pursued, but that the claimant "must elect" which of the two methods of procedure he will adopt, and is further deepened by those provisions of the act which indicate the purpose of Congress to give the remedies allowed in addition to those which pertain at common law. A fuller consideration of the acts, however, soon discloses that certain of their remedial features are made subordinate to the administrative powers conferred, and the remedies afforded do not become effective or cannot be applied except through or until after the exercise of these administrative powers, which are conferred not upon the courts but upon the Commission. This makes necessary that in such cases the appeal of the person injured be made, or at least be first made, to the Commission. This necessity arises, not because of a lack of jurisdiction, strictly speaking, in the courts, but because some facts upon which the judgment of the courts must be based can only be made to appear from the exercise of these administrative powers. To construe the acts as conferring these administrative powers upon the courts would not only work practical confusion, in that the results would vary in different jurisdictions and even in different cases, but such a construction would make the act self-destructive. This is the basis of the ruling in every one of the cases to which we have been referred. For illustration, in Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, the carrier there had published its tariff or schedule of charges. The complaint was that these rates were unreasonable, and the right of action was based upon a finding to this effect. To render judgment against the carrier with the schedules in force involved this incongruity. The act required the carrier to file its tariff. It further required it to adhere to it when filed and to strictly observe it as filed. This is its plain meaning. How, then, could it be construed to also mean that the carrier was bound to depart from the published rates? This and the practical difficulties in the way of any other construction of the act compelled the construction that the determination of the proper rate, or what the rate should be, or, in other words, the fixing of the rate, was committed to the Commission and to the Commission alone as an administrative act.

The latest case on the subject to which we have been referred, that of Texas & Pacific Ry. v. American Tie Co., 234 U. S. 138, 34 Sup. Ct. 885, 58 L. Ed. 1255, affords another illustration of the same distinction. There the complaint was the refusal of the railroad to transport ties in pursuance of an alleged purpose to limit their sale market. The objection to any action by the court was that no rates for ties had been filed by the carrier, and, in consequence, no charge could be made for such service. There was a rate for lumber, and the question was whether this applied to ties. The court held this question "was one to be primarily determined by the Commission" in the exercise of the powers conferred upon it by Congress, because the real purpose to be accomplished was an administrative purpose. These cases are in line with the previous cases ruled by the court upon the distinction between a matter being within the power of the Commission to determine ques-

tions affecting it and the wisdom of a ruling made in pursuance of the power.

The question thus ruled to be within the province of the Commission to primarily determine is a different question from that raised by the allegation that a carrier has charged more than or otherwise departed from the published rate. This may involve the meaning of the tariff in order to determine the fact of the alleged departure. To hold that the court cannot determine the fact of whether the published rate or more or less than the published rate has been collected in a given case is to take from the courts the jurisdiction committed to them by Congress. Nor is this result changed by the fact of whether the rate be one which is fixed by an act of Congress, by a tariff or schedule of rates fixed by being filed by the carrier, or by a ruling by the Commission. In any case, the fact of departure from it must be a fact within the province of the court to find, or it can never proceed to render judgment in any case. It only remains to inquire on which side of the line thus drawn by the courts the complaint of the plaintiffs in this case is. Expressed in its simplest form, as set forth in the statement of claim, it alleges these facts:

(1) The defendant filed its schedule of rates which are set forth in the statement.

(2) It has not adhered to these published rates in that it has charged and collected from the plaintiffs sums in excess of the rates as thus filed in the particular respects set forth in the statement.

(3) For a time it made these overcharges on all the shipments made by the plaintiffs, and later it has made the overcharge on particular shipments.

(4) A statement is shown giving the items, dates, and aggregate amount of these overcharges.

If the court cannot determine the questions which on the face of this statement of claim will arise on the trial of this case, it is difficult to conceive of a case arising under the Interstate Commerce Act, which comes within the proper function of the court to determine.

A touchstone to this case is that if application was made in the first instance to the Commission, and they made a ruling as to the proper amount chargeable by the carrier, and an action was then brought for an alleged overcharge, it would be necessary for the court to construe the ruling of the Commission. This is exactly the situation with the respect to the published schedule, a construction of which will also be called for. The two things have precisely the same basis and the same status. A ruling by the Commission and a published schedule of rates each have the force and practical effect of a statute. It is therefore difficult to understand why it is not as much the function of the court to construe the one as the other. This is in no sense an administrative act, nor is it the exercise of a rate making function. It is wholly and solely the act of construing a statute or what is its equivalent in legal effect. These observations, of course, only apply to the present state of the record, which is made by the averments in the complaint. No trial questions inconsistent with this can be anticipated. If they arise, they can be disposed of when and as they arise.

The motion to dismiss is therefore disallowed, and the rule to show cause is discharged.

MEMORANDUM DECISIONS

AMERICAN IRON & STEEL MFG. CO. v. SEABOARD AIR LINE RY. et al. No. 1064. (Circuit Court of Appeals, Fourth Circuit. March 13, 1912.) Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Richmond. George Wayne Anderson, of Richmond, Va., for appellant. L. L. Lewis, of Richmond, Va., for appellee. See, also, 196 Fed. 1004, 115 C. C. A. 669.

PER CURIAM. Certified to the Supreme Court of the United States on a question or proposition of law. May 14, 1914, mandate of Supreme Court answering question certified up in the affirmative. 233 U. S. 261, 34 Sup. Ct. 502, 58 L. Ed. 949. May 21, 1914, decree of Circuit Court reversed, with costs, and cause remanded.

CAROLINA GLASS CO. v. MURRAY et al. No. 1156. (Circuit Court of Appeals, Fourth Circuit. July 10, 1913.) In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston. Lyles & Lyles, D. W. Robinson, and J. T. Seibels, all of Columbia, S. C., for plaintiff in error. W. F. Stevenson, of Cheraw, S. C., and J. Fraser Lyon and B. L. Abney, both of Columbia, S. C., for defendants in error.

PER CURIAM. Judgment of District Court (197 Fed. 392) affirmed, with costs. 206 Fed. 635, 124 C. C. A. 423. May 7, 1914, plaintiff in error allowed writ of error to the Supreme Court of the United States.

ILLINOIS SURETY CO. v. UNITED STATES et al. No. 1242. (Circuit Court of Appeals, Fourth Circuit. May 9, 1914.) Cross Writs of Error to the District Court of the United States for the Eastern District of South Carolina, at Columbia. W. H. Townsend, of Columbia, S. C., and B. E. Hinton, of Washington, D. C., for plaintiff in error and cross-defendant in error. D. W. Robinson and John L. Rendleman, both of Salisbury, S. C., Pierce Bros., of Augusta, Ga., and Croft & Croft, of Aiken, S. C., for defendants in error and cross-plaintiffs in error.

PER CURIAM. Judgment of the District Court affirmed, with costs. 215 Fed. 334. May 20, 1914, Illinois Surety Company allowed writ of error to the Supreme Court of the United States.

NORFOLK & W. RY. CO. v. HOLBROOK. No. 1230. (Circuit Court of Appeals, Fourth Circuit. May 9, 1914.) In Error to the District Court of the United States for the Western District of Virginia, at Roanoke. McCormick & Smith, of Roanoke, Va., and Theodore W. Reath and F. Markoe Rivinus, both of Philadelphia, Pa., for plaintiff in error. William H. Werth, of Tazewell, Va., for defendant in error.

PER CURIAM. Judgment of District Court affirmed, with costs. 215 Fed. 687. May 25, 1914, plaintiff in error allowed writ of error to the Supreme Court of the United States.

END OF CASES IN VOL. 215